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⁵ Qualified March 27, 1912.



AMENDMENTS TO RULES

SUPREME COURT OF RHODE ISLAND¹

Rule as to Complaints Against Members of the Bar for Unprofessional Conduct

Rule 8 of the rules of practice of the Supreme Court is hereby amended so as to read as follows:

8. Complaints against members of the bar for unprofessional conduct shall be made in writing under oath and shall set forth specifically the facts upon which the charge is based, and the residence and post office address of the complainant. Such complaints when filed with the clerk will be referred for examination and report thereon to a standing committee of five members of the bar appointed by the court. No complaint filed against a member of the bar shall be withdrawn without the consent of the court for

cause shown. Said committee shall also examine all suggestions of unprofessional conduct brought to its attention by the Supreme or superior courts.

In all cases report shall be made to the Supreme Court. The members of the present committee shall hold office until the expiration of their respective terms of appointment, and vacancies as they occur hereafter will be filled by appointments for the term of three years.

The members of this committee will be excused from attendance in court when necessary to fulfill engagements previously made to attend meetings of this committee.

¹ For rule as previously amended, see 75 Atl. vl.

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LEWIS v. GRAY.

(Supreme Judicial Court of Maine. April 22, 1912.)

BAILMENT (§ 18*)—RIGHT TO LIEN—STORAGE OF HAY.

A person, not an innkeeper or warehouseman, nor in the business of storing goods, who permits the property of another to remain on his premises under an agreement that storage is to be paid, but without any agreement for a lien, has no lien for the storage at common law; and hence defendant has no such lien for storing hay, though he has notified plaintiff owner that storage will be claimed.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-84; Dec. Dig. § 18.*]

Exceptions from Supreme Judicial Court, Franklin County.

Action by Mary E. Lewis against Fred O. Gray for the alleged conversion of certain pressed hay. Plea, the general issue with a brief statement as follows: "That he retained possession of the hay which he then had in possession at the time of the alleged conversion, and refused to deliver same to plaintiff on demand, for the reason that defendant had a claim for storage of said hay, and by reason of said claim for storage a lien on the same to enforce collection of same, which claim for storage plaintiff refused to pay prior to the demanded delivery." Verdict for defendant. The plaintiff excepted to certain rulings. Sustained.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Frank W. Butler, of Farmington, for plaintiff. Elmer E. Richards, of Farmington, for defendant.

KING, J. Action of trover for the value of a certain quantity of pressed hay. It appears from the exceptions that the plaintiff was the owner in 1907 of an undivided half of a farm; that the hay in question was cut that year on the farm, pressed, and stored on the premises; that in 1908 the plaintiff sold and conveyed her half of the farm to her cotenant, and thereafter the cotenant sold and conveyed the farm to the defendant, the pressed hay still being stored

thereon; that, after the defendant came into possession of the premises, he notified the plaintiff to remove the hay; and that, if it remained there, storage would be claimed, and there was some evidence introduced tending to show an agreement to pay storage. The question was whether the defendant had a lien on the hay for storage after his notice that storage would be claimed.

The presiding justice gave the jury explicit instructions relating to the question whether there was a contract on the plaintiff's part to pay storage, and then said:

"If they did come to an understanding, if a proposition was made, and assented to by her, that storage should be paid from that time, then I give you this rule, as it lies in my mind at present, that the defendant would be entitled to retain possession of that hay until a fair reasonable price for the storage was made or tendered. We have a class of cases on the subject of liens where things are put into the possession of another to do something to them, to mend them, or repair them, or do work upon them, in which case the one who does the work is entitled to retain them until pay for the work is made to him. And I think, and so rule to you, and it will be your guide in this case, that where one places a thing to be kept, to be stored for pay, under an agreement or an understanding that it is to be paid for, that he is entitled to keep it until he is paid."

It is not claimed that the defendant had any statutory lien, nor that he had any lien on the hay by virtue of any express contract therefor in the nature of a pledge. Did he have a common-law lien, so called—a lien arising under the rules of the common law? We think not. It is quite impossible to find uniform rules by which it may always be determined when a common-law lien results. "Derived from the civil law, and founded on considerations of equity and justice, the rules by which they are governed vary with the grounds on which such rights are given." *White v. Smith*, 44 N. J. Law, 105, 106, 43 Am. Rep. 347.

Particular liens have always been admit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—1

ted by the common law in favor of those persons, such as innkeepers, carriers, common carriers, and warehousemen, who are bound by law to serve the public in their trades and occupations. And the privilege of a particular lien, the privilege to detain and hold the possession of some particular property of another as security for some debt or obligation, has been extended to other persons, in a variety of cases, where such persons by their labor and skill have imparted an additional value to the goods. This includes artisans, tradesmen, mechanics, and laborers who receive property (although not obliged to receive it) for the purpose of mending, repairing, and improving its condition for hire, and they have, by the common law, a lien on such property until the reasonable charges for their labor and expenses thereon are paid.

But the defendant, under the facts in this case, cannot be classed with those persons who are allowed liens because they are bound by law to receive and care for the goods of others. He was under no obligation to permit the hay to remain on his premises. He was not a warehouseman, nor in the business of storing goods. He was, at most, a voluntary bailee of the hay under an agreement with the owner that he was to be paid reasonable compensation for its storage. Nor can he be reasonably classed with those persons who are given liens on specific property which has been enhanced in its intrinsic value by their skill and labor bestowed upon it. True, the storage of the hay may properly be regarded as beneficial to its owner, for it may have preserved it from deterioration and destruction, but we do not think it can be held that, by the mere storage of the hay, the defendant has added to its intrinsic value, and thereby become entitled to a lien on it under the application of this rule of the common law.

As suggested above, any effort to subject common-law liens to uniform rules is necessarily unsatisfactory, and therefore it becomes most important, in the determination of whether or not a lien should be admitted in any given case, to examine and consider judicial precedents.

Our attention has not been directed to any case, and we have found none, in any jurisdiction, which decisively admits a lien under facts and circumstances like those in the case at bar. Mr. Lummus, in his recent work on Liens, cited by defendant, says: "There seems to be no good reason for limiting the lien to persons making a business of acting as warehousemen. It seems that any person having possession of the goods and a valid claim for storing them ought to have a lien." Section 73. No authorities, however, are cited which directly support that proposition. In section 76 he cites *Schneider v. Dayton*, 111 Mich. 396, 69 N. W. 829, as an authority for a lien where notice was given

that storage would be charged, and the owner of the goods made no reply. But we find upon examination of the report of that case that the notice to the owner of the goods was that the landlord "would insist upon a lien for storage," and the court held that inasmuch as a lien for the storage was claimed in the notice, and the owner did not remove the goods, the lien was assented to.

In *Whitlock Co. v. Holway*, 92 Me. 414, 42 Atl. 799, cited by the plaintiff, this court said: "But, in the absence of any agreement, the common law does not give to a person, not an innkeeper or warehouseman, a lien on personal property for its storage." It is suggested that the above-quoted statement is only a dictum, as the case did not really involve that question. There may be merit in that suggestion, for that was a case where a tenant left on the premises a machine the title to which was in the plaintiff, and the question was whether under those circumstances the landlord had a lien on the machine for its storage. But, if that statement be only a dictum, it is, we think, a correct statement of the law as understood and applied by this court, and also in accordance with judicial precedent elsewhere.

In *Allen v. Ham*, 63 Me. 532, it was held that a livery stable keeper, who had a horse in his possession which he had been keeping under an express contract with the owner of the horse to pay one dollar per day for its care and keeping, had no lien at common law on the horse for any care and keeping furnished prior to the passage of Act 1872, c. 27, which provided a statutory lien for pasturing, feeding, and sheltering animals. The court there said: "Not being an innkeeper, or farrier, or trainer, he has no such lien by the common law. *Miller v. Marston*, 35 Me. 153 [56 Am. Dec. 694]. He has none by any agreement with the respondent amounting to a pledge."

This court having thus held that a stable keeper had no lien at common law for stabling and feeding a horse under an express agreement to pay therefor, a fortiori must it be held that a person who is not a warehouseman, nor in the business of storing goods, but who permits the property of another to remain on his premises, under an agreement that storage is to be paid, has no lien therefor at common law. *Stoddard v. Crocker*, 100 Me. 450, 62 Atl. 241, may be cited as holding by implication that only warehousemen have a lien at common law for storage.

In *Jones on Liens*, § 968, it is said: "In some states a person not a warehouseman, and not in the business of storing goods, has no lien on goods for his compensation for storing them, unless there be an express agreement for a lien, or it is the legal duty of one to receive and hold the goods. A mere volunteer under no obligation who accepts the temporary custody of goods with-

out any agreement for a lien can claim none for his compensation."

In *Re Kelly*, 18 Fed. 528 (District Court, S. D. N. Y.), it is said: "The authorities in this state hold that a person not being a warehouseman, nor in the business of storing goods, who has articles on private storage, has no lien upon them for his compensation any more than a landlord has on his tenant's goods for rent." See, also, *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; *Rivara v. Ghio*, 3 E. D. Smith (N. Y.) 267, 268; *Merritt v. Peirano*, 10 App. Div. 563, 42 N. Y. Supp. 97; *White v. Smith*, 44 N. J. Law, 105, 109, 43 Am. Rep. 347; *Preston v. Neale*, 12 Gray (Mass.) 222.

If it be said that considerations of equity and justice seem to require that there should be a lien wherever a valid claim for storage exists, the answer may be made that such a lien can always be provided for by contract between the parties, and it may be created by legislative enactment.

It is therefore the opinion of the court that the ruling at nisi prius, that the defendant was entitled to a lien for the storage of the hay if there was an understanding or agreement between the parties that the storage was to be paid for, was erroneous, and accordingly the entry must be:

Exceptions sustained.

IN RE OPINION OF THE JUSTICES.

(Supreme Court of Rhode Island. April 17, 1912.)

1. STATUTES (§ 235*)—CONSTRUCTION—POLICE POWER—LIBERALITY.

Gen. Laws 1909, c. 238, which created Metropolitan park commissioners, with power to acquire, maintain, and make available to the inhabitants of the district and to the public generally open spaces for exercise and recreation, by purchase or condemnation, contemplates the improvement and conservation of the public health by encouraging outdoor exercise and recreation, and, as an exercise of the police power of the state, is entitled to a liberal construction.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 316; Dec. Dig. § 235.*]

2. TAXATION (§ 40*)—VALIDITY OF STATUTES—TAXING POWER—JUDICIAL AUTHORITY.

Gen. Laws 1909, c. 238, § 7, provides for the appointment by the superior court of commissioners to determine the proportion which each city and town in the Metropolitan park district shall annually pay to meet interest and sinking fund requirements. Section 8 provides that the amount required each year from each city and town of the park district shall be estimated and included in and made a part of the sum charged therein, and shall be assessed as part of its annual state taxes. Const. art. 1, § 2, provides that the burdens of the state "ought to be fairly" distributed among its citizens. *Held*, that the determination as to the fairness of a burden of taxation is entirely for the Legislature; and, as it only requires that the burden be "fairly" distributed, the statute is not unconstitutional,

though it provides for repayment to the state by the towns in the district of sums expended in the creation of the district, as the particular benefit of the residents of the cities and towns therein, because of their proximity, are material considerations beyond the benefit to the general public.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 68-89; Dec. Dig. § 40.*]

3. JURY (§ 19*)—VALIDITY OF STATUTES—TAXING POWER—JUDICIAL AUTHORITY.

And, under Const. art. 1, § 15, which provides that "the right of trial by jury shall remain inviolate," such sections are not void, because they do not give persons assessed the right of trial by jury, as tax assessments have never been subject to revision by jury trial.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 91, 104-133; Dec. Dig. § 19.*]

4. EMINENT DOMAIN (§ 2*)—VALIDITY OF STATUTES—TAXING POWER—JUDICIAL AUTHORITY.

And Const. art. 1, § 16, which provides that private property shall not be taken for a public use without just compensation, refers to the exercise of the right of eminent domain and illegal exactions disguised under the name of taxation, and does not require that taxes legally assessed shall carry with them any obligation, other than that a proper application shall be made, and so will not avoid the sections of the statute noted.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

5. CONSTITUTIONAL LAW (§ 63*)—VALIDITY OF STATUTES.

Nor is the statute rendered unconstitutional by the appointment of commissioners to determine the amounts to be repaid to the state, under Const. art. 4, § 2, which provides that the legislative power shall be vested in two houses, the concurrence of which shall be necessary to the enactment of laws, as the duty of such commissioners is not legislative, but merely a matter of arithmetical computation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

6. CONSTITUTIONAL LAW (§§ 232, 289*)—VALIDITY OF STATUTES.

Nor is the statute in contravention of Const. U. S. Amend. 14, which provides that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, in that it does not provide for a hearing of the cities and towns of the park district as to the necessity for parks and parkways therein, nor as to the size, style, and cost or expense of maintenance of the same, as municipal corporations are subject to control of the state Legislature, which may cast a burden of improvement upon them without notice or hearing.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 686, 870; Dec. Dig. §§ 232, 289.*]

7. MUNICIPAL CORPORATIONS (§ 64*)—VALIDITY OF STATUTES—RESTRAINTS ON LEGISLATURE—LOCAL SELF-GOVERNMENT.

As the Constitution, which is a confinement and restraint of the power of the Legislature, rather than a grant, places no restraint on its control over municipal corporations, a resolution of the Legislature, providing for the submission to the vote of the question whether the General Assembly shall be authorized to issue state bonds for the ac-

quirement and improvement of real estate for public reservations and parks in the Metropolitan park district of Providence Plantations, created by Gen. Laws 1909, c. 238, which provides for the repayment of the amount expended to the state by the cities and municipalities included in the district, is not invalid as an interference with local self-government.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.*]

Answer to questions submitted by request from the Governor of the State of Rhode Island and Providence Plantations.

April 17, 1912.

To His Excellency, Aram J. Pothier, Governor of the State of Rhode Island and Providence Plantations:

We have received from your excellency a request for our opinion upon the following questions, viz.:

"(1) Are sections 7 and 8 of chapter 238 of the General Laws 1909 unconstitutional and void, because in violation of any provision of the state or federal Constitution, especially article 1, §§ 2, 15, and 16, and article 4, § 2, of the state Constitution, and that portion of article 14 of amendments to the federal Constitution as follows: * * * 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

"(2) If the foregoing question is answered in the negative, is there any constitutional objection to the authorizations and directions in the following resolution now pending in the General Assembly: 'Resolved, that the following proposition be submitted to the people for their approval or rejection at the general election to be held on the Tuesday next following the first Monday in November, 1912: "Metropolitan Park Loan. Shall the General Assembly be authorized and directed to provide for the issue of state bonds not to exceed the amount of three hundred thousand dollars for the acquirement and improvement of real estate for public reservations and parks in the Metropolitan park district of Providence Plantations, the amount thereof expended to be repaid to the state in accordance with the provisions of chapter 238 of the General Laws, these bonds to be issued from time to time in such amounts and upon such terms as the General Assembly may hereafter determine?"'

"(3) Does the obligation of repayment of amounts expended either under said chapter 238 and the additions and amendments thereto, or under said resolution, fall upon the state as a whole, or only upon the cities, towns, and voting districts constituting the Metropolitan park district of Providence Plantations?"

In response to these questions, we have the honor to submit the following opinion:

[1] Gen. Laws 1909, c. 238, is the first act in said compilation of the statutes that appears under "Title XXIII, Of Forestry and Parks," and is itself entitled "Of the Metropolitan Park Commissioners." An examination of its provisions discloses the fact that it deals with the "advisability of laying out ample open spaces for the use of the public," within the Metropolitan park district of Providence Plantations, which includes the cities of Providence, Pawtucket, Central Falls, and Cranston, the towns of East Providence, Warwick, Johnston, North Providence, Lincoln, Barrington, and the voting districts Nos. 3, 4, and 5 in the town of Cumberland; that these open spaces are to be used for exercise and recreation, and for intercommunication between them and adjacent streets and highways. It thus appears that the chapter contemplates the improvement and conservation of the public health by encouraging out of door exercise and recreation in parks and parkways within its most densely populated area. It is therefore apparent that the statute in question was passed by the Legislature in exercise of the police power of the state. In such circumstances, the statute is entitled to a liberal construction, in order that its beneficial influence may not be impeded.

[2] The seventh and eighth sections of the chapter, towards which our attention is especially directed by the questions under consideration, respectively read as follows:

"Sec. 7. The superior court shall, on the application of the said Metropolitan park commissioners, and after notice to each of the cities and towns hereinbefore designated, appoint three commissioners who shall not be residents of such cities and towns, who shall, after the notice and hearing, and in such manner as they shall deem just and equitable, determine the proportion in which each of such cities and towns shall annually pay money into the treasury of the state for the term of five years next following the year of the first issue of said scrip or certificates of indebtedness, to meet the interest and sinking-fund requirements for each of said years as estimated by the general treasurer of the state, and to meet the expenses of preservation and necessary care of said public reservations as estimated by the Metropolitan park commissioners and certified by them to the general treasurer, and any deficiency in the amount previously paid in as found by said treasurer, and shall return their award into said court; and when said award shall have been accepted by said court the same shall be final and conclusive adjudication of all matters herein referred to said commissioners and shall be binding on all parties. Before the expiration of said term of five years, and every five years there-

after, three commissioners who shall not be residents of any of the cities or towns constituting the Metropolitan park district shall again be appointed as aforesaid, with the same powers and duties for the next succeeding term of five years: Provided, that no assessment shall be levied for the purposes of this chapter in any one year upon any city or town in excess of a sum equal to one-half mill on the dollar of the valuation thereof. The superior court shall have jurisdiction in equity to enforce the provisions of this chapter and shall fix and determine the compensation of all commissioners appointed by said court under the provisions hereof.

"Sec. 8. The amount of money required each year from each city and town of the said Metropolitan park district of Providence Plantations to meet the interest, sinking-fund requirements, and expenses aforesaid for each year, and the deficiency, if any, shall be estimated by the general treasurer in accordance with the proportion determined as aforesaid, and shall be included in and made a part of the sum charged in such city or town, and shall be assessed upon it in the apportionment and assessment of its annual state tax. The general treasurer shall in each year give notice to each city and town aforesaid of the amount of such assessment, and each of such cities and towns shall pay its respective assessments, so determined as aforesaid, into the state treasury at the time required for the payment of, and as a part of, its state tax."

The foregoing provisions are not in conflict with the Constitution of Rhode Island, art. 1, § 2, which reads as follows: "All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens."

In the case of *In re Dorrance Street*, 4 R. I. 230, Ames, C. J., at page 249, used the following language in reference to the last clause of the foregoing section: "We will not stop to notice the very general language and declaratory form of this clause, setting forth principles of legislation rather than rules of constitutional law, addressed rather to the General Assembly, by way of advice and direction, than to the courts, by way of enforcing restraint upon the lawmaking power. We do not mean to say that a law, purporting to impose a tax or burden of some sort upon the citizen, may not be in its distribution of the burden, both in design and effect, so outrageously subversive of all the rules of fairness as not to come so far within the purview of this general clause as to enable the court to save the citizen from oppression by declaring it to be void. But evidently a wide discretion with regard to the distribution of the burdens of state amongst the citizens was in-

tended to be reposed in the General Assembly by the will of the people, as signified in this clause of the Constitution. The form is 'ought to be'; the word is '*fairly*' distributed, not 'equally' even, unless equality be fair, which it is not always in any sense, and never is in some senses; and especially the words are not 'equally upon property,' or words to that effect, as in the Constitution of Louisiana. * * * Indeed, the language in question can hardly be said to impose any restriction upon the Assembly at all, except what would be imposed by the fact of our free institutions, and the general principles of constitutional law, here and everywhere in this country prevalent. Had the Constitution been wholly silent upon this subject, a greater latitude could not have been given by these principles than seems to be studiously implied in the form, spirit, and general terms of this sentence."

And later, at page 250 of 4 R. I., he uses these illuminating expressions: "All taxation is more or less unfair, and in any proper sense even unequal. Perfect fairness would be to make all those who are benefited by the burdens of the state to bear them, and to extend the burden in due proportion to every person according to this benefit. Take, for instance, the streets of Providence, used by all the inhabitants of the state, nay, of the country, who have occasion to resort hither for business, or pleasure, or instruction. The right of every one of these is as ample to use them, and is as ample, in any way, in them, as that of the rich citizen whose property pays a thousand dollars a year towards the enormous expense of their maintenance; and yet the law casts the entire expense of their maintenance upon those who happen to reside within the limits of certain jurisdictional lines, altered, from time to time, as convenience may require."

The reasoning employed in the foregoing opinion is applicable to the consideration of the sections of the statute involved in the present inquiry. The question, How shall the burdens of the state be fairly distributed? is one of a purely legislative character, to be answered by the lawmaking branch of the government in the exercise of a wise and wide legislative discretion, with which the judicial department has no concern, and over which it will not attempt to assume control, where the same has been exercised honestly and in good faith, and not for the purpose of personal oppression, under color of law. As was said by Durfee, C. J., in *Cleveland v. Tripp*, 13 R. I. at page 61 et seq.: "Without doubt, the propriety of any given tax and the modes in which it shall be apportioned and assessed are legislative matters, with which the courts will not interfere, unless the Legislature has palpably transgressed some limitation of the

Constitution. * * * But our Constitution is extremely latitudinarian. It contains no restriction, except what is implied in the declaration that 'the burdens of the state ought to be fairly distributed'; and this declaration, as was said in the Matter of Dorrance Street, 4 R. I. 230, 249, expresses no more than would be implied without it, 'from the fact of our free institutions and the general principles of constitutional law.' To entitle us to hold that the statute authorizing these assessments is unconstitutional, we ought to be satisfied, not only that fairer modes of assessment might be devised, but that the prescribed mode is indefensibly unfair; for, in a matter of legislative policy, it will not do for the courts to substitute their own judgment for that of the General Assembly, and to convict the General Assembly of fatal error, simply because they differ from it in opinion."

[3] In the sections under consideration, there is nothing to indicate any abuse of legislative discretion in the premises. Neither are the provisions of the sections in conflict with the Constitution of the state, art. 1, § 15, which reads as follows: "The right of trial by jury shall remain inviolate." As this court decided in *Bishop v. Tripp*, 15 R. I. at page 469, 8 Atl. 694: "The plaintiff also contends that the statutes authorizing the [sewer] assessments are void, because they do not give the assessed the right of appeal, with trial by jury, and are therefore in conflict with the Constitution of the state, art. 1, § 15, which declares that the right of trial by jury shall remain inviolate. Assessments for benefits have always been regarded in this state, and, so far as we know, in other states, as a species of taxation; and, though tax assessments were before, and have been since, the adoption of the Constitution subject to revision in the courts, they have never, to our knowledge, been subject to revision by jury trial. *Crandall v. James*, 6 R. I. 144. Therefore we do not think the statutes are obnoxious to this objection. The Constitution requires simply the conservation, not an extension, of the right of jury trial."

[4] Nor do said provisions conflict with section 16 of said article 1: "Private property shall not be taken for public uses, without just compensation." "It has been observed that it is by no means easy to trace the dividing line between the power of taxation and the right of eminent domain; and it is true that both rest on substantially the same foundation—that is, both are exercises of the sovereign power to take private property for public use. In other respects, however, there is a very clear distinction which may readily be pointed out. Taxation exacts money or services from individuals as and for their respective shares of contribution to any burden, operates on a community on a class of persons in a community, and

is governed by some rule of apportionment. On the other hand, private property taken for public use by virtue of the right of eminent domain is taken, not as the owner's share or contribution to the public burden, but as so much beyond his share; and the exercise of this right operates on an individual, and has no reference to the amount or value exacted from any other individual or class of individuals. And, again, special compensation is required to be made when property is taken in the exercise of the right of eminent domain, because the government is the debtor to the amount of the value of the property thus taken; but the payment of taxes is a duty of the citizen, and creates no obligation on the part of the government otherwise than to make a proper application of the taxes paid. The clause of the Constitution requiring compensation to be made when private property is taken for public use is not a limitation on the taxing power, but it is held to guard against illegal exactions disguised under the name of taxation." 27 Amer. & Eng. Ency. 585, and cases cited.

It is apparent from an inspection of the foregoing sections that they make provision for the repayment by the cities and towns within the Metropolitan park district to the state of money advanced and expended by the state in the acquirement and maintenance of public parks and parkways within said district for the general benefit of the public, and the particular benefit of the residents of the cities and towns within said district, whose proximity to the parks enables them to enjoy the benefits thereof with the expenditure of less time and money than those less fortunately situated, because more remote from these sources of improvement and enjoyment. These are material compensations beyond and in addition to the enhanced value of property in the neighborhood of such public improvements.

[5] The sections alluded to are not in conflict with the Constitution of Rhode Island, art. 4, § 2, which reads as follows: "Sec. 2. The legislative power, under this Constitution, shall be vested in two houses, the one to be called the Senate, the other the House of Representatives; and both together the General Assembly. The concurrence of the two houses shall be necessary to the enactment of laws. The style of their laws shall be, It is enacted by the General Assembly as follows." The question, without doubt, is put for the purpose of inquiring whether the General Assembly has attempted therein to delegate its legislative power. We do not so understand the provisions of the sections. The commissioners appointed are to hear and determine what proportion of the total amount expended each city and town shall annually pay into the treasury of the state. Manifestly this is not a legislative duty, but is a duty similar to that imposed upon an auditor, as, for example, to ascertain and

state the assets and liabilities of the firm, including the accounts of the members thereof in the winding up of a partnership, or in the disentanglement of complicated accounts between litigants. As we said in the case of *Blais v. Franklin*, 31 R. I. at page 115, 77 Atl. 180: "While the act confers on the commissioners certain authority and discretion as to their execution of the law, it does not confer on, or delegate to, the commissioners the power to make the law itself, nor to use any discretion as to what the law shall be." In the present case, the proposition that each city and town shall pay is dependent upon the amount of benefits received by it, so that the question is largely one of computation, involving arithmetical rather than legislative powers.

[8] The sections are not in conflict with that portion of article 14 of amendments to the federal Constitution, which reads as follows: " * * * Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." We presume that the question involving the consideration of the above amendment to the federal Constitution is similar to that propounded to us in the case of *Blais v. Franklin*, supra, 31 R. I. 131, 77 Atl. 187: "Neither party in interest is heard as to the necessity of building a bridge, nor as to the expense of the work, or the kind, size, or style of the bridge. The only hearing the cities of Pawtucket and Central Falls get is as to the apportionment of the expense." In the statute under consideration, no provision is made, whereby the cities and towns within the Metropolitan park district may be heard as to the necessity for parks or parkways therein, nor as to the size, style, or cost of the same, nor as to the expense of their maintenance. The only hearing they will have will be the one concerning the apportionment of the expense upon them. The answer to this question will be the same as it was in the case last referred to:

"There is no merit in this contention. No notice is required to be given property owners or municipal corporations respecting those matters which the Legislature itself determines. *Spencer v. Merchant*, 125 U. S. 353 [8 Sup. Ct. 921, 31 L. Ed. 763]; *Meier v. St. Louis*, 180 Mo. 391 [79 S. W. 955]. As was said by Mr. Justice Brewer, in *Williams v. Eggleston*, 170 U. S. 304, at page 310 [18 Sup. Ct. 617, at page 619 (42 L. Ed. 1047)], et seq.: 'It is further contended that the acts of May 24, 1896, and June 28, 1896, are in conflict with that portion of the fourteenth amendment which forbids the depriving of any person of life, liberty, or property without due process of law, because, first, "they deprive the town of the right to perform its town duties by officers of their own choosing, which is contrary to the settled practice and law of the state, and ar-

bitrarily destroys the right which those towns had before the Constitution of Connecticut was adopted, and which was not taken away by that instrument; and, secondly, because the acts provide for arbitrarily taking the property of the inhabitants of Glastonbury, without proper notice of any proceeding under which the property is to be taken, and without opportunity to be heard." Whatever may have been the practice of the state in the past, it cannot be doubted that the power of the Legislature over all local municipal corporations is unlimited, save by the restrictions of the state and federal Constitutions; and that these acts in no way violate any provision of the state Constitution is settled by the decision of the state Supreme Court. *Backus v. Fort Street Union Co.*, 169 U. S. 557, 566 [18 Sup. Ct. 445, 42 L. Ed. 853], and cases cited. It is true that there was a division of opinion between the members of the state Supreme Court; but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the state court decides that municipal corporations within the territorial limits of the state are subject to the control of the state Legislature, and that its act in creating for certain purposes, a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the state court was mistaken in its construction of the state Constitution, or in its declaration as to the extent of the power of the Legislature over municipal corporations. Neither can it be doubted that, if the state Constitution does not prohibit, the Legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed amendment. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. *Spencer v. Merchant*, 125 U. S. 345, 346 [8 Sup. Ct. 921, 31 L. Ed. 763]; *Parsons v. District of Columbia*, 170 U. S. 45 [18 Sup. Ct. 521, 42 L. Ed. 943]. It should be noticed that no question is presented as to the necessity of notice before any property tax is cast upon the citizen. The only question is as to the power of the Legislature to cast the burden of this improvement upon the five towns, towns which may have been already judicially determined to be towns benefited thereby. Although the apportionment made between the towns was not that determined by the judicial proceedings, yet it was one of which certainly the town of Glastonbury cannot complain; for the judicial apportionment was, as to it, reduced by the legislative act. In casting this burden upon the towns.

Legislature did not proceed without a hearing from the towns; for their representatives were in the Legislature and took part in the proceedings by which the act was passed. So they had an opportunity to be heard, if such hearing was necessary, prior to the enactment of the law."

[7] We see no constitutional objection to the authorization and directions contained in the foregoing resolution, now pending in the General Assembly. The people of the state may well authorize the incurring of a state debt by the Legislature, the proceeds whereof are to be expended in a well-defined portion of the state, to be repaid by the cities and towns within which the same has been expended in proportion to the amounts expended therein. Objection has been made that such a resolution is an interference with local self-government; and in support of this contention the cases of Board of Park Commissioners v. Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 202, and State ex rel. Gerry v. Edwards et al., 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, have been relied upon. The sufficient answer to this objection is that the Constitution of Rhode Island differs from those of Michigan and Montana, in that it contains no reference to local government, and nowhere attempts to restrain the power of the Legislature over the various cities and towns within it. "The lawmaking power of the state," it is said in one case, "recognizes no restraints, and is bound by none, except such as are imposed by the Constitution." That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity; and is therefore the paramount law. Its object is not to *grant* legislative power, but to *confine* and *restrain* it. Without the constitutional limitations, the power to make laws would be *absolute*." Cooley, Const. Lim. (7th Ed.) p. 241.

In answer to your last question, we have the honor to reply that, by the terms of said chapter 238 and of the resolution hereinbefore referred to, the obligation of repayment falls only upon the cities and towns within the Metropolitan park district of Providence Plantations.

EDWARD CHURCH DUBOIS.
CLARKE H. JOHNSON.
C. FRANK PARKHURST.
WILLIAM H. SWEETLAND.
WALTER B. VINCENT.

PERRY et al. v. BROWN et al.
(Supreme Court of Rhode Island. May 1, 1912.)

1. WILLS (§ 441*) — CONSTRUCTION — INTENT OF TESTATOR.

The intention of a testator must be gathered from the entire instrument, taking into consideration the surrounding circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.*]

2. WILLS (§ 617*) — CONSTRUCTION — ESTATES DEVISED.

The third clause of a testatrix's will, drawn by herself, recited that she gave the balance and rest of all her property, real and personal, to her husband for his personal use during his natural life. Other portions of that clause provided that the income from the testatrix's property should be used for the care and maintenance of the husband, who was non compos mentis, but that the income from the husband's own property should first be exhausted before recourse might be had to this. The testatrix also devised this same property to trustees, giving them minute directions as to the care of her husband. *Held*, that the husband did not take a life estate, but a limited use of the income of the trust property after the exhaustion of his own.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1431-1435; Dec. Dig. § 617.*]

3. WILLS (§ 684*) — CONSTRUCTION — ACCUMULATIONS.

The testatrix in such case directed that all income exceeding what was necessary for repairs and taxes should be credited to her estate, but to be used freely for the benefit of her husband whenever his own income did not prove sufficient. *Held* that while there was no express direction that the surplus income of testatrix's estate should be accumulated, the words used indicated such an intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

4. WILLS (§ 865*) — PARTIAL TESTACY — ACCUMULATION OF INCOME.

If part of the income of a trust estate is undisposed of by the will creating the trust, the trustees should, in the absence of any provision whatsoever, accumulate it and pay it to those legatees who may be entitled to the original corpus of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

5. WILLS (§ 858*) — CONSTRUCTION — DISTRIBUTION OF INCOME.

Testatrix made numerous pecuniary and specific bequests, and devised and bequeathed the residue to certain named persons. *Held* that, though the income proved more than sufficient for the needs of the husband, the surplus which was accumulated was not payable to the residuary legatees; it appearing that such surplus might be necessary for the payment of specific legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.*]

6. WILLS (§ 634*) — CONSTRUCTION — ESTATES OF DEVISEES.

Where a testatrix, after devising her property in trust for the use of her husband during his life, devised and bequeathed the residue to certain named persons, such persons, together with the other legatees specifically named, took vested interests which were descendible and transmissible to their heirs in case of their death before the death of testatrix's husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

7. WILLS (§ 524*) — CONSTRUCTION — CLASSES ENTITLED TO TAKE.

Where a testatrix devised property to trustees to pay the income to her husband during his life, leaving the remainder to the children and grandchildren of a named couple, all of that class including those who might be born after the death of testatrix and before the death of her husband are entitled to take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

8. WILLS (§ 531*) — CONSTRUCTION—ESTATES DEVISED.

Where a testatrix devised the residue of her property to the children and grandchildren of a named couple and two other named persons, the entire class took per capita instead of per stirpes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1143, 1144, 1148-1152; Dec. Dig. § 531.*]

9. WILLS (§ 664*) — CONSTRUCTION—PERSONS ENTITLED TO TAKE.

Where testatrix gave minute directions as to the care of the husband in case he might be well enough to live in her residence, directing a salary to be paid to one of her servants and a legacy to another if they continued to care for the residence and attend her husband, the right of the servants to the legacy and salary is dependent on the residence of the husband in the house of the testatrix, and the servants were not entitled where the husband's condition was such that he had to remain in a hospital.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1560; Dec. Dig. § 664.*]

10. WILLS (§ 630*) — CONSTRUCTION—PERSONS ENTITLED.

Where testatrix devised her property in trust, giving an interest in the income to her husband for life, and providing that after his death certain bequests should be paid to legatees if then living, and if any of them were not then living the amount of his gift was not to be paid to his representative, but was to be retained in the general fund, the right of any of these legatees to take depended upon their surviving the husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.*]

Case Certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by George A. Perry and others, as executors of the will of Julia P. A. Anthony, against Robert P. Brown and others, asking for instructions. Certified from the Superior Court under Gen. Laws 1909, c. 289, § 35. Questions answered.

Tillinghast & Collins, of Providence, for complainants. Claude R. Branch, Edward P. Jastram, and Edwards & Angell, all of Providence, for Robert P. Brown and others, residuary legatees. Mumford, Huddy & Emerson (Charles C. Mumford, of counsel), all of Providence, for Frederick E. Anthony. Thomas A. Jenckes, of Providence, for respondents Poileys. Comstock & Canning, Patrick P. Curran, John Henshaw, Livingston Ham, and William W. Douglas, all of Providence, Hugh J. Carroll of Pawtucket, and William P. Fowler, for various other respondents.

PARKHURST, J. This is a suit in equity wherein the bill is filed by the executors and trustees under the will of Julia P. A. Anthony, for instructions on certain questions arising under the will and involving the construction thereof. The case has been certified to this court for its determination under chapter 289, § 35. Gen. Laws, 1909, being ready for hearing for final decree.

The will of Julia P. A. Anthony is entirely in her own handwriting, and consists of 16 pages clearly and neatly written on ordinary legal cap paper. It consists of three clauses, of which the "first" relates solely to directions as to her burial and that of her husband, to headstones, etc. The "second" clause contains directions as to the erection of a certain monument, and the payment of funeral expenses. All these provisions are clear and undisputed. The "third" clause of the will, under which all disputed questions arise, covers the remaining 15 pages of the will, is all in one paragraph, contains many provisions which are somewhat confusing and, at first sight, contradictory and inconsistent with each other. It would seem, from the fact that the testatrix uses much legal phraseology, that she must have had before her one or more wills from which she copied such phrases; but it is evident from the general consideration of the whole will that she was not familiar with the meaning of technical legal terms, and did not intend to use them in their precise technical sense.

This "third" clause opens with a bequest to Swan Point Cemetery Corporation of \$2,000 in trust to use income for perpetual care of certain lots, etc. Then follow directions for the sale of enough personal property (within two months after her death) to pay certain specific legacies of money, \$1,000 each to six named persons; \$500 each to six others; \$250 each to two others if living. The will then proceeds as follows, all the words in italics being underlined by the testatrix in the will itself: "The balance and rest, of all my property, real and personal, I give to my dear husband, Frederick E. Anthony, for his personal use, during his natural life, with the exception of some personal properties like jewelry, ornaments or dishes, of which I may make especial provision. Within a week or ten days after my death, I wish my present residence 185 Adelaide avenue to be put in proper condition, as to convenience and safety, so it can be used as a home for my husband, during the balance of his life, or as long as the executors may feel it wise to continue to have him remain in it, with proper care, and attention. One of his peculiarities has been, that however much he might desire to do something, when the time came, he felt he could not then do it, so gentle force may have to be used, to get him to go into the house, but have him if possible understand, it is my wish for him to go there. I would like Mrs. Ora L. Bell to take the position as housekeeper, and companion, at a monthly salary to be decided by the executors and herself, she to have an assistant to do the cooking, washing, ironing, and perhaps extra help at certain times. If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board. His work to be to take care of the house

inside and out, as he has been accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times. Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is to then have two thousand (2,000) dollars, for his faithful services to us both. Mr. Anthony, I desire to have, two attendants, a day, and night one, or still another, if necessary for his comfort. If the *executors think it wise*, I want a reliable doctor to see him once a month, or oftener if necessary. A carriage is to be hired for his use, every suitable day, for a drive of an hour or longer, as he may desire. I want it made possible for him to end his days, in his own home, and wish Mrs. Bell and attendants to keep him interested with games, and card playing if possible. His own income is first to be used for his support, and expenses, and after that the income I leave is for his use, outside of what I have bequeathed to a few persons. Should his own income, and that which I bequeath to him, not be sufficient to give him what he actual needs for himself, attendants, and certain luxuries, his own personal property should first be drawn upon, and if that is used up, the executors are requested to draw what is necessary from the principal of my estate. What I want is to have my husband made as comfortable as possible, with his own property, and all I leave behind me, which I bequeath for his personal use during his natural life. After my death, all the property, I possessed, or am in any way entitled, at such time, shall hereinafter be called, my said trust estate, and shall be held in trust, during the natural life, of my husband, Frederick Eugene Anthony, to be managed in the following manner, in connection with what I have previously written. All income, exceeding, what is necessary for taxes, repairs, incidental expenses, and salary of the trustees, to be credited to my estate, but to be used freely for the benefit of my said husband, *whenever his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any cause, but always, his own rightful income, is first to be expended, upon him, and then when necessary, falling back, upon the income accruing from my trust estate. I hereby now appoint the following parties, as my executors, and trustees of this my last will and testament namely: My cousin George A. Perry of Galesburg, Illinois, Mrs. Ora L. Bell, of Providence, state of Rhode Island, and my husband's nephew, William Richmond Tillinghast, also of said city, and state, as joint tenants in trust, for them, and the survivors of them, and other the trustees, under these trusts for any time being, all hereinafter called my said trustees, to take charge of, and manage the same. I also give the said George A. Perry, if he feels the position

as trustee, would conflict with other interests, and duties, of his own, *power* to place some one in *this position*, who would consider the trusteeship, the same as George A. Perry will, if he accepts personally the position. The real estate must be kept in good tenantable repair, and the buildings thereon, for the time being, properly insured against loss by fire, and the personal estate kept invested either in the investments in which the same may be, at the time of my death, without being accountable for any resulting loss in so doing, or from time to time, to change the investments, or any reinvestments, of the same, as my said trustees, shall deem best; and with power to my said trustees at any time, or from time to time to build, or make other improvements, additions, or betterments, upon any part, or parts of the real estate in their discretion, but if this is done, it must be done by changes, not affecting the *income* from my estate, to be kept intact for the benefit of my said husband; and also, at any time, or from time to time for any of these purposes, or other purposes of the trusts of these presents, or for the payment of the foregoing legacies, or any or either of them, if they shall deem it wiser, so to do, than to sell the personal estate, therefor or for the purposes of reinvestment, to sell, mortgage, or pledge any of my said trust real estate (except my Mathewson street estate now leased for a long term of years, to the Lederer Realty Company, also my estate, cor. of Fountain, and West Exchange streets, now leased to Mr. Isaac Hahn for a long term of years, unless all the reinvestments are to be for the direct benefit of my husband, and if these should not prove sufficient, to assist in carrying out my wishes, he is to have the full benefit of the principal arising from the sale of any of my estate, real or personal) or any of said trust personal estate, and to enter into any contract in respect thereof; With power also at any time or from time to time (providing all trustees agree in writing) to lease any part or parts of the real estate, for fifteen years, or less, with the understanding that if the time comes to close the trust, the lessee, or lessees, shall have one year to make other arrangements, before moving out of, or from location, if sold, and passed into other hands. And my said trustees shall receive, and collect all of the income of all my said trust estate, and shall pay therefrom all taxes, assessments, and other public rates, and charges, all expenses of insurance, and of ordinary repairs, and other expenses upon, or in respect of, or incident to my said trust estate, and the care thereof, and the execution of these trusts, including their, own reasonable compensation, and the *residue of said income*, before mentioned, and hereinafter called the said, 'net income,' shall until the conveyance, and transfer to my said husband of parts, of said trust estate, as hereinafter authorized from time to time apply as fol-

lows, viz.: First to pay over to my said husband, for his own use, if he be able to care for, and use the same himself, otherwise to apply to his comfortable support and maintenance, in his own home, if possible, and if there is the slightest objection to his living in the house, now numbered 183 & 185 Adelaide avenue, from any person or persons, the executors are to select three disinterested physicians, to examine into and decide the matter, with the understanding that proper care, and precautions are to be taken for the safety and comfort of my said husband. If however he has to live elsewhere, he is to have the same use of the income mentioned, and for traveling expenses, if able to travel, with a competent, and agreeable companion, and with suitable servants, to attend to him, and to properly care for his wants, at all times, an amount while received by him, equal at least to the net income, derived from my Adie Mansion estate, and the Anthony Annex, on Westminster and Greene streets, from my estate on Fountain and West Exchange street, now leased to Mr. Isaac Hahn, also my estate between Washington and Fountain streets, on Mathewson & Clemence streets, now leased to the Lederer Realty Company, also all my property on Atwells avenue between Adie and Merrill streets, and whatever benefit may accrue from the sale of the lots on Academy avenue, on the Adie Anthony Park plat, and any other real estate now standing in my name, which I may not now, have mentioned; also from all the stocks now standing in my name, as follows, United Traction, Boston and Albany Railroad stock, Boston and Providence Railroad stock, Narragansett Electric Light Co., and others, which I hold, at the time of my death. Secondly. During the life of my said husband to pay to my cousin Henrietta W. Brown, during her life, an annuity of three hundred dollars, to be paid quarterly, from the date of my death. And all of the residue of said net income, to pay to my husband, for his own use, if he be able to care for, and use the same, if not, as I have said before, deposit it in the name of my trust estate to be used for any necessity, or luxury, which may be for his comfort; and if at any time, the said net income of my said trust estate, shall not be sufficient for these purposes, or if the income aforesaid set apart for my said husband, shall not be sufficient for his uses as aforesaid, when added to his income from his late father's estate, then the deficiency thereof may, from time to time, be raised by sale, mortgage, or pledge of any part or parts of my said trust estate personal or real except the Mathewson St. estate, the estate corner Fountain, and West Exchange streets (they being already leased, at this time), for the direct benefit of my said husband. Provided, and I declare that it shall be lawful for my said trustees at any time, if in their, or his

opinion, the health, and condition of my such husband will justify it, to convey, transfer and make over to him, in fee simple, for his own use, discharged of all trusts, the one-fourth part of the several stocks (the income from all my stocks, having been set apart for him, in case he was not in condition to look after his own property), and also my said estate, corner of Fountain, and West Exchange streets, with any improvements, that may then be thereon, subject however to any then existing lease thereof, but any other then existing incumbrance thereon, if any, to be in that event, paid out of my other estate, or if said stocks, or any of them, or said estate has theretofore been sold, then to pay to my said husband, from any other said estate, other than my said Adie Mansion, and the Anthony Annex estate, an amount equivalent, to the reinvested proceeds derived therefrom; As my husband's income from his Father Anthony's estate, is so connected with what he is to receive from mine, it may be necessary for the two disinterested trustees, to inquire, the reason if my husband's income from his father's estate, should be less, from time to time, as for some time, it has averaged two thousands of dollars per annum from the real estate. Should it be necessary for my husband to continue to live at the Butler Hospital, I desire that my trustees, will be sure that he has very comfortable rooms and accommodations, as good as the hospital affords, and a carriage sent every suitable day for him to drive out, if he is willing, or desires to go. I also desire that one of the trustees shall see him every month personally, and find out if possible, if he desires anything for himself, or anything done for him."

There follow very explicit directions for the care of Frederick E. Anthony in Butler Hospital if he continues to stay there, and various legacies and bequests to take effect after her husband's death, with specific gifts to William R. Tillinghast and various other relatives of Frederick E. Anthony. Also directions as to the care and sale of her property after his death. The residuary gift is as follows: "Whatever may now be left of the so-called trust estate, I bequeath to the children, and grandchildren, of Maria and William Whipple Brown of Providence, state of Rhode Island, and Charlotte Perkins Gilman, and daughter Catherine Stetson, to be equally divided, share and share alike." The will ends with the appointment of the executors, George A. Perry, Ora L. Bell, and William Richmond Tillinghast. Various provisions of the will other than above which throw light on the construction of the residuary gift and of the gifts to Baynes will be referred to hereafter.

The evidence shows that Julia P. A. Anthony executed her will in 1905, and died in Providence October 6, 1907. In 1905 Frederick E. Anthony was 65 years old and

Mrs. Anthony about the same age. He had then been an inmate of Butler Hospital nine years. The will shows that the testatrix knew of his condition, which was one of mental impairment, consisting of apathy, resistiveness, and slight delusion. And she contemplated the possibility of his being obliged to remain at the hospital indefinitely. She expressed in her will, however, a desire that, upon her death, her husband move to her Adelaide avenue residence, if possible; the question of the advisability of his so doing to be determined upon the advice of three disinterested physicians selected by the executors (the will, above quoted). The executors selected three such physicians, who were unanimously of the opinion that it would be most unwise for Mr. Anthony to move from the hospital. Accordingly, since 1896, Mr. Anthony has remained continually at the hospital, where he is gradually growing worse. His condition is described as terminal dementia, with a decline of feeling, amounting to apathy. He has not the power of application to do anything, cannot be diverted, talks only in monosyllables, and does not even ask for food. His affairs are in the hands of his nephew, Charles F. Tillinghast, a brother of William R. Tillinghast. As the three experts consulted by the executors and the assistant superintendent of Butler Hospital are all strongly of the opinion that Mr. Anthony will be better off at that hospital than anywhere else, it seems certain that Mr. Anthony will never leave the hospital. He was 70 years old October 18, 1910. It also seems certain that Mr. Anthony never has been able since 1896 to take care either of himself or of his property, and that he is absolutely unfitted to take care of property or the income thereof, or to spend it for his own maintenance and support. This appears clearly in the testimony of Dr. Hall, the assistant superintendent of Butler Hospital, who has been conversant with the condition of Mr. Anthony ever since 1898.

Mrs. Anthony owned a large amount of property, both real and personal, that she managed herself, and after her husband was sent to Butler Hospital in 1896 she managed his property under a broad power of attorney. Up to the year 1902 she merely received his net income from the trustees of his father's estate. In 1902 the personal property of the Henry Anthony estate was divided, and Mr. Anthony's share delivered to Mrs. Anthony. After that time she invested and reinvested this personal estate, keeping a strict account of both principal and income. It is to be noted in this connection that her account books show that Mrs. Anthony spent her husband's own income solely for his support and comfort, never using any of it for her own support and maintenance. The only money of his that she used was money which she bor-

rowed, using the same for making improvements upon her own real estate; and at the time of her death she owed her husband \$10,348.83, for which she had made out her note. This represented principal and accumulated income of his estate borrowed by her from time to time. It is in evidence, also, that she was careful to keep his expenses within his own income, and objected to paying Butler Hospital more than \$50 per week for his care, on the ground that that was all his estate could afford to pay. At that time she asked William R. Tillinghast whether the trustees of the estate of Henry Anthony could contribute to her husband's support out of the principal of the trust estate, and was disappointed because the principal could not be used. Before the death of the testatrix, Mr. Anthony had no private nurse, and paid the hospital \$50 a week. This arrangement continued for nearly three years after her death. In 1910 he was moved to a better suite, and has since had a special nurse. The change was necessitated by Mr. Anthony's more enfeebled condition. Since 1910 the hospital has charged Mr. Anthony \$100 a week; but his other expenses are nominal, being only for clothing, carriage hire, and the few such other comforts which he is able to enjoy. The entire cost of supporting him as comfortably as possible is about \$8,000 a year. The net income of Mrs. Anthony in recent years was about \$12,000 per year, and Mr. Anthony's own annual net income, outside whatever he is entitled to under the will in question, has been since 1896 approximately \$3,800. Consequently an annual surplus income of \$8,800 is being accumulated.

It appears from the bill and answers that the children of Maria and William Whipple Brown, all first cousins of testatrix, living at the death of the testatrix, were as follows: Elizabeth Whipple Brown, Henrietta Whitman Brown, Julia Adie Jastram, Maria Perkins Brown, Robert Perkins Brown, and Almira Adie Elder. At that time two of the children of Maria and William Whipple Brown had died, namely, Edward Whipple Brown and Reginald C. Brown. Edward Whipple Brown was not married. The grandchildren of Maria and William Whipple Brown living at the death of the testatrix were Bessie V. Polleys, Ethel Abbe, May Field Brown, and Gertrude Perkins Brown, all children of said Reginald C. Brown, deceased; Edward Perkins Jastram and Julia Adie Whittaker, children of said Julia Adie Jastram; Madelaine Ray Brown and Robert Perkins Brown, Jr., children of said Robert Perkins Brown; and Marion Perkins Elder, Christine Pearce Elder, and Marjorie Powell Elder, children of said Almira Adie Elder. Since the death of the testatrix, Bessie V. Polleys has died, leaving surviving her husband, William V. Polleys, and two minor children, namely, William

Polleys and Elizabeth Polleys. No other children or grandchildren of Maria and William Whipple Brown have died, and none have been born since the death of the testatrix. Both Maria and William Whipple Brown are dead. Charlotte Perkins Gilman and Catherine Stetson are both alive. At the death of the testatrix there were living 17 children and grandchildren of Maria and William Whipple Brown, and also Charlotte Perkins Gilman and Catherine Stetson.

The executors and trustees under the will, in their prayers for instructions, submit the following questions to the court:

(1) Whether the whole net income of said trust estate belongs to the said Frederick E. Anthony, or only so much thereof as shall be needed for his support and comfort.

(2) Whether, if the whole net income does not belong to the said Frederick E. Anthony, the surplus income shall be accumulated during his life to be paid over with the principal to those entitled upon his death to said principal, or can be divided and paid over from time to time during the life of said Frederick, and if it may be so paid, to whom it may be so paid and in what proportions?

(3) Whether the children and grandchildren of William Whipple Brown living at the time of the decease of said testatrix took vested or contingent interests under her said will, and if any of them are in any way entitled to any part of the income of the trust estate, to whom will the share or income be payable in case of the death of any one of them during the life of the said Frederick E. Anthony?

(4) Whether Matthew Baynes is entitled under the circumstances to the monthly wages named in the will since July 1, 1908, together with any payments in lieu of his board and lodging; and whether he is entitled either to the legacy of \$2,000 payable to him in case he remained in the service of Frederick E. Anthony during his life, and, if entitled, at what time he is entitled thereto; and if he is not entitled to said legacy, whether he is now entitled to the legacy of \$300 to be paid to him in case he left the employment of Frederick E. Anthony; and whether the two legacies of \$2,000 each to the said Baynes, one named in the early part of the will conditional upon his remaining in the services of said Frederick during his life, and the other toward the end of the will as payable on the death of said Frederick, are both to be paid, or whether they are intended to be or are in legal contemplation one and the same legacy; and whether either or both of said legacies are payable only upon condition that said Baynes survives the said Frederick.

[1] In answering these questions, this court will follow the same general principles so often followed in previous cases, in construing the provisions of wills, viz.: That the intent of the testatrix must be gathered

from the whole will. *Frelinghuysen v. N. Y. Life Ins. & Trust Co.*, 31 R. I. 150, 157, 77 Atl. 98, and cases cited. And that we will also consider the circumstances under which the testatrix wrote her will, in order to ascertain her intention, "so as to look at it, as far as possible, from the testator's point of view," as was said in *Boardman*, Petitioner, 16 R. I. 131, 145, 13 Atl. 94, 99. See, also, *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; 30 Am. & Eng. Enc. of Law, 686, 687.

[2] Now, while it might appear upon the face of the will as above quoted that it was Mrs. Anthony's intention to give to her husband a legal life estate, in the entire residuary property real and personal, after the payments provided for under the previous provisions of the will had been made, and her language in the first instance is appropriate for the creation of such a legal life estate, it is only necessary to read the subsequent provisions to become convinced that she did not so intend, but that, as a matter of fact, knowing, as she did for many years prior to her death, his total mental incapacity for the management of his own estate, which she herself had managed for him for about 11 years prior to her death, the whole scheme of her will was based upon the establishment of a trust estate whereby the legal estate in her property was to be vested in the three trustees named, so that in no event would he be entitled to a legal estate in her property, but only to an equitable interest, except in the event of his restoration to such an extent as to have property turned over to him by the trustees, an event which never happened, and which in the natural course of things cannot happen. The whole frame of the will in its "third" clause is consistent only with an intention which is quite clear to vest her estate in trustees, and to give to her husband only an equitable interest in the income. It is equally manifest that, while her first language above quoted shows an intent to give him a life estate in the whole income of her property, the subsequent provisions show that it was clearly her intention that the income from his own estate should be used up for his support and maintenance, and that only such portion of her estate should be used, after his own resources were exhausted, as became necessary to furnish him with the support and comforts and luxuries appropriate and necessary for him in his condition, whether it was found expedient and proper for him to live in her residence on Adelaide avenue, or to travel, or to remain in the Butler Hospital. The minute and detailed provisions and directions to the trustees for his support in any event, whether at her house, or at the hospital, or while traveling, above quoted, are entirely inconsistent with any intention on her part that her entire income should be turned over to him, or be accumulated in the hands of his guardian, or of

her trustees, for his benefit, or that any portion of the income of her estate should be used for him until after the resources of his own estate were first applied. The constant repetition by her, in various words, in the same paragraph of the will whereby she provides for his support, no less than three or four times, saying explicitly in one place "his own income is first to be used for his support, and expenses, and after that the income I leave is for his use," coupled with the explicit direction to the trustees that all net income is to be credited to her estate, "but to be used freely for the benefit of my said husband, *whenever his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any cause, but always, his own rightful income, is first to be expended, upon him, and then when necessary, falling back, upon the income accruing from my trust estate," shows most conclusively that she intended him to have only such limited use of her income after the exhaustion of his own, and that all remaining net income not so used for his benefit should remain in the hands of her trustees for the benefit of her own estate, to be used in carrying out the subsequent provisions of her will. And it is to be noted that this construction of her intention from the plain terms of the will is entirely consistent with the facts clearly established that she always, during her lifetime, provided for his support out of his own property, and never used any of her own income for his support, so long as she lived.

The mere fact that the testatrix, in the opening sentence of the portion of the will above quoted, used words which in their technical meaning would be sufficient to create a legal life estate in her husband, will not be allowed to override the plain intent and meaning of the provisions taken as a whole, so as to prevent the creation of the trust estate, or to nullify the other provisions of the will relating to the disposition of the income by the trustees. Where the context or other parts of a will indicate that technical words are not used in their ordinary technical meaning, they will be interpreted by the court in the sense intended by the testatrix. See *Ross v. Nettleton*, 24 R. I. 124, 52 Atl. 676; *Cook v. First Universalist Church*, 23 R. I. 62, 49 Atl. 389; *Gallagher v. R. I. Hospital Trust Co.*, 22 R. I. 141, 46 Atl. 451; *Bailey v. Brown*, 19 R. I. 669, 36 Atl. 581; *Homer v. Shelton*, 2 Metc. (Mass.) 194, 198; 1 Redf. Wills (3d Ed.) 409.

In answer to the first question above quoted, we are therefore of the opinion that the whole net income of said trust estate does not belong to said Frederick E. Anthony, but only so much thereof as shall be needed for his support and comfort, after the income from his own property has been used.

Other courts have construed similar wills in the manner herein adopted, holding that

where a testator in one part of will gives a particular estate, and in subsequent passages shows that he means the legatee to take a lesser interest only, the prior gift is restricted accordingly. Such subsequent provisions will not take from an estate given qualities that the law regards as inseparable from it, but they are operative to define the interest given. The fact that there is no limitation over is immaterial.

A case somewhat similar to that at bar is *Bundy v. Bundy*, 38 N. Y. 410. There a will provided: "I give and devise unto my wife, Clarissa M. Bundy, and Ellen R. Bundy, * * * all my real and personal estate, property, assets and effects, subject to my debts. I also further will and direct, that in case either the said Clarissa M. should die without heirs, or that the said Ellen R. should die without heirs that the proceeds invested for either so dying, after sale of my said property, should be equally distributed among the heirs at law of my mother. And I further will and direct, that my executors, hereinafter to be named, sell and convey my real estate, and convert my personal property into cash; also that the said executors invest the proceeds of the sale of both my real and personal property, in bond and mortgage, or other good securities. I also will and direct, that the said Clarissa M. and the said Ellen R. use respectively so much, or enjoy the use of so much, of the interest arising out of the said bonds and mortgages, or said other securities, or both, as shall be necessary and proper for their maintenance and support; and that, if the interest be not sufficient for such maintenance and support, then they, or either of them, shall receive funds for such support from the principal so invested." The court held that Clarissa was entitled only to an amount sufficient to support her during life.

In *Re Shower's Estate*, 211 Pa. 297, 60 Atl. 789, a will provided: "After the death of my wife, Elizabeth, I direct all my estate then remaining to be divided equally between all my children share and share alike; the trustee or trustees appointed as before provided to receive in trust for my son Frederick and daughters Sarah and Clara before named the share to which each may be entitled respectively"—and then this was made subject to certain restrictions. The court held that the children were entitled only to equitable life estates subject to the restrictions, and said (211 Pa. pages 302, 303, 60 Atl. 789, 791): "It is settled by our cases that an estate of inheritance in real estate or an absolute interest in personalty given in a will may be reduced to a lesser estate if the subsequent language of the instrument unequivocally shows that such was the intention of the testator. 'No principle is better settled,' says Strong, J., in *Sheet's Estate*, 52 Pa. 257, 'than that, if a testator in one part of his will give to a person an estate of inheritance of land, or an absolute

interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a lesser interest only, the prior gift is restricted accordingly. Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might be a fee was intended to be a lesser right.' This language is quoted with approval in *Snyder's Appeal*, 95 Pa. 174, *Good v. Fichthorn*, 144 Pa. 287, 22 Atl. 1032, 27 Am. St. Rep. 630, and *Krebs' Estate*, 184 Pa. 222, 39 Atl. 66. * * * Nor is the fact that there is no limitation over of the principal sufficient to control the quantum of the estate in the *cestuis que trust*."

Haring v. Shelton, 114 S. W. 380 (Tex. 1908). Here a will provided: "I give and devise unto my beloved wife, C. C. Shelton, her heirs and assigns forever, the following described tracts or parcels of land * * * and it is my will that my said wife, C. C. Shelton, and her heirs shall hold said lands in fee simple forever, or so long as she shall remain a widow." Although there was no gift over, the court held that the heirs of the testator could recover the land from C. C. Shelton's grantee, and said (page 391): "Here the limitation of the estate to the widowhood of Mrs. Shelton is contained in the very terms of the devise and the intention of the testator is unmistakable. It is conceivable that the testator, having it in mind to limit the estate devised to his wife to her widowhood, may have used the language importing, taken by itself, an intention to make an absolute gift, without clearly understanding the import of such language, as repugnant to the limitation; but it is not reasonably conceivable that he would have used, in this very connection, the language 'or so long as she shall remain a widow,' without having the specific intention to vest an estate determinable upon his widow contracting a second marriage. It is true there is no devise over, but that does not destroy the limitation, but leaves the remainder to descend as in case of intestacy. It being clear that the testator did not use the words, 'so long as she shall remain a widow,' without a full understanding of their import, and that they express his intention, we do not think that intention should be defeated by the application of any technical rules of construction."

Dulin v. Moore, 96 Tex. 135, 70 S. W. 742 (1902). In a will were the following clauses: "Item 2d. To the children of my son, A. B. Moore, he being dead, I give and devise" certain real estate. "Item 9th. I hereby appoint R. R. Dulin of Sherman, Texas, trustee to receive and control the property bequeathed and devised to the children of A. B. Moore. * * * Item 10th. I hereby direct and empower the said trustees to keep

possession and control of the property bequeathed and devised to their said beneficiaries during the lives of said beneficiaries. Said trustees are not authorized to dispose of any of the body of said property, but are expressly prohibited from so doing, except for the purpose of reinvesting, which last they may do at their discretion. Said trustees are authorized and empowered and directed to expend the rents, interests and profits arising from said property in furnishing the said beneficiaries with necessities and such other things as may be suitable for the respective beneficiaries, according to their stations in life." On a suit to construe the will, the court held that items 9 and 10 ought not to be rejected as repugnant to item 2, but with them operated to give the legal estate to the trustee, and that Moore's children took only a beneficial interest. The court said (96 Tex. 138, 139, 70 S. W. 743): "In this case we must construe clauses 2 and 7 of the will in question in connection with clauses 9 and 10. The language of the two former, if unaffected by the latter two, would by virtue of the operation of our statute have conveyed to the devisees therein a fee-simple title to the property. * * * The intention of the testatrix must be given effect, unless prohibited by law. That the provisions in clause 10 do not contravene any rule of law we think clear."

See, also, *Taggart v. Murray*, 53 N. Y. 233 (1873); *In re Boulevard from Second St. to Rhawn St.*, 230 Pa. 491, 79 Atl. 716 (1911).

[3] As to the second question above set forth, whether the surplus income shall be accumulated during Mr. Anthony's life to be paid over with the principal to those entitled upon his death, etc., we are of the opinion that it is the plain intent and meaning of the will that the trustees shall accumulate the income, over and above such portion thereof as may be properly expended for Mr. Anthony's support in accordance with our opinion already expressed; and that such accumulated income becomes a part of the trust estate in their hands to be distributed in accordance with the subsequent provisions of the will.

Counsel for Mr. Anthony contend that "there nowhere appears any direct reference to any surplus of income, and there is no direction for the accumulation of the surplus for the benefit of the remaindermen," and that there is no ground for implying such a direction. It is true that nowhere has the testatrix used the word "accumulate" or "accumulation." But she gave the following directions: "All income, exceeding, what is necessary for taxes, repairs, incidental expenses, and salary of the trustees, to be credited to my estate, but to be used freely for the benefit of my said husband, *whenver his own income*, from the estate of the late Henry Anthony, does not prove at times sufficient, from any cause, but always, his own rightful income, is first to be expended,

upon him, and then when necessary falling back, upon the income accruing from my trust estate." It is our opinion that this direction to "credit" the income to her estate amounts to a direction to accumulate it, and the testatrix, by providing that the trustee may "fall back" upon it, shows an intention to treat the surplus income accruing as principal. The same idea is expressed in the following direction to "deposit" the income: "And all of the residue of the net income, to pay to my husband, for his own use, if he be able to care for, and use the same, if not, as I have said before, deposit it in the name of my trust estate, to be used for any necessity, or *luxury*, which may be for his comfort." It may be that the vocabulary of the testatrix did not contain the technical term "accumulate," and so to express her desire to convert the income into capital she used the words which her business experience rendered familiar to her, "credit" and "deposit." And that the accumulation was to be for the benefit of the residuary legatees is made clear by the residuary clause which disposes of "whatever may now be left of the so called trust estate," previous provisions having carefully defined the "so called trust estate" and directed that the income accruing from it should be made a part of it.

The authorities treat such expressions as directions to accumulate. The law is summarized in 22 Am. & Eng. Ency. of Law (2d Ed.) 728: "In any case where it is made the duty of the trustee to treat as principal the income of the trust property, instead of distributing it in the ordinary course, there is an accumulation." In *Matter of Estate of Fisher*, 4 Misc. Rep. 46, 47, 25 N. Y. Supp. 79, 80, a will directed the trustee under it to pay off a mortgage from the income of the estate. The court held that this in effect directed an accumulation (which was void under a statute) and said of the income: "It goes into and forms part of such estate and increases the capital, the income of which is distributable under the trusts in the will, and the augmented principal ultimately. The provision is, in effect, precisely the same as if the testator had, in so many words, required the trustee to apply the income to swell the principal of the trust fund."

[4] But no such express direction is necessary. If a part of the income of a trust estate is undisposed of, the trustees should, even in the absence of any provision whatsoever, accumulate it and pay it to the legatees entitled to the original corpus of the estate.

In 22 Am. & Eng. Ency. of Law (2d Ed.) 729, it is said: "A direction to accumulate need not be express; it may be implied from the terms of a will or deed, as where the instrument disposes of an estate in such a manner that an excess above what is reasonably necessary to carry out the trust

necessarily accumulates." Such was the holding in *Eberly's Appeal*, 110 Pa. 95, 98, 1 Atl. 330, in which the court used language almost identical with the above. The following are among other cases which recognize and apply this principle: *McDonald v. Bryce*, 2 Keen, 276; *Penrose's Appeal*, 102 Pa. 448; *Scott v. West*, 63 Wis. 529, see pages 573, 574, 24 N. W. 161, 25 N. W. 18.

[5] As to the second branch of the second question submitted to us, whether such surplus income can be divided and paid over from time to time during the life of Mr. Anthony, and, if so, to whom and in what proportions, we are of the opinion that the case is not such as to warrant this court in making any order for such payment. While it appears from the evidence that in all probability the principal of the trust estate will be amply sufficient to pay the very numerous pecuniary legacies, payable after Mr. Anthony's death, some 37 in number, and amounting in the aggregate to the sum of upwards of \$50,000, without its being necessary to resort to the accumulated income of the estate, nevertheless, as very large portions of both real and personal estate are specifically devised, and bequeathed, and other portions of real and personal estate will have to be sold to raise the necessary funds, and it cannot now be known what will be realized from such sales, it cannot at present be accurately determined whether there is sufficient property to carry out all of the provisions of the will and still leave the accumulated income intact. It is further to be noted that the testatrix in making these numerous bequests divides them into several classes, and constantly provides for abatement in case there is not enough remaining to pay them all. No case is cited on behalf of the children and grandchildren of Maria and William Whipple Brown, for whose benefit and to whom such distribution is urged, which is like the case at bar, or in which there are so many bequests to be provided for. The case of *Barstow v. Thomas*, 20 R. I. 561, 40 Atl. 498, is not directly in point, as in that case the time for the distribution of the estate subject to an annuity and certain expenses, expressly provided for in the will, had arrived, and the question of anticipated distribution was not involved; and the real question was as to the amount of property which should be retained by the trustee to provide for the annuity and expenses. In the case of *Harbin v. Masterman* (1896) 1 Ch. 351, which was a case of anticipated distribution, there were several annuities charged upon the estate; but all of the annuitants except one consented to the distribution, and it was clearly shown that the annuity of the one objecting was amply secured by a deposit of government stock or consols; and it further appears in the report of the case that this ostensibly objecting annuitant was not actually objecting in good faith, but had al-

lowed her counsel to use her name for ulterior purposes of his own, for which he was severely reprimanded by the court, and ordered to pay costs. The other cases cited to this point have no more bearing upon the case at bar than the two last above referred to.

For the reasons above given, we do not find in the present case any reason for ordering any distribution of the accumulated income prior to Mr. Anthony's decease.

[6] As to the third question, whether the children and grandchildren of William Whipple Brown living at the time of the decease of said testatrix took vested or contingent interests under her said will, and, if any of them are in any way entitled to any part of the income of the trust estate, to whom will the share or income be payable in the case of the death of any one of them during the life of the said Frederick E. Anthony, we are clearly of the opinion that the said children and grandchildren, together with Charlotte Perkins Gilman and Catherine Stetson, who are specifically named hereinbefore, together took a vested remainder in the residuary estate, at the death of the testatrix, subject to the limited equitable life estate of the said Frederick E. Anthony, as above set forth, that Bessie V. Polleys, who has since died, became entitled to a vested estate in remainder the same as the others, and that her interest was descendible and transmissible to her heirs, so far as it is an interest in real estate, and to her husband as to such portion of the residuary estate, as consists of personal property (unless she has disposed of her interests by will).

[7] The rule laid down by this court in *Greene v. Rathbun*, 32 R. I. 145, 156, 157, 78 Atl. 528, is entirely applicable to the question now under discussion, both as to the vested interests of the said children and grandchildren, and of said Charlotte Perkins Gilman and Catherine Stetson; and also as to the interests of said Bessie V. Polleys and her husband and children.

It is also to be observed that the rule in *Greene v. Rathbun*, supra, involves the further finding that the remainder vested in these children and grandchildren is subject to open and let in any grandchildren who may be born after the death of the testatrix, and before the death of Frederick E. Anthony, at which time the estate will vest in possession and be distributed. See 32 R. I. 157, 78 Atl. 528. This furnishes an additional reason, if any were needed, why none of the income of the estate should be distributed during the life of Mr. Anthony, because there can be no legal certainty that other grandchildren will not be born during his life, and thereby become entitled to share in the distribution of the residuary estate.

[8] It is also clear that, under the terms of the residuary clause, the said children and grandchildren take per capita with Char-

lotte Perkins Gilman and Catherine Stetson and with each other. In the absence of expressions of a contrary intention, a gift to "A. and the children and grandchildren of B." gives each child and grandchild a share equal to A.'s and to that of each other child and of each other grandchild. In *Guild v. Allen*, 28 R. I. 430, 436, 67 Atl. 855, 857 (1907), Mr. Justice Johnson said: "In general, where a gift is to the children of several persons and the children of another person, they take per capita and not per stirpes." See, also, *Schouler, Wills* (2d Ed.) § 540; 2 *Jarman, Wills* (5th Amer. Ed.) 756, and cases cited. Moreover, the words "to be equally divided, share and share alike," show unmistakably that this was the intention of the testatrix.

[9] In answer to the fourth question above stated, we are clearly of the opinion that Matthew Baynes is entitled to nothing more than he has already received under the will, unless he survives Frederick E. Anthony, and in that event he will be entitled only to one legacy of \$2,000. Baynes is not entitled to \$40 a month with payments in lieu of room and board during the life of Mr. Anthony. The following extracts will throw light on Baynes' rights: After the directions for burial, monument, and cemetery, the testatrix directs: "Within two months of my death, I wish enough personal property to be sold to give" (inter alia) "to Matthew Baynes, * * * one thousand dollars (\$1,000)." Then follows the gift of the residue to her husband and directions that the Adelaide avenue house be used as a home by her husband, if possible. The testatrix provides: "I would like Mrs. Ora L. Bell to take the position as housekeeper, and companion, at a monthly salary to be decided by the executors and herself, she to have an assistant to do the cooking, washing, ironing, and perhaps extra help at certain times. If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board. His work to be to take care of the house inside and out, as he has been accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times. Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is then to have two thousand (2,000) dollars, for his faithful services to us both. Mr. Anthony, I desire to have two attendants"—and other minute directions as to how Mr. Anthony is to be cared for. The clause in question reads: "If Matthew Baynes should be in my employ, and wish to continue, he is to be retained at forty dollars each month, and his room and board." It is inserted in the midst of minute directions for the care of Mr. Anthony, all of which rest on the condition that Mr. An-

thony should be able to occupy the Adelaide avenue house. The very work for which this is to be given to Baynes is care of this house, "inside and out, as he has been accustomed to do, and also give some attention to Mr. Anthony, if the latter should need it at times." In another part of the will, the testatrix makes directions for the care of her husband in event of his not living in the Adelaide avenue house, and in this part there is no provision whatever for Baynes. An absolute legacy of \$1,000 is given Baynes in the first part of the will, and another legacy of \$2,000 is given him in a clause near the last part of the will referred to hereafter. In the light of these circumstances, it is clear that the clause under discussion was intended not primarily as a gratuity to Baynes, but rather as a provision for the support of Mr. Anthony in a contingency which has not occurred.

The executors have paid Baynes the legacy of \$1,000 provided for in the early part of the will. As Mr. Anthony could not live in the Adelaide avenue house, the executors closed it, after giving Baynes one month's notice that they should not require his services there after July 1, 1908, and paying him his stipulated compensation of \$40 a month to that date. As the testatrix died October 6, 1907, Baynes received in all payment for about nine months' service at the rate directed in the will. As he cannot render further services, even though it is through no fault of his own, he is obviously not entitled to any further payment. A similar question came before the court in *Re Dempsey*, 25 Misc. Rep. 257, 55 N. Y. Supp. 427 (1898). There a testator made a gift to a charity, for the support and maintenance of his wife; the charity to retain any balance for its own benefit. The wife died before the testator, and the court held that, as the gift was made for a service which the charity was prevented by circumstances from performing, it could not get the gift.

Baynes is not and never will be entitled to anything under the clause: "Should Matthew Baynes, not be satisfied after giving it a fair trial, he is to receive on leaving five hundred dollars with his wages, but should he remain with Mr. Anthony during his life, he is then to have two thousand (2,000) dollars, for his faithful services to us both." The testatrix evidently contemplated the possibility of Baynes' being dissatisfied with working for a person of Mr. Anthony's peculiarities, but wished to give him every incentive to stay with Mr. Anthony, and so carefully provided to reward him "for giving it a fair trial," making dissatisfaction after a fair trial a condition precedent. This contingency has not occurred—Baynes was not shown to have been dissatisfied, but circumstances did not allow him to "give it a fair trial."

The gift of \$2,000 is conditioned in unam-

biguous terms on Baynes' remaining with Mr. Anthony during his life, and this contingency cannot happen. The law is well settled that where a gift by will is made on an express condition precedent, which becomes impossible of performance (and the existence of impossibility is unknown to the testator), the gift cannot vest. The cases on this point are numerous. The following are illustrative:

Priestley v. Holgate, 3 K. & J. 286 (1857). The will provided: "Whereas * * * James Priestley * * * has emigrated to Australia, I give * * * him, in case he remains in Australia or out of this kingdom, 600£; to be paid to him twelve months after the decease of my wife; but if he return to England before her decease, I give and bequeath to him the further sum of 400£." Several years before the death of the widow, Priestley took passage on a boat for England, with intention of returning, but was drowned, with all on board. The court refused to allow the additional 400£ to his representative.

Higgins v. Eaton (C. C.) 178 Fed. 153 (1910). Here a legacy of \$100 a month was left to a sister, provided that she cared for a mute brother during his lifetime. The brother, however, lived elsewhere; and the court, saying that it was immaterial that the sister was willing to care for the mute, held that she was not entitled to the legacy.

Colvin v. Pairpoint, 9 Ky. Law Rep. 191 (1887). The complainant's bill alleged that the testatrix left \$200 to him in case he should live with and care for her as he was then doing until her death; that he lived with and cared for her for several years, until she ceased to have a house and gave him no place where he could stay with her. The court sustained a demurrer to the bill.

Fisher v. Fisher, 80 Neb. 145, 113 N. W. 1004 (1907). A testator, contemplating his future inability to look out for himself, provided that if his son should care for and support him during the remainder of his life, he should have a certain piece of land. The son thereafter gave his father whatever care he required and rendered many personal services; but, owing to a change in circumstances, his father required him to support him financially only to a small extent. The court held that the son was not entitled to the land.

Stark v. Conde, 100 Wis. 633, 76 N. W. 600 (1898). The will provided: "If at that time (when nephew attains the age of 30 years) said trustee deems my said nephew competent to care for, * * * the said sum of \$10,000 * * * he shall then pay over to my said nephew * * * said sum." The nephew attained the age of 30 about a year before the death of the testator; and the court held that, as there consequently was no trustee at that time, the nephew could in no way get the legacy.

See, also, Jarman, Wills (5th Am. Ed.) 520; 1 Underhill, Wills, 648; Schouler, Wills (2d Ed.) § 599.

[10] Baynes will be entitled to the legacy of \$2,000 given him in the last part of the will only if he survives Frederick E. Anthony. This legacy is one of several pecuniary legacies payable from the general trust fund after Mr. Anthony's death; the provisions of the will throwing light on it being the following: "After my husband's death, and his funeral, and all our other debts, and expenses have been paid, I give and demise certain properties as follows:" (Here follow various legacies, none of them pecuniary.) Then the will continues: "At the death of my said husband, I devise and bequeath all the rest of my said trust estate * * * as follows, viz.:" (Here follow more legacies, none of them pecuniary.) There are next directions for selling certain property, "a reasonable time after the death of my husband," and immediately follow these sentences: "As to the stocks, they are to be held or sold, as executors think best, but their value added to the general trust fund, out of which are first to be taken the following bequests, if all the parties are then living, if not their portion is to be retained in the general fund, until the so called trust estate, is fully closed. The following legacies, are to be paid, in the order in which they are named; and if my estate hereinbefore set apart for this purpose, shall prove insufficient for the payment of all of them, then they shall abate in the inverse order. And if my estate proves sufficient therefor, all of the following legacies, to be paid free, from all legacy, or other public tax, or duty the same, if any, to be paid from my then remaining estate. First I give to Matthew Baynes, now in my employ, two thousands of dollars (\$2,000)"—and several other pecuniary legacies. Although the testatrix expressed her idea rather clumsily, it is obvious that her meaning was "the following bequests are to be paid to those of the following legatees then living, and if any one of them is not then living, the amount of his gift is not to be paid to his personal representative or children, but is to be retained in the general fund, and be distributed with that fund as hereinafter provided."

Having now answered all of the questions above set forth, the parties may present a decree for the approval of the court, in accordance with this opinion.

ANNIS v. SAUGY.

(Supreme Court of Rhode Island. May 2, 1912.)

APPEAL AND ERROR (§ 1005*)—REVIEW—VERDICTS—CONFLICTING EVIDENCE.

A verdict, approved by the trial judge, based on conflicting evidence, submitted under

proper instructions, will not be interfered with on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Kent County; George T. Brown, Judge.

Action by Eugene M. Annis against Alphonse L. Saugy. Verdict for plaintiff, and defendant brings exceptions. Overruled.

See, also, 74 Atl. 81.

Terence M. O'Reilly, of Providence, for plaintiff. Lyman & McDonnell, of Providence, for defendant.

PER CURIAM. The defendant's exceptions are without merit. The evidence was conflicting, and was submitted to the jury under suitable instructions from the court. The verdict of the jury was approved by the judge presiding at the trial. In these circumstances, the case falls within the rule referred to in the case of Wilcox v. Rhode Island Company, 29 R. I. 292, 70 Atl. 913.

The defendant's exceptions are overruled, and the case is remitted to the superior court within and for the county of Kent, with direction to enter judgment on the verdict.

DANIELS v. PHILADELPHIA & R. RY. CO.

(Superior Court of Delaware. New Castle. Feb. 14, 1912.)

1. MASTER AND SERVANT (§ 258*)—DECLARATION—NEGLIGENCE OF MASTER—RAILROAD TRACKS—SAFETY APPLIANCES.

A declaration in an action for damages for the death of a brakeman, which avers that defendant used certain tracks for storing cars, that it negligently omitted to provide a derailing device in connection with one of such side tracks, so that cars placed thereon would not pass close to the main track, such appliances being reasonable, necessary, and proper at that place, and that through such negligence a car on the side track came in contact with a locomotive on the main track, killing plaintiff's intestate, sufficiently alleges that a derailing device was reasonable and necessary and should have been provided.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. DEATH (§ 48*)—PLEADING FOREIGN STATUTES.

A declaration in an action for the death of plaintiff's husband, which alleged that defendant was a corporation existing under the laws of Pennsylvania and operated a railroad in that state, on which deceased was employed, and that a statute of that state, then and still in force, provided that when death was caused by negligence, and no action was brought by deceased during his life, his widow might maintain an action for damages for his death, sufficiently set out the statute of Pennsylvania upon which the plaintiff's right of action was founded.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 63; Dec. Dig. § 48.*]

Action by Annie M. Daniels, widow of George W. Daniels, against the Philadelphia

& Reading Railway Company. Demurrer to declaration overruled.

Argued before PENNEWILL, C. J., and WOOLLEY, J.

William S. Prickett, for plaintiff. Andrew M. Sanborn, for defendant.

Action on the case (No. 3, January term, 1911), to recover damages for death of plaintiff's husband, which death occurred at or near Coatesville, in the state of Pennsylvania, on the 12th day of September, A. D. 1910.

Demurrer to declaration.

The declaration contained one count, in which the following allegations were made:

"For that whereas, to wit, at the time of the committing of the grievances hereinafter mentioned, the said defendant was and still is a corporation existing under the laws of the state of Pennsylvania engaged in operating a certain line of railroad in the said state. That while so engaged as aforesaid, the said defendant employed the said George W. Daniels, who was then and there the husband of the said plaintiff, as a brakeman of freight trains engaged in the business of the said defendant. That the statute of the state of Pennsylvania then and now in force provided, among other things, that when death should be occasioned by negligence and no suit for damages be brought by the party injured during his life, the widow of any such deceased might maintain an action for and recover damages for the death so occasioned. That no such action was brought by the said George W. Daniels during his life. That on the 12th day of September, A. D. 1910, at or near Coatesville in the state of Pennsylvania aforesaid, while the said George W. Daniels was so employed as aforesaid, the said defendant operated a certain main track or tracks with certain side tracks connected therewith, and the said defendant used the said side tracks for the purpose of storing or shifting cars in its business aforesaid. That on the day and year aforesaid, at or near Coatesville in the state of Pennsylvania aforesaid, the said defendant negligently and carelessly omitted to provide a derailing device or other safety appliance in connection with one of the said side tracks so used by it as aforesaid, so that cars placed thereon would not pass or drift upon or close to the said main track, the said derailing device or safety appliance being reasonably necessary and proper in the location aforesaid, whereby through negligence and carelessness of the said defendant in not providing such derailing or other safety appliance, a certain car then and there being on one of the said side tracks came close to or upon the main track so used by the said defendant as aforesaid, whereby a certain locomotive, tender and train of cars upon which the said George W. Daniels was then

riding along the said main track came in contact with the said car so allowed to remain close to or upon the said main track as aforesaid, and thereby the tender attached to the engine upon which the said George W. Daniels was riding as aforesaid was upset, and the said George W. Daniels having jumped from the said engine was caught under the said tender and killed. Wherefore the said plaintiff as widow of the said George W. Daniels brings this suit and saith that she hath sustained damage for the death thus occasioned in the sum of \$25,000."

The defendant demurred to the said declaration, upon the following grounds:

"(1) Because no sufficient facts are alleged in the declaration showing, or tending to show, that a derailing device, or safety appliance, was reasonably necessary, or should have been provided, by the defendant at the time and place of the accident.

"(2) Because the alleged statute of the state of Pennsylvania, upon which the plaintiff's right of action is founded, is not set out in the declaration."

PENNEWILL, C. J. The demurrers are overruled.

SEININSKI v. WILMINGTON LEATHER CO.

(Superior Court of Delaware. New Castle. June 2, 1911.)

1. EVIDENCE (§ 471*)—OPINION EVIDENCE.

A question to a witness in an employee's action for personal injuries, "Was or was not that machine on the day of the accident a dangerous machine?" will be excluded as a matter of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES—EVIDENCE—CONFORMITY TO PLEADING.

Where plaintiff's narr. in an action for personal injuries while working on a machine contained no allegation as to any defective design of the machine, a question as to whether a wooden cover was the regular covering furnished for the knife cylinder of the machine was properly excluded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

3. EVIDENCE (§ 472*)—OPINION EVIDENCE.

A question, in an employee's injury action for personal injuries while working at a machine, whether it was possible for any one working at such machine for some days not to know that there was a knife or other cutting instrument in the machine, was properly excluded as calling for a matter which was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

4. MASTER AND SERVANT (§ 270*)—INJURIES—ADMISSION OF EVIDENCE.

In a leather factory employee's action for personal injuries by coming in contact with

knives in a machine, the maker of the machine was properly allowed to answer a question, after striking the quoted word, as to whether a circular cover over the knife cylinder had any other "intended" purpose in connection with the construction and operation of the machine than to protect the operator from becoming blinded by the particles flying from hides or skins.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

5. EVIDENCE (§ 156*)—EXCLUSION OF SIMILAR EVIDENCE.

A question as to whether there was any hidden or obscure danger about a machine on which an employé was working when injured was properly excluded, where plaintiff was not permitted to show that the machine was dangerous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 459; Dec. Dig. § 156.*]

6. EVIDENCE (§ 472*)—OPINION EVIDENCE—QUESTION FOR JURY.

A question, asked in a leather factory employé's action for personal injuries by coming in contact with knives on his machine, as to whether there was any special warning or instructions that could be given to a catcher of skins working at the machine which would not be obvious to one of mature judgment, was properly excluded as calling for a matter which was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

7. TRIAL (§ 28*)—VIEW BY JURY—PROPRIETY.

In determining whether the jury should be given a view of the premises where an employé was injured, the court must find that a view is necessary to the just decision of the issues, and that the place to be viewed has not been changed since the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.*]

8. MASTER AND SERVANT (§ 265*)—INJURIES—BURDEN OF PROOF—NEGLIGENCE.

An employé has the burden of proving negligence in an action for personal injuries; negligence never being presumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

9. MASTER AND SERVANT (§ 278*)—INJURIES—WEIGHT OF EVIDENCE—NEGLIGENCE.

Negligence by an employer must be proved to the satisfaction of the jury by a preponderance of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

10. NEGLIGENCE (§ 1*)—DEFINITION.

Negligence is the want of due care; that is, of such care as an ordinarily prudent man would exercise under the same or similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

11. MASTER AND SERVANT (§ 247*)—CONTRIBUTORY NEGLIGENCE.

An employé must himself have been without negligence proximately contributing to the injury in order to recover therefor from the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

12. MASTER AND SERVANT (§ 281*)—INJURIES—WEIGHT OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Contributory negligence by an employé must be proved by a preponderance of the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

13. MASTER AND SERVANT (§ 265*)—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

The burden of proving contributory negligence is upon the employer in an action for a servant's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

14. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S DUTY—FURNISHING SAFE APPLIANCES.

The employer is only bound to furnish an employé reasonably safe tools, machinery, and appliances, and keep them in reasonably good repair, and they need not be the safest or most approved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 172, 180-184, 192; Dec. Dig. §§ 101, 102.*]

15. MASTER AND SERVANT (§ 205*)—ASSUMED RISK—DEFECTIVE APPLIANCES.

An employé may rely on the employer to furnish safe appliances without inquiry on his part, and assumes no risk of injury from the employer's failure to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

16. MASTER AND SERVANT (§§ 217, 219*)—ASSUMED RISK—KNOWN DANGERS.

An employé assumes the ordinary risks incident to the employment, which are obvious, or which may be known by the employé by the reasonable use of his senses, or the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600, 610-624; Dec. Dig. §§ 217, 219.*]

17. MASTER AND SERVANT (§§ 213, 219*)—ASSUMED RISK.

One undertaking a dangerous employment assumes the risks ordinarily incident thereto, as well as those incurred from manifest dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564, 610-624; Dec. Dig. §§ 213, 219.*]

18. MASTER AND SERVANT (§ 152*)—ASSUMED RISK—DANGER FROM INEXPERIENCE.

A master may assume, in the absence of contrary knowledge, that a servant who engages to do specific work has the knowledge, experience, and skill necessary to do it in a reasonably safe manner, especially if the servant holds himself out as being experienced in such work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 313; Dec. Dig. § 152.*]

19. MASTER AND SERVANT (§ 152*)—ASSUMED RISK.

The rule that an employer may assume that an employé engaging to do particular work is competent and skillful does not apply, if the servant engages to work generally and is directed by the master to do particular work without holding himself out as experienced thereat.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 313; Dec. Dig. § 152.*]

20. MASTER AND SERVANT (§ 153*)—MASTER'S DUTY—WARNING SERVANT—INEXPERIENCED SERVANT.

If the employment is dangerous, the employer must warn and instruct as to its dangerous character, if the servant because of his inexperience or ignorance has no knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 814-817; Dec. Dig. § 153.*]

21. MASTER AND SERVANT (§ 152*)—WARNING SERVANT—EXTRAORDINARY DANGERS.

A master is bound to warn even an experienced servant of any special or extraordinary danger connected with the employment, if it could not have been known by the servant by the reasonable exercise of due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 818; Dec. Dig. § 152.*]

22. MASTER AND SERVANT (§ 265*)—BURDEN OF PROOF—ASSUMED RISK.

The burden of proving that an employé had knowledge of the particular defect in a machine at which he worked was upon the employer in an action for personal injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

23. MASTER AND SERVANT (§ 103*)—DELEGATION OF DUTY.

An employer cannot delegate his primary duties, such as that of furnishing reasonably safe appliances, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-190; Dec. Dig. § 103.*]

24. MASTER AND SERVANT (§ 235*)—CONTRIBUTORY NEGLIGENCE.

An employé must exercise reasonable care to learn of the dangers in the course of his employment, and cannot recover for resulting injuries if he fails to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

25. MASTER AND SERVANT (§ 245*)—ASSUMED RISK—OBEYING MASTER'S ORDERS.

An employé need not obey his employer's orders, directing him to go in a dangerous place of work, if the employé, by exercising reasonable care, might have known of the danger of the place, and he cannot recover for his own injuries if he obeys such orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

26. MASTER AND SERVANT (§ 89*)—SCOPE OF EMPLOYMENT.

If a leather factory employé, injured while working at a hide machine, undertook the work of catching the skins as they passed through the machine of his own motion, or at the suggestion of one other than the employer's agent having authority to give him such orders, he was acting without the scope of his employment in doing the work, and cannot recover for injuries received.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.*]

27. MASTER AND SERVANT (§ 219*)—ASSUMED RISK.

If a leather factory employé was furnished a machine which was reasonably safe and adapted to its use, and the dangers incident to its use were obvious to one of average intel-

ligence and judgment, such employé would assume the risk incident to doing the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

28. MASTER AND SERVANT (§ 234*)—CONTRIBUTORY NEGLIGENCE.

If an employé knew, or by due diligence could have known, of the defects in a machine at which he was injured, and of the resulting dangers, he was negligent in continuing to work at it, barring recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

29. MASTER AND SERVANT (§ 234*)—ASSUMED RISK—KNOWN DANGERS.

An employé cannot recover for injuries from a defect in a machine of which he knew, and the danger from which he appreciated, if he continued to work with such knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.*]

30. MASTER AND SERVANT (§ 155*)—WARNING SERVANT.

An employer is not required to warn or instruct an employé as to the dangers which are matters of common knowledge, or which may be seen by common observation, or as to which the servant could not have been further enlightened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 810; Dec. Dig. § 155.*]

31. MASTER AND SERVANT (§ 238*)—CONTRIBUTORY NEGLIGENCE.

If an employé, working in a leather factory on a hide machine, knew of two or more ways of removing the skins from a roller, one of which was safe and the other dangerous, he would be guilty of contributory negligence if he voluntarily chose the dangerous way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

32. MASTER AND SERVANT (§ 265*)—NEGLIGENCE—EVIDENCE—EXISTENCE OF INJURY.

The jury cannot infer negligence by an employer by the mere fact that an employé was injured while working at a machine; a breach of the employer's duty being essential.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

33. MASTER AND SERVANT (§ 224*)—ASSUMED RISK—ACTING WITHOUT SCOPE OF EMPLOYMENT.

An employé assumes the risk of injuries received while acting without the scope of his employment, without his employer's orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 664; Dec. Dig. § 224.*]

34. MASTER AND SERVANT (§ 217*)—ASSUMED RISK—VIOLATING WARNING.

An employé assumes the risk of injury from doing something he was warned by his superiors not to do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

35. MASTER AND SERVANT (§ 264*)—INJURIES—PROOF.

An employé cannot recover if his injuries were received from some defect in a machine other than that alleged and proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

36. DAMAGES (§ 95*)—MEASURE—PERSONAL INJURIES.

Upon finding for an injured servant, the jury should award him such sum as will reasonably compensate him for his injuries, including his pain and suffering in the past, and such as may result in the future, as well as for loss of time and wages, and any impairment of his future ability to earn a living by reason of the injuries.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

Action by Thomas Seininski against the Wilmington Leather Company for personal injuries. Verdict for plaintiff.

See, also, 78 Atl. 296.

Argued before PENNEWILL, C. J., and BOYCE and WOOLLEY, JJ.

Robert H. Richards and Daniel O. Hastings, for plaintiff. J. Harvey Whiteman, for defendant.

Action on the case (No. 24, May term, 1910), to recover damages for personal injuries to the plaintiff occasioned by his left arm coming in contact with the knives of a fleshing machine in defendant's morocco plant, where plaintiff was employed at the time as a catcher of skins at said machine, whereby his arm was so injured that it had to be amputated at the elbow.

At the trial, the following questions were objected to and ruled upon:

[1, 2] One of the plaintiff's witnesses, who had worked ten years on a fleshing machine, was asked, concerning the machine on which plaintiff was injured, "Was or not that machine, on the day of the accident, a dangerous machine?" This was objected to by defendant as a matter of opinion. Objection sustained. The same witness was then asked, "You say that there was a wooden cover over the knife cylinder of this machine; was that the regular covering furnished with these machines?" Objected to by counsel for defendant as irrelevant, there being no allegation in plaintiff's narr. covering defective design. Objection sustained.

[3] The same witness was asked on cross-examination the following question: "X. Is it possible for any one working at a fleshing machine for some days to fail to know that there is some sort of cutting instrument in the machine?" Objected to by counsel for defendant as being a matter for the jury to determine and not for the witness. Objection sustained.

"X. You have described this operation in detail. You have stated that you had 9 years and more experience in this particular factory, and that you had operated fleshing machines elsewhere. I will ask you if it is possible for a man 21 years or more of age, with good eyesight and good hearing, working as a catcher at a fleshing machine, having worked there for several days, to fail to know that there is a knife in the cylinders underneath the wooden guard which is over the

knife cylinders?" Objected to by counsel for plaintiff on the same ground. Objection sustained.

E., who was the maker of the machine in question, was asked by defendant's counsel, the following questions:

"Q. What is the purpose of the circular cover over the knife cylinder? "

"A. To protect the operator from getting blinded by the particles of flesh and water which come from working on green hides or skins."

[4] "Q. Has it any other intended purpose in connection with the construction and operation of the machine?" Objected to by counsel for plaintiff. The form of the question being changed by striking out the word "intended," the question was allowed by the court.

[5] "Q. Is there any hidden or obscure danger of any kind about this machine?" Objected to by counsel for plaintiff because the plaintiff had not been permitted to introduce testimony tending to show that the machine was a dangerous machine. Objection sustained.

[6] "Q. Is there any special warning or instruction that could be given to a catcher of skins working at the machine in question that would not be obvious to a person of mature judgment at a glance?" Objected to by counsel for plaintiff as a matter for the jury to determine from all the facts and circumstances in the case. Objection sustained.

At the conclusion of the defendant's testimony, application was made by defendant's counsel for an order that the jury view the locus in quo.

PENNEWILL, C. J. [7] Counsel for defendant has made an application for an order for the jury to view the locus in quo in this case. Judge Woolley in his work on Delaware Practice, volume 1, § 673, says: "The statute provides that 'upon the motion of either party the jury may be taken to view the premises or places in question, or to which the controversy relates, when it shall appear to the court that such view is necessary to a just decision.' Upon an application for a view of the place in which or by which the cause of action arose, or to which it in some pertinent manner relates, two things must be shown to the court's satisfaction before it will order a view; first, that such a view is necessary to a just decision of the issues before the jury, and second that the place, or locus in quo remains the same and has undergone no change."

We have considered the defendant's application, and are clearly of the opinion that the locus in quo, the condition of the machine in question, the buildings and the lights, cannot be sufficiently identical or similar to the conditions as they existed on the

day of the accident, to justify the court in ordering a view by the jury.

The application therefore is denied.

PENNEWILL, C. J. (charging the jury). Gentlemen of the Jury: Thomas Seininski, the plaintiff, is seeking in this action to recover from the Wilmington Leather Company, the defendant, damages for personal injuries, which he alleges were caused by the negligence of the defendant on the 14th day of January, 1910, at its leather factory in the city of Wilmington, where the plaintiff was at the time employed in catching skins from a fleshing machine.

The plaintiff's declaration consists of three counts. In the first count it is averred that the defendant on the 14th day of January, 1910, negligently and carelessly furnished and operated in its leather factory a certain machine, known as a fleshing machine, which was out of order, defective and dangerous in that the cover or guard over the rollers or knives of said machine was broken, defective, dangerous and out of order, whereby the plaintiff, who was then and there directed to work on the machine, and ignorant of the risk and danger incident thereto, and in the exercise of due care and caution on his part, had one of his arms caught in the said machine and greatly injured and mangled.

In the second count it is averred that the defendant on the day aforesaid, well knowing that the plaintiff was inexperienced in the occupation to which he was then put by the defendant, to wit, taking skins from a certain fleshing machine which was defective and dangerous, negligently and carelessly omitted to warn or instruct the plaintiff as to the danger connected with the said occupation, whereby the said plaintiff was injured.

In the third count it is averred that the defendant, who had employed the plaintiff in general duties about the defendant's place of business, the same being a safe and secure occupation, on the day aforesaid negligently and carelessly placed the plaintiff at work upon a certain fleshing machine, the same being a dangerous employment, without giving to the plaintiff any instruction or warning in relation thereto, the defendant well knowing that the plaintiff was ignorant of the risk and danger connected therewith.

Such are the acts of negligence on the part of the defendant company, which the plaintiff has averred as the cause of his injuries, and upon which he seeks to recover.

[8, 9] This action is based upon the alleged negligence of the defendant. The burden of proving such negligence is cast upon the plaintiff, and it must be proved to the satisfaction of the jury by a preponderance of the testimony. Negligence is never presumed, it must be proved. Whether there was any negligence at the time of the accident, and whose, must be determined by the jury from the evidence.

[10] Negligence, in a legal sense, is the want of due care, that is, such care as an ordinarily prudent man would exercise under like circumstances. It is the failure to observe, for the protection of another person, that degree of care and vigilance which the circumstances justly demand.

[11-13] In order for the plaintiff to recover in this action he must satisfy you by the weight, or preponderance, of the evidence, that the defendant was guilty of one or more of the negligent acts averred in his declaration. He must satisfy you not only that the injuries complained of resulted from the negligence of the defendant, but also that at the time of the accident he was himself without any fault or negligence which proximately contributed to his injuries; for, if at that time his own negligence did proximately contribute to his injuries, the defendant would not be liable even if it was also negligent. Where the contributory negligence of the plaintiff is relied on as a defense it must be proved by a preponderance of the evidence, and the burden of proving it rests upon the defendant, if it does not appear from the testimony produced by the plaintiff.

The defendant has prayed that you be directed, by binding instructions, to render a verdict in its favor. We decline to do this because we think the case should be submitted to, and determined by the jury under the evidence, and the law, as we shall state it.

[14] The relation existing between the defendant company and the plaintiff at the time of the accident was that of master and servant, and one of the primary duties imposed upon the master towards the servant in the course of his employment, by reason of such relation, was to furnish him reasonably safe tools, machinery and appliances with which to work and to keep the same in reasonably good repair and condition. The tools or machinery used need not be of the safest, best, nor of the most improved kind. It is sufficient if they are reasonably safe, and adapted to the purpose of the employment.

If the master fails to observe this rule of law and injury results to his servant from such failure he becomes liable therefor to the servant on the ground of negligence.

[15-17] The servant has the right to rely on the master for the performance of this duty without inquiry on his part. The servant assumes no risk as to such primary duty at the time he enters upon his employment, but he does assume all the ordinary risks incident to the employment that are obvious, seen or known, or which may be seen or known by the reasonable use of his senses or the exercise of due care. The servant also assumes the dangers and hazards which are ordinarily and naturally incident to the service which he undertakes. When a person enters upon a dangerous employment, he not only assumes the risks ordinarily incident thereto, but also the risk he may incur

from manifest peril. The master is not bound to insure the absolute safety of his machinery or mechanical appliances, which he provides for the use of his employes.

[18] When a servant engages himself in any specific work the master has the right to presume that the servant has the knowledge, experience and skill necessary for the performance of the work so undertaken, in a reasonably safe and proper manner, in the absence of knowledge to the contrary. And especially has the master the right so to presume if the servant represents or holds himself out to the employer as experienced in such work.

[19] But this rule does not apply when the servant was engaged to work generally, and while so engaged, and without seeking or holding himself out to be experienced and skilled in a specific and particular work, is sent by the master to perform such specific and particular work. In other words, the phrase "engages himself in any specific work" implies a seeking and acceptance by the servant of some specific and particular kind of work, and is not met by a case where the servant, without his seeking, is sent by the master from one employment to some other and different employment.

[20, 21] Where the employment is dangerous it is the duty of the master to warn and instruct his servant as to its dangerous character, if, by reason of inexperience or ignorance the servant is unacquainted with such danger. And even if the servant be experienced, it is the duty of the master to warn him of any special and extraordinary danger connected with the particular employment, if the same was unknown to the servant, and could not be seen or known by the reasonable use of his senses and the exercise of due care.

[22] The burden of proving that the plaintiff had knowledge, before the accident, of the particular defect in the machine rests upon the defendant, unless the jury believe from the testimony of the plaintiff, or other evidence in the case, including the knowledge and experience of the plaintiff, that he knew, or should have known, of the defect complained of.

[23] The master cannot delegate his primary duties, and if a machine provided for the servant to work with is defective and dangerous the master is responsible in damages to the servant for any injury caused him by the defective condition of such machine, provided the servant was himself free from fault, had no knowledge of the defect, and provided also the defect was not apparent and obvious.

[24] The servant must exercise reasonable care to avoid injury to himself, and to learn the dangers that are likely to beset him in his employment.

If a servant in the course of his employment becomes aware of threatened danger,

which by the exercise of reasonable care he could avoid, but fails to do so and is thereby injured, he must abide the result of his own negligence.

[25] The servant is not bound to obey the orders of his superior directing him to go to a place of danger or engage in a dangerous service if he knows, or by the reasonable use of his senses might know of the danger of the place or service; and if he, having such knowledge, or opportunity of observing the danger, nevertheless obeys the order and exposes himself to the danger, and suffers injury therefrom, the master cannot be held liable therefor.

[26] If the plaintiff undertook the work of catching skins as they passed through the fleshing machine, of his own motion, or at the suggestion and request of a fellow servant, or at the suggestion and request of any other person than the defendant's agents having the authority to give such orders, then the plaintiff was acting outside the scope of his duty, and cannot recover for the injuries he suffered.

[27, 28] If the defendant furnished for plaintiff a machine, reasonably safe and adapted to the purposes for which it was used, and the dangers incident to the operation of the machine were of a patent character, and obvious to the mind of a person of average intelligence, judgment and understanding, and the plaintiff possessed such average intelligence, judgment and understanding, or had knowledge of such dangers, then he assumed all the risks incident to the work he was engaged in at the time of his injuries, and the defendant would not be liable. The plaintiff was bound to see any patent and obvious defects of the machine with which he was working at the time he was injured, and he assumed all patent and obvious risks incident to his employment; and if he knew or by the exercise of due diligence might have known of the defects in the hood, and the dangers to be apprehended therefrom, and continued to work with the same and received his injuries therefrom, he was guilty of contributory negligence and cannot recover.

If the plaintiff was of such age, apparent intelligence, experience and maturity of judgment that he could have known of the danger incurred by him while working at the machine with the hood in the condition testified to, he took upon himself and assumed all the patent and obvious risks incident to his employment. And if all the perils and risks incident to the use of the fleshing machine upon which the plaintiff was injured, were open and obvious, and could be readily observed by a person possessing average intelligence and judgment, by the ordinary exercise of his senses, then the plaintiff assumed the risks and cannot recover.

In order to find a verdict for the plaintiff in this case the jury must be satisfied by

a preponderance of the evidence that the plaintiff was ignorant of the danger he incurred while working with the fleshing machine in the condition it was.

[29] If the plaintiff knew of, and appreciated, the alleged defect in the hood of the fleshing machine, and with such knowledge continued to work on said machine, not relying on any promise of the defendant to remedy such defect, he cannot recover.

[30] The duty upon the master to warn and instruct the servant regarding the dangers incident to the servant's employment, is not an absolute and unqualified one. The master is not required to instruct the servant as to those dangers which are matters of common knowledge, or which can be readily seen by common observation. Warning and instruction are not required where it does not appear that the servant could have been told anything that he did not already know.

But whether the plaintiff was instructed and warned or not, if he knew the danger to which he was exposed, or in the exercise of reasonable care might have known it, considering his apparent intelligence and experience, then he assumed the risk and would not be entitled to recover.

We cannot charge you as requested by the twenty-fourth prayer of the defendant, relative to the purpose of the hood.

The cases of *Hazen v. West Superior Lumber Co.*, 91 Wis. 208, 64 N. W. 857, and *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469, cited by the defendant, do not, in our opinion, support such a proposition. But the cases of *Craver v. Christian*, 36 Minn. 413, 31 N. W. 457, 1 Am. St. Rep. 675, and *Hunt v. Kane*, 100 Fed. 256, 40 C. C. A. 372, cited by the plaintiff, seem to be much more in point, and strongly indicate that the defendant's contention is untenable as a proposition of law.

[31] But we do charge you, as requested by the defendant in his twenty-fifth prayer, that if you believe from the evidence that the plaintiff had knowledge of two or more ways of removing the skins from the grip roller around which skins would become wound in the operation, one of which was perfectly safe and the other subject to risk and dangers, and he voluntarily chose the latter and was injured, he was guilty of contributory negligence and cannot recover.

[32] The jury may not infer negligence on the part of the defendant from the mere fact that the plaintiff was injured in the work, and upon the machine, at which he was engaged. The ground upon which a servant recovers against a master for injuries sustained in his service is that such injuries were caused by the violation or neglect of some duty which the master owed to the servant. If there was no such duty, there can be no such liability.

If the plaintiff from his experience gained in the defendant's factory, or elsewhere,

knew how to do with safety the particular work he was doing at the time he was injured, the defendant would not be liable on account of its failure to give the plaintiff instruction and warning. If he knew of the danger, or by the ordinary use of his senses could have known thereof, he assumed the risk and may not recover therefor.

[33, 34] If the plaintiff, at the time of the accident, was acting outside the scope of his employment without the order of the master, he cannot recover, even though the machinery or appliance was defective and dangerous. Neither is he entitled to recover if the accident was caused by his attempt to do something which he was warned not to do. In the one case he would be doing something he was not authorized to do, and in the other something he was forbidden to do, and in either case assumed his own risk, for which he could not hold the master liable.

[35] The plaintiff cannot recover for any negligence of the defendant other than that which he has alleged and proved. So that, if you believe from the evidence that his injuries were caused by some defect in the hood or covering of the machine different from the defect alleged and proved, he is not entitled to recover no matter what other defects there may have been in said hood or covering.

[36] In conclusion, gentlemen, we say, that if you believe from a preponderance of the evidence that the plaintiff's injuries were caused by the negligence of the defendant as we have instructed you, and further believe that the plaintiff's own negligence did not proximately contribute thereto, your verdict should be in favor of the plaintiff, and for such sum of money as will reasonably compensate him for his injuries, including therein his pain and suffering in the past, and such as may result to him in the future therefrom; and also for his loss of time and wages, and for any impairment of ability to earn a living in the future arising from such injuries, as may be disclosed by the evidence.

If, however, you are not satisfied that the plaintiff's injuries were caused by the negligence of the defendant, or, if you believe that the plaintiff's own negligence contributed in any way proximately to his injuries, your verdict should be in favor of the defendant.

You have listened very attentively and patiently to the presentation of this case, and the court, in view of the importance of the questions involved, has at some length and as clearly as they were able to do, given you the law applicable to the facts. It now becomes your duty to carefully, fairly and conscientiously consider all the evidence, and after applying thereto the law as we have stated it, reach such a conclusion as you believe to be just and proper under the law and the evidence.

Verdict for plaintiff.

SPAHN v. PEOPLE'S RY. CO.

(Superior Court of Delaware. New Castle.
Feb. 9, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—ACTION—ESSENTIALS.

Negligence is the basis of an action by a servant against his master for injuries from a defective appliance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—ACTION—BURDEN OF PROOF.

In an action by a motorman against his master for injuries received by reason of a defective brake on the car, the burden of proving negligence is on the motorman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 227*)—ACTION—DEFENSES—CONTRIBUTORY NEGLIGENCE.

A servant, guilty of contributory negligence, cannot recover for injuries caused partly through his own negligence and partly through that of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 668, 669, 672; Dec. Dig. § 227.*]

4. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—DUTY OF MASTER.

The primary duty of a master towards his servant is to use all reasonable care, proportioned to the danger of the employment, to furnish him with reasonably safe tools and appliances with which to work, though they need not be of the safest, best, or most improved kind; and if the master neglects this duty he is liable for injuries received by the servant because of such neglect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

5. MASTER AND SERVANT (§ 205*)—INJURIES TO SERVANT—APPLIANCES.

A servant has the right to rely on the master's furnishing of safe appliances, and assumes no risk of injury because of defects therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

6. MASTER AND SERVANT (§§ 206, 217, 219*)—INJURIES TO SERVANT—RISKS ASSUMED.

A servant assumes all of the ordinary risks incident to the employment, and such as are patent or may be discovered by the ordinary use of his senses.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 574-600, 610-624; Dec. Dig. §§ 206, 217, 219.*]

7. MASTER AND SERVANT (§§ 85, 229*)—INJURIES TO SERVANT—DUTY OF SERVANT.

A master is not an insurer of his servants; the servant being bound to use ordinary care for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140, 674, 683; Dec. Dig. §§ 85, 229.*]

8. MASTER AND SERVANT (§ 127*)—INJURIES TO SERVANT—SAFE APPLIANCES.

A master is bound, not only to furnish reasonably safe appliances, but also to use due diligence to keep them in a reasonably safe condition so long as used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 252; Dec. Dig. § 127.*]

9. MASTER AND SERVANT (§ 125*)—INJURIES TO SERVANT—VICE PRINCIPALS.

Notice given to the foreman or person in general charge of a master's business of defective appliances is notice to the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

10. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where a servant, with knowledge of the defect, continues to use a dangerous appliance, the master is not liable for resulting injury, though if the master promises to remedy the defect, and the servant, relying on that promise, is injured while using it for a reasonable time, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

11. MASTER AND SERVANT (§ 123*)—INJURIES TO SERVANT—DUTY OF INSPECTION.

A motorman, injured because of a defective brake on an electric car, cannot recover, where the defect could not have been discovered by a reasonable inspection, or occurred while in use or after inspection; the master being bound only to use reasonable care to furnish safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 233, 234; Dec. Dig. § 123.*]

12. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A motorman of an electric car, who received injuries, owing to his running the car at an unusual and excessive rate of speed, letting it get from under his control, cannot recover, being guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

13. EVIDENCE (§ 598*)—PROVINCE OF JURY—CONFLICTING EVIDENCE.

It is the duty of the jury, where the evidence is conflicting, to reconcile it, if possible, but, if impossible, to decide in favor of that party whose evidence preponderates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2450-2452; Dec. Dig. § 598.*]

14. EVIDENCE (§ 588*)—CREDIBILITY—DETERMINATION.

In determining the weight of the testimony and credibility of witnesses, the jury should consider the apparent fairness and interest or bias of the witnesses, together with their opportunity to see and know of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.* Witnesses, Cent. Dig. § 1164.]

15. DAMAGES (§ 95*)—PERSONAL INJURIES.

Where a motorman received personal injuries, owing to a collision caused by a defective brake on his car, he is entitled to such damages as will compensate him for money expended for medical attendance, for his suffering in the past, and for such as he may endure in the future, together with loss of wages in the past and any impairment of earning power for the future which is due to defendant's negligence.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

Action by John B. Spahn against the People's Railway Company, brought by the plaintiff, who at the time was employed as a motorman by the defendant, to recover dam-

ages for personal injuries. Said injuries were alleged to have been sustained on account of the negligence of the defendant in not furnishing the plaintiff with reasonably safe appliances, to wit, brakes. The contention of the plaintiff was that by reason of the imperfect and defective condition of the brakes upon the car which he was operating as the servant of the defendant, he was unable to stop the car, and by reason thereof, collided with another trolley car and was thereby injured. Verdict for plaintiff.

Argued before PENNEWILL, C. J., and WOOLLEY, J.

W. W. Knowles and Caleb E. Burchenal, for plaintiff. Robert H. Richards, for defendant.

PENNEWILL, C. J. (charging the jury). Gentlemen of the Jury: The plaintiff in this action seeks to recover from the defendant company damages for personal injuries which are alleged to have been sustained on account of the negligence of said company.

The plaintiff claims that about 11 o'clock on the night of August 14, 1911, he was motoring a car of the defendant from Brandywine Springs to the city of Wilmington, and because of defective brakes on the car, which would not take hold of the wheels, he was unable to stop or hold the car when descending a grade near Haley's curve, and in consequence thereof his car collided with another car and he was injured.

The plaintiff's declaration consists of two counts, one of which avers that the said defendant negligently and carelessly suffered and permitted the said plaintiff to use and operate a certain car with an improper, defective, inadequate, unfit, unsafe, unsuitable and dangerous brake shoe, all of which was well known to the said defendant but unknown to the said plaintiff, and by reason of the said negligence of the said defendant in permitting the use of said car with the defective brake shoe as aforesaid at the time and place aforesaid, the said car on which the said plaintiff was a motorman as aforesaid ran into and collided with another car operated and controlled by the said defendant, whereby the said plaintiff was greatly bruised, cut, mangled, broken, injured and distressed.

The second count is similar to the first, except that the word "brakes" is used in the second count instead of "brake shoe," as in the first count.

So that, the negligence averred, and relied upon, by the plaintiff is, that the defendant suffered and permitted the plaintiff to use and operate the car with a defective, unsafe and dangerous brake shoe, or brakes.

[1-3] The gist of this action is negligence, which is the want of ordinary care, and the burden of proving the negligence of the defendant rests upon the plaintiff. If there was no negligence on the part of the company your verdict should be for the defend-

ant. Even if there was negligence on the part of the defendant, yet if the negligence of the plaintiff contributed proximately to the accident at the time thereof, the plaintiff cannot recover. In such case the plaintiff would himself be guilty of contributory negligence, and where there is such negligence the law will not attempt to measure the proportion of blame or negligence to be attributed to each party.

Contributory negligence has been defined to be the negligence of the plaintiff, or of the person on account of whose injury the action is brought, amounting to a want of ordinary care, and approximately contributing to the injury.

[4-7] The relation existing between the defendant and the plaintiff at the time of the accident was that of master and servant, and the primary duty imposed upon the defendant towards the plaintiff in the course of his employment by reason of this relation was to furnish him reasonably safe tools, machinery and appliances with which to work. The tools or machinery used need not be of the safest, best nor of the most improved kind. It is sufficient if they are reasonably safe, and adapted to the purpose of the employment. If the master fails to observe this rule of law and injury results to his servant from such failure, he becomes liable therefor on the ground of negligence. In the performance of this duty the master must use all reasonable care and prudence for the safety of the servant, having regard to the character of the work to be performed. Such care must be in proportion to the danger of the employment. The servant has the right to rely on the master for the performance of this duty without inquiry on his part. The servant assumes no risk whatever as to such primary duty at the time he enters upon his employment; but he does assume all the ordinary risks incident to the employment; such as are patent, seen and known, or which may be seen and known by the ordinary use of his senses. And he is required to exercise due care and caution in the course of his employment to avoid dangers and injuries; for the master, having performed the primary duties required of him, is not an insurer of the safety of his servants.

[8-10] "It is the duty of the master also to maintain said tools and machinery in a reasonably safe condition so long as they are continued in use. If the master knows, or by the use of due diligence might know that the tools and machinery in use in his business are not reasonably safe it is negligence on his part to fail to remedy and correct the defects of which he has knowledge, or by the exercise of due diligence he might discover. Notice to the foreman or person in general charge of the business, or having charge and control of the men and the cars, that the machinery is unsafe or dangerous, is, in law, notice to the master; and after the receipt

of such notice it would be negligence on the part of the master to fail to make such machinery reasonably safe for the servant in his employment. But in such case the master would not be liable if the servant having knowledge of such defect continued to use such machinery. The servant must always exercise such care and caution to avoid danger as the circumstances reasonably require, and the greater the danger the greater the care, diligence and caution required."

But even though machinery is defective in the knowledge of the employé, yet if the master has knowledge of such defect and promises to remedy the defect, and the employé, relying on that promise, continues by direction of the master to use it for a reasonable time, he does so at the master's risk, inasmuch as he has a right to rely on such promise. *Boyd v. Blumenthal*, 3 Pennewill, 567, 52 Atl. 330; *Ray v. D. S. Steel Co.*, 2 Pennewill, 528, 47 Atl. 1017.

[11] If you should believe from the evidence that the defendant exercised reasonable care in the inspection of the trolley car which the plaintiff was operating at the time of the accident, and that the brakes of said car, or other appliances complained of, when last inspected before the accident, were in reasonably good working condition, and that any defect or disorder (if any) in any of said appliances was not discovered sufficiently long before the accident to reasonably permit the repair thereof or the discontinuance of the operation of such car, in such event the existence of such defect or disorder would not constitute negligence on the part of the defendant.

If you should believe from the evidence that the defendant exercised reasonable care in the inspection of the car, in question and of the brakes and other appliances thereon, and that the same were found in reasonably good working condition when the car was turned over to the plaintiff to operate as a motorman, shortly before the accident, and that any defect or disorder (if any) in said appliances occurred during the operation of the car by the plaintiff, and that there was no opportunity to repair the same or discontinue the use of the car before the accident, in such event the existence of such defect or disorder would not constitute negligence on the part of the defendant.

If you should believe from the evidence that the plaintiff knew on the day of the accident and before he began to operate car number 6 that the brake of said car was defective, and should also believe from the evidence that the defendant did not promise to remedy said defect upon any complaint thereof by the plaintiff, and that the plaintiff took said car out and operated it with knowledge of such defective brake, then the plaintiff assumed the risk of operating said car with such defective brake, and cannot re-

cover for any injury to himself caused by such defective condition of such brake.

[12] It is the duty of a motorman to so run and operate his car as to have it under proper control, and be able to stop it, or reduce its speed whenever necessary to avoid accident, if by proper care and caution he can do so. Therefore, if you believe from the testimony in this case that the brakes were not defective, and that the plaintiff's injuries were caused by his running the car at such a high, excessive and unusual rate of speed, or by such improper handling of the brakes, that he was not able to, and just before the collision, to stop or control the car by the means provided for the purpose, he would be guilty of contributory negligence and could not recover.

[13-14] Where there is a conflict of evidence, as there is in this case, it is the duty of the jury to reconcile it if they can, but if they cannot do so, then it becomes their duty to render their verdict in favor of that side upon which the evidence reasonably and clearly preponderates. In determining the weight of the testimony and the credibility of the witnesses, the jury may consider the apparent fairness, interest or bias of the witnesses, if any, their opportunity to see and know of the accident, their recollection of the circumstances connected therewith, and any and all other facts and circumstances that go to test the accuracy of their testimony.

[15] If you believe from the preponderance, that is, the weight of the evidence, that the injuries of which the plaintiff complains in this action were caused by the negligence of the defendant company, remembering the law as we have stated it, and applying it to the facts in the case; and shall also believe that the plaintiff at the time of the accident was himself entirely free from any negligence that proximately contributed to his injuries, your verdict should be for the plaintiff, and for such sum as you believe from the testimony will reasonably compensate him for any money laid out and expended for medical attendance, for his pain and suffering in the past, and for such as may be in the future, resulting from the defendant's negligence; and also for any loss of wages suffered by him in the past, as well as for any impairment of ability to earn a living in the future, as may be shown to be the result of the defendant's negligence.

If you are not satisfied by the preponderance of the evidence that the plaintiff's injuries were caused by the negligence of the defendant; or if you believe from the testimony that the plaintiff's own negligence, or want of care and caution, contributed proximately to his injuries, your verdict should be in favor of the defendant.

Verdict for plaintiff.

STATE ex rel. BRUMLEY v. JESSUP & MOORE PAPER CO.

(Superior Court of Delaware. New Castle. April 8, 1912.)

1. APPEAL AND ERROR (§ 1198*)—MANDATE—POWERS OF LOWER COURT.

When the Supreme Court has reversed a judgment of the Superior Court sustaining the return to an alternative writ of mandamus, and has directed the issuance of a peremptory writ, the Superior Court has no duty or power, except to issue the peremptory writ as directed, in conformity with the opinion delivered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. § 1198.*]

2. APPEAL AND ERROR (§ 1198*)—STOCKHOLDERS—RIGHT TO INSPECT BOOKS.

The Supreme Court ordered mandamus requiring a corporation to permit a stockholder to inspect and make copies of such books, papers, and writings of the corporation, and only such, as under direction of the Superior Court might be found essential to furnish the stockholder information as to the value of his stock. *Held*, that the peremptory writ would require the corporation to permit the stockholder to examine and make copies of the company's general ledgers and the balance sheets submitted by the company to the directors, but not to inspect the directors' minutes, or make copies of the names of the corporation's customers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4668; Dec. Dig. § 1198.*]

Application by the State, on the relation of Irene Brumley, for writ of mandamus against the Jessup & Moore Paper Company to compel the respondent to allow the relator to inspect and make copies of certain books, etc., in conformity with the opinion of the Supreme Court in reversing the judgment of the said Superior Court in refusing to quash the return to the alternative writ. Writ granted.

See 7 Pennewill, 397, 72 Atl. 1057. See, also, 80 Atl. 350; 82 Atl. 540.

Argued before PENNEWILL, C. J., and BOYCE, J.

Robert H. Richards, of Wilmington, for relator. Willard Saulsbury and Hugh M. Morris, both of Wilmington, for respondent.

PENNEWILL, C. J. The Supreme Court, in reversing the court below in the above stated case, said:

"We hold that the relator is therefore entitled to the peremptory writ of mandamus of the court to which this case is remanded, to be issued by that court under such reasonable regulations as to time and place as it may direct, commanding the defendant to suffer and permit the relator, or his duly authorized attorney, to inspect and make copies of such of the books, papers and accounts and writings of the defendant mentioned in his petition, and only of such of them that, under the direction of said court, are found essential and sufficient to furnish

the information whereby the relator may determine the value of his stock."

[1] The Superior Court has no duty to perform, and no power in the premises, other than to carry out the mandate of the Supreme Court, which is, to order the issuance of the peremptory writ as directed, and in conformity with the opinion delivered by the court.

[2] Manifestly such opinion means that the relator and his counsel should not be permitted to inspect and make copies of all the books and papers mentioned in his petition; but only of such of them as are required to furnish the information asked for.

Our effort has been to ascertain what books and papers are required for such purpose, and we have made some independent inquiry and investigation in order to ascertain that fact. The task imposed has not been easy to satisfactorily perform. The thought in the mind of the Supreme Court evidently was that inspection should not be authorized except for the purpose mentioned in the petition, to wit: The ascertainment of the value of the stock, and that the business of the defendant company should not be interfered with by any inspection of its affairs not essential to that purpose. In order to faithfully carry out the mandate of the court, it is our duty to restrict the inspection as far as may be consistent with the relator's rights under the decision of the Supreme Court.

What books and papers, and what books and papers only, are required to furnish the information whereby the relator may determine the value of the deceased's stock in said company, cannot perhaps be ascertained with perfect exactness, but it is our opinion, based upon the most reliable information we have been able to obtain, that the minutes of the directors are not so required. There may be very much in the minutes that would not be pertinent to the inquiry, and which need not be disclosed.

We are of the opinion that in order to ascertain the value of the stock held by Horace T. Brumley, deceased, his executrix should be permitted to inspect and make copies of the general ledgers of the defendant company, from the 1st day of August, 1905, up to the present time, and also of the statements or balance sheets submitted by the company to the directors thereof, showing the business done by the company, its profits and losses, and assets and liabilities, from the 1st day of August, 1905, up to the present time; but that no copies should be made of the names of the customers of the company, either the persons from whom it buys or to whom it sells.

We further hold that such inspection and copies should be made by the relator, or by her duly constituted attorney, between the hours of 10 and 12 o'clock in the forenoon and 1 and 3 o'clock in the afternoon, of such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

number of consecutive days as may be necessary for that purpose, after 10 days' notice by the relator of her intention to begin such inspection and making of copies and of the name of her attorney duly constituted for that purpose, in case she should name such an attorney; and that such inspection and such copies shall be made at the principal office of the defendant company within the state of Delaware, to wit, at the Augustine Mills, belonging to said company, near the city of Wilmington, Delaware, unless the said relator and the said defendant can, by written stipulation filed in this cause, agree upon another place for making such inspection and copies more convenient to both of them, or either of them.

CARPENTER v. CORNISH et al.

(Supreme Court of New Jersey. April 11, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 1*)—QUALIFICATIONS OF VOTERS—SEX.

Prior to the adoption of the Constitution of 1776 of the state of New Jersey, women had no legal claim to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ELECTIONS (§ 7*)—QUALIFICATIONS OF VOTERS—SEX.

No right to vote was conferred on females by the Constitution of 1776.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 7.*]

3. ELECTIONS (§ 10*)—QUALIFICATIONS OF VOTERS—SEX.

Even though the act of 1797 (Paterson's Laws, p. 231) permitted females to vote, it was subsequently repealed by the statute of 1807 (Bloomfield's Laws, p. 33).

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 7; Dec. Dig. § 10.*]

4. ELECTIONS (§ 9*)—QUALIFICATIONS OF VOTERS—SEX.

The act of 1807 (Bloomfield's Laws, p. 33) and subsequent statutes excluding females from the right to vote are not in contravention of the Constitution of 1776.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 6; Dec. Dig. § 9.*]

5. ELECTIONS (§ 9*)—QUALIFICATIONS OF VOTERS—SEX.

The act of February 23, 1844 (P. L. p. 111), calling for a constitutional convention, and which excluded women from voting for delegates thereto, was neither in contravention of the letter nor of the spirit of the Constitution of 1776.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 6; Dec. Dig. § 9.*]

6. CONSTITUTIONAL LAW (§ 1½, New, vol. 4, Key No. Series)—ADOPTION OF CONSTITUTION—EFFECT.

The Constitution of 1844 having been submitted to the vote of the people, in pursuance of the act of February 23, 1844 (P. L. p. 111), and adopted, is the fundamental law of this state until supplanted either by a new Constitution adopted, as that was adopted, or by amendment in the manner therein provided.

(Additional Syllabus by Editorial Staff.)

7. ELECTIONS (§ 7*)—QUALIFICATIONS OF VOTERS—CONSTITUTIONAL PROVISION—"ALL INHABITANTS."

In Const. 1776, art. 4, conferring the right to vote on "all inhabitants" having certain qualifications, the quoted phrase is limited to those having the right to vote before the adoption of the Constitution.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 1, pp. 312-335; vol. 8, pp. 7572-7573.]

8. ELECTIONS (§ 7*)—QUALIFICATIONS OF VOTERS—CONSTITUTIONAL PROVISION—"CLAIM A VOTE."

In Const. 1776, art. 4, providing that all inhabitants of full age who, among other qualifications, have resided within the county in which they claim a vote for twelve months shall be entitled to vote, etc., the phrase "claim a vote" means a lawful claim to vote at the time of the adoption of the Constitution.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

Application by Harriet F. Carpenter for rule to show cause why a peremptory mandamus should not issue to Charles A. Cornish and others. Rule discharged.

Argued November term, 1911, before TRENCHARD and KALISCH, JJ.

Mary Philbrook, for relator.

KALISCH, J. Harriet F. Carpenter seeks to obtain a writ of mandamus to be directed to the members of the board of registry and elections of Passaic township, Southern district, requiring her to register her name, that she may be qualified to vote.

It is admitted that her application came too late to enable her to vote at the last November election, but she insists that her application should receive consideration so as to qualify her by having her name upon the list to vote at the Primaries in September of this year.

This presents the question of the right of women who are in other respects qualified as to citizenship and residence to vote in New Jersey. It is clear that under the Constitution of 1844 women cannot vote. The argument advanced by the relator in behalf of the right of women to vote, notwithstanding the constitutional impediment, is that the Constitution of New Jersey of 1776 gave to "all inhabitants" possessing certain qualifications the right to vote; that certain statutes relating to elections subsequently passed, including the laws of 1790, in referring to those persons who are entitled to the right of suffrage mentioned them as "he" and "she"; and that women voted extensively throughout the state until 1807 (Bloomfield's Laws, p. 33), when the first act was passed, depriving women of the right to vote; that the statute of 1807 and the subsequent statutes passed in 1820 (Rev. Laws 1821, p. 741) and 1838 (Laws 1838-39, p. 199) depriv-

ing women of the right to vote are unconstitutional, and that the act of the Legislature (P. L. of 1843-44, p. 111), provided for the election of delegates to the convention to frame a constitution, and excluding women from voting for such delegates, were also unconstitutional, in so far as it excluded women, and that, therefore, the provisions of the Constitution of 1844 giving to every male citizen the right to vote cannot be held to exclude women, and that the election laws passed since the adoption of the Constitution of 1844 are unconstitutional, in so far as they exclude women from the right to vote.

[2] The premises upon which this argument rests are inaccurate and fallacious. There is nothing in the Constitution of 1776 which confers on women the right to vote. The fourth clause of the Constitution declares: "All inhabitants of this colony of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in council and assembly; and also for all other public officers that shall be elected by the people of the county at large." The contention of the relator is that the term "all inhabitants" in this clause includes the female as well as the male sex. And it is from this constitutional declaration that it is insisted by the relator that women derive the constitutional right to vote. A careful reading of the clause demonstrates that the framers of the Constitution had in view a particular class of inhabitants, and that the inference drawn by the relator from the use of the term "all inhabitants" cannot be justified when the context is considered. It is of material significance that the constitutional provision after declaring, "all inhabitants of this colony of full age, who are worth fifty pounds proclamation money, clear estate in the same," is followed by this qualification: "And have resided within the county in which they claim a vote, for twelve months immediately preceding the election shall be entitled to vote," etc.

[7] The plain and obvious meaning of this provision is that all inhabitants who are qualified as required by the constitutional provision and who have been legal voters before the adoption of the Constitution and who claim a vote in the county in which they reside shall be entitled to vote in such county, provided they have a residence therein for 12 months preceding the election. The term "all inhabitants" must be limited to those legally entitled to vote in this state before the adoption of the Constitution and who have qualified under it. If it were not for this constitutional limitation referred to, it might well have been maintained that the term "all inhabitants" included females of full age as well as males. In the absence

of such a constitutional limitation, there would have existed no good reason for excluding aliens, and negroes who were in a state of servitude, from exercising the elective franchise. It is essential to observe that this constitutional provision is a simple declaration that those inhabitants of this state, who claimed a right to vote prior to the adoption of the Constitution shall be entitled to vote, provided they are otherwise qualified, as prescribed therein.

[8] The words "claim a vote" must be understood to mean a lawful claim to vote at the time of the adoption of the Constitution. A fair reading of the constitutional clause makes it plain that it is an affirmation of a privilege which was enjoyed by a certain class of inhabitants at the time of its adoption, and which will more clearly appear by a reference to the laws pre-existing the adoption of the Constitution. It was not intended to confer the right to vote on all inhabitants irrespective of their sex, condition, or servitude. The Constitution dealt with the legal voter as then known and understood, and it was not intended to create a new and additional class of voters. The constitutional clause must be construed in the light of the conditions which existed at the time it was framed and by contemporaneous legislation. Due regard must also be had to the context in order to ascertain whether the term "all inhabitants" was used in a general or restrictive sense. It is manifest from the context of the constitutional clause that the term "all inhabitants" was used and intended to be understood in a restrictive sense, but to what extent can only be determined when it is ascertained what class of persons had a lawful claim to vote at the time of its adoption.

[1] It does not appear that, before the adoption of this clause of the Constitution, women did exercise the right of suffrage. No such right was conferred on them by the law of the land. It appears conclusively that prior to the adoption of the Constitution of 1776 the right to vote was exercised exclusively by the male inhabitants. Grants and Concessions of New Jersey (Leaming and Spicer) p. 154, § 3; Allinson's Laws, p. 6, c. 10, § 1; page 306, § 1; pages 69, 70, §§ 1, 5. It thus appearing that the male sex was the class who exercised the right and had a claim to vote from the earliest period of legislation in this state up to the time of the adoption of the Constitution of 1776 leads us to the inevitable conclusion that the use of the term "all inhabitants" in said Constitution did not confer on women the right to vote. Since this right to vote claimed by the relator did not exist prior to the Constitution of 1776, and although females are not by express terms of its provision excluded from exercising the elective franchise, no right to exercise such franchise can be predicated upon it. It must be conceded that it was the intention of the framers of the Con-

stitution, in order to prevent a chaotic condition in the government of this state, to keep alive and in full force the laws which were in force at the time of the adoption of the Constitution, in so far as they were consistent with the new form of government which had been created and which were not altered by the Constitution. The twenty-first paragraph of the Constitution of 1776 reads: "That all the laws of this province, contained in the edition lately published by Mr. Allinson, shall be and remain in full force, until altered by the Legislature of this colony (such only excepted as are incompatible with this charter) and shall be, according as heretofore, regarded in all respects by all civil officers, and others, the good people of this province." We have been dealing with the law as it was prior to and stood at the time of the adoption of the Constitution of 1776, in order to ascertain the true purport and meaning of the paragraph therein relating to the class of inhabitants who shall exercise the right to vote. The first pronouncement of the Legislature upon that subject and which may be regarded as a contemporaneous exposition by the Legislature of the meaning of the mooted clause of the Constitution because it was the very first legislative act passed concerning the subject in this state after the colonies had achieved their independence is the act of 1783. Wilson's Laws, p. 346. The seventh section of this act, on page 348, is in exactly the same language as that of the constitutional provision, with the exception that there is added thereto the following: "Except such as may be hereinafter excluded for offenses committed against the state." The eighth section provides: "That if any person's vote shall be objected against, it shall not be received until he shall have taken the oath of abjuration and allegiance prescribed by an act entitled, 'An act for the security of the government of New Jersey, passed the nineteenth day of September, 1776,' etc."

[3] Not until 1790, 14 years after the adoption of the Constitution, do we find any material change in this constitutional provision. See Blauvelt's Laws (Ed. 1790) p. 672, § 11; and Paterson's Laws 1797, pp. 230, 231, §§ 9, 11. The material changes of the constitutional provision are to be found in the eleventh section, which substitutes "all free inhabitants" for "all inhabitants," and omits the words "clear estate in the same" after the words "proclamation money" as contained in the original, and has added to it the following proviso: "And no person shall be entitled to vote in any other township or precinct, than that in which he or she doth actually reside at the time of the election,"—and the ninth section, which recites "that every voter shall openly, and in full view, deliver his or her ballot (which shall be a single written ticket), containing the names of the person or persons for whom he or she

votes," etc. It can hardly be claimed that section 11 of the act of 1790 and which was incorporated in the act of 1797 was in any sense contemporaneous legislation expounding the true meaning of the debated constitutional clause, when it is considered that the Legislature, by omitting the words "clear estate in the same," contained in the Constitution after the words "proclamation money" must have deliberately designed, regardless of the constitutional provision, to give to those married women the right to vote who, though worth fifty pounds proclamation money, could not, by reason of their marital relation under the then existing state of the law relating to married women, have a clear estate therein. It is very likely, as has been urged by counsel for the relator, that, after the passage of the acts of 1790 and 1797, some women availed themselves of the privilege to vote, but, after all, it was nothing more than a privilege emanating from a legislative act, which a subsequent Legislature had a right to repeal, and later did repeal.

As had been said, it is manifest that the constitutional clause does not in express terms exclude women from voting, yet it is to be inferred from a fair reading of it, and from the state of the law as it was before its adoption, and the construction given it by the act of 1783, that the right to vote was conferred only on the male inhabitants. It was evidently due to the failure of the clause of the Constitution to limit the right to vote in express terms to male inhabitants that gave rise to the uncertainty which existed in the public mind even after the passage of the acts of 1790 and 1797 as to whether women were entitled to vote. The history of subsequent legislation reveals that the legislative construction given to the constitutional provision by section 11 was challenged, and not generally acquiesced in. In 1807 the Legislature passed an act entitled, "An act to regulate the election of members of the legislative council and General Assembly, sheriffs and coroners in this state; passed at Trenton the twenty-second day of February, one thousand seven hundred and ninety seven," the preamble of which recites as follows:

"Whereas doubts have been raised and great diversities in practice obtained throughout the state in regard to the admission of aliens, females, and persons of color, or negroes to vote in elections, as also in regard to the mode of ascertaining the qualification of voters in respect to estate. And whereas it is highly necessary to the safety, quiet, good order and dignity of the state, to clear up the said doubts by an act of the representatives of the people, declaratory of the true sense and meaning of the Constitution, and to ensure its just execution in these particulars, according to the intent of the framers thereof; therefore:

"Section 1. Be it enacted by the council

and general assembly of this state, and it is hereby enacted by the authority of the same, that from and after the passing of this act, no person shall vote in any state or county election for officers in the government of the United States or of this state, unless such person be a free, white, male citizen of the age of twenty-one years, worth fifty pounds proclamation money, clear estate," etc.

This act contains a repealer repealing all conflicting sections therewith. Bloomfield's Laws, p. 33.

[4] It is conceded that from the time of the passage of the act of 1807, up to the adoption of the Constitution of 1844, females did not claim any legal right to vote. The constitutionality of the act of 1807, which gave a settled meaning to the Constitution of 1776, relating to the exercise of the right of suffrage, went unchallenged, and so remained for more than a century. But even if it were admitted that under the Constitution of 1776 women were entitled to vote, and that subsequent legislation deprived them of that right, we are unable to perceive any foundation for the present application, since it appears that in 1844 the people of this state adopted a Constitution which limited the right of suffrage to male citizens that had attained the age of 21 years.

[5] The attack upon the legislative act of 1844, which called for the constitutional convention and excluded women from the right to vote for the delegates to that convention upon the ground that it is unconstitutional, is a result of the fallacy of the position of counsel for the relator, in assuming that such an act could only be justified by constitutional authority; but this is not so. It required no constitutional authority. It was the exercise of the sovereign power of the people. It provided as a matter of course that the Constitution framed by the delegates should be submitted to the vote of the people.

[6] The Constitution of 1844 was so submitted to the vote of the people. The Constitution, therefore, rests for its validity upon the public will, and, being adopted in that manner, is the fundamental law of the land until supplanted either by a new Constitution adopted as that was adopted or by amendment in the manner therein provided.

The rule to show cause will be discharged.

DUDROW et al. v. KING et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. DESCENT AND DISTRIBUTION (§ 12*)—MANNER OF TAKING—TAKING BY PURCHASE.

Upon the death of E.'s father intestate, one-eighth of the estate descended to E., subject to dower, as one of eight children, some of whom, including E., were by a second wife, and E. became administrator. E. agreed with the widow and the other children to purchase their interest in the land under an understanding with them that he should not dispose of it, and that it would descend at his death to the

brothers and sisters then living or their descendants per stirpes. They did not know that children by the first and second wives of a decedent inherited in different degrees, and would not have agreed to sell at the price without such understanding. Upon being erroneously advised that E., because he was administrator, could not purchase directly, all of the children conveyed to another with the understanding that he should immediately convey to E. by a deed then prepared, who was merely to take it in trust to convey to E. and conveyed to him as contemplated; E. paying the entire consideration. *Held*, that the conveyance to the third person and his conveyance to E. did not change E.'s title from one of descent to one by purchase, so that, on E.'s death, it would descend in the same manner as though the conveyances had not been executed.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 50; Dec. Dig. § 12.*]

2. DESCENT AND DISTRIBUTION (§ 12*)—DESCENT OR PURCHASE.

As a rule one who holding by descent conveys his title away holds by purchase and not descent upon a reconveyance to him.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 50; Dec. Dig. § 12.*]

3. COMMON LAW (§ 8*)—SOURCES—ENGLISH DECISIONS.

A decision of the English High Court of Chancery, rendered in 1798, is not binding on the Maryland courts as authority.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 8; Dec. Dig. § 8.*]

Appeal from Circuit Court, Frederick County, in Equity; Edward C. Peter and John C. Motter, Judges.

Action by Birdie J. Dudrow and another against James R. King and others. From an order ratifying an auditor's account distributing a part of the proceeds of the sale of an estate, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Glenn H. Worthington, for appellants. Milton G. Urner, for appellees.

PEARCE, J. This is an appeal from an order of the circuit court of Frederick county, ratifying an auditor's account distributing the sum of \$1,045.10, part of the proceeds of sale of the real estate of Edmund Dorsey King of Frederick county, deceased, and the sole question presented is whether the distribution shall be to the next of kin of the whole blood alone or to the next of kin of both the whole and half blood.

Singleton King died intestate in 1897 seised of a farm in Frederick county, Md., containing 155 acres, and leaving a widow, Caroline King, and eight children, his only heirs at law. Four of these children, Singleton L. King, James Harrison King, Mary Jane Browning, and William King were by the first wife of the deceased, and four, viz., Mrs. Manzella Bell, J. Beall King, E. Dorsey King, and Caroline C. Harris, were by the second wife. His widow, Caroline King, was his third wife, and had no children. The real

estate in question, therefore, descended upon the death of Singleton King to the above-named eight children, subject to the dower of the widow, Caroline King. Edmund Dorsey King became the administrator of his father, and entered into an agreement with his brothers and sisters and with Caroline King to purchase all their interest in said real estate for the sum of \$6,986.25, but being advised erroneously that he could not purchase directly from them, because he was the administrator of their father, he united with them in conveying said real estate by deed dated January 8, 1898, to Wm. P. N. Lawson, with the understanding among all said parties that said Lawson should immediately convey the same to said Edmund Dorsey King by a deed then prepared, and intended to be of even date with the deed to said Lawson. This deed to Lawson was not acknowledged by all the grantors until January 27, 1898, as they resided in different places, but, when it was acknowledged by all, Lawson, by deed dated February 2, 1898, conveyed the property to Edmund Dorsey King, it being described in the deed to Lawson as the same which descended from Singleton King to his eight above-named children, subject to the dower of Caroline King, and being described in the deed from Lawson as the same described in "a deed from Caroline King and others of even date herewith, and intended to be recorded herewith, to the said Wm. P. N. Lawson." The same consideration was expressed in both deeds, viz., \$6,986.25, but Lawson did not pay the same nor any sum whatever to any of the grantors in the deed to him, nor did he receive, nor was he intended to receive, any beneficial interest whatever in said real estate; but he accepted said conveyance to him, in trust to convey the property to said Edmund Dorsey King, in the manner and for the purpose for which he did convey it, and Edmund Dorsey King concurrently with the delivery of both said deeds paid the entire purchase money to his stepmother and his brothers and sisters. Edmund Dorsey King died intestate in 1910, leaving surviving him no child or descendant, no father or mother, brother or sister, but leaving two nieces, Mabel S. King, a child of his deceased brother, J. Beall King, and Birdie J. Dudrow, a child of his deceased sister Manzella Bell, as the only descendants of his brothers and sisters of the whole blood, and leaving also a number of nieces and nephews, descendants of his brothers and sisters of the half blood, all of whom are named in the proceedings.

The real estate in question was sold under a decree of court by the trustee appointed for that purpose for \$15,530, and, the sale being reported, the purchaser filed exceptions thereto, because of the claim of the nieces and nephews of the half blood to an interest in said real estate; they not having been made parties to the proceedings. They

were thereupon made parties by order of court, upon petition of the purchaser, and all appeared and answered said petition, setting up their claim in their answers, and the two nieces of the whole blood demurred to said answers. The sale was ratified and an auditor's account was stated distributing the net proceeds equally between the two nieces of the whole blood, upon the theory that Edmund Dorsey King took title to the whole tract by purchase. Exceptions were filed to this account by the nieces and nephews of the half blood, which exceptions were sustained, and the said auditor's account was rejected, and the auditor was directed to state another account distributing seven-eighths of the net proceeds to the two nieces of the whole blood, and one-eighth to the nieces and nephews of the whole and half blood. Upon this basis, the sum of \$1,045.10 is distributed to the nieces and nephews of the half blood, and to that distribution the two nieces of the whole blood except, and their exceptions being overruled, and the auditor's account being ratified, they have appealed.

Sections 3 and 4 of article 46 of the Code provide that where the estate descended to the intestate on the part of the father, if there be no child, or descendant, or father, living, it shall descend to the brothers and sisters of the intestate of the blood of the father and their descendants equally. Section 19 of article 46 provides that if the estate shall be vested in the intestate by purchase, or shall descend to or vest in him in any other manner than by descent on the part of the father or mother, and there be no child or descendant of the intestate, then the estate shall descend to the brothers and sisters of the intestate of the whole blood and their descendants in equal degree equally. Section 26 provides that there shall be no distinction between brothers and sisters of the whole and half blood, all being descendants of the same father, where the estate descended on the part of the father.

[1] Upon the death of his father intestate, Edmund Dorsey King took one-eighth of the land in question by descent from him, and the only question for us is whether the effect of the two conveyances above mentioned broke this descent and changed his title to that one-eighth from a title by descent to one by purchase. The learned judges of the circuit court held that no change of title was effected, and we are of opinion their decision was correct. It is quite clear from the admitted facts in the case that there was no actual intention on the part of Edmund Dorsey King, by adopting the course of conveyancing used, to effect any change in the title which he took from his father to that one-eighth of the estate, and that no change could have been effected, if he had taken a conveyance, as he contemplated, from his brothers and sisters of their seven-eighths

of the estate. The question could not have arisen but for the erroneous advice given him that he could not acquire any title by direct purchase from them. It may be observed here that the demurrer of the appellants to the answer of the appellees admits the averments of the eighth and ninth paragraphs of the answer, that "it was understood between Edmund Dorsey King and his brothers and sisters that he should not dispose of said farm," and "that, on his death, it would descend by inheritance to all of his said brothers and sisters, if living, and if not, then to their descendants per stirpes, * * * as they did not know there was any difference in law as to the right of inheritance between the children of the first wife and those of the second wife. * * * And that they would not have agreed to sell him their interests in said farm at the valuation of \$45 per acre, being \$20 less per acre than the land was worth, if it had not been for their understanding that he was not to dispose of said farm, and that it would come back to them or their descendants on his death." This consideration could not, of course, defeat an intention to break the course of descent by an apt conveyance, nor could it control the operation of a conveyance, the clear legal effect of which was to break the descent, although not so intended, but it is an element of this case not to be disregarded in the light of all the cases upon the subject.

[2] The general rule is that if one who is in by descent conveys his interest away, and it be conveyed back to him, he holds thereafter by purchase, and not by descent. The rule is stated thus in 1 Coke upon Littleton, 12b: "If a man be seised of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and his heirs, this is a new purchase, and if he dyeth without issue, the heirs of the part of the father shall first inherit." The authorities, ancient and modern, agree that this is the general rule. But in a note by Mr. Hargrave to the above text of Coke it is said: "But here Lord Coke must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second regranting the estate to him. For, if in the first feoffment the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his ancient use, and not by purchase." It is upon the doctrine of this note of Mr. Hargrave that the court below was satisfied to rest its decision. That doctrine, however, is supported by law writers of high authority, and by cases illustrating its ap-

plication. 2 Greenleaf's Cruise on Real Property, tit. "Descent," pp. 338, 341, states the law in almost the exact words of Mr. Hargrave's note, to which he refers on page 338, and on page 341 cites Godbold v. Freestone, 3 Lev. 406, in support of the rule. He states that case as follows: "A person seised of lands by descent ex parte materna made a feoffment of them to uses, to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs. * * * Adjudged that upon the death of the husband without issue the remainder descended to the heirs of the feoffor ex parte materna, because the ancient fee remained in him." And he adds on page 341: "Where a fine was levied or a common recovery suffered, if the use was not altered, the mode of descent was not changed." In a more modern work, Broom and Hadley's Commentaries, top page 600, the same doctrine is stated thus: "If one seised ex parte materna made a feoffment in fee so as to part with the estate absolutely, and then took a reconveyance, the descent was broken, but, if he made a conveyance for the purpose of creating particular estates and limited the ultimate fee to himself, this was held to be the same estate he had before, and it descended to the heir ex parte materna. The estate which is taken back must be in reality a new estate, and not merely a part of the old estate, unless it comes within the statute of 3 & 4 William IV, c. 106, § 1, enacted in 1833"—which changed the rule previously stated, but which is, of course, not in force in Maryland.

The great case of Cave v. Holford, 3 Vesey, 650, is the most interesting discussion of the principles here involved which we have examined. In that case the opinions of Justices Rooke, Heath, and Buller given in the Court of Common Pleas controlled the decision, while Chief Justice Eyre dissented, and the opinions of each of these justices are reported in full, the editor of the Reports referring to it as a case involving deep research of authority.

[3] The judgment of the Court of Common Pleas was affirmed by the High Court of Chancery, but that decision, having been rendered in 1798, is not binding upon us as authority, and we are free to consider it with that deference which is due to all the cases of the higher courts of England. In this spirit we have examined that case, and in our judgment the conclusion of Chief Justice Eyre rests upon principles more in accord with justice, and with an enlightened view of the application of legal principles and more in consonance with the views of the courts of this country upon this question. The form in which the question was there presented was whether the conveyance by a testator of property devised by his will was a revocation of the will as to that prop-

erty, upon the ground that after-acquired property could not pass by the will. The conveyances which were there held to operate as a revocation of the will were of lease and release, and Chief Justice Eyre said: "Let the operation of this conveyance be what it may, the testator died seised of that estate which he had at the time he executed the will; * * * and that I may be clearly understood, when I say the same estate, I do not mean the identity of the land, but the quality of estate and interest in that land. I mean to argue that he died seised of the old use, to which the new estate, right, title, and possession (to use the words of the statute) that was for a moment in the trustees, under the conveyance, had united itself, not as a new estate, right, title, and possession, but according to the quality, manner, form, and condition of that old use, for those are the words of the statute. Here I take my ground. * * * The intent of the parties in this deed and the whole substantial effect (be its formal operation what it may) was simply to secure a jointure of £1,400, and the estate, subject to that, was not intended to be altered or in any manner affected; and, as far as the form of the conveyance purports to alter the nature and quality of the estate, it goes beyond the object of the conveyance. Courts of justice not only do not incline to allow the form of the conveyance to go beyond the intention, but will be ready to adopt all expedients to prevent it and to confine the operation of every conveyance to the special purpose"—citing for this purpose Lord Hardwicke in *Parsons v. Freeman*, Atkyns Report. Referring to *Tichner v. Tichner*, the Chief Justice said: "They, the judges, wisely determined the purpose of conveyance was everything, the form nothing; * * * and upon that authority, supported by that of Lord Hardwicke in *Parsons v. Freeman*, I am of opinion that the authorities will be better supported by declaring that this conveyance is not a revocation than by the contrary determination." It is significant, moreover, that in the opinion of Mr. Justice Rooke he observes "you must distinguish between an intention to have the land as a new purchase, and an intention to revoke the will"—thus intimating a distinction between the case of a mere conveyance and reconveyance to accomplish some collateral purpose and a case involving also the question of the revocation of a will as to the special property under consideration as a result of a conveyance and reconveyance after the execution of the will. And in the opinion of Mr. Justice Buller in the same case he refers to *Godboldt v. Freeman*, 3 Levinz, 406, and *Abbott v. Burton*, 2 Salk, 560, in both of which the estate taken back was held to be of the old use, and therefore to go to the heir ex parte materna, and he says: "In these last two cases there was no

question about a revocation." The principles thus announced are not without support by analogy in our own decisions. In *Lynn v. Gephart*, 27 Md. 563, where the question before the court was as to changing the quality of property from real to personal by a deed of trust, our predecessors said: "The inclination of courts of equity upon this branch of jurisprudence is not generally to change the quality of property, unless there is some clear intention or act by which a definite character either as money or land has been unequivocally fixed upon it throughout."

The views expressed by Chief Justice Eyre above are in exact accord with the language of Judge Robinson in *Rawlings v. Lowndes*, 84 Md. 643, where he said: "At common law the widow was entitled to dower in the lands and tenements by which the husband was seised as of an estate of inheritance during the coverture. If, however, the seisin was merely instantaneous, intended as a means of accomplishing some ulterior purpose in regard to the estate, the husband being, as it were, a conduit, through which the estate passed, without any intention to clothe him with a beneficial interest, the widow would not be entitled to dower, as for instance a conveyance to a trustee to reconvey, or as put in the old books, a levy by way of a fine, the donee rendering back by the same fine, the lands and tenements to the donor. The husband in such cases holds the bare legal title without any beneficial interest. 2 Crabb's Real Prop. 61; Washburn's Real Prop. 176; Coke, Litt. 31b." And in *Glenn v. Clark*, 53 Md. 606, this is said to be "the established law in Maryland." The cases of *Freeman v. Allen*, 17 Ohio St. 527, and *Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757, both cases for partition of land of which the ancestor died seised, support the conclusion reached in this case by the circuit court, and the case of *Helfinger v. Wolff*, 11 Ohio Dec. (Reprint) 906, which is not a case for partition, will be found especially instructive. That case is fully and clearly reasoned, and the conclusion reached by the court is thus expressed: "Where one owning both the legal and equitable estates by descent parts by her own act momentarily with the mere technical legal title, retaining the entire beneficial interest which standing alone would have descended as ancestral, thus creating a mere dry trust, which is held to her unqualified use, the immediate reacquirement of the naked title does not break the descent and constitute her a new source of title, for she conveyed the title for her own use."

This case has been argued for the appellants with great zeal and very ably, and their argument is sustained by the decision in *Holme v. Shinn*, 62 N. J. Eq. 1, 49 Atl. 151, in an elaborate opinion by the Chancellor, and also by the case of *Nesbitt v. Trindle*, 64 Ind. 185, but we are not able to adopt

the views there held for the reasons already stated.

Order affirmed, with costs to the appellees above and below.

SLOAN v. SLOAN et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

**1. EXECUTORS AND ADMINISTRATORS (§ 314*)
—RIGHTS OF BENEFICIARIES—REMEDY AT LAW.**

A testatrix gave her residuary estate, including debts due her, to her son and two daughters equally, and appointed the son and a daughter executors. An administration account showed stock, bonds, and cash in the hands of the executors for distribution after payment of the debts and expenses. The son was indebted to the estate, but the amount thereof was in dispute. *Held*, that a third of the indebtedness was extinguished by the gift, and a third was vested in each daughter, who, without any order by the orphans' court, could recover from the son individually in an action at law her respective third of the indebtedness, and it was error for the orphans' court to submit to the superior court issues whether the son was indebted to testatrix at the time of her death and the amount of the indebtedness at the date of the verdict.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 314.*]

**2. EXECUTORS AND ADMINISTRATORS (§ 291*)
—SETTLEMENT OF ESTATES—ADMISSIONS BY EXECUTORS.**

An admission by an executor that the estate in hand is subject to distribution is an admission that all debts are paid and a practical assent to the bequest which assent is for the executor's own protection against liability to the extent of the assets for the debts of testator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1153-1163; Dec. Dig. § 291.*]

**3. EXECUTORS AND ADMINISTRATORS (§ 501*)
—RIGHTS OF BENEFICIARIES—COMPENSATION OF EXECUTORS.**

Where testatrix gave her residuary estate, including debts due her, to her son and two daughters equally, and appointed the son, who was indebted to the estate, executor, the question of the son's right to commissions as executor on the indebtedness will be determined in an action at law by the daughters for the amount due them by virtue of the gift of the indebtedness.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 501.*]

Appeal from Orphans' Court of Baltimore City.

Petition by Elizabeth B. Sloan, executor of Rebecca E. Sloan, deceased, and in her own right, and another, against Fisher Sloan, coexecutor, praying that issues be sent to the superior court in the settlement of the estate of decedent. From an order of the orphans' court ordering the submission of issues to the superior court, defendant appeals. Reversed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, and STOCKBRIDGE, JJ.

George Weems Williams and Frank Gossnell, for appellant. Thomas Foley Hisky and John Hinkley, for appellees.

PEARCE, J. The primary and substantial question in this appeal is, whether the appellees have the right to have issues sent from the orphans' court of Baltimore city to a court of law, under sections 224 and 227 of article 93 of the Code of Public Laws of Maryland.

It is admitted in the agreement filed as to the record that Rebecca E. Sloan, the mother of the parties to this proceeding, died leaving a last will and testament, duly admitted to probate, and that letters testamentary thereunder were granted to Fisher Sloan, the appellant, and Elizabeth B. Sloan, one of the appellees, who were named as executors of said will; that they both duly qualified as executors, being excused by the will from giving bond, and complying with the statute by giving bond for \$200; that the testatrix by the first three clauses of her will, provided for the payment of her debts and funeral expenses, and specifically bequeathed certain articles of personal property to her stepson, George F. Sloan, and to her two daughters, Isabella H. Sloan and Elizabeth B. Sloan, and by the residuary clause of her will provided as follows: "Fourth. All the rest and residue of my estate, including all debts that may be due me at the time of my death, I give to my said two daughters, and my son, Fisher Sloan, to be equally divided between them, share and share alike."

It is also admitted in said agreement that an inventory was returned of the personal property of the decedent to the Orphans' Court of Baltimore City; that by the first administration account, copy of which is in the record, that there are in the hands of the executors, *subject to distribution* under the residuary clause of said will, stocks, bonds, and cash amounting to upwards of \$55,000; that said agreement should take the place of, and be in lieu of, the will, inventory, and administration account, which it was agreed should be omitted from the record; and that the evidence adduced before the orphans' court at the hearing on June 12, 1911, appears in the record.

Fisher Sloan, one of said executors, on March 16, 1910, filed the following list of debts due the estate of his decedent:

Obligation of Fisher Sloan, dated Baltimore, December 8, 1887, due on demand, interest payable monthly.	\$10,200
(Interest has been paid on the above to May 1, 1908.)	
Obligation of George F. Sloan for \$10,700, dated December 12, 1902, whereon \$2,700 has been paid.	8,000
(Interest has been paid on the above to January 1, 1910.)	

Whole amount of debts due deceased. . . \$18,200
(The usual affidavit being attached.)

Elizabeth B. Sloan, coexecutor with Fisher Sloan, on June 18, 1910, excepted to the above inventory, on the ground: (1) That the

indebtedness of Fisher Sloan was not truly stated therein, in that the interest on said sum of \$10,200 had not been paid to May 1, 1908, and alleging that "she was informed and believed that for many years prior to the death of Rebecca E. Sloan in June, 1908, the interest of \$612 was not paid annually in full, but only about \$400 annually was paid thereon, and that for three years preceding June, 1908, the annual payments were considerably less than \$400." (2) Because no indebtedness was returned of the firm of George F. Sloan & Bro. consisting of said George F. Sloan and Fisher Sloan, and that she was informed and believed that said firm was indebted to said Rebecca E. Sloan at the time of her death and still was so indebted.

On June 23, 1910, Fisher Sloan answered said exceptions, alleging:

(1) That his said obligation of \$10,200 represented that amount loaned to him by his mother to commence business in 1878; that from that time to 1886, he paid her interest thereon at the rate of 8 per cent. per annum; that from 1886 to 1898 he paid her interest thereon at the rate of 12 per cent. per annum; and that from 1898 to May 1, 1908, he paid her interest thereon at the rate of 6 per cent. per annum.

(2) That in the fall of 1907, he had an accounting with his mother for interest on said obligation down to January 1, 1908, the amount then due being ascertained to be \$512, which sum was then and there entered in a memorandum book of his mother's, kept and then retained by her; and that on January 1, 1908, he gave his mother a check for \$512, in full for all interest to that date, being so written in the body of said check, and which check she held at the time of her death, without having indorsed the same, being influenced by the false statement of the exceptant that there was a larger sum then due for interest.

He also alleged that on April 2, 1908, he paid his mother \$102 for interest thereon for January and February, 1908, and that on May 16, 1908, he paid her another sum of \$102 for interest thereon for March and April, 1908. He denied all the allegations of the exceptant as to the insufficiency of his interest payments, and reiterated his former statements as to overpayment of interest, and declared that if the settlement with his mother in January, 1908, was resisted by the appellee, and it was judicially determined that he had paid interest in excess of 6 per cent. per annum on said loan, he reserved the right to claim any sum so paid in excess, to be credited on the principal sum.

(3) He denied the existence of any indebtedness from the firm of George F. Sloan & Bro. to his mother, and filed with his answer a transcript from the books of said firm, which he alleged showed payment in full of all indebtedness that had ever existed from

said firm to her. On March 6, 1911, Elizabeth B. Sloan, as one of the executors of her mother, returned a separate list of debts alleged by her to be due the estate, and returned as stated by her in compliance with order of the orphans' court dated March 3, 1911. This list of debts is so unusual as to the method of statement, that it is given in full as follows:

An inventory of all the debts due to Rebecca E. Sloan, late of Baltimore city, deceased, as appears by the books and papers left by said deceased, or which have come to the knowledge of Elizabeth B. Sloan, one of her executors:

1. Fisher Sloan.

Obligation dated 8th December, 1887, due on demand with interest payable monthly..	\$10,200 00
Interest on same May 1, 1906, to	
May 1, 1908.....	\$1,836 00
Less payments.....	404 00
	<u>1,432 00</u>

Memorandum.—A check was given by the said Fisher Sloan in December, 1907, for \$512.00, which check is in possession of counsel of the executrix, but the same was not used by Mrs. Rebecca E. Sloan because it contained the words "being interest in full to Jan. 1, 1908."

Interest on \$10,200.00 from July, 1897, to May 1, 1906.....	\$4,794 00
Supposed to have paid on account about \$400.00 a year.....	3,133 33
	<u>1,660 67</u>
Add interest on \$10,200 from May 1, 1908.	
Debit balance per account rendered July, 1897	527 50
	<u>\$18,820 17</u>

This executrix believes that the above statement does not include the full amount of the indebtedness of the said Fisher Sloan to Mrs. Rebecca E. Sloan, but it is as accurate as she is now able to make it, and she believes that on a full accounting between said Fisher Sloan and the said Rebecca E. Sloan he would be shown to be indebted in a larger amount.

2. George F. Sloan.

Obligation for \$10,700.00 dated December 12, 1902 whereon \$2,700.00 has been paid.....	\$ 8,000 00
Interest paid on above to March 12, 1910.	

3. George F. Sloan & Bro.

Difference in settlement in 1896 between a note of \$5,000 and a statement of \$4,112.66 as per account rendered by Fisher Sloan July, '97	\$887 34
Interest on portion of legacy to Mrs. Sloan from estate of James Watt on \$7,064.19, July 1, 1897, to July 1, 1899	846 48
July 1, 1899, to September 28, 1899..	102 28
On \$2,091.60, September 28, 1899, to January 31, 1902.....	293 83
Error in Alexander Brown & Son's drafts	18 00
	<u>\$ 2,146 93</u>

The interest on the Watt estate money amounting to \$1,241.60, if found to be an individual liability of Fisher Sloan instead of a firm liability, would decrease the amount of indebtedness of the said George F. Sloan & Bro. and increase the amount of the indebtedness of Fisher Sloan individually.

Total	\$23,967 10
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[Signed] Elizabeth B. Sloan,
One of the Executors of Rebecca E. Sloan.
Sworn to in open court March 6th, 1911.
Howard W. Jackson,
Register of Wills for Balto. City.

Fisher Sloan filed exceptions to this separate list of debts on April 27, 1910, denying: First. That there was any debt due from him to his mother, because it appeared from a statement and account filed by him with his exceptions, that upon a proper accounting for overpayments at excessive rates of interest upon said loan of \$10,200, there was due him from the estate of his mother the sum of \$9,025.99, for which sum he had proved a claim. Second. That there was any debt due from George F. Sloan to his stepmother, because upon a like proper accounting upon said debt of \$8,000, for excessive interest, there was a considerable sum due to said George F. Sloan, for which sum he had duly proved a claim. Third. That there was anything whatever due to the estate of his mother by the firm of George F. Sloan & Bro.

Thereupon, Elizabeth B. Sloan, on April 28, 1911, filed a petition praying that the following issues be sent to the superior court of Baltimore city: (1) "Was Fisher Sloan, one of the executors of Rebecca E. Sloan, indebted to the said Rebecca E. Sloan at the time of her death on June 26, 1908?" (2) "If the verdict of the jury should be in the affirmative on the first issue, what is the amount of the indebtedness of the said Fisher Sloan to the estate of the said Rebecca E. Sloan at the date of your verdict?"

Fisher Sloan, in his own right, and as one of the executors of Rebecca E. Sloan, answered said petition, repeating his denial of indebtedness to said estate and his averment that upon a proper accounting said estate was indebted to him as shown by his claim proved. He also averred that he took one-third of his mother's residuary estate, which was large, and that should it appear he did owe any sum to her estate, the orphans' court would have power to deduct such sum from his share of said estate, and he offered to submit the question of his indebtedness to said orphans' court, in accordance with his previous offer, and the expressed willingness of petitioners to accept said offer, from which position the petitioners had since withdrawn. He also alleged he was advised that it was not a proper case for issues, and prayed that the petition therefor be dismissed.

On June 12, 1911, the record shows the following proceedings in the orphans' court, viz.: "Tried before Justices Block, Gaither and Dunn."

June 12, 1911. " * * * Petition read and opening statement made on behalf of petitioners by Mr. Hisky. Answer read and opening statement made on behalf of respondents by Mr. Gosnell. Mr. Hisky: We ask your honor to consider the list of debts returned by Mr. Fisher Sloan and filed in this court March 31, 1910 (reading inventory of debts returned by Fisher Sloan, one of the executors supra). * * * Also list of

debts returned by Elizabeth B. Sloan, one of the executors (supra) read."

Mr. Hinkley, of counsel for petitioners, was then sworn on behalf of the petitioners, the subject of his examination and cross-examination being the negotiations for the trial of all matters between the parties, before the orphans' court, but it is unnecessary to state this testimony in detail. The orphans' court ordered the issues submitted by the petitioners to be sent to the superior court of Baltimore city for trial, and this appeal is from that order.

[1] The appellant contends: (1) That the appellees waived the right to issues in this case, if such right ever existed, by going in to the trial of the case before the orphans' court, and offering evidence tending to prove the indebtedness they alleged. (2) That the second issue could in no event be properly submitted to a jury because it requires the jury to find what, if any, indebtedness exists *at the date of their verdict*, which would require them to determine not only the question of indebtedness, but all questions involved in the ascertainment of the amount of the appellant's share of his mother's estate. (3) That it would be idle to submit the second issue to a jury, because the appellant could not be required to introduce the question of usury, and as that question could be gone into by the orphans' court after the transmission of the verdict, the judgment rendered by the orphans' court, upon the presentation of that question, might nullify the verdict, and certainly would do so, if the appellant should establish the usury claimed since the result would be to show that the estate was largely indebted to him. (4) That the orphans' court is without jurisdiction to order the submission of these issues, because, whatever the indebtedness of the appellant may be, if any, it has under the explicit bequest in the residuary clause of Mrs Sloan's will vested in the appellant and the appellees, and as the record shows that all debts have been paid, and the administration of the estate, so far as the orphans' court is concerned, has been fully completed.

In the view which we take of this case, it will not be necessary to consider any other contention than the last. The agreement before mentioned expressly admits "that, by the first administration account filed herein, it appears that there are in the hands of the executors, *subject to distribution under the residuary clause of the will of the said Rebecca E. Sloan, deceased*, stocks, bonds and cash amounting to upwards of \$55,000." This is in addition to any indebtedness due her from the appellant, but by the residuary clause of the will she gave *directly* to her three children, not only the stocks, bonds and cash above mentioned, but also all debts due at her death. It necessarily follows from the admission that the stocks, bonds, and cash are now subject to distribution, that all costs

of administration, and all debts due from the estate have been paid, and the only thing to be done by the executors is to deliver to each of the legatees one-third part of the estate, all of which is now ready for distribution. The situation is precisely the same (all debts of the estate being paid) as if she had specifically bequeathed to her three children the debt due her by the appellant at the time of her death, together with the stocks, bonds, and cash mentioned in the agreement. In this situation one-third of any indebtedness of the appellant is extinguished by the gift to him, and one-third is vested in each of the appellees, their right and title thereto being complete without any order or action by the orphans' court. In *Kent v. Somervell*, 7 Gill & J., 265, a testator bequeathed to Sarah H., Susan and Ann Somervell, a single bill for \$1,569, executed to him by Thomas T. Somervell, who was made executor of the will. He delivered the single bill to the legatees, who assigned it in writing to John Somervell, and he assigned it to Kent, the appellant, who brought suit thereon against the maker, not as executor, but in his individual capacity. The court below sustained a demurrer to the declaration, but the judgment thereon was reversed in the Court of Appeals, Chief Judge Buchanan, saying: "A bequest by the obligee of a single bill is an inchoate transfer of the bill in writing, by a person authorized to make it, which, when assented to by the executor, is made perfect, and vests at law, in the legatee, the bona fide title, or interest in the bill, * * * and gives to the legatee the right to sue in his own name."

[2] The assent of the executor is for his own protection, against liability to the extent of the assets, for the debts of the testator (*Clark v. Sandrock*, 113 Md. 426, 77 Atl. 644), and an admission that the estate in hand is subject to distribution is an admission that all debts are paid, and a practical assent to the bequest.

In *Handy v. Collins*, 60 Md. 245, 45 Am. Rep. 725, this court said: "Where there is a specific bequest of an individual bond or note, the sole duty of an executor in regard to it, where the money upon it is not needed for other exigencies of the estate, is to give his assent to the legacy and deliver the instrument to the legatee. By such assent and delivery the legatee is vested with the right to sue upon the obligation in his own name."

In *Blays v. Roberts*, 68 Md. 510, 13 Atl. 306, the case was this: Judge A. C. Magruder died intestate in 1853, leaving two sons and two daughters. His son, John, administered on his estate, and his final account passed in 1858, showed a balance of \$5,997 for distribution. John died in 1886, leaving all his property to his wife, and, his executors renouncing, letters of administration were granted to Jos. K. Roberts. One of

Judge Magruder's daughters, Mrs. Blays, having died, the appellant, her son, administered upon her estate, and as such administrator, filed a bill in equity in his own behalf, and of the other distributees of his grandfather's estate, against the administrator of John. To this bill a demurrer was sustained, and the order was affirmed on appeal, Judge Miller saying: "The passage of this final account (by the administrator of Judge Magruder) was a complete settlement of his administration so far as the orphans' court was concerned. He was not obliged to state a distribution account, or make distribution under the supervision of that court, though he could have done so, if he had chosen to protect himself and his bond by adopting that course. The law required him to make distribution, but he could have made it in pairs without the order of any court, if he chose to take the risk of paying the right amount to the right parties. *Connor v. Ogle*, 4 Md. Ch. 450; *Donaldson v. Raborg*, 28 Md. 55. As soon as this final account was passed, the parties entitled to shares of the surplus thereby shown to exist, could at once have demanded the same, and if he had refused or neglected to pay, could immediately have brought an action at law against the administrator *individually*, or have instituted suit upon his administration bond to recover their respective shares. Such suits by parties entitled to distributive shares are of common occurrence in our courts. *Shriver v. State*, to Use of Reister, 65 Md. 282, 4 Atl. 679."

In *Crean v. McMahon*, 106 Md. 507, 68 Atl. 265, 14 L. R. A. (N. S.) 798, which was an action of ejectment for leasehold property specifically bequeathed to A. for life, with remainder to his issue, the title of the legatee and the remainderman was held valid where possession was taken with the assent of the executor, and it was held not necessary to show that the property had been distributed to the legatee under an administration account by the orphans' court. In that case the following passage from an opinion by Judge Robinson in *Matthews v. Turner*, 64 Md. 109, 21 Atl. 224, was cited and applied: "The title of a legatee to property specifically bequeathed does not depend upon the inventory returned by the executor, nor does it necessarily depend upon the orders of the orphans' court. By the will itself, the legatee gets an inchoate title, and when the debts are paid, and the executor assents to the delivery of the property to the legatees, the title is thereby perfected. Nothing more is necessary, and upon the title thus perfected, the legatee may maintain an action of ejectment if the property be leasehold, or an action of trover for the conversion of personal property."

The case now before us falls directly within the principles decided in the cases cited above, and is in perfect analogy with *Kent v. Somervell*, as to the facts. The appellant,

Fisher Sloan, is alleged to have been indebted upon his certain obligation to Rebecca E. Sloan at her death, as Thomas T. Somervell was indebted to John Somervell upon his own obligation. Each was made executor of the will of the decedent. The obligation of each was bequeathed to certain legatees, and in each case the assent of the executor or executors has been given. In each case the maker of the obligation so bequeathed has become *personally* and individually liable to an action at law by the legatees of that obligation to recover their respective shares thereof. There is no question here of a suit by one executor or administrator against another, as in *Beale v. Hilleary*, 1 Md. 186, 54 Am. Dec. 649. Fisher Sloan's one-third of this obligation is extinguished by operation of law, and the two appellees can recover from him individually at law their respective third parts.

[3] The question of the executor's right to commissions on any indebtedness of the appellant could only operate to the prejudice of the appellees as they would be obliged to contribute two-thirds, while the appellant would receive one-half of that amount. But if raised, it would be a proper question for consideration in determining the amount due the appellees, if any.

For the reasons stated, the order will be reversed, but without remanding, as we hold this is not a proper case for issues.

• Order reversed, with costs to the appellant, above and below.

MAYOR AND COUNCIL OF CITY OF EASTON v. TURNER et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. INJUNCTION (§ 172*)—DISSOLUTION—PLEADING.

Where a motion to dissolve an injunction is heard upon the bill, answer, and evidence, and the bill makes a case for plaintiffs, the injunction will not be dissolved upon the evidence if the equity of the bill is not denied by the answer, so that where the bill in a suit to enjoin a city from constructing drains on a certain street showed that the city proposed to make the gutters so deep in carrying out its plan of diverting and concentrating the water from other streets into that street which was admittedly an improper plan that the trees would be injured or destroyed, all of which was practically admitted in the answer, defendant could not, without amending the answer, have the injunction dissolved on a showing that the deepening of the gutters was a part of a general scheme to grade the street, and hence was authorized.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 374-384; Dec. Dig. § 172.*]

2. MUNICIPAL CORPORATIONS (§ 663*)—RIGHTS OF PROPERTY OWNERS—SHADE TREES.

The courts will restrain the unnecessary destruction by a city of trees belonging to private owners, and not constituting a nuisance, though, if the general plan of street improvement requires that shade trees be destroyed,

the city cannot be enjoined from destroying them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

3. MUNICIPAL CORPORATIONS (§ 663*)—STREETS—SHADE TREES—DESTRUCTION BY CITY.

A municipality should not unnecessarily or recklessly injure shade trees in the street belonging to abutting owners and should give the owners the opportunity to remove them, or, if possible without interfering with the proper use of the highway, should protect them.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

Appeal from Circuit Court, Talbot County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Suit by J. Frank Turner and others against the Mayor and Council of City of Easton. From a decree for plaintiffs, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, and STOCKBRIDGE, JJ.

Wm. Mason Shehan and James C. Mullikin, for appellant. J. Frank Turner, for appellees.

BOYD, C. J. The bill in this case was filed by the appellees and Samuel Norris against the appellant, but subsequently it was, with leave of the court, dismissed as to Mr. Norris without prejudice to the other plaintiffs. It prayed for an injunction to prohibit the appellant from the construction of drains and curbing on Goldsborough street between Harrison and Hanson streets, in Easton, in the manner proposed as set out in the bill, and from draining the water of Dover, Harrison, and Washington streets over and upon that part of Goldsborough street, and from cutting down or in any manner injuring the shade and ornamental trees on it. A preliminary injunction was granted, and, after filing its answer, the defendant made a motion to dissolve it. On April 11, 1911, a decree was passed making the injunction perpetual, and the mayor and council were "perpetually enjoined from draining the water on Dover, Washington, and Harrison streets into Goldsborough street as originally proposed by Ordinance No. 198, and from so lowering the curb and gutters on Goldsborough street as to destroy or to injure in any manner the trees on said street between Harrison and Hanson streets in said town of Easton." This appeal was taken from that decree.

The bill and answer, when taken in connection with subsequent events, must to a great extent dispose of this appeal, notwithstanding a large amount of testimony was taken. The theory of the bill was that the defendant (appellant) was about to divert large quantities of surface water from its natural and usual course, direct its flow along certain streets until it reached the

corner of Harrison and Goldsborough streets, and then conduct it in an open drain on Goldsborough street to Turner's alley, thence in a stream flowing across the property of the complainants Turner and Jump. It is alleged that, in order to conduct the greatly increased volume of water down Goldsborough street between Harrison and Hanson streets, it would, according to the plans of the town, be necessary to deepen the drains from 12 to 16 inches, and, in order to secure a proper foundation for the drains, it would be necessary to dig down 18 inches below the bottom of them, thus making cuts in the sides of Goldsborough street to the depth of 34 inches, and that the cutting of the drains would necessarily be very injurious to, if not entirely destructive of, the trees on the sidewalks. While the answer does not admit that the defendant proposed to drain the water precisely as the plaintiffs alleged, it does in effect admit a diversion of it from its accustomed flow, its concentration and increased volume, and emptying it into the drain running through the Turner and Jump properties. It says that: "In order to secure a proper drainage of the water along said Goldsborough street, it is necessary to change and deepen the drains upon each side of said street, but (they) neither admit nor deny the depth alleged to be necessary" in the bill. They neither admit nor deny the injuries which the bill alleges the trees will sustain, by reason of the drains being made so deep, in order to carry off the large quantity of water. The bill was filed on August 12, 1909, and the answer on September 1st of that year. What is spoken of as Resolution or Ordinance 198, which had been passed by the mayor and council, seems to have given rise to the trouble. On December 21, 1910, an agreement of solicitors was filed, by which it was agreed that the defendant had put in a storm sewer for the accommodation of the water which was originally intended by Resolution 198 to pass down Goldsborough street and down the culvert between Fountain's and Turner's properties into the stream. The present mayor testified that he did not know what that resolution was until about the time the testimony was being taken in this case, and as he did not believe that was the scheme proposed by the engineers who had made the plans several years before, and as he was opposed to carrying out that resolution, he recommended its repeal which was duly done.

The storm sewer in the opinion of the lower court relieved the difficulty at present as to the diversion of the water, and it said that, if it proved inadequate and resulted in flooding the plaintiffs' properties, they could then apply for an injunction under the principles announced in *Guest v. Church Hill*, 90 Md. 689, 45 Atl. 882. There would seem to be but little room for doubt that the plan as

proposed when the bill was filed might have resulted disastrously to the plaintiffs, and the appellant practically admits by its action that it was not a proper plan. Under the circumstances, there can be no ground for complaint of the part of the decree that enjoined the defendant from draining the water as proposed by Ordinance No. 198, and that is not now urged. It is strenuously contended, however (1) that the court has no power to interfere with the exercise of the sound judgment and discretion of the municipal authorities as to the grading, draining, and paving of the streets, inasmuch as it is empowered by the Legislature to act; and (2) that, if the court is ordinarily possessed of such right, it should not have interfered in this case. As the case is presented by the pleadings, the only reason for digging the drains or gutters on Goldsborough street so deep was to carry off the large quantity of water which the appellant proposed to divert from its regular course, and to turn into that street. The bill so alleges and the answer in effect admits it. Inasmuch, then, as that plan has been abandoned, and it is practically admitted to have been an improper one, in so far as the disposition of the water is concerned, it would seem to be clear that, when this case came before the court on the motion to dissolve, there was nothing which it could properly do but continue the injunction.

[1] It is said in *Miller's Eq. Proc.* 708: "When the motion to dissolve is heard upon bill, answer, and testimony, and the bill shows a case entitling the plaintiff to an injunction, the injunction will not be dissolved if the equity of the bill is not denied by the answer. The defendant cannot rely upon the testimony for the purpose of denying or disproving the equity stated in the bill, where the answer is not a sufficient denial of the equity"—citing *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184; *Bouldin v. Mayor, etc., of Baltimore*, 15 Md. 18.

At the time the bill and answer were filed, according to the allegations of the bill and the practical admissions of the answer, it was proposed to make the gutters so deep that the trees would be injured or destroyed in order to carry out the plan of diverting and concentrating the water, which was confessedly an improper plan, and has been abandoned. There is no other reason given in the answer for making the gutters so deep. It is not permissible for the appellant to change its position under the pleadings, as they stood without amendment, and contend that, although the answer admits that the object in changing and deepening the drains was to carry off the water which was to be brought to and conducted down Goldsborough street, it could still justify its proposed action in deepening the gutters because that is a part of a general scheme to

grade the streets. If the reason given in the answer for doing what would probably have injured, and possibly have destroyed, the trees was the true one, then, when the plan was abandoned, the reason ceased. As was said by the court below: "The only necessity alleged by the defendant for lowering the curb and gutters on Goldsborough street to the extent contemplated by the plan of Williams, Proctor, and Potts was to enable the corporation to pass down that street all the water to be collected at Harrison and Goldsborough streets; and, as the change of plan now provides for passing all that water north on Harrison street to the stream at the end of that street, there is now no existing necessity whatever for changing the grade as contemplated by that plan."

How far courts can or ought to interfere with a municipality which, in grading or paving a street, is about to destroy or seriously injure shade trees on the sidewalk of an abutting owner, is a question of some delicacy, and not always easily determined so as to avoid doing injury either to the public or to such owner, but, when there is clearly no necessity for such destruction or injury, the law of this state is well settled. In *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627, 1 Ann. Cas. 783, the bill admitted the right of the mayor and council to improve the streets, to repave or change the width of the sidewalks or the curbing, but charged that the plan adopted was a wholly unnecessary, unreasonable, unjust, and arbitrary one. The municipality by ordinance had declared that two trees of Wineland were a nuisance and an obstruction to the paving and curbing of the street, and had instructed the street commissioner to remove them. An injunction granted below was sustained by this court. Judge Briscoe, in delivering the opinion, said: "The law has been settled in this state, since the case of *Alberger v. Mayor, etc.*, of Baltimore, 64 Md. 7, 20 Atl. 988, that where the Legislature confers the power on a municipality, in general terms, to provide by ordinance for paving or repaving the streets, the discretion exercised by the city council in regard to the propriety or necessity of the improvement provided by the ordinance cannot be controlled by the courts, except where the power is exceeded or fraud is charged, and shown to exist, or where there has been a manifest invasion of private rights." And he concluded the opinion by saying: "The general doctrine, as stated by the appellee in his brief, cannot be denied that a city which is invested with power to regrade and repave a street can determine upon the expediency and necessity of so regrading, and upon the kind of pavement to be used, free from the interference of a court of equity; but, if a municipality in doing an act of that kind arbitrarily or unnecessarily

undertakes to destroy private property which is not a nuisance, it then undertakes to do an act beyond its delegated power, and those acts are within the corrective powers of a court of equity."

[2] That case clearly recognized the right of the court to interfere when a municipality unnecessarily undertook to destroy trees which were private property and did not constitute a nuisance, and it resulted in the municipality being required to build the curb to each side of the trees and let the trees remain. Such being the decision of this court, we cannot hesitate to say that inasmuch as it is clearly shown that there is no necessity for injuring these trees for the purpose for which it was alleged, and in effect admitted, the work was to be done, the injunction was properly continued, and we are therefore of the opinion that the decree must be affirmed. Inasmuch, however, as the record discloses that the town of Easton has begun a general plan of improving the grades of certain of its streets, which includes Goldsborough street, we deem it proper to add that the decree continuing this injunction, being affirmed for the reason we have stated, must not be construed to prohibit the appellant from grading this street under a general plan of improvement adopted or to be adopted, even if in the execution of such plan it becomes necessary to so lower the gutters or drains along that street, or to so curb it, as will injuriously affect the trees on it. If such an effect can reasonably be avoided, the municipal authorities should not "arbitrarily or unnecessarily" destroy or injure the trees, but, if a general plan for the improvement of this and neighboring streets can only be properly carried out by adopting a grade that will necessarily injure the trees, then, although it is to be regretted, it cannot be interfered with by the court. Trees on residence streets are ornamental, useful, and sometimes very valuable, but they cannot be permitted to hinder improvements authorized by the Legislature, if made in a proper and reasonable way, and it is only when there is some such exception to the general rule as to the powers of courts to control municipalities as were pointed out in *Alberger's Case*, or *Wineland's Case*, that they will interfere.

[3] Municipal authorities should not act ruthlessly or without regard to the injuries likely to be sustained by abutting owners, and it is a wise rule, adopted by some courts, which requires them to give an owner of trees planted in the highway an opportunity to remove them, or, if possible, protect and save them, if that can be done without interfering with the proper use of the highway. We will therefore affirm the decree, but with the understanding that this injunction is not to have the effect of prohibiting the defendant from lowering the curb and gutters on Goldsborough street, if that be necessary in

carrying out a general plan for the improvement of the streets. Whether or not the defendant can be prohibited from executing any particular plan cannot now be properly determined, as we cannot anticipate what action will be taken, but it must be understood that the continuance of this injunction under the circumstances we have stated will not of itself preclude the municipality from lowering the curb and gutters in the execution of a proper plan for improvement of the streets.

Decree affirmed, the appellant to pay the costs.

SAFE DEPOSIT & TRUST CO. v. THOM et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. WILLS (§ 174*)—REVOCATION—PRESUMPTIONS.

Under Code, art. 93, § 318, providing that a will may be revoked by some other will or codicil in writing, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence, or by his direction, a testator may revoke one clause of his will without destroying other clauses, provided he does not enlarge the estate of one taking under the will, or change the character of the remaining provisions; and so, where only one clause of the will is canceled, a complete revocation will not be presumed, unless that clause and the remainder of the will were so interdependent that the other portions could not stand alone.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.*]

2. WILLS (§ 174*)—REVOCATION—PRESUMPTION OF CANCELLATION.

Although Code, art. 93, § 318, authorizes a testator to revoke his will by canceling or obliterating it, an incomplete cancellation, where it shows that the testator had attempted to restore the marks erased, raises no presumption of revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 453; Dec. Dig. § 174.*]

3. WILLS (§ 196*)—REVOCATION—REPUBLICATION.

Where a portion of a will was erased by the testator with an intention of revoking it, the will cannot be re-established by restoring words or letters erased.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 270; Dec. Dig. § 196.*]

4. WILLS (§ 173*)—REVOCATION—INTENT.

A cancellation or obliteration of a will does not operate as a revocation, unless it was done animo revocandi.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 452; Dec. Dig. § 173.*]

5. WILLS (§ 306*)—REVOCATION—INTENT—EVIDENCE.

In a proceeding for the probate of a will, evidence held insufficient to show that erasures made by the testator were made with the intention of revoking the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 732, 733; Dec. Dig. § 306.*]

Appeal from Orphans' Court, Baltimore County.

Petition by the Safe Deposit & Trust Company, as trustee, for the probate of the will

of Annie Lowe Rieman, deceased, contested by Mary Isabel Thom and others. From a judgment denying probate, the trustee appeals. Reversed and remanded.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

W. Calvin Chestnut and Edgar H. Gans, for appellant. D. G. McIntosh and Bernard Carter, for appellees.

THOMAS, J. On the 5th of July, 1911, Charles E. Rieman, of Baltimore county, Md., filed in the orphans' court of said county a petition, in which he stated that his mother, Annie Lowe Rieman, of said county, died on the 3d of March, 1911, leaving as her only heirs at law and next of kin two daughters, namely, Mary Isabel Thom, of Baltimore city, and Charlotte Rieman McIntosh, of Baltimore county, and three sons, Carlton Alexander Rieman, of Baltimore county, the petitioner, and Perlee L. Rieman, who has been adjudicated non compos, and whose trustee and committee is the petitioner. The petition further averred that the petitioner and his two sisters and his said brother, Carlton Alexander Rieman, some days after the death of his mother, made diligent search among her papers, for the purpose of ascertaining whether she left a will, and that they found the will, hereinafter referred to, among her private papers; that upon examination of the same in the presence of his said brother and sisters and George R. Willis, Esq., an attorney at law of Baltimore city, he discovered that "the face of the paper contained evidence of the erasure, or attempted erasure, of the first item of the will;" that subsequently Mr. Willis informed the petitioner and his said brother and sisters that the deceased had told him that she had erased the "first item," and had given him her reasons for so doing. The petition then stated that said will, when found, was in a sealed envelope, in which was also inclosed a letter, addressed by the deceased to Mr. Willis; that the will and letter had been in the possession of the petitioner ever since the envelope containing them had been found, and were "in the same condition in which they were when so found;" and that he presented them, with said petition, to the court for such action as might be proper to be taken in connection with the probate of said will or instrument of writing.

By agreement of counsel representing all persons interested in the estate and the Safe Deposit & Trust Company of Baltimore, appointed trustee by said will, said trustee, after notice to the heirs at law and next of kin of the deceased, on the 13th of July, 1911, presented and propounded the will for probate in said orphans' court, and thereupon Mrs. Thom and Mrs. McIntosh filed in said court their petition, charging that the

deceased had erased the first item of the will; that her said act operated as a cancellation and revocation of said item and of the whole will, and that she intended that it should so operate, and praying that said will be by said court declared canceled and revoked; and that said trustee, the said Charles E. Rieman, trustee and committee for Perlee Lowe Rieman, and Carlton Alexander Rieman and Charles E. Rieman, named as executors of the will, be required to answer, etc. This petition was answered by the Safe Deposit & Trust Company, trustee, denying that the will, or any part of it, had been revoked. The answer of Charles E. Rieman and Carlton Alexander Rieman, executors, states that they do not admit that the deceased "attempted to erase, believed she had erased, and did erase, the first item in said" will, or that her act, in connection "with the alleged erasure of said first item, operated as a cancellation and revocation of said first item, and of said" will, and that they require proof thereof by the petitioner; while the answer of Charles E. Rieman, trustee and committee, "neither admits nor denies" the alleged revocation of the will. A replication was filed by the petitioners, evidence was produced before the orphans' court, and, by agreement of counsel, was subsequently written by the stenographer and filed in the case. On the 18th of July, 1911, the orphans' court passed an order, adjudging that the will had been canceled and revoked by the deceased, and that probate of the same be refused, and, on the same day, passed a further order, granting letters of administration on the estate of the deceased to Charles E. Rieman and Carlton Alexander Rieman. It is from these orders that the Safe Deposit & Trust Company, trustee, has appealed.

In order to arrive at the real intention of the deceased, and to determine the effect to be given to the alleged act of revocation, it will be necessary to keep in view the provisions of the will in question. After providing for the payment of her just debts and funeral expenses, it proceeds:

"Item: I give and bequeath unto each of my children, that is to say: Mary Isabel Thom, Carlton Alexander Rieman, Charles E. Rieman and Charlotte Rieman McIntosh, the sum of ten thousand dollars (\$10,000)."

"Item: I give and bequeath unto the Safe Deposit & Trust Company of Baltimore, in trust for the use of my son Perlee Lowe Rieman, the sum of ten thousand dollars (\$10,000) to be held by the said trustee for and during the term of his natural life and subject to the same limitations hereinafter expressed of that part of the rest and residue of my estate which I have given unto the said trustee for the use and benefit of my said son, Perlee Lowe Rieman."

By the third item, the deceased gives to Mary Ann Donovan, nurse of her deceased daughter, provided she was living at the death of the deceased, the sum of \$250. By

the fourth item, she gives to each of certain servants \$100, and to certain other servants each the sum of \$25; and by the fifth item she gives to her two daughters all her wearing apparel, jewelry, laces, toilet silver, contents of her wardrobe, writing desks, and storerooms. The sixth item is as follows:

"Item: I give, devise and bequeath all of the rest and residue of my estate hereinafter called my 'trust estate' unto the Safe Deposit & Trust Company of Baltimore, in special trust and confidence, with the powers and to and for the uses and purposes following, that is to say: With full power and authority to invest all moneys which it may receive in permanent or transient investments, ground-rents, annuities, stocks, bonds, mortgages or other good and safe income-producing securities, as may to it seem most advantageous to those interested in the rest and residue of my estate, and my said trustee is further authorized and empowered at all times during the continuance of said trust, for the purpose of re-investment to sell any of the securities or investments so made or to change any investments left by me or which may be procured by it and to re-invest the proceeds of any sale or sales upon the trusts herein declared, and in turn to sell or change any of the investments thus made by it, submitting, however, in the administration of this trust all of its acts so to be done with reference to the management of the trust estate to some court of competent jurisdiction for its approval. And my trustee is further directed to pay unto each of my four children, Mary Isabel Thom, Carlton Alexander Rieman, Charles E. Rieman and Charlotte Rieman McIntosh, in quarterly installments, one-fifth (1/5) part of the net income of the rest and residue of my estate, such payments to be continued to be made to each of my said four children for and during the full end and term of his or her natural life, and to pay the other one-fifth (1/5) part of the net income of the said rest and residue of my estate to the committee or trustee of my son Perlee Lowe Rieman, for and during the term of his natural life. In the event of any one of my five children above named, departing this life, I direct my said trustee to divide my estate into five equal parts, having reference to quantity and values and to transfer, pay and deliver one of said five parts unto the child or children of such deceased child of mine, share and share alike per stirpes and not per capita. In the event of any of my five children departing this life without issue living at the time of his or her death, then shall a portion of my trust estate so set apart for the use of the child so dying, be by my trustee divided equally among my children, the child or children of any deceased child of mine to take his, her or their parent's share per stirpes and not per capita. The share of each of my children living at the time of this division, shall be held by my trustee for the use of

my children respectively, for life, with the same limitations over, as is herein imposed upon the original shares of my children respectively."

Then follows a suggestion to the trustee in reference to the sale of certain unimproved real estate in Dayton, Ohio, and by the remaining and last item Carlton Alexander Rieman and Charles E. Rieman are appointed executors.

The will is dated March 11, 1907; and the evidence produced by the Safe Deposit & Trust Company, trustee, shows that it was duly executed by the deceased on that date, and that it remained in the possession of Mr. Willis until the 29th of June, 1909, when, at her request, he mailed it to her address in Baltimore county. It was found after her death in her desk, with some instructions to Mr. Willis, in an envelope, which was sealed and addressed to him.

From an inspection of the original will, which was produced at the argument of the case in this court, it appears that the names of the four children of the deceased in the first item have been rubbed, and that some of the letters making up these names have been relined or retraced with a lead pencil. The words "each of my children" in the same item appear to have been rubbed also; but no part of said item has the appearance of having been entirely rubbed out, erased, or rendered illegible.

It appears from the evidence produced by the petitioners, appellees, that on the 20th of April, 1910, Mr. Willis called to see Mrs. Rieman at her home in Baltimore city in regard to some changes she desired to make in her will, and that she then told him that she desired to divide the whole of her estate into five equal parts; that "she did not want any distinction among her children, wanted to have them all alike," and that she wanted her two sons, Carlton A. and Charles E. Rieman, and her two daughters, to have their parts absolutely, but she wanted the share of her son, who was non compos, to be held in trust for him for life; that she did not want the shares of her sons, Carlton and Charles, and her two daughters held in trust, as is provided in the will in question, and gave as her reason for desiring to make this change that at the death of Mrs. Thom and Mrs. McIntosh their children will come into possession of quite large estates under their grandfather's will; and that she wanted her daughters to have what she was going to leave them, subject to their control absolutely. Mr. Willis says that Mrs. Rieman called at his office on the 25th of April and on the 16th of June, 1910, when they talked over the proposed changes in her will, and that on the 28th of June, 1910, she called again, "and gave me instructions to prepare the will, giving these four children I have named their shares absolutely, and the other one-fifth to be in trust for the other son.

She said to me further: 'There are some specific legacies, money legacies, I want to give, and I will write the names out for you and the amounts I want to give.' I remember, in particular, one was an indebtedness she wanted to release. 'All right,' I said; I was ready to prepare the will just as soon as I got the information with reference to the legacy. She died before she sent me the memorandum, and in this envelope, which was found, after her death, in my presence, and which was handed to me by her son Charles and by me opened, was this memorandum addressed to me:

"Mr. Willis:

"My legatees are my cousin, Mrs. Nellie Lowe Johnston, Mrs. Gabriel Johnston, Washington, D. C., the sum of \$2,000.00 and the debt of \$3,000.00 be forgiven her if it is not paid at my death.

"To Lucilla Rieman,

"Mary Rieman,

"Clara Rieman,

"Mildred Rieman, all daughters of Henry Rieman of Hawksworth near Easton, eastern shore of Maryland, the sum of \$250.00 apiece. To Miss Mary Hutchinson Warfield, 700 N. Howard street, Baltimore, the sum of \$500.00.

"To Mrs. Mary Willoughby Osterhaus, wife of Capt. Hugo Osterhaus, U. S. N., the sum of \$500. Annie L. Rieman."

Mr. Willis also states: "At the last interview, which was on the 28th of June, she told me, in commenting upon the change that she was going to make, giving the children I have named one-fifth absolutely, that she had rubbed out a provision in her will, whereby she had given to each of the children I have named \$5,000 absolutely, because she said: 'That is no use now, because, if they are going to get one-fifth of the whole of the estate, there is no use of giving them \$10,000 absolutely.' I told her that she ought not to rub anything out of the will, because that was not a proper thing to do, to erase a will, or to attempt to change it in that manner."

The Safe Deposit & Trust Company, trustee, objected to this evidence adduced by the petitioners, and filed a motion to strike it out; but the court below overruled the motion.

[1] Under the provision of section 318 of article 93 of the Code, a will may be revoked "by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same, by the testator himself or in his presence, and by his direction and consent;" and the right of a testator under this section of the Code to revoke a clause of his will, without destroying or invalidating the remaining clauses, provided he does not thereby enlarge the estate of any one who takes under the will, or change the character of the remaining provisions, was distinctly

recognized in *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123, and affirmed in the case of *Home of the Aged v. Bantz*, 107 Md. 543, 69 Atl. 376. In the latter case, this court, upon the authorities there cited, also adopts the rule that, where a will was in the custody of the testator and upon his death is found among his private papers, canceled or obliterated, it is presumed that it was so canceled or obliterated by the testator, and that he did it *animo revocandi*, and quotes the statement in *Redfield on Wills*, 307, that "the rule of evidence in the ecclesiastical courts in regard to presumptive revocations from the absence or mutilation of the will seems to be that if the will is traced into the testator's possession or custody, and is there found mutilated in any of the ways pointed out in the statute for revocation, or is not found at all, it will be presumed that the testator destroyed or mutilated it *animo revocandi*; but if it was last in the custody of another it is incumbent upon the party asserting the revocation to show the will again in the testator's custody, or that it was mutilated or destroyed by his direction."

If, therefore, in the case at bar, the first item of the will had been canceled or obliterated, the will having been in the custody of Mrs. Rieman, and having been found after her death among her private papers, the presumption would have been that it was done by her, and that she intended thereby to revoke that clause of her will, unless it could be said, which, however, we must not be understood as saying, that there is such an intimate or interdependent relation between that clause and the other portions of the will as to give rise to the presumption that she intended to revoke the whole will. *Home of the Aged v. Bantz*, *supra*.

[2] But, as we have said, from an inspection of the original will, it appears that parts of the first item were only rubbed, and then some of the letters were retraced by lead pencil, and that no part of the clause was entirely obliterated or rendered illegible. We have been unable to find any case in which it was held that a will found in such a condition, among the papers of the deceased, must be presumed to have been revoked by him. The ground upon which the presumption of revocation rests, where the will was in the custody of a testator and is found canceled, etc., is that there is no other way to account for its condition. Revocation requires an act, sufficient under the provisions of the Code, and an intention to revoke; and while, where the intention is clear, slight acts of cancellation or obliteration may be sufficient to constitute a revocation, an intention to revoke cannot be *presumed* from acts that are in themselves incomplete and inconclusive, and that are as readily accounted for in

some other way. In the case of *Eschbach v. Collins*, *supra*, the court said: "It is not necessary that the words erased should be wholly illegible; but the act of the testator must be such as to clearly indicate an intention to expunge the whole clause, so that it will no longer constitute a subdivision of the will." And this was repeated in *Home of the Aged v. Bantz*, *supra*. These cases furnish an instance of attempted alteration and of a revocation by cancellation where, of course, the parts canceled need not be entirely erased or rendered illegible; but even in those cases the court was careful to say that cancellation must be such as to clearly indicate an intention to revoke. Here, as appears from the face of the will, the act itself is incomplete, not in the sense that the clause was not entirely rubbed out or obliterated, but in the sense that that which was begun was not finished, and was abandoned. Such an act is clearly too indefinite—too incomplete—to form the foundation of a presumption that the testatrix intended thereby to revoke an instrument which she had executed with so much formality. She may have commenced to rub out the first clause of her will with the view of revoking it, and then, before completing what she intended to do, changed her mind and retraced the letters rubbed; and that is what is suggested by the appearance of the will.

In 1 *Jarman on Wills* (6th Ed.) 157, it is said: "But it is clear that, if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked."

In the case of *Doe v. Perbes*, 3 B. & Ald. 489 (106 Eng. Rep. Full Reprint, 740), the testator, urged by sudden impulse of passion against one of the devisees, undertook to cancel his will by tearing, and, after tearing it twice through, was persuaded by one present, before he completed his purpose, to desist, and he then, after putting the pieces of the will together, said, "It is well it was no worse." It was held that the will remained unrevoked.

In the case of *In re Wood's Will* (Sur.) 11 N. Y. Supp. 157, it appeared that the signature of the testatrix had been erased by drawing diagonal lines over the same, and then the lines and the name were nearly erased, and her name carefully rewritten in her own handwriting with a different colored ink. The court, in disposing of the case, said: "I am asked by the contestants to presume, as a matter of law, that the erasure was made *animo revocandi* with intent to revoke and destroy the will, and that the act was sufficient to accomplish the intent. If the will had been found in her safe carefully preserved among the valuable papers of the testatrix, with her signature erased

ed, it would have been a fair and reasonable presumption that she erased the signature *animo revocandi*, and it would then be lacking in one of the statutory requirements of a valid will—the signature of the decedent at the end thereof; but, when found with the signature carefully restored, no such presumption arises. In the absence of all proof, how can I find that it was made with the intent to revoke, when the instrument was preserved by her with her signature carefully restored? An intention to revoke a will, not fully consummated, is no revocation. *Doe v. Perbes*, 3 Barn. & Ald. 489. The cancellation of a will does not necessarily involve its revocation. The canceling itself is an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi*. 2 Whart. Ev. § 900; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 490 [15 Am. Dec. 395]. It may be that Mrs. Wood drew the lines through her name with the intention of revoking the will, but immediately, and before the act was completed, changed her mind, erased the marks, and restored her signature. To sustain the theory of the learned counsel for the contestant, I must find that the erasure was made by the testatrix herself, understandingly, freely, and voluntarily, with no other purpose than to destroy her will, and that it was done at some time previous to the act of rewriting her name; and this finding is asked for in the absence of proof, and with the burden resting upon the contestants to establish the fact of revocation."

We have quoted at some length from the opinion in that case, because it shows that the court was dealing with much the same state of facts as confronts us in this case, when considering the question whether a revocation can be presumed from the condition of the will.

It is said in Schouler on Wills and Administration, § 390: "Where the testator arrests his own design before the act is completed, a revocation does not take place." And in 1 Redfield on Wills, *307, it is stated that, "where the testator is arrested in his purpose, and changes his determination to revoke his will, before the act is completed, by which he designed to express his intention," his act does not amount to a revocation.

If, where the act by which the testator designed to accomplish a revocation and to evidence his intention to do so is not completed by him, but is abandoned, a revocation is not effected, it would seem to follow that, where the condition of the will indicates that the act of obliterating was abandoned before completion, and that the testatrix restored the letters or words partially rubbed out or erased, there can be no presumption that the will was revoked. For these reasons, there is no presumption in this case, because of the condition in which the will was found,

that Mrs. Rieinan intended to revoke either the first item or the whole will, and this brings us to the consideration of the other evidence in the case, which was objected to by the appellant.

[3-5] Assuming, without deciding, that all of it was admissible, we do not think it is sufficient to sustain the contention of the appellees. When taken in connection with the will itself, it demonstrates two things: First, that Mrs. Rieinan had no idea of dying intestate; and, second, that it was her fixed and settled purpose throughout to make equal provision for her five children, and to so leave the share of her son Perlee that after his death it would go to her other children and their descendants. Therefore an intention to revoke her will, or the first item of it, by rubbing parts of that item would be inconsistent with her clearly established desire to make the provisions mentioned, unless it was done with the further purpose of accomplishing them by another will. The evidence shows that she was, from the 20th of April until some time after her last interview with Mr. Willis on the 28th of June, 1910, anxious to make a change in her will; and the appellees rely upon her statement to Mr. Willis that she had rubbed out the provision in her will giving four of her children each \$10,000, and the condition of the will, to show that she had, prior to that statement, obliterated the clause referred to, with the intention of destroying the will. Of course, if she rubbed the first item to the extent indicated, with the intention that *that slight rubbing* should operate as a revocation, she could not afterwards re-establish the will by retracing the letters rubbed. But the fact that when the will was found, after her death, in an envelope, with additional instructions for a new will, the words or letters that had been rubbed were retraced would indicate that she did not, in the first instance, intend the rubbing to effect a revocation; for, if she had deliberately revoked the will, and intended to make a new one, there was no reason why she should retrace what she had partly erased. If, on the other hand, she did not intend, *by the rubbing of the first item*, to revoke the will, it was but natural, when told by her trusted adviser that it was not the proper thing to do, that she should attempt to rectify it, pending the execution of a new will containing the changes she desired to make, and which she knew would effect a revocation of the old. It is clear that she could not have intended, by the slight rubbing of the *first item*, to revoke the *whole* will; and her settled purpose, apparent from the evidence, to make equal provision for her children precludes the idea that she intended to revoke the first item; for that, if it could have been accomplished, would have resulted in giving to her son Perlee more than he would otherwise have received, and in an unequal distribution

of her estate. The only reasonable conclusion from all the evidence is that, having determined to change her will, so as to give to her two daughters and her two sons, Carlton A. and Charles E. Rieman, absolute estates in their shares, Mrs. Rieman partly rubbed out or erased the item giving each of them \$10,000, not with the intention of *thereby* destroying the will or that clause, but as a means and for the purpose of indicating to her attorney, who was to prepare the new will, that that clause or item was to be left out of the will she was about to make, and that she did not intend that the rubbing should have any significance, independent of and apart from the making of a new will. This view is confirmed by her statement to Mr. Willis, as her reason for rubbing out the first item, that if the children referred to "are going to get one-fifth of the whole estate, there is no use giving them \$10,000 absolutely."

This conclusion is not at all in conflict with the case of *Semmes v. Semmes et al.*, 7 Har. & J. 388, where it is stated by Chief Justice Buchanan that if a will is deliberately canceled, without accident or mistake, it will operate as a revocation, although the party may at the time have intended to make another will, and afterwards failed to do it. The same view is expressed in 1 Redfield on Wills (4th Ed.) *308, where the author says: "But if a testator destroys a will upon the mere general purpose of thereafter making another, it will not hinder the revocation becoming effectual, because he dies without carrying such purpose of making a new will into effect."

Where, however, what was done was not intended to have any effect apart from and independent of the making of a new instrument, it cannot operate as a revocation of the existing will, for the manifest reason, as distinctly recognized in *Semmes v. Semmes*, supra, that, unless the act relied on was done *animo revocandi*, it does not amount to a revocation. A similar principle is clearly stated and applied in the case of *McIntyre v. McIntyre*, 120 Ga. 71, 47 S. E. 503, 102 Am. St. Rep. 71, 1 Ann. Cas. 606, where the court says: "The mere fact that the testator intended to make a new will, or made one which failed of effect, will not alone, in every case, prevent a cancellation or obliteration of a will from operating as a revocation. If it is clear that the cancellation and the making of a new will were parts of one scheme, and the revocation of the old will was so related to the making of the new as to be dependent upon it, then, if the new will be not made, or, if made, is invalid, the old will, though canceled, should be given effect, if its contents can be ascertained in any legal way. But if the old will is once revoked—if the act of revocation is completed—as, if the will be totally destroyed by burn-

ing and the like, or if any other act is done which evidences an unmistakable intention to revoke, though the will be not totally destroyed, the fact that the testator intended to make a new will, or made one which cannot take effect, counts for nothing." This rule is also stated in 1 Williams on Ex. (7th Ed.) 200, 1 Jarman on Wills (6th Ed.) 154, and in 30 Ency. of Law (2d Ed.) 633, where many cases are cited in support of the text. Here all that the evidence shows is that what was done must have been done for the sole purpose of indicating to the attorney of the deceased that the item slightly rubbed was not to be included in the new will; and we are not, therefore, required to go to the extent of the authorities last cited.

We have carefully considered the very able arguments of counsel, and have examined the authorities cited, but are unable to reach the conclusion that Mrs. Rieman intended to destroy the will in question. In the case of *Bell v. Fothergill and Others*, 2 Law Reports, Probate Div. 148, cited by the appellees, and which resembles in some respects the case at bar, Lord Penzance, speaking of the condition of the will, said: "The signature had been cut clean out, above, below, and cross-ways, apparently by a pair of scissors, but the paper so cut out had been placed in its position again, and gummed there." Under such circumstances, the court held that the will had been revoked. We cannot give to the slight rubbing in the case at bar the effect of such a decisive act as that described.

It follows from what has been said that the orders appealed from must be reversed.

Orders reversed, with costs, and case remanded.

BOOK DEPOSITORY OF BALTIMORE ANNUAL CONFERENCE OF METHODIST EPISCOPAL CHURCH et al. v. TRUSTEES OF CHURCH ROOMS FUND OF METHODIST EPISCOPAL CHURCH et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. TRUSTS (§ 21*)—CREATION—CERTAINTY.

The creation of a trust is ordinarily required to be with a reasonable degree of definiteness and precision.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.*]

2. CHARITIES (§ 49*)—CREATION—EQUITABLE ESTABLISHMENT.

At the instance of a corporation organized to supply the Methodist Church with suitable buildings for religious, social, and other meetings, and which also carried on a mercantile business among the members of the church, subscriptions were made to a fund for a home for general church purposes, free of rent, and as the sum needed was not secured that actually received in cash and shares of the corporation was carried in the name of a person on the books of the corporation as a separate account, and later converted as an entirety into shares of the corporation. The corporation supplied the room for the meetings, etc., but, upon the destruction of its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

building by fire, sold its lot and attempted to go into voluntary dissolution, and to distribute among its shareholders, other than the meeting house fund, the proceeds of the liquidation. *Held*, that the contributors to the fund, while not creditors of the corporation in the sense that there is any money or property to pass to them, are entitled to the performance of an obligation, and occupy a position not dissimilar to that of a mercantile creditor, so that equity is warranted in establishing a trust as regards the shares of stock in question.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 82; Dec. Dig. § 49.*]

3. EQUITY (§ 427*)—DECREE—CONFORMITY TO PRAYER—ESTABLISHMENT OF TRUST.

Although a complaint contains no specific prayer for the declaration of a trust, where it does contain the usual prayer for general relief, equity will give effect to a trust which is warranted by the evidence.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

4. CHARITIES (§ 20*)—BENEFICIARY—NECESSITY OF INCORPORATION.

Though religious organizations for whose benefit a fund was created to establish a meeting room, to be given free of rent, were unincorporated, that fact will not prevent the establishment of a trust in such fund.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

5. CHARITIES (§ 19*)—ESTABLISHMENT—DESIGNATION OF TRUSTEE.

Where, upon the establishment of a fund for the purpose of providing a meeting room for religious organizations, a particular person was designated as treasurer, and in that capacity collected a certain sum and turned it over to a corporation for the purchase of stock therein, and receipted as "treasurer" for the certificates, though such shares of stock were not made out in his name, but were made out in the name of the treasurer of the "Church Rooms Fund," he was not thereby divested of his character of trustee; and the establishment of a trust is not prevented by an insufficient designation of a trustee.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 42; Dec. Dig. § 19.*]

6. CHARITIES (§ 19*)—TRUST—APPOINTMENT OF TRUSTEE.

It is not necessary for the valid appointment of a charitable trustee that he be specified by name, or that the word "trustee" be used, if it satisfactorily appears that the duties to be performed are such as are performed by one who is a trustee, and that the person is designated with sufficient precision to leave no doubt as to the identity.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 42; Dec. Dig. § 19.*]

7. CHARITIES (§ 20*)—CAPACITY OF TRUSTEE—CORPORATION.

A religious and mercantile corporation, organized to accommodate the Methodist Episcopal Church with suitable buildings for religious, social, and other meetings, is capable of acting as trustee of a fund raised for the fitting up and maintaining of a meeting room for various Methodist societies.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

Appeal from Circuit Court of Baltimore City.

Bill by the Trustees of the Church Rooms Fund of the Methodist Episcopal Church and others against the Book Depository of the Baltimore Annual Conference of the Methodist Episcopal Church and another.

From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before BOYD, C. J., and PEAROE, URNER, and STOCKBRIDGE, JJ.

Frank Gosnell and George Weems Williams, for appellants. John Philip Hill and Bernard Carter, for appellees.

STOCKBRIDGE, J. In the year 1871, the Book Depository of the Baltimore Annual Conference of the Methodist Episcopal Church in Baltimore city was duly incorporated under the General Laws of the state of Maryland. One of the purposes of the corporation, as set forth in its charter, was: "The accommodation of the ministry and membership of said church with suitable buildings for religious, social and other meetings." The corporation thus formed secured a location at 112 W. Fayette street, which it occupied until the fall of 1874, when, having purchased the property then known as Nos. 166 and 168 W. Baltimore street, it removed to that location. At a meeting held on November 2, 1874, of either the stockholders or the board of directors, the following resolution was presented and adopted: "Resolved, that the committee be instructed to make arrangements for a reception at our new rooms of the bishops of our church some time during their session in this city next month; and that they also make arrangements for raising at the same time a fund that will justify the society in setting apart the new hall for general church purposes free of rent."

As a part of the exercises referred to in the foregoing resolution, a dinner was given at the Carrollton Hotel, at which a proposition was brought forward to raise a fund of \$10,000, if possible, which should constitute a Church Rooms Fund, the income of which was to be paid over to the Depository as compensation for the fitting up and maintaining a commodious room for meetings of the Baltimore Preachers, the Missionary Society, the City Missionary and Church Extension Society, the Preachers' Aid Society, the Emory Grove Camp Meeting Association, the Women's Foreign Missionary Society, and others. At this dinner, subscriptions were taken from individuals present for various amounts, but which amounts, in the aggregate, fell far short of the \$10,000 desired. Apparently the next step which was taken in the matter was on February 3, 1875, at a meeting of the board of directors of the Depository, when the following action was had: "On motion of L. H. Cole, resolved, that the agent of the Depository receive the money paid in on the Church Rooms Fund, to keep a separate account of the same, and use it in the transaction of his business until further instructions from the board." A week later, at a meeting held on February 10th, the fund so raised and

to be raised were authorized to be invested. This fund was apparently paid, partly in cash, and partly in donations of the capital stock of the Methodist Book Depository, and finally reached the sum of \$3,050.

The principal witness called by the plaintiff was Dr. David H. Carroll, for many years the agent of the Book Depository, and the designated recipient of subscriptions intended for the Church Rooms Fund, under the resolution of February 3, 1875. Dr. Carroll's evidence, given entirely from memory, and after a lapse of over 30 years, is necessarily rather vague; and but for the books of the Depository, which have been preserved, containing entries, unfortunately meager and at times vague, it would be a matter of extreme difficulty to reach any conclusion in the case.

It does appear from the entries that there was apparently some shifting back and forth, as between the sinking fund of the Depository and the Church Rooms Fund, stock of the appellant corporation, which finally culminated in February, 1881, when there was issued, as appears from the stub of the stock book, a certificate No. 145, of the capital stock of the appellant, for 61 shares to "Treas. Church Rooms Fund," and receipted for on the 25th February, 1881, by "D. H. Carroll, Treas.;" and on the same day certificate No. 147, for 61 shares, also "issued to Treasurer Church Rooms Fund," and receipted for on the same date, February 25, 1881, by "D. H. Carroll, Treas."

The Methodist Book Depository continued in business down until the fire of 1904, and during all that time continued to provide the associations, before enumerated, with accommodations for their meetings; and, as dividends were declared upon the stock, they appear to have been covered into the current receipts of the Book Depository. After the fire, the Depository, which had also throughout its existence been conducting a commercial business, discontinued business, sold its lot, and of its own accord, and without any intervention by a court, began a liquidation of its business and a distribution among the shareholders. As appears by the amended bill and answer, it was proposed in this liquidation to distribute all the sums realized among the stockholders, other than, and without taking into account, the 122 shares issued as hereinbefore stated. To prevent this distribution, and to preserve this fund, together with its proportionate increase from the enhanced value of the assets, for the original purposes of the donors, this bill was filed.

The plaintiffs are David H. Carroll, Sumnerfield Baldwin, and Benjamin F. Bennett, three of the subscribers to the original Church Rooms Fund, and the fourth, is a corporation by the name of "the Trustees of the Church Rooms Fund of the Methodist Episcopal Church of Baltimore City," incorporated under the provisions of the General

Laws of Maryland, on the 5th day of February, 1909. It clearly appears from the evidence that the subscriptions, contributions, or donations made to the Church Rooms Fund were absolute gifts in furtherance of the objects for which the fund was inaugurated; and it therefore follows that none of the individual plaintiffs can have any claim whatever, as individuals, to share in or participate in the liquidation of the Book Depository on account of those 122 shares. The corporate plaintiff, which did not come into existence until long after all of the events connected with the origin and administration of this Church Rooms Fund, could only have an interest by a somewhat circuitous application of the doctrine of cy pres. But the objections to this are, first, that we have not here the technical charitable trust, as defined by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen (Mass.) 556; and, second, that the statute of 43 Elizabeth is not, and never has been, in force in the state of Maryland. *Dashliell v. Attorney General*, 5 Har. & J. 392, 9 Am. Dec. 572; *Halsey v. Convention*, 75 Md. 275, 23 Atl. 781.

The important question in this case is whether or not the fund known as the "Church Rooms Fund," and so described in the minutes, and which was contributed either in cash or by the donation of the capital stock of the Book Depository, and which was represented by the two certificates, aggregating 122 shares did or did not constitute a trust fund, so as to properly come under equitable jurisdiction. Through all of the haze which the lapse of time has thrown over this matter, a few facts stand out clearly, that the money or stock given, even if not given upon an express trust, were given and received upon a condition. This appears both from the testimony of Dr. Carroll, the minutes of the meeting on February 3d, which required it to be kept in a separate account, the report of the committee on the Church Rooms Fund in February, 1876, January, 1877, February, 1877, all of which antedated the establishment of the sinking fund committee, the report of the agent of the Depository in 1880 and 1881, and finally the issuance to Dr. Carroll, as treasurer, of the certificates of stock for 122 shares, and a portion of which shares were, by the report of 1882, shown to have been purchased from the sinking fund committee.

[1] The creation of a trust ordinarily is required to be with a reasonable degree of definiteness and precision, and many cases might be cited where the courts have refused to construe a trust owing to the uncertainty of the language used to create it, or of the trustee in declaring its creation; but the cases are comparatively few which have arisen in the precise manner in which the question now arises. In the case of *Ruhe v. Ruhe*, 113 Md. 601, 77 Atl. 797, this court, citing from the case of *Coyne v. Supreme*

Conclave, 106 Md. 57, 66 Atl. 705, says: "If a man, in confidence of the parol promise of another to perform an intended act, should omit to make certain provisions, gifts, or otherwise, such a promise would be specifically enforced in equity, although founded on a parol declaration creating a trust, contrary to the statute of frauds; for it would be a fraud upon all parties to permit him to derive a benefit from his own breach of duty and obligation."

In this case, money and stock were contributed by various individuals upon what they believed to be a promise upon the part of the board of directors of the Book Depository, to afford an appropriate meeting room for the gratuitous use of the church for all proper uses under their direction.

And now, when the corporation which has received these benefits no longer affords the accommodation, and in addition to that proposes to distribute the proceeds derived from its liquidation among other stockholders, with no reservation for the protection of the shares of stock which the corporation itself had issued, and which constituted an evidence that the fund represented by these certificates was set apart for a specific purpose, to sanction such a proceeding would, under the language quoted, operate as a fraud, both on the original contributors and upon the associations or organizations for the benefit of which the contributions were made.

Reference was made in the argument to the cases of *Braithwaite v. Attorney General*, L. R. 1 Chan. 511 (1909), and *Cunnack v. Edwards*, L. R. 2 Chan. 679 (1896); but in both of those cases the question arose by reason, not of the nonexistence of a trustee to carry out and perform the trust, but because there was no proper beneficiary of the trust; and these cases are thus readily distinguishable from the present case. A case which much more nearly approaches the present case is that of *Spiller v. Maude, Jurist*, N. S. 10, pt. 1, 1864, page 1089, in which Sir. Saml. Romilly required the fund there in question to be paid into the court; but that likewise arose from the approaching condition of there being no beneficiary entitled to the income of the fund, and the last survivor was making application to have the entire fund, principal as well as income, paid over to her, which application the Master of the Rolls denied, and required the fund to be brought into court, that upon her death it might be treated as bona vacantia.

When we turn to the American rule, for a situation like the present, where the question arises as a consequence of the voluntary dissolution of a corporation which apparently had control of a fund for a series of years, and in consideration of that had carried out the purpose specified when the fund originated, we have an entirely different proposition to deal with. The beneficiaries or objects to be promoted by those who contribut-

ed this fund are not creditors in the sense that there is any money or property, as such, to pass to them; but they are in a position of being entitled to the performance of an obligation by a body which had theretofore been rendering an important service, and in a wider sense occupy a position not essentially dissimilar from that of a mercantile creditor. In the one case, it is money which is due, and in the other the performance of a service or an obligation which is due; and in 10 Cyc. 1330, it is said: "The dissolution by a voluntary act of its shareholders does not have any greater effect in putting an end to the powers of the corporation than would be produced by the expiration of its charter or a decree of forfeiture." And, again, on page 1320: "The death of a corporation no more impairs the obligations of its contracts than does the death of a natural person; but its assets remain a trust fund or pledge for the payment of its creditors and shareholders, and a court of equity will lay hold of those assets and see that they are duly collected and justly applied." And on page 1321: "A corporation cannot, by dissolving itself, defeat the rights of its creditors; but if its officers die, resign, or refuse to act, and its shareholders neglect or refuse to appoint others in their place, a court of equity, which never allows a trust to fail for want of a trustee, will interfere and appoint a receiver, for the purpose of winding up and putting an end to the concern."

[2, 3] Neither the original nor the amended bill of complaint in this case contains any specific prayer that the court shall declare a trust; but it does contain the usual prayer for general relief; and under this, where the evidence warrants it, a court of equity will never hesitate to give effect to a trust, where the facts justify such a conclusion. Therefore, unless there be some additional reason why a trust should not be declared as regards the 122 shares of stock of the Depository, the law amply warrants it.

[4] Objection is made to implying a trust in the present case, upon the ground of the indefiniteness of the objects sought to be benefited, and the further fact that some or all of these supposed beneficiaries are unincorporated associations. Numerous cases have been cited upon the theory that these bodies would come within the scope of the rule laid down in such cases as *Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244, 1 Am. St. Rep. 412, and *Crisp v. Crisp*, 65 Md. 442, 5 Atl. 421; but to place any such construction upon the charter of the Methodist Book Depository would involve an extension of that doctrine far beyond anything which was in contemplation when those cases were decided. Nor is it necessary to do so in the present instance. All of the objections of this character which have been urged in the present case were pressed upon this court in the case of *Snowden v. Crown*

Cork & Seal Company, 114 Md. 650, 80 Atl. 510, and were disposed of by the very careful and able opinion prepared by Judge Urner in that case. In that case, as in this, the question arose, not in the course of construction of any will or deed of trust, but with regard to a gift inter vivos, where the donee and beneficiaries alike were unincorporated, and the gifts, which in that case also were shares of stock, were sustained. A further discussion of this question would be simply a repetition of what was said in the opinion filed in that case; and no sufficient reason has been suggested in the argument why this court should now reverse the rule which was there laid down.

[5] The next question for consideration is whether there was a sufficient designation of a trustee in this case, and whether that trustee was capable in law of taking the gift. It clearly appears, both from the minutes of the directors and from the stub of the stock certificate book, that David H. Carroll was the treasurer of this Church Rooms Fund. From the testimony, he appears in that capacity to have collected what money was collected, to have turned it into the Book Depository for the acquisition of stock of that corporation, and to have received as such treasurer for the certificates of stock representing the 122 shares. These, so far as it is possible now to determine, were not made out in his name, but were made out in the name of the treasurer of the Church Rooms Fund.

[6] It is not necessary for the valid appointment of a trustee that he shall be specified by name, or that the word "trustee" shall be used, provided it appears to the satisfaction of the court that the duties to be performed are such as are properly to be performed by one who is a trustee, and that the individual or corporation is designated with sufficient precision to leave no doubt as to the identity. There can be no question but what David H. Carroll, as treasurer of the Church Rooms Fund, was originally the trustee for this fund, as well as treasurer of it. But he assumed that when he ceased to be the agent of the Depository he at the same time ceased to be the treasurer of this fund, and the trustee, and thereafter performed no duties with regard to it. He testifies that at that time he turned the certificates of stock over to the Reverend John Lanahan, who succeeded him as agent; but whether the duties of treasurer and trustee were thereafter performed by Dr. Lanahan, or by the Book Depository, nowhere satisfactorily appears from the record in this case.

[7] The argument is made that the Book Depository was incapable of acting as trustee. With this view, we are unable to agree, in view of the fact that one of the declared objects of the formation of the corporation was "the accommodation of the ministry and membership of said church with suitable

buildings for religious, social and other meetings." The object sought to be attained by the donors was distinctly in line with this purpose.

The original certificates for the 122 shares have apparently disappeared and been lost or destroyed; but there is nothing to show that there was ever any transfer of them to any person or corporation, and they are therefore outstanding, representing the investment of this fund, which must now be regarded as a trust fund and, as such entitled to share pro rata in the liquidation of the assets of the corporation, the Book Depository.

From what has been said, it follows that the decree of circuit court No. 2 of Baltimore city, in this case, will be affirmed.

Decree affirmed; costs to be paid by the Book Depository of the Baltimore Annual Conference of the Methodist Episcopal Church in Baltimore.

SAFE DEPOSIT & TRUST CO. OF PITTSBURG v. DIAMOND COAL & COKE CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. FRAUDS, STATUTE OF (§ 110*)—SUFFICIENCY OF MEMORANDUM—SALE OF REALTY.

An agreement for the sale of coal lands which fails to definitely describe any of the boundaries is void and unenforceable under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

2. FRAUDS, STATUTE OF (§ 106*)—SUFFICIENCY OF MEMORANDUM—SALE OF REALTY.

Under the statute of frauds (Act April 22, 1856; P. L. 533), a contract for the sale of land must be in writing, and both the consideration and subject-matter must be definitely defined, and the land must be described in the agreement or by reference to a plan or other matter, so that it can be identified without the aid of parol testimony or the future action of the same or other parties.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 210, 211; Dec. Dig. § 106.*]

3. SPECIFIC PERFORMANCE (§ 39*)—CONTRACTS ENFORCEABLE—DEFINITENESS.

Though parol evidence may be introduced to vary a written contract for the sale of land on the ground of fraud, accident, or mistake, and the contract thereupon reformed in equity, the contract as so reformed, being oral in contemplation of law, will not be specifically enforced.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 114-119; Dec. Dig. § 39.*]

4. FRAUDS, STATUTE OF (§ 119*)—OPERATION OF STATUTE—BAR OF REMEDY.

The statute of frauds (Act April 22, 1856; P. L. 533) is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 266, 267, 270; Dec. Dig. § 119.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by the Safe Deposit & Trust Company of Pittsburg against the Diamond Coal & Coke Company. From a decree sustaining a demurrer to a cross-bill for the reformation of a written agreement for the sale of coal and for the specific performance thereof, defendant appeals. Affirmed.

The Midland Steel Company is the owner of about 903 acres of the Pittsburg or River vein of coal in Washington county adjoining a tract of the same vein of coal owned by the Diamond Coal & Coke Company. On December 2, 1905, the steel company executed and delivered to the Safe Deposit & Trust Company of Pittsburg as trustee a first mortgage on its coal to secure the payment of a bond issue. The trustee accepted the trust set forth in the mortgage, and has since continued to act as such trustee. The entries in the mine of the coal company were in close proximity to the coal of the steel company, and, the former having threatened to extend its entries into and mine the latter's coal, the trustee in October, 1909, filed a bill to restrain the coal company from entering upon, mining, or in any wise interfering with the body of coal covered by the mortgage. The coal company demurred to the bill, but the demurrer was overruled, and the company required to answer. An answer and replication having been filed, the court, after hearing, dissolved the preliminary injunction, but retained the bill in place "that compliance with the terms of this agreement may be enforced, in case there should be a default on the part of the Diamond Coal & Coke Company." The agreement referred to in the decree was a contract, dated December 12, 1908, by which the steel company sold to the coal company 200 acres of its coal; the part of the agreement material to this issue being the description of the coal land sold as follows: "The precise bounds of the coal land, proposed to be sold, cannot be exactly stated, but will be substantially as follows: The same is to be the Pittsburg or River vein of coal, underlying one contiguous block of 200 acres to be carved out of said larger tract, bounded on the east by the line between the Vesta Coal Company and the steel company extending from the point of intersection of the lands of the coal company, the Vesta Coal Company, and the steel company at least to the point of intersection of lands of Williams and Dorsey now owned by the steel company and the Vesta Coal Company with the privilege of the steel company extending the line to any portion of the Williams farm, bounded on the north by the line of the lands of the coal company at least the full length thereof, with the right of the steel company to extend said line along the line of the lands of the Lilley coal so far as in its discretion it may determine. The western

boundary of said tract shall be the boundary line as decided upon between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company as determined by a proposed trade arrangement between the steel company and the Monongahela River Consolidated Coal & Coke Company, and bounded on the south by a straight line so determined in consideration of the other boundaries that the tract shall contain 200 acres. A description of the precise boundaries of the coal land sold, to be defined as above by the steel company, shall be by the steel company furnished to the coal company in writing at least ten days prior to the delivery of the deed hereinafter mentioned."

Upon the dissolution of the injunction, the steel company presented its petition to the court for leave to intervene and to become a party to the proceedings instituted by the trust company, and to file a cross-bill against the coal company and trustee. The coal company filed an answer denying the right of the steel company to intervene and become a party by filing a cross-bill, and praying that the petition be dismissed. The court, however, granted the prayer of the petition, permitted the steel company to intervene and file its cross-bill, which prayed for an injunction to restrain the coal company from mining the coal, and for the surrender and cancellation of the agreement between the steel and coal companies for the sale of the 200 acres of coal sold.

The steel company having thus become a party to the proceedings, the coal company filed the present cross-bill against the latter company and the trustee, averring, *inter alia*, as follows: "Ninth. That prior to the consummation of said agreement the defendant, the Midland Steel Company, through its representatives, exhibited to the officers and agents of this cross-plaintiff a general map showing its coal property at this point, and thereupon marked and designated the coal agreed to be conveyed and more particularly showed on said map the western boundary of said tract, fraudulently misrepresenting to the agents of this cross-plaintiff that the western boundary line as designated and pointed out on said map was substantially the boundary line decided upon between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company as determined by the proposed trade arrangement, and that, while it might be required to move said line a few feet one way or the other, said line would be substantially as directed and pointed out at that time; that this cross-plaintiff * * * accepted said designation and description of the western boundary line, and in the preparation of the agreement between the parties the said boundary line was so designated and described; that this cross-plaintiff * * * avers that the said line as desig-

nated and pointed out to them by the representatives of the Midland Steel Company, the defendant, did not constitute substantially the boundary line as decided between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company, as determined by said proposed trade arrangement, and that a line entirely different from this one was the one proposed by the Monongahela River Consolidated Coal & Coke Company, and the line pointed out by the officers of the defendant company did not constitute the line substantially decided upon; that this cross-plaintiff, relying upon the fraudulent misrepresentations of the defendant, the Midland Steel Company, representations which were entirely within the knowledge and possession of the said defendant, the Midland Steel Company, entered into said agreement; * * * that a true and correct boundary line of said property as designated and pointed out to this cross-plaintiff and said to have been the boundary line in the proposed trade arrangement is the extension or continuation in the southerly direction of the western boundary line of Lilley coal which immediately joins the coal of the Midland Steel Company at this point."

The bill prayed, *inter alia*, as follows: "(1) That said tract be reformed in its description so that the description of the western boundary line of said property which reads as follows: 'The western boundary of said tract shall be the boundary line as decided upon between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company, as determined by a proposed trade arrangement between the steel company and the Monongahela River Consolidated Coal & Coke Company'—shall be modified, reformed and changed so that the same shall read: 'The western boundary of said tract shall be a line constituting an extension or continuation in the same southerly direction as the western boundary line of the Lilley coal which immediately adjoins the coal of the Midland Steel Company, said line to be continued in such length, so that the straight line fixed in this agreement as the southerly line taken with this westerly line shall close and the entire area constitute 200 acres.'" The bill further prayed that the steel company be directed to furnish a description of the precise bounds of the coal lands sold, to be defined as contained in the contract, that the court decree the specific performance of the contract, and thereafter the steel company deliver to the coal company a deed in fee simple for the coal as substantially described in the agreement upon delivery by the coal company of the consideration money stipulated in the agreement, and that the trustee be directed to release from the lien of the mortgage held by it the 200 acres of coal described in the agreement. The steel company and the

trustee demurred to this cross-bill on the grounds, *inter alia*, that (1) "the bill shows that the efficacy as a contract of the so-called agreement is inherently dependent on the consummation of the proposed trade agreement between the steel company and the Monongahela River Consolidated Coal & Coke Company, but fails to allege that said trade was ever made; (2) the allegations of the bill show that under the Pennsylvania statute of frauds the plaintiff is not entitled to the prayer for reformation and specific performance." After hearing, the court entered a decree sustaining the demurrer and dismissing the bill. From the decree the coal company has taken this appeal.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART and MOSCHISKE, JJ.

William A. Stone and Stephen Stone, for appellant. M. W. Acheson, Jr., for appellee.

MESTREZAT, J. This is a cross-bill in which the Diamond Coal & Coke Company (herein called the coal company) is plaintiff, and the Midland Steel Company (herein called the steel company) and the Safe Deposit & Trust Company, trustee (herein called the trustee), are defendants. The plaintiff seeks to reform by parol an executory contract in writing for the sale of coal lands, and prays for a decree of specific performance of the contract as reformed. The facts and the proceedings leading up to the filing of the cross-bill are stated by the reporter. The part of the contract sought to be reformed is the description of the coal lands sold by the steel company to the coal company, the cross-plaintiff.

[1] Analyzing the written contract between the parties, we find that the agreement is a proposition to sell 200 acres of coal the precise boundaries of which could not then be exactly stated, but the description of the boundaries was to be substantially as stated. The eastern boundary line is stated with the privilege of the steel company to extend it, and the northern boundary line was to be the line of the lands of the coal company, at least the full length thereof, with the right of the steel company, in its discretion, to extend the line along the line of the Lilley coal. The western boundary of the tract "shall be the boundary line as decided upon between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company," and the southern boundary was to be a straight line determined in consideration of the other boundaries so that the tract should contain 200 acres.

If there is any more uncertain and indefinite description of lands agreed to be sold and purchased in any case in this court, it has escaped observation. There is neither course nor distance given to any of the four boundary lines. In fact, the memorandum of agreement distinctly states that at the

date of its execution the precise boundary lines "cannot be exactly stated." The only thing definitely stated in the memorandum is the number of acres to be sold. The vendor company owned 903 acres of coal, and out of that body it proposed to sell 200 acres to the coal company. There is not one of the boundary lines, as will be observed, that is definitely described. The length of the east and north lines is not fixed, but depend upon the discretion of the vendor. The western line "shall be the boundary line as decided upon between the steel company and land of the Monongahela River Consolidated Coal & Coke Company as determined by a proposed trade arrangement between the steel company and the Monongahela River Consolidated Coal & Coke Company," which leaves the line undetermined until the boundary line has been fixed by the proposed trade arrangement, and the southern line is not given but is to be "determined in consideration of the other boundaries." It is not averred in the bill, and hence must be assumed not to be a fact, that the proposed trade arrangement has yet been consummated, and the boundary line therein provided for has been determined. It is apparent that without this line neither the north nor the west line of the coal lands sold can be ascertained. It is not alleged that the coal company took possession of any definitely described tract of 200 acres, or, in fact, of any coal land in pursuance of the sale, or made any improvements thereon. Neither these nor any other matters of estoppel, except the payment of \$5,000 on the \$300,000 consideration, are averred in the bill. It follows that, by reason of the defective description of the lands, the contract of sale is indefinite, uncertain, and not self-sustaining, and is therefore void, and not enforceable under the statute of frauds.

[2] The act of April 22, 1856 (P. L. 533; 2 Purdon's Dig. [13th Ed.] p. 1757), known as the "Statute of Frauds," provides in its fourth section that "all declarations * * * of any lands, * * * and all grants and assignments thereof shall be manifested by writing, * * * or else to be void." Without this statute, an agreement either in writing or by parol to sell lands is not valid unless its terms are sufficiently definite to identify the subject of the sale. Under the statute, the land must not only be sufficiently described to identify it, but the contract must be in writing, or it is void and not enforceable. The statute requires both the consideration and the subject of the agreement to be definitely defined. The land must be described in the agreement or by reference to a plan or other matter so that it can be identified and located, and the description must be sufficiently definite within itself and not require the aid of parol testimony or be left to the future action of the same or other parties. *Holthouse v. Rynd*, 9 Sadler, 193, 12 Atl. 340; *McCoy v. Brunot*, 183 Pa. 105,

38 Atl. 1102; *Soles v. Hickman*, 20 Pa. 180; *Cunningham v. Neeld*, 198 Pa. 41, 47 Atl. 954; *Agnew v. Southern Avenue Land Company*, 204 Pa. 192, 53 Atl. 752; *Baldrige v. George*, 216 Pa. 231, 65 Atl. 662.

[3] It is apparent that the contract as written cannot be specifically performed, and it is equally clear that no essential part of it can be supplied or reformed by parol testimony, and, as thus varied or changed, be specifically enforced against the vendor. If the written agreement lacks any of the essentials necessary to make it a complete contract, the statute declares it void. *Mellon v. Davison*, 123 Pa. 298, 16 Atl. 431. The vendee corporation, recognizing the invalidity of the agreement as written and its inability to enforce specific performance of it, seeks by its cross-bill to reform the contract by parol, and then to have the contracts as thus rectified specifically carried out by the vendor. The ground on which the reformation is sought is fraud which, as set out in the ninth paragraph of the bill, is averred to consist in the steel company, prior to the consummation of the agreement, exhibiting to the coal company a map showing the steel company's property and designating thereon the coal agreed to be conveyed and the western boundary of the tract, and fraudulently misrepresenting that such boundary line was substantially the line decided upon as determined by the proposed trade arrangement with the Monongahela company, by reason of which representations the coal company accepted said designation and description in the contract as the western boundary line. We have possibly gone as far as any American state in admitting oral testimony to vary and contradict written instruments. We have uniformly held that parol evidence is competent to vary or contradict a writing where there was fraud, accident, or mistake in the creation of the instrument itself, or where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed. In such cases, where the parol evidence is sufficient to warrant a chancellor in reforming the instrument, it is admissible to contradict or vary the writing. Wherever the oral evidence furnishes this degree of proof, our courts in the exercise of equitable jurisdiction have reformed the writing so as to make it conform to the intention of the parties in the execution of this instrument. We have applied this doctrine, and permitted parol testimony to be introduced for the purpose of reforming both executory and executed contracts. Wherever a written instrument fails to express the intention of the parties by reason of fraud, accident, or mistake, the injured party may invoke the equitable jurisdiction of the court which, by the aid of parol testimony, may reform it.

This is the well-settled doctrine of our state and recognized by judicial decision since it became a commonwealth. No party should, in morals or in law, insist upon the performance of a written agreement which by reason of fraud, accident, or mistake does not speak the intention of the parties, and a chancellor will reform the instrument so as to make it declare their real intention. Equity looks alone to justice and fair dealing, and will command even the law, hampered by its technicalities, to obey her decree enforcing the true intention of the parties to a contract.

While, therefore, the admissibility of parol evidence, under proper limitations, to alter, vary, and even to contradict a written instrument in such cases is settled in this state, it has not yet been determined by this court that, the instrument having been varied or rectified by the evidence, the court may decree specific performance of the agreement in its varied or corrected form where the contract is required by statute to be in writing. It is one thing to alter or vary a written contract by parol evidence, and quite another to specifically enforce it in its varied or altered form. In the absence of fraud, accident, or mistake, a written contract speaks for itself, and parol evidence will not be received to vary or contradict it. This rule, however, as we have seen, is relaxed, and the courts will not enforce it where the agreement does not speak the intention of the parties by reason of fraud, accident, or mistake, but will rectify the contract so as to declare their real intention. In the absence of statutory inhibition, a chancellor will, where there is no adequate remedy at law, compel a party to keep his written engagements. That is one of the settled powers of a court of equity. It simply involves the application of the exception to the general rule that parol evidence is not admissible to vary or contradict a written instrument.

Where, however, the people speaking through the legislative branch of the government have declared that contracts relating to certain subjects shall possess certain requisites necessary to their validity, it is not within the power or the jurisdiction of a court of equity to annul or disregard the mandate. Equity corrects that wherein the law is deficient, but, where the statutory law has spoken, equity must remain silent. A chancellor cannot by his decree repeal or set at naught an act of assembly constitutionally valid. To uphold such a power or to enforce such a doctrine is in the very teeth of the proposition that "all power is inherent in the people." Where the federal or state Constitution imposes no prohibition, the Legislature may declare the manner in which or the instrument by which lands in the state shall be sold and transferred, and the courts have no discretion in the enforcement of the statutory provision. We are clear that upon reason and authority a court of equity cannot

vary or rectify by parol an executory agreement in writing for the sale of lands, and as thus varied, in the absence of an estoppel, specifically enforce performance of it. It is the doctrine of this court, declared in numerous cases, that, where a written agreement is varied by oral testimony, the whole contract in legal contemplation becomes parol. If there is anything settled in our law, that principle is firmly established. When, therefore, a party to an executory agreement in writing for the sale of lands succeeds in reforming it by oral testimony, he reduces the whole agreement to a parol contract, and deprives himself of the right to have it specifically performed. He pulls down the house on his own head. When he converts the writing into an oral agreement, the statute declares it to "be void." He has rectified the written contract, and in its place has established an agreement which in contemplation of law is parol, and therefore, by statutory mandate, absolutely invalid and without force. The true contract, as declared by the chancellor, cannot be enforced. "It is then apparent," says Judge Hare, 2 Wh. & Tudor's Lead. Cas. in Eq. (4th Am. Ed.) 994, "that the contract as it stands is not the true one, and that the true contract is invalidated by the statute, and as the former ought not to be, and the latter cannot be enforced, there is no room for a decree of specific performance." Our statute of frauds declares that all grants and assignments of land shall be manifested by writing "or else to be void," and under this statute, therefore, a parol contract for the sale of land is a nullity, and no court can decree its specific performance. It is equally apparent that this rule applies whether the contract originally was oral, or whether it becomes so by the decree of a chancellor reforming the written agreement and thereby reducing the whole contract to parol. Equity strikes down the written agreement, and substitutes the parol contract as expressive of the intention of the parties. In either case the statute declares the agreement void, and it is not within the power of a chancellor to rehabilitate and make it a valid instrument for the conveyance of land. Whether a written contract is reformed on the ground of fraud, accident, or mistake, the effect is the same, the whole contract is, in contemplation of law, reduced to a parol agreement which the statute of frauds declares to be void and incapable of being specifically enforced so as to compel the transfer of title to real estate.

[4] The statute is not a mere rule of evidence but a limitation of judicial authority to afford a remedy. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, 423.

The above conclusion is in accord with the English doctrine as announced in the leading case of *Woollam v. Hearn*, 7 Ves. Jr. 211, decided in 1802. The case has been followed in subsequent decisions, and is the

present law of England. The leading American case in support of this view is *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418. The bill was filed by the vendee against the vendor, and asked relief in several particulars connected with the alleged oral contract of purchase. In dismissing the bill Mr. Justice Wells delivered an exhaustive opinion reviewing all the authorities on the subject in which he said, *inter alia*: "When the proposed reformation of an instrument involves the specific performance of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense. * * * Rectification by making the contract include obligations or subject-matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all." The same doctrine is announced and enforced in *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Climmer v. Hovey*, 15 Mich. 18; *Davis v. Ely*, 104 N. C. 16, 10 S. E. 138, 5 L. R. A. 810, 17 Am. St. Rep. 667; *Westbrook v. Harbeson*, 2 McCord, Eq. (S. C.) 112; *Bogard v. Barhan*, 52 Or. 121, 96 Pac. 673, 132 Am. St. Rep. 676; *Alabama Mineral Land Company v. Jackson*, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46; *Miller v. Chetwood*, 2 N. J. Eq. 199; *Webster v. Gray*, 37 Mich. 37; *Dennis v. Dennis*, 4 Rich. Eq. (S. C.) 307; *Allen v. Kitchen*, 16 Idaho, 133, 100 Pac. 1052, 18 Ann. Cas. 914.

In *Adams on Equity* (5th Am. Ed.) 171, the learned author says: "Where land is the subject of the erroneous instrument, the reformation of an executed conveyance on parol evidence is not precluded by the statute of frauds, for otherwise it would be impossible to give relief. And, where a mistake in an executory agreement relating to land is alleged, parol evidence may be admitted in opposition to the equity for specific performance. But it does not appear that, where the defendant has insisted on the benefit of a statute, the court has ever reformed such an executory agreement on parol evidence, and specifically enforced it with the variation." The authorities cited by the learned counsel for the appellants do not rule the question raised by this record. Those decisions deal with executed contracts and with the admissibility of parol evidence to reform contracts in cases where, as said by Woodward, J., in *Workman v. Guthrie*,

29 Pa. 495, 510, 72 Am. Dec. 654, "The statute of frauds and perjuries has nothing to do with the question," and, as said in *Schettiger v. Hopple*, 3 Grant, Cas. 54, 56, "where no statutory provision intervened." While dicta in some of the opinions might apparently support the appellant's contention, the decision of the case did not require the court to pass upon the question involved in the present case. On the other hand, Judge Biddle, in *McCann v. Pickup*, 17 Phila. 56, 57, a bill filed to correct the description in an agreement in writing for the exchange of certain real estate, followed the English and Massachusetts rule, and refused to decree specific performance of the contract on parol evidence. In his opinion he said: "But, when the omitted term or obligation is within the statute of frauds, there is no valid agreement which the court is authorized to enforce outside of the writing." The same doctrine is recognized in *Andrews Bros. Company v. Youngstown Coke Company, Limited*, 7 Pa. Co. Ct. R. 67, by the Circuit Court of the United States for the Western District of Pennsylvania. Judge Hare also sustains the doctrine in his elaborate note to *Woollam v. Hearn*, 2 Wh. & Tudor's Lead. Cas. in Eq. (4th Am. Ed.) 920, 944, in which he exhaustively reviews all the English and American cases on the subject to that date.

There is a conflict of authority on this side of the Atlantic on the question of the right of a court of equity, in the absence of part performance or other matters of estoppel, to reform by parol evidence an executory contract for the sale of land and specifically enforce it with the variation. In several states, courts of great respectability have held that a parol variation of the written agreement may be specifically enforced notwithstanding the statute of frauds. The leading case relied upon by those who support that doctrine is *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559. That was a bill to reform, not an executory contract, but a deed which, it was alleged, by mutual mistake, included more land than was sold. The question under consideration here did not arise in that case, and hence what was said on the authority of the court to enforce a written contract with a parol variation for the sale of land must be regarded as dicta. In commenting on the doctrine announced in *Gillespie v. Moon* and analogous cases, the court in *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205, holding the opposite view, says: "In all these cases there was written evidence to amend by, either resulting from the plain intention of the parties, although defectively expressed, or from previous instructions, or subsequent declarations in writing." The subject is ably and elaborately discussed in *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910, and the court denies the power to enforce a written contract with a parol variation for the sale of

lands, and says that the arguments used in support of the rule "seem to have been directed against the doctrine of English Chancery Courts, which, as we have seen, is applied to all written contracts, whether within the statute or not, and it does not appear that in making them they gave thought to the distinction created by the statute."

For the reasons stated, we are of opinion that, in the absence of an estoppel, the court cannot reform a written contract for the sale of land and specifically enforce the agreement with the variation, and that, therefore, the court below was right in dismissing the plaintiff's cross-bill.

The decree is affirmed.

In re GUNNING'S ESTATE. (No. 1.)

Appeal of MILLER.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. WILLS (§ 647*)—CONSTRUCTION—ESTATE CONVEYED—CONDITIONS.

In a devise to a named person on condition that he is not living with the woman he married in 1899, the condition is precedent, and is not either impossible or illegal, and where the devisee was living with the woman at the death of testatrix, he is not entitled to take.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.*]

2. WILLS (§ 664*)—CONSTRUCTION—ESTATE CONVEYED—CONDITIONS.

That a devisee is not at fault for the non-performance of a condition precedent because he must do some act which he is incapable of performing is immaterial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1560; Dec. Dig. § 664.*]

3. WILLS (§ 481*)—CONSTRUCTION—TIME OF TAKING EFFECT.

Wills should be construed to speak as if executed immediately before the testator's death, unless a contrary intent appears.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1005-1007; Dec. Dig. § 481.*]

4. WILLS (§ 447*)—CONSTRUCTION—PRESUMPTION IN FAVOR OF VALIDITY.

In construing a restriction in a will, there is no presumption of illegality, but the presumption is in favor of innocence and validity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 963; Dec. Dig. § 447.*]

5. WILLS (§ 647*)—VALIDITY—LEGALITY OF PROVISIONS.

The rule invalidating gifts based upon a future separation of husband and wife is inapplicable to a legacy upon condition that it shall be effectual only if the legatee's wife be dead or divorced from the legatee, since such condition must exist at testator's death, and nothing that the legatee could do thereafter would have any effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Anna M. Gunning, deceased. From a decree dismiss-

ing exceptions to adjudication, Karl F. Miller appeals. Affirmed.

The opinion of the Supreme Court states the case.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John M. Freeman, Harry F. Stambaugh, Francis R. Harbison, and D. T. Watson, for appellant. J. C. Boyer, W. A. McConnell, Lazear & Blaxter, and Lawrence B. Hurst, for appellees. J. P. Patterson and Boyd Crumrine, for certain infants.

POTTER, J. By her last will, after providing for the sale of her real estate, Anna M. Gunning gave from the proceeds legacies aggregating \$58,000, and then proceeded as follows: "The income of the balance to be given to Karl F. Miller, provided he is not living with the woman he married in 1899—one Jane Wilson, should she die, or he be divorced from her—that is finally divorced—he is to be given absolutely one half of the principal, and the interest of the other half as long as he lives. If he marries again he can by will leave all to his second wife and children. If he dies unmarried a second time without children the one-half—or all his share—is to be equally divided between the children of Wesley Greer, Culbert Greer and John Blackford. In no case is the present wife of Karl F. Miller to benefit by anything I leave him either in personal or real estate."

[1-3] At the time of testatrix's death, Karl F. Miller was living with his wife, the Jane Wilson referred to in the will, whom he married in 1899. Upon the adjudication of the fourth account of the executor, which included the proceeds of the greater part of the real estate of testatrix, the auditing judge held that, as Karl F. Miller was living with his wife when the testatrix died, the condition annexed to his legacy was not fulfilled, and he could not take it. Exceptions to the adjudication were filed on behalf of Karl F. Miller, which were dismissed by the court. Alleging that this was error, Miller has appealed. The auditing judge held that the condition annexed to the gift was precedent, and in this view we think he was unquestionably right. The condition provided by the testatrix for Karl Miller was one which must happen or be in existence before the estate dependent upon it could arise. No title to the estate to which she attached the condition could vest in Miller until the condition which she prescribed was fulfilled. This condition was that Miller should not be living with the woman he married in 1899, one Jane Wilson. It limited the acquisition of the estate and not its retention. There must be strict and literal performance of a condition precedent, and unless there is such the devisee takes no title. Admittedly, the

condition imposed was not met. Karl Miller was at the time of testatrix's death, and has ever since been, living with the wife to whom the testatrix referred, and whom she desired to exclude from any benefit, even indirectly, under her will. "The fact that the devisee is not at fault for the nonperformance of the condition precedent required, because he must do some act which he is incapable of performing, is immaterial." 1 Underwood on Wills, 486. In the opinion of the auditing judge, the time when the condition became effective and was to be met was at the time of the death of testatrix. It was then that the gift to Miller was to take effect, providing he was "not living with the woman he married in 1899, one Jane Wilson." With this conclusion we also agree. In *McKinley v. Martin*, 226 Pa. 550, 75 Atl. 734, 134 Am. St. Rep. 1076, we said: "Wills should be construed to speak and take effect as if executed immediately before the death of the testator, unless a contrary intent shall appear. Act of June 4, 1879, § 1 (P. L. 88)." It is a fair construction of the language used by testatrix to regard the condition placed upon Miller's right to take as applying to the time when the will became effective; that is, at the time of her death. This avoids the inference that by postponing the time of fulfillment of the condition to a time subsequent to her death, the testatrix intended to hold out an inducement to Miller to separate from or procure a divorce from his wife. The prime purpose of the condition evidently was to prevent the then wife, Jane Wilson Miller, from receiving any benefit under the will.

[4] But the death of the wife in the natural course of events would have brought Miller within the terms of the gift. "In considering any restriction there is no presumption of illegality; on the contrary, the presumption is in favor of innocence and validity." *Holbrook's Estate*, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537. And again in the same case it is said (page 96 of 213 Pa., page 369 of 62 Atl., 2 L. R. A. [N. S.] 545, 110 Am. St. Rep. 537): "The primary rule is to give effect to the intention of the testatrix, and the presumption is that the intent was lawful." The condition required by the testatrix was one of fact, and that was to be determined as it existed when the will took effect. That there is no gift over in case Miller does not meet the condition, does not alter the case. In *Gilliland v. Bredin*, 63 Pa. 393, page 397, the question was as to a pecuniary legacy. It was held that the condition was precedent, and Mr. Justice Agnew said: "The condition was inseparably connected with the gift of the legacy, and not merely its payment. . . . There are numerous authorities that where the contingency is attached to the legacy itself, and not merely its payment,

the legacy itself is contingent (citing several). The legacy not vesting until the condition has been performed, the want of a bequest over makes no difference."

[5] If the condition under which Miller alone could take must have existed at the time of testator's death, then nothing which he could do thereafter would have any effect. The rule which makes void gifts based upon a future separation of husband and wife would not therefore apply to this case. Then, too, the fulfillment of the condition precedent was not originally impossible or illegal; that is, as noted above, the death of the wife through natural causes, or a separation uninfluenced by any knowledge of the contents of the will prior to the death of testatrix, would have made it impossible to meet the conditions. It is therefore unnecessary to take into consideration any difference between the rule of the common law and that of the civil law, which it is urged governs in the distribution of legacies as distinguished from devises; the point here urged being that the condition only is void, and that the gift should be held to be absolute.

In the seventh assignment of error complaint is made of the admission of certain testimony to the effect that testatrix had stated, about the time she made her will, that appellant had left his wife, was living apart from her, and was about to obtain a divorce. If, however, the court was right in construing the language of the will so as to prevent the interest given to the appellant from vesting, the admission of this testimony becomes immaterial. The words in the will, "should she die, or he be divorced from her," apply to the principal of the estate, the income of which is given to the legatee provided he is not living with his wife. We think it is evident that this language refers to the same date as the former condition, the date of testatrix's death.

The assignments of error are overruled, and, in so far as the questions therein raised are concerned, the decree of the orphans' court is affirmed.

IN RE GUNNING'S ESTATE. (No. 2.)

Appeal of GREER et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. REMAINDERS (§ 10*)—CONTINGENT REMAINDERS—NECESSITY OF PARTICULAR ESTATE.

A contingent remainder can exist only where it has a particular estate to support it, and with the destruction of the particular estate the contingent remainder necessarily falls.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 7; Dec. Dig. § 10.*]

2. REMAINDERS (§ 10*)—CONTINGENT REMAINDER—BAR OR DEFEAT.

Where a will directed that the income of certain property be given to a person named

provided he is not living with the woman he married in 1899, should she die or he is divorced from her, and in case he dies unmarried a second time his share to go to children named, the gift to the children was a contingent remainder, and the gift in the first instance having failed because the person named was living with his wife at the death of testatrix, the contingent remainders were not accelerated, but fell on the failure of the particular estate.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. § 10.*]

3. REMAINDERS (§ 10*) — CONSTRUCTION — CONTINGENT REMAINDER—BAR OR DEFEAT.

Where a gift over is limited to take effect on a particular event and the opposite or alternative of that event happens, the subsequent gift fails though the prior gift be out of the way.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 7; Dec. Dig. § 10.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Anna M. Gunning. From a decree dismissing exceptions to adjudication, Helen F. Greer and others appeal. Affirmed.

The facts appear in the opinion of the Supreme Court and in *Re Gunning's Estate* (No. 1) 83 Atl. 60.

Argued before FELL, C. J., and MOSCHIZSKER, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. P. Patterson and Boyd Crumrine, for appellants. J. C. Boyer, W. A. McConnell, Lazear & Blaxter, and Lawrence B. Hurst, for appellees.

POTTER, J. These appeals are from the same adjudications as that from which Miller's appeal was taken, in which we have just filed an opinion affirming the decision of the orphans' court, holding that the gift to Karl F. Miller under the will of Anna M. Gunning failed because the condition prescribed by the testatrix, upon which it was to vest, was not fulfilled at the time when the will became effective. In this adjudication the orphans' court further held that, as the gift to Miller failed, the limitations over as to one-half of the estate, in favor of the Greer and Blackford children, also failed. The auditing judge held that an intestacy resulted, and he awarded the fund to those entitled under the intestate law. Exceptions to the adjudication were filed on behalf of the Greer and Blackford children. The exceptions were dismissed by the court, and these appeals were taken from the decree of dismissal. Counsel for appellants contend that the fund should have been awarded to them as remaindermen. But clearly the estate bequeathed to appellants in the will is a contingent remainder. It is contingent in the first place upon the fact that Karl F. Miller shall not be living with his wife when the will takes effect; and, secondly, on the fact of his dying unmarried a second time,

without children. These were uncertain events, and the first contingency, viz., that Karl F. Miller should not be living with his wife, was a condition precedent to the vesting of his legacy. As a matter of fact, this contingency did not occur, and it never can happen.

[1] In *McCay v. Clayton*, 119 Pa. 133, 139, 12 Atl. 860, 861, referring to a contingent remainder, Mr. Justice Paxson announced a familiar principle when he said: "Such a remainder can only exist where it has a particular estate to support it. With the destruction of the particular estate the contingent remainder necessarily falls." The same principle is somewhat differently stated in *Page on Wills*, § 671, thus: "Upon the occurrence of such contingencies as make it impossible for the contingency upon which the legacy is given ever to occur, the contingent interest is absolutely extinguished."

[2] Under these and many other authorities which might be cited, it is evident that when the particular estate which was to go to Karl F. Miller failed by reason of his inability to answer the description, or fulfill the requirements of the condition upon which it was given, the contingent remainder to appellants which rested upon it was without support, and therefore fell. Counsel for appellants, however, urge that the gift was accelerated, and in support of their view they cite the decision in *Fletcher v. Hoblitzell*, 209 Pa. 337, 344, 58 Atl. 672, 674. But in that case the remainder was vested, and was not contingent; the devise over taking effect upon the death of the life tenants. In the opinion of Mr. Justice Mestrezat, he refers to and cites the rule given in 24 Am. & Eng. Ency. of Law (2d Ed.) 418; but the section from which the quotation is taken refers only to vested remainders.

[3] Upon the next page of the text-book, referring to contingent remainders, is this statement (page 419): "If the gift over is limited to take effect on a particular event and the very opposite or alternative of that event actually happens, the subsequent gift falls altogether, though the prior gift be out of the way." The principle thus stated covers the present case. The particular event did not happen, and quite the opposite situation arose; that is, Miller was living with his wife when the will took effect. Even had the first condition been met, and the estate vested in Miller, there would have remained another contingency, that of his remarriage, in which case he was empowered to leave all to his second wife and children. Had he remarried and exercised his right of bestowal, these appellants would have had no share in the estate, as the gift to them is only upon condition that Miller dies unmarried a second time, without children. The illustrations of the doctrine of acceleration, cited by counsel for appellants, taken

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

from Jarman on Wills, are cases of vested remainders. No case is cited, and none has been found, where a contingent remainder following a particular estate, given on a condition which has failed, has been held to have been accelerated by the failure of the particular estate to vest, on account of the nonperformance of the condition. Where a widow is given a life interest and elects to take against the will, or where, as in one of the cases in Jarman, a monk is given a life estate which he is unable to take, the life tenants are regarded as if dead, and the vested remainders are accelerated accordingly.

But in the case at bar the interests of the appellants were not vested; they were contingent, and that to a remote degree. Karl F. Miller took no estate, because he did not answer to the description required, and was not able to fulfill the conditions upon which he was take. It should be remembered that the gift to these appellants does not depend on the nonfulfillment of the conditions prescribed by testatrix; but, on the contrary, it depends upon their fulfillment. No provision was made for the disposition of the fund in the event of a failure to fulfill the conditions; therefore an intestacy results from the failure.

The court below so held, and its decree in this respect is affirmed.

IN RE GUNNING'S ESTATE. (No. 3.)

Appeal of McCONNELL.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. WILLS (§ 734*)—RIGHTS OF LEGATEES—INTEREST ON LEGACY.

A legacy bears interest from the time it is payable under the terms of the will; the rule that interest runs from the expiration of a year from testator's death applying only when the will does not direct payment at a particular time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.*]

2. WILLS (§ 734*)—RIGHTS OF LEGATEES—INTEREST ON LEGACY.

Where testatrix provided for the sale of certain property, expressing the desire that it should not be sold for less than a price named, and a delay in sale was due to the effort of the personal representatives to procure the best price, it is error to allow interest on legacies from the proceeds of the sale from the expiration of one year from the death of testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Anna M. Gunning. From a decree dismissing the exceptions to the adjudication, Sarah McConnell appeals. Modified.

The facts appear in the opinion of the Supreme Court and in Gunning's Estate (Nos. 1, 2) 83 Atl. 60, 61.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Jesse T. Lazear, W. A. McConnel, J. C. Boyer, Thomas C. Lazear, and H. V. Blaxter, for appellant. W. H. S. Thomson and Frank Thomson, for appellee Greer. W. S. Thomas and E. W. Arthur, for appellees McCombs and others.

POTTER, J. The only question raised by this appeal is whether the legacies should bear interest from the expiration of one year after the death of the testatrix. The portion of the will bearing upon this question is as follows: "In event of my death I wish my property, 602 Liberty St., and 5435 Potter St., sold, provided a good price can be gotten for both. My property on Liberty St. should bring one hundred and seventy five thousand dollars, Potter St., not less than five thousand. If they cannot be sold at those figures I wish the property kept a while until a good price can be gotten; in the meantime the taxes, interest, insurance to be paid out of the rentals. * * * When my property is sold I wish to be given to Mazie McCombs ten thousand dollars * * * to Nellie Danner ten thousand, etc., * * * making in all \$58,000." The testatrix died July 18, 1905. The Liberty street property was sold in 1911, by her executor at public sale, in pursuance of an order of the orphans' court, for \$93,000, and the proceeds of the sale were included in the executor's fourth account. The auditing judge found as matter of fact that "It was not possible to sell the real estate at any time since decedent's death for a price approximating the value set upon the Liberty street property. The delay in the sale was caused by the endeavor of the trustee (executor) to get the best possible price for the benefit of the residuary legatees or heirs. There is no evidence of any willful delay or neglect." Interest upon the legacies of \$58,000 was allowed from the expiration of one year from the death of testatrix, amounting to over \$14,000. An exception was filed by an heir at law who had an interest in the balance of the fund. The court dismissed the exception, and that dismissal is here assigned for error.

[1] It is plainly reasonable, and the authorities agree, that a legacy bears interest from the time it is payable under the terms of the will. If the time is not fixed, then interest runs from the expiration of a year from the testator's death. In Page's App., 71 Pa. 402, Mr. Justice Agnew said: "This is a vested legacy, but the time of payment is deferred until the legatee shall arrive at age.

In such a case the rule is well settled that interest does not run upon the legacy until it falls due. *Leech's App.*, 44 Pa. 140; *Kerr v. Bosler*, 62 Pa. 183. Section 47 of the Act of February 24, 1884 (P. L. 82), requiring the executors, after one year has elapsed, to pay and deliver legacies under the direction of the orphans' court, affords no countenance to the running of interest after the expiration of the year. * * * When a testator bequeaths a sum of money and fixes the time of payment, he determines by that act the precise sum to be paid at the time fixed by him. The only exception to this rule is where the law infers an intention to pay interest from the relation in which the testator stands to the legatee." Our Brother Brown, in *Hermann's Est.*, 220 Pa. 52, 58, 60 Atl. 285, 287, quotes with approval the following language from *Wheeler v. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315: "The rule that a legacy is payable one year after the testator's death only applies in the absence of a direction in the will controlling the general rule established by the courts, or other decisive indication in the instrument, interpreted in the light of the surrounding circumstances of a different intention on the part of the testator."

[2] An extract from the opinion of Judge Over, in *Lewis' Est.*, 52 Pitts. Leg. J. 367, fits closely the facts of the present case. He there said: "The testator knew that it would be necessary to sell his real estate before there would be any funds which could be applied to the payment of the legacies; his provisions for his daughter Florence, indicate that he anticipated there would be delay in selling it; and his intention seems to have been that the legacies should not become due and payable until the fund realized from the conversion of his real estate could be distributed. It follows therefore that no interest is to be allowed on these legacies." So here, the testatrix knew that the legacies could not be paid until the real estate was sold. She placed a high valuation upon the property, and said if it could not be sold at that figure it was to be kept a while, until a good price could be obtained. Then she goes on to say, "When my property is sold, I wish to be given," etc. Until that time arrived, after some delay if need be, no part of the legacies was to be paid, nor could it be, for the fund from which they were payable was the proceeds of the real estate. The time fixed for payment of the legacies was "when" the property was sold. It follows that no interest should have been allowed upon these legacies.

The assignments of error are sustained, and it is ordered that the decree of distribution be modified in so far as it allows interest upon the preferential legacies mentioned in the will.

CATANZARO v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. CARRIERS (§ 187*)—CONTRACT FOR FREIGHT—OTHER CONTRACT—EVIDENCE—QUESTIONS FOR JURY.

In an action against the terminal carrier for loss of perishable freight, whether a through contract of shipment was made with the defendant, or whether a contract for line terminal transportation was executed with the initial carrier, *held* for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 851, 852; Dec. Dig. § 187.*]

2. CARRIERS (§ 187*)—LOSS OF FREIGHT—OTHER CONTRACT—MODIFICATION.

Plaintiff having contracted for the transportation of fruit from Boston to Pittsburgh with the agent of defendant terminal carrier, and having left Boston, plaintiff's agent gave to the initial carrier orders on its blanks for the shipment of the goods routed over defendant's line, and thereafter accepted receipts or bills of lading from the initial company; the agent testifying that the giving of the orders was a mere matter of form, and given, as he supposed, pursuant to the contract already made with defendant terminal carrier. *Held*, that the giving of such orders and the acceptance of the receipts or bills of lading from the initial company did not constitute an abandonment or modification of the original contract made with the terminal company, as a matter of law, so as to preclude a recovery on such contract against the terminal company for loss of the fruit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 851, 852; Dec. Dig. § 187.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Salvatore Catanzaro, doing business as S. Catanzaro & Co., against the Pennsylvania Railroad Company to recover the value of a consignment of fruit, damaged in transit. From a judgment for plaintiff for \$8,270.92, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZSKER, JJ.

Thomas Patterson and James R. Miller, for appellant. J. Roy Dickie and Wm. W. Wishart, for appellee.

STEWART, J. When this case was before us in 230 Pa. 305, 79 Atl. 624, we held—though not the point on which our decision of the case rested—that, notwithstanding there appeared in evidence orders for shipment from the plaintiff, addressed to the Boston & Maine Railroad Company, and receipts given for the goods by the latter company, on the evidence presented, it remained a question for the jury to decide whether the contract for shipment had been made with the defendant company. On a second trial, the case was submitted to the jury in accordance with the views expressed by us, and resulted in a verdict for the plaintiff. It is now contended on part of the defendant that, in view of the evidence on second trial, binding instructions should have been

given in favor of the defendant. The facts are so fairly and accurately stated in appellant's history of the case that we can do no better than repeat them as they are there stated.

In December, 1906, the plaintiff went from Pittsburgh to Boston, Mass., where he purchased a large consignment of fine grapes and lemons. After the purchase, at his request, he was taken by the broker through whom he had bought the fruit to the office of W. C. Brown, district freight solicitor of the Pennsylvania Railroad. The negotiations from this on were conducted entirely for the plaintiff, who spoke but little English, by Di Cola, the fruit broker, who was admittedly plaintiff's agent in the premises. The plaintiff claimed that he told Mr. Brown that he wanted to ship four cars of grapes and two cars of lemons to Pittsburgh by the Pennsylvania Railroad; that the grapes had come in on the steamer Republic, and were at the White Star Dock in Charlestown; that they wanted dry, warm refrigerator cars; and that Mr. Brown replied that he would take care, and about 11 o'clock a. m. would furnish some cars at the dock (that is, on December 4th, the day of the conversation), and would ship one or two cars, and the next day, the 5th, they would ship the other cars. During the conversation, Mr. Brown called up some one by telephone; but Di Cola did not hear or attend to the conversation. On that day, the plaintiff and his agent, Di Cola, went to the Charlestown dock about 2 o'clock in the afternoon, and there found a car in process of loading. Mr. Brown came on the dock while the car was being loaded, and told them that if the car had finished loading not later than 3 o'clock it would be shipped on the fast freight. On the afternoon of that day, December 4th, at 3 o'clock, Catanzaro, the plaintiff, left Boston, leaving his agent, Di Cola, in charge of the shipment of the fruit. On the same day, Di Cola, on behalf of Catanzaro, made out in his own office, and on forms kept by him, the regular and formal orders for the shipment of the goods over the Boston & Maine Railroad, routed to Pittsburgh over the Pennsylvania Railroad, signed them, and delivered them to the Boston & Maine Railroad, and received in return formal shipping receipts from the Boston & Maine Railroad identical with the shipping orders, except that in the shipping orders the date, number of car, and number of barrels were left blank. What follows in appellant's history of the case is more or less argumentative, and we omit it. What we have given is sufficient for present purposes.

The cross-examination of Di Cola, who testified to the facts above recited, developed certain features not wholly consistent with the claim that a contract had been made with defendant company for a through shipment of the fruit from Boston to Pitts-

burgh; yet it left unqualified quite enough to warrant an inference that such contract had been entered into by the defendant's freight solicitor. The cars furnished proved defective, and as a result plaintiff's fruit was damaged to an extent that made it valueless.

[1] We do not understand that the authority of the defendant's freight solicitor to make such contract as plaintiff alleges was made (that is, for a through shipment from Boston to Pittsburgh) was denied. The question in the case therefore was, Did he make such contract? If Di Cola's testimony as to what occurred in the solicitor's office be accepted, it might well be argued that a final understanding was then and there reached, and that a through shipment was contracted for. The solicitor was told that what plaintiff wanted was a shipment of his goods from Boston to Pittsburgh over the lines of the company the solicitor represented. Not a word was said by the solicitor which would give the plaintiff to understand that any other than himself was to be consulted in the transaction. The conversation was in an office maintained by the defendant company and in charge of this solicitor. The solicitor took upon himself the task of making all provisions for the shipment; he told the plaintiff that he would see that the kind of cars he wanted were furnished, the place where and the time when they would be assembled, and that he would take care, whatever that meant. With nothing else appearing in the evidence, no other conclusion could be reached than that the contract was with the defendant company. Except as Di Cola knew or had reason to believe that there were regulations of the Boston & Maine Company which would prevent the defendant's solicitor from effecting a through shipment on account of the defendant company, a jury might well derive from what was there said and done a contract for through shipment. Certainly an uninformed shipper would, under such circumstances, naturally rest in such belief.

[2] Subsequently, on the same day that the conversation occurred, the plaintiff, through his agent, Di Cola, gave to the Boston & Maine Railroad Company orders filled out on the blanks of that company for the shipment of the goods, and a day or two thereafter accepted receipts or bills of lading from that company. It may well be argued, as doubtless it was upon the trial, that these orders and receipts make against plaintiff's claim that a through contract had been made with the defendant's agent, or that the transaction was so understood. It might be further argued, as, again, it doubtless was, that, even if such contract had been made, the orders and receipts from the Boston & Maine Company showed an abandonment of such contract and the creation of a new one with the Boston & Maine for the shipment. But it can hardly be contended that such

inference resulted from the orders and receipts as would have justified the trial judge in holding, as matter of law, that they negatived conclusively the making of the contract alleged, especially in view of Di Cola's testimony that the giving the orders was mere matter of form, and that they were given, as he supposed, pursuant to a contract already made with the defendant company. The case on its facts was for the jury. The only error assigned was the refusal of the court to enter judgment for the defendant non obstante. As we view the case, it would have been error to have done so.

The assignment is overruled, and the judgment is affirmed.

BOROUGH OF BELLEVUE v. HALLETT.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

JUDGMENT (§ 46*)—CONFESSION OF JUDGMENT—EXHAUSTION OF POWER.

Power to confess judgment in a note is exhausted by entering judgment thereon after a prior judgment has been stricken off for irregularities, and the subsequent judgment entered on the same warrant will be set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 67, 70, 72, 85-88; Dec. Dig. § 46.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Borough of Bellevue against Ebenezer Hallett. From an order striking off judgment for plaintiff, it appeals. Affirmed.

It appeared from the record that the plaintiff borough had undertaken to enter a judgment by confession against the defendant at No. 117, second term, 1911, D. S. B., on the warrant contained in a contract between plaintiff and defendant, in which proceeding a statement of claim was filed, but by mistake no formal confession of judgment was filed, for which reason the judgment was subsequently stricken off upon motion. The plaintiff then filed a new statement of claim and a formal confession of judgment, upon the same warrant and for the same debt as that involved in the former irregular proceeding.

The court below filed the following opinion sur petition to strike off the judgment:

"We have studiously applied the case of Philadelphia v. Johnson, 208 Pa. 645, 57 Atl. 1114, to the facts in this case, but cannot construe it in favor of the plaintiff as so ably urged in his brief. It is true the court therein substantially states that, when the purpose of the power has been fully executed by its accomplishment, it is exhausted, and the authority ends, when nothing remains to be done in pursuance thereof. This language apparently has reference to the purpose of the warrant being accomplished—that is, the act of confessing judgment, which

is its only object—and not to the purpose of the contract or anything connected with it. The power in this case was perfectly executed the moment the first judgment was confessed on January 25, 1911, and became the subject of review by the court, by reason of any existing facts 'not entering into the mere act of execution.' An application was made, and this court, after argument and due consideration, made absolute the rule to strike off the first judgment entered in January, 1911. True, this was done because of irregularities appearing on the face of the record; but the power authorized by the warrant had nevertheless been exhausted. We cannot breathe into it the breath of life, in view of the unbroken line of decisions sustaining this construction, down to the latest case of Commonwealth v. Massi, 225 Pa. 548, 74 Atl. 419, which approved the case of Philadelphia v. Johnson, 208 Pa. 645, 57 Atl. 1114, cited by plaintiff in support of his argument, but which we are unable to construe in any other way but as being against plaintiff's position; all the other cases are so evident as not to require citation.

"The petition and rule to strike off this second judgment, entered on May 24, 1911, is therefore made absolute."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. S. Dalzell and David L. Starr, for appellant. George H. Quail, for appellee.

PER CURIAM. The judgment of the Common Pleas, appealed from, is affirmed on the opinion of that court.

In re MUNHALL'S ESTATE.

Appeal of KIEFER.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

WILLS (§ 140*)—NUNCUPATIVE WILL—PROBATE.

Where the evidence shows that at the time instructions were given for an alleged nuncupative will decedent was mentally competent to have asked another to sign for him any testamentary paper, the probate of such nuncupative will will be refused.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 352; Dec. Dig. § 140.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the Estate of Robert J. Munhall. From decree vacating decision granting probate, Teresa M. Kiefer appeals. Affirmed.

Hawkins, P. J., filed the following opinion in the orphans' court:

"The question here is of nuncupation. The facts are these:

"Mr. Munhall became suddenly ill on December 9, 1908. On the 14th, an operation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index—

for appendicitis was performed, and for a day the symptoms seemed encouraging; but there was a relapse on the 15th, and he was taken to the Mercy Hospital, where a second operation was performed; and when he found that his recovery was hopeless he called his two brothers, William and Charles, to his bedside (priest, doctor, and attendants having left the room), and gave these instructions:

"Will, I want you to settle up all my affairs; I want you to close out the business just as quickly as possible; sell it as a whole if you can; if not, do the best you can, and use your best judgment without sacrificing too much. The Carson street yards you can lease; the other lease you ought to be able to make some money out of. Settle up father's estate. I have six or seven thousand dollars on deposit in the banks, and if you need more you can make a loan on some South Side Trust stock. You will find a list of my notes and papers in the safe. You can check them all up; I think you will find everything correct. Give Marie, Catherine and Herbert [his sister and brother] \$1,500.00 each. I don't want Stella to handle any of my money; I want you and Charles to hold it in trust for her and use it for her as you think best. I want to give at least \$1,000.00 to charity; \$250.00 to the Hospital, the Sisters have been very kind to me; \$250.00 to St. Paul's Orphan Asylum; \$250.00 to the Little Sisters of the Poor, Allegheny; and the balance you can select whatever charity you wish. Have plenty of masses said for me. Pay all my just debts and divide the balance among the four of you."

"Toward the end of this recital, Robert, having been asked 'if he had made a will,' said, 'No.' 'He seemed,' said the witness, 'to have his mind made up as to just what he wanted to go through with, and he went through with it to the end.' After this witness left the room, he concluded, on consultation with his uncle, to have these instructions of Robert put in writing; and this was accordingly done by an attorney at his dictation. When, returning to the sick room about three hours after the former interview, he told Robert that he had 'a paper here outlining the statements you made,' and the reply was: 'No, Will; I have told you everything I wanted. I have nothing further to add.' Miss Vogel's (the nurse's) recollection of the reply was this: 'No, Will; I have told you everything in the presence of Charles; now let that do. I must have some sleep. I haven't had any sleep for three nights.' Robert died six or seven hours afterwards. Attending physicians gave the opinion, based on their observation, that from one hour after Robert had given the instructions to his brother Will he was unfit, physically and mentally,

to have made a will; but the evidence of what Robert said at the time the alleged instructions were given and three hours later, when Will suggested he sign the paper outlining his instructions, which had been prepared, show conclusively that he was mentally competent to have asked another to sign for him any testamentary paper. He had then an intelligent comprehension of what he had previously done, and what he would not do. He had given his instructions, and would do no more. His refusal to sign must end the matter. His purpose had been accomplished.

"This case falls within the principle of Butler's Estate, 223 Pa. 252, 72 Atl. 508. Assuming that Mr. Munhall was physically too weak himself to sign, the evidence leaves no room for doubt of his ability to ask another to do so for him. The extremity which validates nuncupation is therefore lacking; and the decree of the register, granting probate, must be set aside.

"And now, to wit, December 19, 1910, this matter came on to be heard upon appeal from the decision of the register of wills in admitting to probate a certain paper, reduced to writing, purporting to be a nuncupative will of said decedent, and answer thereto, and testimony taken before the register, having been offered in evidence with same force and effect as if the same had been taken before the court and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the appeal be sustained; and decision of the register, granting probate, is hereby vacated and set aside."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

James R. Sterrett, for appellant. E. L. Kearns, for appellees.

PER CURIAM. The decree is affirmed on the opinion of the learned president judge of the orphans' court.

CITY OF PITTSBURGH v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. EQUITY (§ 148*) — BILL — MULTIFARIOUSNESS.

Whether a bill contains too many subjects, or subjects too different from each other to be litigated in one proceeding, is a matter of convenience, to be determined, in each case, under all the circumstances, so that, if the subject-matter of all claims is substantially the same, and may be conveniently considered together, the bill is not multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

2. SPECIFIC PERFORMANCE (§ 91*)—REPAIR OF STREETS—DEMAND.

It is not necessary to the maintenance of a bill to compel a street railway company to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

perform an alleged contract to repair certain streets that there shall have been a prior demand and time given to make the repairs; a court of equity having ample power to allow time to make repairs, the want of time being material only on the question of costs.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 230-232; Dec. Dig. § 91.*]

3. SPECIFIC PERFORMANCE (§ 75*) — STREET RAILWAY CONTRACT—REPAIR OF STREETS—ACTION TO COMPEL.

A court of equity has no jurisdiction to compel specific performance of a contract by a street railway company, based on ordinances, to keep certain streets on which its tracks were laid in repair, by compelling the railway company to proceed immediately to repair the streets to the extent it was liable under the ordinances, and to use, in making such repairs, first-class and modern material and modern approved methods of repairing a track construction, with rails and fittings of modern design and first-class quality; but in such case the city would be left to legal remedy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210; Dec. Dig. § 75.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by the City of Pittsburgh against the Pittsburgh Railways Company for specific performance of an alleged contract to repair streets. From an order sustaining a demurrer to the bill, complainant appeals. Affirmed.

On demurrer to the bill, Shafer, J., filed the following opinion:

"The bill alleges that the defendant company claims to be a corporation under certain letters patent, and claims the right to maintain and operate street railways in the city of Pittsburgh under certain leases and agreements from some 40 street railway companies; that, by the provisions of the acts under which some of these companies were incorporated, they are bound to maintain in good repair certain portions of the streets; that a large number of ordinances have been passed, relating to these street railways, imposing certain duties upon them as to keeping streets in good repair, copies of some 50 ordinances being annexed to the bill, some of these ordinances being of the city of Pittsburgh, some of the former city of Allegheny, and others of a number of boroughs which have since been incorporated into the city of Pittsburgh.

"It is further alleged that these street railways are now maintained and operated by the defendant company under these agreements, and that it is therefore liable to keep the streets of the city in good repair, but that, notwithstanding its liability to do so, it has neglected and refused to keep certain of the streets in good repair, and neglects to put such streets in condition of good repair, and refuses to adopt modern and improved methods of repaving and to adopt a good type of rails and fittings, and that by reason thereof the streets of the city occupied by

the company are continually in a state of bad repair, being full of holes and unevenness, and that accidents are liable to happen by reason thereof, and that the plaintiff is obliged to spend more money than it should to maintain the portion of said streets which it is liable to maintain, and that a schedule of the streets so claimed to be out of repair, and showing the character of the defects, is added to the bill as an exhibit; the defects pointed out in the schedule being, substantially, 'paving bad,' 'paving bad along the tracks,' or 'paving bad in places.'

"The prayer of the bill is for a decree that the defendant company 'immediately proceed to place in repair the said streets and highways in the city of Pittsburgh to the extent it appears to be liable by the foregoing acts and ordinances, and that it use in making such repairs first-class and modern material and modern approved methods of repaving and track construction, and rails and fittings of modern design and first-class quality.'

"To this bill the defendant has demurred (1) that the bill is multifarious; (2) that no demand on the company to make the repairs is alleged; (3) that no reasonable opportunity after notice was given the defendant to make the repairs; (4) that the plaintiff has an adequate remedy at law, and (5) that it does not appear that the defendant is a person or corporation competent to be sued.

[1] "Whether a bill in equity contains too many subjects, or subjects too different from each other to be litigated in one proceeding, is a matter of convenience, to be determined, in each case, under all the circumstances. As the subject-matter of all the claims made by the plaintiff against the defendant is substantially the same in each case, though founded upon different ordinances, we are not convinced that all the matters contained in the bill may not be discussed in one proceeding without inconvenience to the parties or the court.

[2] "The second and third grounds of demurrer, which, taken together, substantially are that the plaintiff cannot maintain a bill without showing previous demand for the making of the repairs, and the allowance of a reasonable time to make them, constitute a more serious objection to the bill. If this were an action at law to recover for the cost of paving done by the plaintiff, which should have been done by the defendant, we are of opinion that the objection would be fatal; but, as against a bill in equity, in which the court has full power to give the defendant time to make repairs, we are of opinion that it is not necessary, in the first instance, to make a demand or give time to repair, but that the want of this goes only to the question of costs.

[3] "The fourth ground of demurrer, that the court has no jurisdiction to decree spe-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cific performance of the company's duty to repair the streets, is, however, in our opinion, well taken. So far as that duty is statutory, it must be enforced by the remedy provided by the statute. In the present case, however, the plaintiff's claim is founded wholly, or almost wholly, upon the contracts made with the various railway companies operated by the defendant company by which they bound themselves to keep the streets in repair. There is nothing in the fact that the plaintiff is a municipal corporation, or that the defendant is a public service corporation, which can give the plaintiff any peculiar right to a decree for specific performance different from the right of one individual against another. The only cases in which specific performance has been decreed in Pennsylvania are the common cases of the sale of land and the very few cases concerning personal property in which it has appeared that for some peculiar reason a suit for damages for failure to perform would not give adequate relief, such as the case of *Vail v. Osburn*, 174 Pa. 580, 34 Atl. 315, where specific performance was decreed of an agreement to cut and deliver bark to a tannery from trees close to the tannery, where it appeared that bark could not be obtained otherwise. Unless some such element appears, equity leaves the parties to their legal remedy. Especially must this be the case where the contract sought to be enforced specifically is for putting streets in repair and thereafter keeping them in repair, which would involve a supervision of the court over the matter for an indefinite time. No case has been pointed out to us wherein specific performance of such a contract has been asked for or decreed as the principal relief sought by a plaintiff. On the contrary, there have been quite a number of cases in this commonwealth where the breach of duty to repair streets by street railway companies has been enforced in action of assumpsit, as the cases of *Reading v. United Traction Co.*, 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380, *McKeesport Borough v. McKeesport Passenger Railway Company*, 158 Pa. 447, 27 Atl. 1006, *Philadelphia v. Ridge Avenue Passenger Railway Company*, 143 Pa. 444, 22 Atl. 695, and many others.

"Counsel for the plaintiff cites as precedents for the bill two cases, *McKeesport v. Pittsburgh Railways Company*, 50 Pitts. Leg. J. 377, and *Patton Township v. Monongahela Street Railway Co.*, 226 Pa. 372, 75 Atl. 589. In neither of these cases, however, did the bill pray for specific performance of a contract to repair. In the *McKeesport Case*, the bill was to forfeit the franchise of the railways company for breach of a condition upon which it was granted, namely, that it shall keep the streets in repair; and the prayer was not for an order requiring the repairs to be made, but for a decree of forfeiture, unless it was made within a rea-

sonable time, which is a very different thing. In the *Patton Township Case*, as in the *McKeesport Case*, the bill was to forfeit the franchise of the agreement of the railways company, namely, to lay a second track, which it had agreed to do upon certain conditions, the existence of which it denied; and the prayer as to the want of repair of the track, which was already laid, was the same as that in the *McKeesport Case*, for forfeiture, unless the repair was made, it being alleged that the keeping of the street in repair was a condition subsequent to the grant of the franchise to lay the street railway; and the prayer was that, unless the repair was made, the whole railway should be removed. The present bill contains no allegation that the duty to repair in any of the streets mentioned in the bill was a condition of the continuance of the franchise; nor does it ask for any forfeiture on that account. It is purely and simply a bill for specific performance. Being of opinion, therefore, that the court has no jurisdiction to grant the relief sought, for the reason above stated, the demurrer is sustained, and the bill is dismissed, at the costs of the plaintiff."

An amendment to the original bill having been allowed, Shafer, J., filed the following opinion on demurrer:

"A demurrer having been heretofore sustained to the bill in this case, the plaintiff was allowed to amend by adding an additional paragraph to the bill. By the added paragraph, it is alleged that the city and the railways company are unable to agree upon the extent of the liability of the defendant or the manner in which the defendant should do the work or make repairs; that it would be difficult to keep an accurate account of the cost of said work so as to properly charge the defendant, the defendant being liable to the city only for repairs and cleaning done on only a part of the street; and that it is not practicable for the plaintiff to do the work and make the repairs, because in so doing it would interfere with the operation of the defendant's cars. To the amended bill, the defendant has demurred as before. Upon a careful consideration of the bill as amended, we are unable to see that it differs substantially from the original bill, or that anything contained in the amendment is sufficient to give jurisdiction to decree specific performance under the circumstances.

"The demurrer is therefore sustained."

Argued before *FELL, C. J.*, and *MESTREZAT, POTTER, ELKIN, STEWART*, and *MOSCHZISKER, JJ.*

C. Elmer Bown and *C. A. O'Brien*, for appellant. *David A. Reed* and *Allen H. Kerr*, for appellee.

PER CURIAM. The decree is affirmed for the reasons stated in the opinion of Judge Shafer.

AMERICAN CONDUIT MFG. CO. v. KENSINGTON WATER CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

WATERS AND WATER COURSES (§ 203*)—SUPPLY—RIGHT TO SERVICE—MISAPPROPRIATION OF WATER—DECREE.

Where a customer of a water company sought to restrain the shutting off of its water, and the water company filed a cross-bill for an accounting for water alleged to have been stolen by the complainant, and the chancellor found that an average of 9,000 gallons a day for 26 days a month for a specified period had been misappropriated by means of a meter device, a decree requiring complainant to pay defendant for the amount of water so taken, and enjoining defendant from shutting off the supply, provided complainant complied with defendant's rules, was proper.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by the American Conduit Manufacturing Company against the Kensington Water Company for an injunction to restrain the defendant from shutting off complainant's water supply, in which defendant filed a cross-bill for an accounting for water stolen. From the decree, complainant appeals. **Affirmed.**

Shafer, J., filed the following opinion in the court of common pleas:

"The bill is by a customer of a water company to enjoin the shutting off of the water by it. The defendant company filed a cross-bill for an accounting for water alleged to be stolen by the plaintiff from the defendant company by means of a device connecting the main with the company's works, without passing through the meter.

"Findings of Fact.

"First. The plaintiff is a manufacturing company, having its works located in the borough of Kensington, Westmoreland county; and the defendant is a water company, incorporated for the purpose of furnishing water to the borough of Kensington under the laws of Pennsylvania relating to water companies.

"Second. In September, 1903, and for some time prior thereto, the water company furnished water to the plaintiff at a certain rate per month, without measurement. Some time before October 1, 1903, the plaintiff was notified by the water company that they desired to install a meter; and that the flat rate theretofore prevailing would cease on October 1, 1903.

"Third. From that time until the following May, there appear to have been negotiations of some character between the plaintiff and defendant as to the method of furnishing water, and no meter was in fact put in until May 16, 1904; and it was agreed by the parties some time before that that

after the meter was put in a test should be made for a certain length of time, and the water furnished after October 1, 1903, and up to May 16, 1904, should be paid for by a rate to be established by the average readings of the meter for a certain time.

"Fourth. The meter was put in by the plaintiff company, and either by the addition of new pipes or the adaption of those which were already in use, or both, the arrangement of the pipes conducting the water from the water main into the works of the plaintiff, at and immediately after the installation of the meter, was as follows: The street on which the water main lies runs north and south. From this main to the south side of the plaintiff's works, a pipe was run at right angles to it for some distance into the ground of the plaintiff. From this pipe, there extended north, and parallel with the street, three pipes, the first of which, counting from the street, passed through the meter; the second extends some distance into the yard, and ends in a hydrant; and the third extends northward to a part of the plaintiff's works, including a gas engine. From the third pipe to the first, after the first passed through the meter, extended another pipe, in a southerly direction, connecting the first and third pipes. The stopcocks on these pipes were one near the street, which would shut off all the water, one on the third pipe, and going to the branch pipe leading south to the first pipe, another one on the third pipe after that branch, one on the branch itself, and one on the second pipe. The last four mentioned valves being within a foot or so of each other and inclosed in a box, which could be reached with a proper instrument from the surface of the ground, so as to turn them on or off.

"Fifth. The object of this device was to enable the plaintiff to take the water without its passing through the meter, and the effect of the construction was that none of the water which passed through the second pipe could pass through the meter; that all the water which passed through the third pipe might be allowed to pass through the meter, or none of it pass through, as might be desired; and that all the water which passed through the first pipe might be made to pass through the meter, or part of it might be allowed to pass through the meter, and a part to pass through the branch pipe, as desired.

"Sixth. According to the readings of the meter from May 16, 1904, to June 30, 1904, a settlement was made for the water used between October 1, 1903, and May 16, 1904, the parties having agreed to settle for this water, not actually measured, according to the readings of the meter for a month and a half after May 16th.

"Seventh. The water company continued to furnish water and render monthly bills therefor, according to the readings of the meter,

on its schedule of rates, until about October 22, 1910; the same being paid by the plaintiff company.

"Eighth. The present officers of the plaintiff company were none of them connected with the company at the time the device above mentioned was installed. The president of the company at that time, by whose direction the device was put in, being dead. The fact of its existence was known to some of the employés.

"Ninth. The bill in this case alleges that the first knowledge any of the officers of the company had of the existence of the by-pass, 'which caused it to make an investigation,' was on or about May 1, 1910. The present president of the plaintiff company, who has held that office since January, 1910, and immediately before that time was secretary and treasurer of it, testified that Armstrong, who was then a foreman for that company, said to him, as he saw a check made out for the water company, that the water company had done him a wrong, and he had gotten even with them, saying: 'I fixed it down at the fixture, so we are getting a lot of water we are not paying for.' This is denied by Armstrong, who says he never told the president of the company anything about it until May, 1910. The fact is, however, that no steps were taken to investigate any supposed method of stealing water until May, 1910, when Armstrong, who had in the meantime gone out of the service of the plaintiff company, and had had some contention with them, informed the president of the company of the nature of the by-pass, giving him a sketch of it.

"Tenth. At that time, or some time later in the summer, the president of the plaintiff company directed one of the valves to be turned, so that the water could not pass through the gas engine, and ordered it to be cut off, so that it could not be re-turned, and some of the valves were so cut off.

"Eleventh. The officers of the plaintiff company did not communicate to the water company the existence of the by-pass; and it became known to them only by information from Armstrong, given in October, 1910. On October 22, 1910, the water company made an examination of the plant, taking off the meter and substituting for it a piece of pipe with a stopcock in it, and making tests at different parts of the plant, from which it was ascertained that, in addition to the water at the hydrant, which could not pass through the meter, water was running to the gas engine, although the stopcock in the pipe, substituted for the meter, was closed. The valves were then closed, so that, so far as appears, no water went through the by-pass since that time, except what may have gone by way of the hydrant.

"Twelfth. It is obviously impossible to determine with accuracy, or any approximation to it, the amount of water which went

through the by-pass, and was therefore not measured by the meter, during the time from May 16, 1904, to October 22, 1910, and we have no evidence of the amount which could have so passed. The best that can be done under the circumstances, in view of the rule that everything is to be presumed against the party by whose fault the want of more accurate measurement arose, is to take the various uses of the different parts of the plaintiff's works, and the amount of water probably used by them, and in that way ascertain the amount of water which may well have passed through the by-pass and been used by the plaintiff.

"Thirteenth. The defendant has given evidence as to the amount of water probably used in the gas engine and at the hydrant, and also of the amount probably wasted by a leak, alleged to be in the gas engine, together with the number of hours and days when these sources of loss to the defendant were probably in operation; and the plaintiff has given evidence tending to show that the estimate of the defendant is too large. No attempt was made on the part of the defendant to show anything about the water which may have passed into the other parts of the works through the connection which, when open, competed with the connection through the meter. The evidence on the part of the defendant shows that it is not unreasonable to believe that an average of 9,393 gallons was lost to the defendant daily for 26 days of each month during the period in question, amounting in a month to 244,218 gallons; the total amount so taken being obtained by multiplying this amount by the number of months from May 16, 1904, to October 22, 1910.

"Fourteenth. As to the amount of water supplied by the defendant to the plaintiff from October 1, 1903, to May 16, 1904, it appears that the gas engine and hydrant were in use during that time substantially as they were afterwards; that no meter was then in use, although the flat rate had been discontinued; and that the water so supplied was paid for by the plaintiff company upon the average of the meter readings for a certain time after May 16, 1904. The defendant company was therefore deceived in its settlement for the water furnished during these months. No water was, however, stolen during these months.

"Fifteenth. The market value of water during all the time in question was 30 cents per thousand gallons. The meter rates charged by the defendant company were, for 500 gallons or less daily, 30 cents per thousand; from 1,000 to 5,000 gallons daily, 25 cents per thousand; from 5,000 to 15,000 gallons daily, 15 cents per thousand. The rate, however, at which water was actually furnished to the plaintiff by meter was by special contract, under a schedule known as the "Manufacturers' Schedule of Meter

Rates," in which the price of 500 gallons per day is 30 cents per thousand, 5,000 gallons per day, 12.31 cents per thousand, 9,000 daily is 10.94 cents per thousand, and of 10,000 gallons per day is 10.75 cents per thousand; the whole of the last-mentioned schedule being set out in the seventh paragraph of the answer.

"Sixteenth. Some time before the filing of the bill, the defendant company made a claim upon the plaintiff company for a sum of money, amounting to something less than \$6,000, for the water alleged to be stolen, and demanded payment of it, and threatened, if the same were not paid, to shut off the water altogether. The plaintiff refused to make the payment demanded, and thereupon filed this bill.

"Conclusions of Law.

"First. Upon a state of facts, such as appears in this case, it seems to us that there is a single principle of law upon which the rights and duties of the parties is to be determined; and that is the principle embodied in the maxim, '*Omnia præsumentur contra spoliatores.*' We deem it unnecessary to cite cases to show the applicability of this maxim to the case in hand.

"Second. A strict application of this maxim might justify a finding against the plaintiff for all the water which the device installed by it could have taken from the defendant. The defendant company had not undertaken to show how much this might be, but has taken a view of the matter more favorable to the plaintiff, and shown the amount which, considering the construction of the pipes and apparatus through which water was taken, and the uses to which it was put in the operation of the plaintiff's works, may reasonably be supposed to have been taken by the plaintiff. As it is evidently impossible to ascertain with any approach of accuracy the amount of water actually taken, and as this impossibility was created solely by the wrong of the plaintiff, we think the plaintiff is chargeable at least with the amount which it may have probably taken, to say nothing of what it may possibly have taken.

"Third. As to the water supplied from October 1, 1903, to May, 1904, we do not see how, under the pleadings, the defendant is entitled to recover anything in this proceeding. The bill alleges the stealing of water to have taken place from October, 1903, down to the present time; whereas, in fact, the actual taking of water by means of a by-pass began in 1904, and the wrong done to the defendant was the procuring of a settlement with it for the water theretofore supplied upon a false basis. As no relief is prayed for on this ground in the cross-bill, we are of opinion that the defendant is not entitled to recover anything in this proceeding for

any loss of water which occurred before May 18, 1904.

"Fourth. As to the price which the plaintiff should pay for the amount of water so determined to have been taken, it is contended by the plaintiff that it is liable only for the price which the defendant would have been entitled to receive for the same, if it had passed through the meter, according to the schedule of rates published by the company. The defendant's contention is that it is entitled to recover the market price of the water taken by the gallon, without reference to the rates at which water was furnished to customers by meter. The only evidence on the market value of water during the time in question was that it was 30 cents per thousand gallons, which is much greater than the schedule of rates published by the company. We do not well understand how the plaintiff company can claim any rebate from the ordinary or market price of water, because it stole a large quantity, and are therefore of opinion that the measure of defendant's damage is the market value of water, namely, 30 cents per thousand gallons. The defendant is obviously entitled to interest, or its equivalent, upon the value of the water so taken, the delay in payment being caused entirely by plaintiff; and, as the payments for water delivered should have been made monthly, the interest ought to be calculated upon the amount found to be taken each month.

"Fifth. The relief prayed for by the plaintiff is an injunction to prevent the defendant from shutting off the supply of water now furnished by it by meter, which the defendant had threatened to do, unless it were paid the sum demanded by it for the water taken, as above described. As the defendant company is a public service corporation, it seems to us to be bound to furnish water to the plaintiff, notwithstanding the matters above set forth. To hold otherwise would be to make it the judge in its own cause, and to enable it to impose upon the plaintiff a penalty for its wrongdoing different from that which is provided by law. We are therefore of opinion that the plaintiff is entitled to an injunction restraining the defendant company from ceasing to supply water to the plaintiff by meter, so long as the plaintiff company shall comply with the reasonable rules of the defendant company in regard to the supply of water.

"Sixth. No question of the jurisdiction of the court to entertain either the bill or the cross-bill was raised by either party.

"Seventh. Let a decree be entered that the defendant be enjoined from cutting off the supply of water to the plaintiff, so long as the plaintiff shall comply with the rules of the water company and pay, according to its rules, for the water supplied, according to the meter readings, provided that the

plaintiff company shall pay to the defendant company, within 30 days hereafter, all arrearages for water supplied since the filing of the bill; and, further, that the plaintiff company pay to the defendant company for the water taken by it at the rate of 30 cents per thousand gallons, with interest to be calculated from the end of each month upon the amount due for that month, the amount of each month to be ascertained by taking 9,393 gallons of water taken each day for 26 days in each month, the calculation to begin with May 16, 1904, to October 22, 1910; and that the plaintiff pay the costs.

"And now, to wit, June 24, 1911, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed as follows, viz.: That the defendant, Kensington Water Company, is enjoined from cutting off the supply of water to the American Conduit Manufacturing Company, the plaintiff, so long as the plaintiff shall comply with the rules of the Water Company and pay, according to its rules, for the water supplied, according to the meter readings, provided that the American Conduit Manufacturing Company, the plaintiff, shall pay to the Kensington Water Company, the defendant, within 30 days hereafter, all arrearages for water supplied since the filing of the bill; and it is further ordered, adjudged, and decreed that the American Conduit Manufacturing Company, the plaintiff, has unlawfully taken from Kensington Water Company, the defendant, through the by-pass arrangement complained of in the cross-bill, water to the amount of nine thousand three hundred and ninety-three (9,393) gallons for each day, for 26 days in each

month, during the period beginning with May 16, 1904, and ending October 22, 1910; further, that the American Conduit Manufacturing Company, the plaintiff, shall pay to Kensington Water Company, the defendant, for the water so taken by it at the rate of thirty (30) cents per thousand gallons, with interest to be calculated from the end of each month upon the amount due for that month, being the sum of six thousand nine hundred sixty-six dollars and fifty cents (\$6,966.50); it is also further ordered, adjudged, and decreed that the American Conduit Manufacturing Company, the plaintiff, shall forthwith remove the system or arrangement of pipes constituting the by-pass complained of in the cross-bill filed in the above-entitled suit, or shall make such changes in the arrangement of the pipes constituting the by-pass as shall render the operation of the same as a by-pass physically impossible, and that this shall be done under the supervision and subject to the reasonable inspection of the employees of the Kensington Water Company, the defendant, in accordance with the rules of the said Water Company; and it is further ordered, adjudged, and decreed that the American Conduit Manufacturing Company, the plaintiff, pay the costs."

Argued before FELL, O. J., and MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Edward Schreiner, for appellant. William Watson Smith and Alexander Black, for appellee.

PER CURIAM. The decree is affirmed on the findings of fact and conclusions of law by Judge Shafer.

GREENWICH COAL & COKE CO. v. LEARN.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. GIFTS (§ 49*)—LAND—EVIDENCE.

Evidence *held* to establish a gift of coal land from father to son prior to a conveyance of the coal by the father to plaintiff.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

2. FRAUDS, STATUTE OF (§ 129*)—REAL PROPERTY—GIFTS.

Where, after a father orally gave certain coal land to his son, the latter entered and for more than 21 years *held* exclusive possession of the property and made valuable improvements thereon, the gift was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

3. MINES AND MINERALS (§ 47*)—COAL LANDS—GIFTS.

Where, at the time of a gift of coal land by a father to son, there had been no severance of the title to the coal, and the son took actual and exclusive possession of the surface, such possession carried with it actual possession downward perpendicularly through the various strata so as to confer title to the coal on the son as against a subsequent grantee of the coal by the father.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 183; Dec. Dig. § 47.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—PREJUDICE.

On an issue as to whether defendant had maintained absolute possession of certain coal land under a gift from his father, plaintiff was not prejudiced by the court's failure to use the term "exclusive possession" in a particular part of its charge, where there was nothing in the language used, or in any of the instructions, excluding the idea of the necessity for exclusive possession, and there was no doubt under the charge as a whole that the jury must have understood the necessity for defendant to have maintained an absolute possession in order to have established his claim.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. GIFTS (§ 50*)—NATURE OF ARRANGEMENT—QUESTION FOR JURY.

Where a father gave coal land to his son under an agreement that the father should receive one-third of the grain grown on the land by the son, and the evidence was conflicting as to the exact nature of the arrangement, the question was properly submitted to the jury.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. § 50.*]

6. ADVERSE POSSESSION (§ 88*)—ELEMENTS—PROOF—PAYMENT OF TAXES.

Evidence of payment of taxes is admissible to show possession under claim of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 509-511; Dec. Dig. § 88.*]

7. GIFTS (§ 50*)—REAL PROPERTY—PAYMENT TO DONOR—QUESTION FOR JURY.

Where defendant claimed certain coal land under a gift from his father, and there was evidence of an agreement by which defendant delivered one-third of the grain grown on the land to his father, whether the delivery of the grain constituted a payment of rent, or a pay-

ment for services rendered by the father, was for the jury.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. § 50.*]

8. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS.

Where defendant claimed title to certain coal land under a gift from his father, and there was evidence that defendant had given to his father each year one-third of the grain grown on the land, but the evidence was conflicting as to whether the grain so delivered was treated as rent or for the father's services, the court properly charged that the running of limitations in defendant's favor depended on whether the jury found the grain was delivered as rent or for services, and refused to charge that the statute would not run in favor of defendant so long as he paid any of the proceeds of the farm to his father.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

9. EVIDENCE (§ 121*)—OCCUPANCY OF LAND—DECLARATIONS—RES GESTÆ.

On an issue as to the character of defendant's occupancy of certain land alleged to have been obtained from his father by gift, defendant's declarations while in possession of the premises, together with the understanding of his neighbors, as to the character of his claim accompanying his acts, constituted part of the *res gestæ* and were admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-333, 1117, 1119; Dec. Dig. § 121.*]

Appeal from Court of Common Pleas, Indiana County.

Action by the Greenwich Coal & Coke Company against Elias Learn. Judgment for defendant, and plaintiff appeals. Affirmed.

Action under the Act of June 10, 1893 (P. L. 415), on an issue to determine the title to coal under a certain piece of land.

The plaintiff claimed under a deed from Peter Learn dated September 9, 1902. The defendant claimed under a parol gift from Peter Learn made in 1880 or 1881 followed by possession and valuable improvements made. The plaintiff proved its title by deed and rested. The defendant produced testimony that his father, Peter Learn, had the land surveyed and gave it to him, saying "to go and rid it up and put his buildings on it; it was his." And "go on and farm it; it is yours, but give me one-third of the grain." Prior to this Peter Learn had taken the timber brush and logs off a considerable part of the land, but the stumps had not been removed; and he said to his son, "I give it to you, but you clear it out. * * * The son took possession, built a house, took out the stumps, improved the land, and has lived continuously upon the premises with his family ever since. For the greater part of the time the land was assessed in his name, and he paid the taxes upon it. The change of assessment was made at the request of Peter Learn, who told the tax assessor that his son owned the land. Peter Learn had also made gifts of about the like number of acres to other of his sons, and the defendant produced a witness who testified that Peter

had said to him: "That the other boys had to go into the woods and clear it. Elias was to give him one-third because part of his was clear before he went on." And "he said Elias owned it (meaning the land)." And further: "That Elias was to farm the land to suit himself as it was his own." To another witness Peter said that "he expected one-third of the grain that Elias raised because he had cleared part of the land for him." A host of witnesses were produced who gave testimony of declarations made to them by Peter Learn that the farm belonged to Elias as his own property, and that Elias was giving him one-third of the grain for the work that he, Peter, had done in clearing the land. When Elias desired to make improvements upon the property, he said to his father: "My wife has money, and I could get the money from her; but we have no deed for this property, and she don't like to use her money." To which Peter replied: "Do you think that I would give you a piece of land and turn around and take it from you? It is yours. Tell her to use her money." Other witnesses testified that in their presence Peter had said to Mrs. Learn to go ahead and put her money in the land; that it was Elias' property. In 1902 Peter Learn said to the agent of the parties to whom he subsequently sold the coal, referring to the land under which it lay: "At one time I owned all this; I gave them to the boys." And he then pointed out the various tracts and showed where the several boys lived. The agent, who was upon the land for the purpose of renewing an option which his principals afterwards took up, asked Peter how he could lease the coal under such circumstances, and Peter replied: "When I gave them this land there was nothing thought or said about the coal; we did not know anything about coal then." Testimony was produced to show that Elias always and repeatedly referred to the land as his own, that it was generally known throughout the district as his property, and that before the purchaser paid for the coal Elias had notified it not to do so because his father did not have the right to sell. The plaintiff produced witnesses to rebut parts of this testimony, but the only evidence which attacked the exclusive possession of Elias was the fact that the father usually went upon the land each year at threshing time and received his one-third of the grain, together with the tax records showing that no land was assessed to Elias until the year 1892.

The court submitted the case to the jury. Verdict for defendant and judgment thereon. Plaintiff appealed.

Errors assigned: (1) Refusal to direct verdict for the plaintiff. (2) Refusal of judgment non obstante verdicto for the plaintiff. (3) A portion of the charge stating the elements necessary to a verdict for the defend-

ant, in which the term "exclusive possession" was not used. (4) Part of the charge in which the trial judge told the jury they were to decide in what capacity defendant occupied the land, whether as tenant or owner, and that if he occupied it as a tenant the verdict would have to be for the plaintiff; that the plaintiff contended the delivery of one-third of the grain by Elias to his father "was an acknowledgment that he was there only as a tenant, and that the father still exercised control over that property, and that of itself should be sufficient to find that the defendant was not there claiming it absolutely as his own." Adding: "This is replied to by the defendant saying that inasmuch as a certain amount of clearing had been done upon this farm, that in order to even him up with the rest, he should make some return. * * * He was not bound to make any specific return, but nevertheless one-third of the grain that he raised upon that place should be given to his father in payment of the amount he was relieved from clearing on that property." After which the court said, "You will be required to find that fact so that you may have the entire matter before you." (5) Part of charge making reference to the testimony concerning the assurance given by Peter Learn to Mrs. Elias Learn that she could safely put her money in the property, and adding, "That is argued by the defendant as convincing, and from what they say you will have no difficulty in finding that Peter Learn did give absolutely this property to Elias." (6) Part of charge in reference to the testimony as to tax assessments in which the court calls attention to the fact that 53 acres were transferred in 1895 from the name of Peter Learn to that of Elias Learn. (7) Refusal to instruct that if Peter after the date of the alleged gift, required a share of the proceeds of the land, and Elias complied, "this shows that Peter Learn still retained control over the land and that he had not made an absolute gift," adding, "If the jury find, therefore, that the payment of rent was imposed on Elias after the gift or after he took possession, the verdict must be for the plaintiff." (8) Refusal to instruct that "the statute of limitations would not run in favor of Elias so long as he paid any of the proceeds of the farm to Peter Learn." And answering, "The answer to this point depends upon the finding of fact." (9-12) The affirmation of certain points submitted by the defendant in which the word "possession" is used without the word "exclusive" in connection therewith. (13) The affirmation of a point of defendant: "Time is a powerful factor in cases of parol gift or sale of land. Equity is loath to undo a gift or contract for one who has failed to move for its rescission until passing years have grafted new equities upon the transaction, until the donee is grown old, spent the vigor of his age in the use and improve-

ment of a property long regarded as his own." The answer being, "This point is affirmed. It is the language of the Supreme Court in *Sower v. Weaver*, 84 Pa. 262." (14) The admission of testimony as to the general reputation in the community concerning ownership of the property. (15) The admission of testimony of declarations by the defendant while upon and in possession of the land in dispute, as to the character of his ownership.

Argued before FELL, C. J., and MES-TREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Ernest Stewart, John A. Scott, and Samuel Cunningham, for appellant. William Banks, Harry White, and J. N. Banks, for appellee.

MOSCHZISKER, J. [1, 2] The evidence produced by the defendant was full, complete, satisfactory, and clear, and upon a favorable view the jury could have definitely found the boundaries and the quantity of land claimed; that the parties to the gift had been brought face to face; that the gift had been made in express, direct, positive, and unambiguous language; that it had been repeatedly acknowledged by the donor, and as often asserted by the donee; that, in pursuance of the gift, the latter had gone upon the property and made valuable improvements, the cost of which he had defrayed out of his own and his wife's money, with the knowledge and approval of the donor; that the change from father to son was notorious, and the defendant had maintained open, adverse, and exclusive possession of the property continuously for more than 21 years; and that it was understood and agreed between the father and the son that the delivery of one-third of the grain by the latter to the former during his life was in payment for work done by the father in clearing the land. These findings would have been sufficient to sustain a verdict for the defendant. *Mahon v. Baker*, 26 Pa. 519; *Sower v. Weaver*, 84 Pa. 262; *Hart v. Carroll*, 85 Pa. 508; *Allison v. Burns*, 107 Pa. 50; *Hyde-Murphy Co. v. Boyer*, 229 Pa. 7, 77 Atl. 1092; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230. So much has been written upon the general law applicable to the subject in hand that it would serve no good purpose to review it here. The authorities all hold that a case such as the present is not within the statute of frauds, and that where a man under circumstances like these has spent the best part of his life improving a piece of land for a home, compensation in damages is not adequate.

[3] At the time of the gift to the defendant, there had not been any severance of the title to the coal, and therefore the "actual possession of the surface carried with it the actual possession downward perpendicularly through the various strata." *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436. While

there was some evidence that the defendant was in possession of the land before the completion of the gift, there was evidence to the contrary. Hence that issue was for the jury. *Hyde-Murphy Co. v. Boyer*, 229 Pa. 7, 77 Atl. 1092; *Mahon v. Baker*, 26 Pa. 519. The court could not have directed a verdict for the plaintiff, and no error was committed in refusing judgment non obstante verdicto in its favor. The first two assignments are overruled.

[4] Although the trial judge failed to use the term "exclusive possession" in the particular part of the charge called to our attention by the third assignment, yet there was nothing in the language there used, or in that employed in any of the instructions, which excluded the idea of the necessity for "exclusive possession." The jury were told that they must inquire: "Was there an absolute gift? * * * Did Elias go into possession of the land, following this gift, do as his father had suggested, build his buildings upon it, pay taxes for a time, have it all to himself, and claim it absolutely as his own? * * * If the gift was not of that character, * * * and Peter Learn held control of this property during the occupancy of his son, Elias, then he is not entitled to a verdict, and the verdict will be for the plaintiff." Again, in the defendant's points the terms used are "undisturbed possession" and "claiming it as his own against every person and has so continued in such possession." There is no doubt but that the jury must have understood the necessity for exclusive possession by the defendant. The assignment in question is overruled.

[5] There is no merit in the fourth assignment. The trial judge left it to the jury to find what the real bargain was between the father and son as to the delivery of the one-third of the grain. He called attention to the contention on each side, and the language employed at the end of the instruction was evidently intended to convey to the jury the thought that they were to find which was true in point of fact, so that they might consider the entire case from that viewpoint. The assignment is overruled.

The fifth assignment fails to quote all that was said by the court in connection with the instruction complained of therein. If the language employed is taken with its context, it is not likely that the jury could have understood it as a direction to find the particular fact referred to in favor of the defendant; it is more probable they understood that the court merely meant to call their attention to the fact that the defendant argued that they should have no difficulty in finding that Peter Learn made an absolute gift of the land to Elias. While this portion of the charge was not as nicely phrased as it might have been, we are not convinced that the plaintiff suffered any harm therefrom, and the assignment is overruled.

[6] We see no error in the sixth assignment. All the cases hold that the payment of taxes is an element in the proof of possession under a claim of title, and if the plaintiff desired the court to call attention to the fact that the land was assessed to Peter Learn prior to the date mentioned in the instruction, it should have so requested. The assignment is overruled.

[7] Had the court affirmed the point in the seventh assignment, it would have been equivalent to instructing the jury that the delivery of the grain was the payment of a rent, and that the verdict should be for the plaintiff. Whether or not the one-third of the grain was a rent depended upon the facts. It nowhere appeared in the evidence that Peter Learn had ever so designated it, and all his declarations were inconsistent with such an idea. As before indicated, that issue was for the jury and was properly submitted. This assignment is overruled.

[8] The eighth assignment criticises the answer made by the trial judge to the effect that the running of the statute of limitations in favor of the defendant depended upon how they might find the fact as to whether or not Elias paid rent. We see no error in this, and the assignment is overruled.

The matters covered by the next four assignments are sufficiently disposed of in our discussion of the third assignment. These assignments are overruled.

Although there was no testimony to show that the defendant had "grown old," yet we cannot say that any substantial harm was done by the instruction complained of in the thirteenth assignment; it is overruled.

[9] The testimony quoted in the next two assignments, concerning declarations by the defendant and others, was properly admitted. As to the admission of such testimony, we have said: "His (the occupant's) own declarations while in possession of the premises as well as the understanding of his neighbors was proper evidence of the character of his claim." *Kennedy v. Wible*, 11 Atl. 98. "Such declarations accompanying his acts constitute part of the *res gestæ*, and as such are always received in evidence in questions of possession." *Potts v. Everhart*, 26 Pa. 493. "The character of possession of a party as stated by himself while in possession is part of the *res gestæ*." *Susquehanna & Wyoming Valley R. R. & Coal Co. v. Quick*, 68 Pa. 189. These assignments are overruled.

Before concluding, we note that it is not clear how much of the testimony of the defendant was intended to be stricken from the record; but we do not take it that the first part covering the language and the time of the gift was affected by the order of the court. However that may be, whether the bargain to pay the one-third of the grain to his father was made at the time of the gift

or later on would not necessarily fix the nature of the obligation. It might have been made after the defendant went into possession, independently of the gift, out of appreciation of the services performed by his father in clearing the property, without of necessity being a rent or acknowledgment of Peter Learn's continued control over the land; or it might have been a unilateral contract made at the time of the gift, and yet not be a rent or in the nature thereof. The repeated declarations of Peter Learn to the effect that he had given the land to his son, and as to the arrangement for the delivery of the grain, made when the parties were face to face, accompanied by the act of the assessment of the land to the defendant by the direction of his father, constituted strong evidence of a gift. *Sower v. Weaver*, 84 Pa. 262, 269; *Matthews v. Matthews*, 11 Pa. Super. Ct. 381; *Caldwell v. Caldwell*, 24 Pa. Super. Ct. 230. It may also be well to note that the equities of this case are with the defendant. He was not only in actual possession of the land which was enough to put the purchasers of the coal upon inquiry as to his title (*Hottenstein v. Lerch*, 104 Pa. 454; *Rowe v. Ream*, 105 Pa. 543; *White v. Patterson*, 139 Pa. 429, 21 Atl. 360), but, if the evidence of his witnesses is to be believed, and the verdict shows that it was, he served actual notice of his claim of title before any purchase money was paid. After reading the testimony and reviewing the entire record, we feel that the evidence was sufficient to sustain the verdict and that no reversible error was committed in the trial.

The judgment of the court below is affirmed.

COATES v. ALLEGHENY STEEL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MASTER AND SERVANT (§ 31*)—CONTRACT OF EMPLOYMENT—TERMINATION—DISCHARGE.

A contract for plaintiff's employment for a definite term provided for termination by giving 12 months' notice in writing. On April 29, 1909, defendant gave notice of its election to cancel the contract, and on May 1, 1910, affirmed its liability to pay salary to that date, but requested that plaintiff use his best endeavors to obtain other employment in the meantime, and relieve defendant from its obligation to pay salary. Plaintiff thereafter went to Europe, and some time in October, 1909, requested information as to why his monthly salary was not paid, and was informed on November 9th that it was because he had not used and was not using any diligence to procure another position, and that defendant took the position that it had allowed sufficient time for that purpose, and that its obligation to pay salary was terminated. *Held*, that the letter of April 29, 1909, giving notice of the termination of the contract, did not amount to a discharge, which only occurred on receipt of the letter of November 9th following.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 37; Dec. Dig. § 31.*]

2. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—DISCHARGE—QUESTION FOR JURY.

In an action for salary under a contract of employment after discharge, whether cause existed for the discharge when made, and whether the discharge was in good faith, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

3. MASTER AND SERVANT (§ 42*)—CONTRACT OF EMPLOYMENT—TERMINATION—DISCHARGE—RIGHTS OF SERVANT.

Where a servant has been discharged without sufficient cause, and before the expiration of his term of employment, he may recover wages for the whole term, subject to the qualification that he is bound to make reasonable efforts to obtain employment elsewhere.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 54-56; Dec. Dig. § 42.*]

4. MASTER AND SERVANT (§ 40*)—EMPLOYMENT—WRONGFUL DISCHARGE—EFFORTS TO OBTAIN OTHER EMPLOYMENT.

The burden of proving that a discharged servant did not make reasonable efforts to obtain employment elsewhere is on the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

5. MASTER AND SERVANT (§ 43*)—CONTRACT OF EMPLOYMENT—DISCHARGE—OTHER EMPLOYMENT—QUESTION FOR JURY.

In an action by a discharged servant for wages under his contract of employment, whether the defense that the servant failed to use reasonable efforts to obtain other employment is sufficient to overcome a prima facie case of the plaintiff, or to what extent it may be considered to reduce the amount to be recovered, are questions of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.*]

6. MASTER AND SERVANT (§ 42*)—CONTRACT OF EMPLOYMENT—BREACH—OTHER EMPLOYMENT—DUTY TO PROCURE.

The duty of a discharged servant to make reasonable effort to secure other employment does not arise until final discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 54-56; Dec. Dig. § 42.*]

7. PLEADING (§ 348*)—AFFIDAVIT OF DEFENSE—DEMURRE.

Where, in an action for breach of a contract of employment, defendant's affidavit of defense showed that plaintiff as a matter of law was not entitled to judgment for the whole sum demanded, and raised questions of fact to be submitted to the jury, the court did not err in dismissing a rule for judgment for want of a sufficient affidavit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Jesse Coates against the Allegheny Steel Company. From an order dismissing a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Rule for judgment for want of an affidavit of defense. It appears from the statement of claim that the plaintiff was employed by

the defendant company under a written agreement, made determinable by either party upon twelve months written notice. Under date of April 29, 1909, the defendant company wrote to the plaintiff as follows:

"Mr. Jesse Coates, Natrona, Pa.—Dear Sir: Owing to the changes already made and others about to be introduced, by the Allegheny Steel Company, in the manufacture of its product, and especially in the manufacture of magnetic steel sheets, it is obvious that it will not hereafter have the occasion for such services, as are contemplated under the agreement between you and the Allegheny Steel Company of March 1st, 1907. Therefore, the Allegheny Steel Company desires to avail itself of its privilege under the said agreement, of terminating the same on twelve months' notice, and the Allegheny Steel Company hereby accordingly gives to you notice that it has elected to exercise its privilege and that the agreement is and will be cancelled, on and after the expiration of twelve months from the giving of this notice, that is to say, cancelled on the first day of May, 1910. The Allegheny Steel Company does not intend to hereby claim, or to assert, any right to sooner terminate your employment under the agreement, but, if agreeable to you, the Allegheny Steel Company would like to effect some amicable arrangement under which, at the earliest practicable day, you may have employment elsewhere in some field in which your skill and ability may be made available and wherein you may secure as high, or even higher salary, than is payable under our agreement. You may regard yourself as free to take up any line of employment that you may deem proper and if we can assist you in any way in so doing, we will be pleased to do so. Our hope and desire is that during the intervening year prior to the termination of our agreement you will do all you reasonably can to relieve us from our obligation thereunder. With best wishes for your success and assurances of our high esteem for you personally, we beg to remain, Yours truly, The Allegheny Steel Company, [Signed] H. E. Sheldon, President.

"P. S.—Please be good enough to acknowledge the receipt of this and keep us advised as to your P. O. address."

Later, on November 9, 1909, the following letter was written:

"Mr. Jesse Coates, Care of Deutsche Bank, Berlin, Germany—Dear Mr. Coates: I have your letter of October 20th and note that you are still in Berlin. I received a cablegram from you several days ago asking me to wire reasons that your salary was stopped. I believe that we had a thorough understanding at the time we gave you leave of absence, that circumstances of which neither you nor we had any control

had occurred which made your services of little or no value to us, explaining this matter thoroughly to you and also explaining it to you that while we considered it our duty under the contract to continue your salary, it was also your duty to use all due diligence in procuring for yourself another position, so as to relieve us as soon as possible of the burden of paying your salary without any recompense. It does not seem to us that you have made any such effort. We do not know by whose authority or instructions you went to Europe, but we most certainly know it was not instructions from the Allegheny Steel Company. The Allegheny Steel Company takes the position that it had given you sufficient time to procure other employment, that you have made no effort whatever to do so and therefore its obligation to pay you a salary is ended. Personally I regret this very much but under the circumstances the company had no other course to pursue. I remain, very respectfully, [Signed] Allegheny Steel Co., Harry E. Sheldon, President."

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frank McC. Painter, for appellant. Alexander J. Barron and McKee, Mitchell & Alter, for appellee.

ELKIN, J. This is an appeal from an order dismissing the rule for judgment for want of a sufficient affidavit of defense. In our consideration of the case we do not have the benefit of the views entertained by the learned court below on the questions involved because no opinion was filed. The suit was brought to recover wages under a contract of employment for a definite term. The contract in terms gave to either party the right to declare a termination by giving 12 months' notice in writing. On April 29, 1909, appellee gave notice in writing to appellant of its intention to exercise this privilege by terminating the contract on May 1, 1910. In giving this notice appellee acted within its contractual rights, and appellant was bound by the terms of his own agreement. As the case then stood the relation of employer and employé was to continue until the time fixed by the notice for the termination of the contract, and appellant had the prima facie right to demand his salary up to May 1, 1910. If nothing had subsequently occurred between the parties, payment only would have been a defense in a suit to recover the salary for the remainder of the period named. Something did subsequently occur, and the questions involved here have to do with the subsequent occurrences. Are they sufficient to overcome the prima facie case upon which appellant stands, and, if so, to what extent is appellee relieved from this prima facie liability?

[1] We cannot regard the letter of April

29, 1909, as a discharge of appellant. The parties themselves did not so regard it and why should the courts? There is nothing in the language used to indicate an intention to discharge at that time, and the payment of the salary for several months after the notice was given can only mean that the party who gave it did not so understand it. It is averred in the affidavit of defense that about the middle of June, 1909, appellee notified appellant that he must diligently exert himself to secure other employment, and, unless he did so, all relations between the parties would be terminated and the payment of salary discontinued. In the light of this averment how can it be seriously contended that there had been a discharge in the preceding April? The averment was that the contract of employment had not been terminated at that time, but would be in the future, unless appellant diligently exert himself to secure other employment. There is the further averment that about the middle of August, 1909, the president of appellee company met appellant in Germany, and there learned that he was traveling in Europe for purposes of his own, and not for the benefit of appellee company. Upon learning these facts, appellee ceased to make further payments on account of salary, but it is apparent on the face of the record that no notice of discharge or of refusal to pay further salary was given appellant at that time. Whatever reasons appellee had for so doing were not communicated to appellant. The record shows some time in October appellant by cablegram from Germany asked why his salary had not been paid. In answer to this cablegram appellee wrote the letter dated November 9, 1909. This is the first notice served on appellant that can be considered in the nature of a discharge.

It is contended that even this letter does not in any proper legal sense constitute a discharge. We cannot accept this view of the case. The rule is that no set form of words is necessary to constitute a discharge. Words which show a clear intention on the part of an employer to dispense with the services of an employé, equivalent to a declaration that the services of the employé will be no longer accepted, are sufficient. It is true the words used must convey to the servant the idea that his services are no longer required and will not be accepted. We are of opinion that nothing said or done by the appellee prior to the writing of the letter of November 9, 1909, conveyed to appellant the idea that his contract of employment had terminated, and that his services as an employé would be no longer compensated. In other words, up to that time nothing done by appellee was within the meaning of the law sufficient to constitute a discharge. On the other hand, we think the letter of November 9th was a sufficient notice of discharge under the rule above indicated.

While we hold the letter in question to be a sufficient notice of discharge, we do not now undertake to determine the question whether there was sufficient cause for discharge. The discharge may or may not have been wrongful, depending upon the facts and circumstances. If there be no dispute as to the facts, the court may determine as a matter of law whether there was sufficient cause, but, if the facts be disputed, the general rule is that the jury must determine whether or not the discharge was wrongful. Appellee contends under the authority of *Corgan v. Lee Coal Company*, 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, 11 Ann. Cas. 838, that it was not necessary to assign a valid reason in his notice of discharge, provided appellee had, in fact, a good reason for exercising the right to discharge.

[2] The rule announced in that case is sustained by ample authority, but, under the facts of the present case, we think it is for the jury to say whether a good cause for discharge existed when the letter of November 9th was written. It is also for the jury to determine in view of all the facts whether the discharge was made in good faith, and whether the reasons given therefor were not a mere subterfuge to dispense with the services of appellant so as to relieve appellee from the payment of salary under the terms of the contract. In our view of the case under the facts presented by the pleadings, appellant is entitled to recover full monthly salary up to and including November, 1909, the month when notice of discharge was given. His right to recover salary after November depends upon what the jury shall determine as to the discharge being rightful or wrongful. If appellant was rightfully discharged, he cannot recover salary; if wrongfully, his right to recover still exists under the contract.

[3] One more question should be adverted to, so that, when the case is tried in the court below, it may finally be disposed of.

The rule is that, where a servant has been discharged without sufficient cause before the expiration of his term of employment, he is entitled to recover wages for the whole term, but he is bound to make reasonable efforts to obtain employment elsewhere. We have held that the letter of April 29, 1909, was not a discharge, but was in effect a leave of absence with salary attached. That it was a leave of absence, and not a discharge, is shown by the letter of November 9th, in which it is expressly stated that appellant was given a leave of absence. If the jury shall determine that the discharge of November 9th was made without sufficient cause, the burden of showing that appellant by reasonable effort might have found other employment is upon the appellee.

[4] Such a defense is by way of mitigation, and the burden is upon him who asserts it. *Emery v. Steckel*, 126 Pa. 171, 17 Atl. 601, 12 Am. St. Rep. 857.

[5] Whether this defense is sufficient to overcome the prima facie case of appellant, or to what extent it may be considered to reduce the amount to be recovered, are questions of fact, to be determined by the jury.

[6] The duty of making a reasonable effort to secure other employment did not arise until there had been a final discharge. Prior to that time, the parties were acting under and bound by their contractual obligations.

[7] The learned court below simply refused to enter judgment for want of a sufficient affidavit of defense, and under the motion nothing else could be done. Appellant was not entitled as a matter of law to judgment for the whole sum demanded. The averments of the affidavit of defense raise some questions of fact to be submitted to the jury.

Order of the court below dismissing the rule for judgment for want of a sufficient affidavit of defense is affirmed, and the record is remitted for the purpose of having a trial upon the merits.

CYRULIK v. BOSWORTH.

(Supreme Court of Rhode Island. May 11, 1912.)

TRIAL (§ 140*)—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

The probative value of the testimony of children of tender years and of foreign parentage, competent to testify and testifying without the aid of an interpreter is for the jury under suitable instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Martin Cyrulik against Leonard P. Bosworth. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and case remitted for judgment on the verdict.

A. B. Crafts and William H. McSoley, both of Providence, for plaintiff. Charles H. McKenna, of Providence, for defendant.

PER CURIAM. The justice of the superior court presiding at the trial of the above-entitled case properly refused to direct a verdict for the defendant at the conclusion of the testimony. The eyewitnesses of the accident which caused the death of the plaintiff's intestate were all children, with the exception of the defendant's servant in charge of the automobile which struck the child. Although the witnesses for the plaintiff were children of tender years, and most, if not all, of them of foreign parentage, they were competent to and did testify without the aid of an interpreter. The probative value of the evidence contained in their testimony was properly left to the determination of the jury under suitable instructions by the justice aforesaid.

The defendant's exception to the refusal of said justice to direct a verdict for the defendant is therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

TOURJEE v. MATTESON, Town Treasurer (two cases).

(Supreme Court of Rhode Island. May 11, 1912.)

ABATEMENT AND REVIVAL (§§ 45, 47*) — ACTIONS AGAINST OFFICER.

Gen. Laws 1909, c. 283, § 13, provides that no action, commenced or pending against any officer, etc., in his official capacity, shall abate because of his ceasing to hold office within one year thereafter, but at any time within one year thereafter his successor may come in and take up the defense of such action. The marginal notes to the section are entitled: "Proceedings by or against Any Officer * * * may be Revived by or against His Successor within One Year." *Held*, that suits against an officer do not abate immediately upon his ceasing to hold office, but become dormant, subject to be revived

ed within a year thereafter by the appearance of his successor in court; but if the successor does not appear within the year the suit abates by operation of law.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 226-236, 239-244; Dec. Dig. §§ 45, 47.*]

Exceptions from Superior Court, Kent County; Willard B. Tanner, Presiding Justice.

Actions by Sarah E. Tourjee and by Everett L. Tourjee against John Matteson, Town Treasurer. Cases dismissed, and plaintiffs bring exceptions. Exceptions overruled, and cases remanded for further proceedings.

A. B. Crafts, of Providence, for plaintiffs. E. K. Parker, of Providence, for defendant.

DUBOIS, C. J. These actions were brought by the plaintiffs against John Matteson as town treasurer of the town of Coventry, in Kent county—that of Sarah E. Tourjee for damages as the result of an accident to her which took place on June 17, 1906, caused, as alleged in the declaration, by reason of a defective highway; and the action of Everett L. Tourjee, her husband, for loss of his wife's services.

The defendant was re-elected to the position of town treasurer in June, 1909, and subsequently resigned or declined to serve, and one Greene was appointed town treasurer by the town council in his place. The plaintiff had notice that the defendant was re-elected, but was unaware of the fact of his declination, or that a new town treasurer had been appointed. A little over a year after the qualification of Mr. Greene the plaintiffs' attorney learned of the foregoing facts, and made a motion, which was granted, whereunder the new town treasurer, Greene, was summoned in to answer these two cases, and through his attorney entered a general appearance, without any objection to the time elapsed. Subsequently, on the 19th day of November, A. D. 1910, on motion of the defendant, appearing among the files in the cases, the cases were dismissed under Gen. Laws 1909, c. 283, § 13. The decision of the court was based upon the case of Saunders v. Pendleton, 19 R. I. 659, 36 Atl. 425.

The exceptions of the plaintiffs in both cases are as follows:

"1. That the court erred in granting said motion to dismiss, the exception to which ruling appears on page 8 of the transcript herewith filed.

"2. That on the evidence offered by the defendant to sustain said motion, the court erred in granting the same.

"3. That the new town treasurer, Greene, having been duly summoned in to answer said case as successor to the said Matteson, and having entered a general appearance

without any objection to the lapse of time of more than one year after John Matteson had ceased to be town treasurer of said town, it was too late to file any such motion to dismiss, and the court erred in granting the same.

"4. That the fact that said Matteson had ceased to be town treasurer of said town of Coventry on the 14th day of June, A. D. 1909, and that the new town treasurer, said Greene, was not summoned in to answer said case, until more than a year thereafter, is no ground for dismissing said action, and the court erred in granting said motion."

The plaintiffs' claims are as follows:

"First. That the said decision in *Saunders v. Pendleton* is wrong, erroneous, and should be overruled.

"Second. That by entering the general appearance the defendant waived the right to make the motion to dismiss."

The consideration of this case involves the construction of Gen. Laws 1909, c. 283, § 13, which reads as follows:

"Sec. 13. No action, suit or proceeding, commenced or pending by or against any officer, receiver, or trustee, in his capacity as such, shall abate in consequence of his death, or of his ceasing to hold his office, place, or trust, within one year thereafter; but at any time within one year thereafter his successor in the office, place, or trust may come in and take upon himself, or he may be summoned in to take upon himself, the prosecution or defense of such action, suit or proceeding."

Although the marginal notes to statutes are no part of the same, nevertheless they afford some indication of the construction placed thereon by the compilers thereof. The marginal notes accompanying the section under consideration read as follows: "Proceedings by or against any officer, receiver or trustee may be revived by or against his successor within one year." We have no doubt that the present actions are within the purview of this statute. See *Saunders v. Pendleton*, 19 R. I. 659, 36 Atl. 425. Nor have we any doubt as to the correctness of the doctrine announced in that case. Under the statute referred to, suits against an officer do not abate immediately upon a vacancy occurring in his office by reason of his death, or of his ceasing to hold the same, but become dormant, as it were, subject to be revived at any time within a year thereafter, by the appearance in court of his successor; but in case no successor makes appearance within the year the suits abate by operation of law, by expiration of the time within which they may be revived. In other words, the comatose condition of the suits terminates in their death. Having abated, they cannot be revived. Therefore the questions of general appearance, waiver, and the like have no application in the premises.

The plaintiffs' exceptions are therefore

overruled, and the cases are remitted to the superior court within and for the county of Kent for further proceedings.

EVANS v. MUNRO.

(Supreme Court of Rhode Island. May 11, 1912.)

1. PHYSICIANS AND SURGEONS (§ 18*)—NEG-LIGENCE—BURDEN OF PROOF.

In an action against a surgeon for alleged negligence, proof of the fact that a drain was left in an incision in the plaintiff's breast and allowed to remain there after the wound had healed, imposes upon the defendant the burden of explaining that its presence there was not due to his negligence.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 1005*)—RECEIVED—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, sustained by the trial judge, will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

3. PHYSICIANS AND SURGEONS (§ 18*)—AC-TION FOR NEGLIGENCE—DAMAGES.

For injury from a surgeon's negligence in leaving a drain in an incision, causing inflammation and requiring a subsequent operation for its removal, at which plaintiff's entire right breast was removed, a verdict for \$1,250 was not excessive.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Jane A. Evans against Walter L. Munro. Judgment for plaintiff, and defendant excepts. Exceptions overruled, and cause remitted to superior court, with direction to enter judgment on the verdict.

Plaintiff brought action against a surgeon, who had removed a tumor from her breast, for damages for injuries alleged to have been caused by his negligence in using a drain of improper material and in fastening it so that it slipped into and remained in the wound, causing inflammation and necessitating another operation, at which the right breast was removed. The case was tried before a jury, which returned a verdict for plaintiff for \$1,250.

Littlefield & Barrows, of Providence, for plaintiff. Gardner, Pirce & Thornley, of Providence (James A. Pirce and Hugh B. Baker, both of Providence, of counsel), for defendant.

PER CURIAM. [1] There is no merit in any of the exceptions of the defendant. There is no question but that the plaintiff was in the exercise of due care during the operation performed upon her by the defendant, and thereafterwards while under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his care, and that it was through no fault of hers that the drain disappeared and was lost within the incision made by the defendant, and remained within the wound in her breast, which healed by first intention. As such drains are not ordinarily permitted, in the exercise of good surgery, to remain within the body of a patient after a wound has so healed, proof of the fact that the drain in question was left by the defendant in the breast of the plaintiff imposed upon him the burden of explaining that its presence there was not due to his negligence in the premises.

[2] The jury found for the plaintiff, and their verdict was sustained by the judge who presided at the trial. In such circumstances, the rule approved in the case of *Wilcox v. Rhode Island Company*, 29 R. I. 292, 70 Atl. 913, is controlling.

[3] The damages awarded are not so large as to shock the conscience of the court, or to indicate that the verdict of the jury was actuated by passion, prejudice, or other improper motive.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

SAYLES v. STEERE.

(Supreme Court of Rhode Island. May 11, 1912.)

APPEAL AND ERROR (§ 353*) — EXTENDING TIME.

Under Gen. Laws 1909, c. 297, § 3, providing that when a person is aggrieved by a decree, and from accident or mistake has failed to prosecute his appeal, the Supreme Court, if it appears that justice requires a revision of the case, may, on petition filed within a year after entry of such decree, allow an appeal, one cannot be allowed to affect a decree appointing an administrator, entered more than a year before the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920-1922; Dec. Dig. § 353.*]

Petition, under Gen. Laws 1909, c. 297, § 3, of Laura M. Sayles against Varnum Steere. Denied.

Frank L. Hanley, of Providence, for plaintiff. Tillinghast & Collins, of Providence, for defendant.

PER CURIAM. The petitioner would receive no benefit from the granting of her petition. The same cannot operate to affect the decree of the probate court, entered June 26, 1909, appointing Varnum Steere administrator d. b. n. on the estate of Elliot S. Sayles, from which decree no appeal was taken by the petitioner, and the statutory time for granting relief by allowing an appeal to be taken has long since elapsed.

The petition of the said Laura M. Sayles is therefore denied and dismissed.

SHAW v. STREICHER et al.

(Supreme Court of Rhode Island. May 11, 1912.)

APPEAL AND ERROR (§ 1005*)—REVIEW—CONFLICTING EVIDENCE.

A verdict rendered under suitable instructions upon conflicting evidence and approved by the trial judge will not be disturbed, in the absence of a showing of improper motive or error in the approval.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Henry Shaw against Mark Streicher and others. From a decision for plaintiff, defendants bring exceptions. Exceptions overruled, with directions.

William A. Heathman, of Providence, for plaintiffs. J. Jerome Hahn, of Providence, for defendant.

PER CURIAM. The evidence in this case was conflicting, and was properly submitted to the jury under suitable instructions, and the verdict for the plaintiff has been approved by the justice of the superior court who presided at the trial. In these circumstances, in the absence of anything to indicate that the verdict was the result of some improper motive actuating the jury, or that the judge erred in his approval, the verdict ought not to be disturbed. The newly discovered evidence is not of such a character as to be likely to change the result, if another trial should be had.

The defendants' exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

LYNCH v. LYNCH.

(Supreme Court of Rhode Island. May 13, 1912.)

MARRIAGE (§ 59*)—ANNULMENT—DEFENSES.

If petitioner was married to another when she attempted to marry defendant, in reliance upon an alleged invalid divorce which he procured and showed to her, the fact that she continued to cohabit with defendant did not make her in pari delicto, so as to prevent her having the marriage with defendant annulled; the state having an interest in having the marriage annulled, if it were in fact invalid because of the former marriage.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 59.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Margaret E. Lynch against Charles W. Lynch. Judgment dismissing the petition, and petitioner excepts. Exceptions sustained, and case remanded for further proceedings as directed.

Page & Cushing, of Providence, for petitioner. Cassius L. Kneeland, of Providence, for respondent.

PER CURIAM. The evidence clearly shows that at the time of the marriage of the above-named parties the petitioner had a husband living, who is still alive, and that they have never been divorced. The respondent, prior to his marriage with the petitioner, obtained for, and gave to her, a paper purporting to be a decree of divorce from her husband, but which was of no validity. Upon the strength of the same, and his representations to her, she married him, and they lived together as man and wife for many years. For the past ten years they have not cohabited. The petitioner applied for a divorce from the respondent upon the ground of nonsupport. The case was heard, as an uncontested petition, and decision was rendered in her favor. Subsequently the respondent made application to the court to vacate the decision and reinstate the case, in order that he might contest the same, which motion was granted by the court. The counsel for the petitioner thereupon made preparation for another trial of the case, and in the course of his investigations learned of the former marriage of the petitioner, ascertained the residence of her first husband, and had an interview with him, which disclosed the fact of the first marriage and that the same had never been annulled or terminated, whereupon the petitioner amended her petition for divorce by alleging that her marriage with the respondent was originally void. The case was then heard by a justice of the superior court, who decided that the petitioner had not come into court with clean hands, and thereupon dismissed the petition.

His opinion was that the petitioner knew or ought to have known that she was not divorced from her first husband, and that her continued cohabitation with the respondent was of a willfully bigamous nature, and that she was not entitled to relief in the premises under such conditions. Her legal status, however, is something in which the state as well as the parties are interested. If, as a matter of fact, she was already married when she undertook to enter into the married state with the respondent, such second marriage was a nullity, and the court should so declare. The judge of the superior court found such to be the fact, and declined to give decision for the petitioner solely upon the ground that she was in pari delicto with the respondent. In this the court erred.

The petitioner's exception to the ruling of the justice is therefore sustained, and the

respondent will be given an opportunity, on the 3d day of June, 1912, at 10 o'clock a. m., to show cause why said case should not be remitted to the superior court, with direction to forthwith enter a decision in favor of the petitioner, granting her petition, and annulling the marriage between her and the respondent, on the ground that the same was originally void in law, the final decree in such case to be entered in accordance with the statute in such case made and provided.

WAYLAND et al. v. CITY OF WOONSOCKET et al.

(Supreme Court of Rhode Island. May 11, 1912.)

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Frances M. G. Wayland and others against the City of Woonsocket and others. From a decree for complainants, defendants appeal. Appeal dismissed, decree affirmed, and the cause remanded for further proceedings.

Erwin J. France, of Woonsocket, for appellants. Green, Hinckley & Allen, Theodore Francis Green, and Arthur M. Allen, all of Providence, for appellees.

PER CURIAM. The conclusions of the justice of the superior court, before whom this cause was tried, are fully sustained both by the law and the evidence. The respondents' appeal is therefore dismissed, the decree appealed from is affirmed, and the cause is remanded to the superior court for further proceedings.

SMITH v. PROVIDENCE TELEPHONE CO.

(Supreme Court of Rhode Island. May 11, 1912.)

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Mary Smith against the Providence Telephone Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and case remitted for judgment on the verdict.

Harry J. Williams, of Providence, for plaintiff. Vincent, Boss & Barnesfield, and Alexander L. Churchill, all of Providence, for defendant.

PER CURIAM. The defendant's motion for direction of a verdict in its favor was properly denied by the judge of the superior court who presided at the trial of the case. The question of the defendant's negligence in placing and maintaining the manhole cover in question in the sidewalk of Gaspee street was rightly submitted by the judge to the jury under suitable instructions. The defendant does not insist upon the validity of the other exceptions taken in its behalf.

The defendant's exceptions are therefore overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

STEMMLER v. BOROUGH OF MADISON.

(Court of Errors and Appeals of New Jersey.
March 4, 1912.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS (§ 115*)—ORDINANCES—POWER TO REPEAL.**

As a general rule the power to pass an ordinance includes the power to repeal it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 266½, 267; Dec. Dig. § 115.*]

2. MUNICIPAL CORPORATIONS (§ 312*)—ORDINANCES—POWER TO REPEAL.

Section 33 of the Borough Act (P. L. 1897, p. 301) provides that "the council shall have power and authority by ordinance * * * to lay out, open etc. any street or avenue." An ordinance for the initiation of such an improvement having been passed by a borough council, a member thereof who had voted therefor demanded \$1,000 for land of his that would be taken, and it was ascertained that for the lands of other owners damages would have to be paid. Upon the coming in of the report of the commissioners of assessment the ordinance was repealed, no portion of the proposed street having been actually opened.

Held, that at this stage of the proceeding council had power to repeal its said ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 824; Dec. Dig. § 312.*]

*(Additional Syllabus by Editorial Staff.)***3. MUNICIPAL CORPORATIONS (§ 105*)—"ORDINANCE."**

"Ordinance," as a term of municipal law, is the equivalent of legislative action, and in a statute carries with it by implication the usual incidents of such action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 223, 224; Dec. Dig. § 105.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5024-5027.]

Error to Supreme Court.

Action by Jennie T. Stemmler against the Borough of Madison. Judgment for plaintiff, and defendant brings error. *Affirmed*.

The judgment of the Supreme Court set aside an ordinance repealing what is designated in the case as the "Oak Street Ordinance."

In August, 1905, the council of the borough of Madison passed an ordinance which provided for the laying out of a street from Cook avenue to Central avenue. This ordinance received four votes, one being cast by Benjamin Warren Burnet, who owned a lot which would be taken. A committee of council interviewed the property owners, and all but three offered to donate the portion of their lands required. Mr. Burnet demanded \$1,000. Mrs. Danforth would not convey, and the estate of Luke C. De Hart could not convey. On March 8, 1909, the commissioners appointed to assess damages filed a report, which on July 11, 1910, was rejected. No conveyance for any of the lands was received by the borough, nor any damages paid to any property owner. The re-

pealer ordinance was passed by the council and approved by the mayor November 16, 1910. No portion of the so-called Oak street has ever been actually opened or prepared as a street by the borough.

The prosecutrix having, between the passage of the ordinance and its repeal, bought land fronting on Oak street as described in the ordinance, the Supreme Court, on a writ of certiorari sued out by her, held that the council had no power to repeal the ordinance.

Charles A. Rathbun, for plaintiff in error.
Edward K. Mills, for defendant in error.

GARRISON, J. (after stating the facts as above). [1] Of the implied power to repeal ordinances, Dillon tersely says: "The power to make includes the power to repeal." *Municipal Corporations*, p. 314.

In *Hudson Telephone Co. v. Jersey City*, 49 N. J. Law, 303, 8 Atl. 123, 60 Am. Rep. 619, Justice Reed said of this implied power: "It is a general power, which exists, outside of the express power conferred by the charter, by reason of the right to pass ordinances." And such in varying form is the statement of the rule when the ordinance is not a contract, or one that is, from its nature, exhausted by a single exercise. 28 Cyc. p. 383; 21 A. & E. Enc. Law, p. 1002.

[2] The implication in question may, of course, be negated by statutory language, and such, in the present case, the Supreme Court thought was the effect of sections 33 and 58 of the Borough Act of 1897. We do not, however, find in these sections, or elsewhere in the act, anything that abrogates this salutary and well-nigh indispensable rule, which proceeds upon the principle that, when the Legislature confers upon a deliberative body a power to be exercised by it, such grant, without express words, includes the ordinary incidents of the exercise of similar powers by such a body. Such incidents are by this rule presumed to have been in the legislative mind in the selection of the recipient of its delegated power. The nature of the powers to be implied depends, therefore, upon the nature of their recipient: a power conferred upon a judicial body having one set of implications, and a power conferred upon a deliberative body having a totally different set. In every case something is left to implication, and the line cannot logically be drawn short of the exercise of the power by the recipient in accordance with its characteristic mode of procedure.

[3] "Ordinance," as a term of municipal law, is the equivalent of legislative action, and hence its employment in a statute carries with it by natural, if not necessary, implication the usual incidents of such action. If this were not so, the power to pass an ordinance would not carry with it the power to introduce it, or to refer it, or to amend

it, or to move for its reconsideration, or to apply to it any of the legislative or parliamentary usages that universally obtain in deliberative bodies as incidents of legislative action.

That the right to repeal is as much an incident of ordinary legislative action as the right to enact rests, as we have seen, upon sound authority, and hence must, in reason, be included among those powers that pass by the natural implication that, if recognized at all, as it must be, cannot logically stop short of giving full effect to the legislative will as thus construed.

That this should be so is well illustrated by a case like the present, in which an ordinance is passed at the very inception of a proceeding that in its progress may develop or disclose the gross impropriety of permitting it to proceed to a final conclusion detrimental to the public interest. In such a case it may be that the expense involved, when ascertained, renders it highly inexpedient to go on with the improvement. To such a case the remark of Chief Justice Beasley in *O'Neill v. Freeholders of Hudson*, 41 N. J. Law, 161, well applies. "A man of prudence," he says, "relinquishes a project when he finds the cost is likely to exceed in a large measure its benefit; it would seem intolerably unreasonable to require the agent of the public to pursue the opposite course."

If, on the other hand, it transpires, as it did in the present case, that the ordinance on which the whole proceeding rests was vitiated ab initio by a violation of public policy, we have a situation to which the spirit of the judicial remark just quoted applies with equal force.

If we thus assume, either that the expense, when ascertained, was excessive, or that, by reason of the interest of a councilman who voted for its passage, the ordinance was invalid as against public policy, and hence voidable, upon the authority of *Traction Co. v. Board of Works*, 56 N. J. Law, 431, 29 Atl. 163, or if for any other sufficient reason the proposed improvement was inexpedient, it is, in a sense, begging the question to argue that the sole remedy of council was to vacate the street that is thus in fieri. With as much show of reason it might be urged that the council should have procured a prosecutor to attack its ordinance in the courts. Such contentions do not touch the question of the power of the council to do directly by its own implied powers that which it is thus suggested it might properly do by indirection.

The question is one of statutory construction. The express grant in the present case is: "The council shall have power and authority by ordinance to lay out * * * any street," etc.

By this language, we think, the expediency of such improvements was committed wholly

to the council, which by its legislative action was to give to the public the benefit of its judgment—not of its snap judgment, but of its sound judgment, and not merely of its initial judgment, but, if necessary, of its mature judgment—and that to this end, under the rule of construction we have discussed, the power to pass the ordinance, which was the required legislative action, included during the pendency of the proceedings the power to repeal it.

The right of the prosecutrix to question the action of council by virtue of her status as a citizen, or by reason of her legal interest in the controversy (into which she, so to speak, "bought herself"), although directly challenged, has been tacitly assumed for the purpose of reaching a decision upon the merits.

The judgment of the Supreme Court is reversed, and the action of the borough council is affirmed.

AMERICAN AGR. CHEMICAL CO. v. GOODEN.

(Superior Court of Delaware. New Castle.
Nov. 27, 1911.)

PLEADING (§ 350*)—JUDGMENT ON AFFIDAVIT OF DEFENSE.

Plaintiff is not entitled to judgment before the last day of the term on affidavit of demand for the amount admitted by the affidavit of defense to be due, provided by statute and rule 27 of the Superior Court; the motion for judgment by default not having been made until after the second Friday of the term.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1053, 1054, 1070–1077; *Dec. Dig.* § 350.*]

Action by the American Agricultural Chemical Company against George S. Gooden. On application for judgment. Application denied.

Summons case (No. 76, November term, 1911).

Application for judgment at first term, before the last day of the term, on affidavit of demand, for the amount admitted to be due by the defendant in his affidavit of defense; the motion for judgment by default not having been made until after the second Friday of the said term, as provided by statute and rule 27 of the Superior Court.

In support of his motion, plaintiff cited the said rule and chapter 135, vol. 16, *Laws of Del.*; Rev. Code, 699.

Argued before BOYCE and RICE, JJ.

Josiah O. Wolcott, of Wilmington, for plaintiff. Caleb E. Burchenal, of Wilmington, for defendant.

BOYCE, J. This is an application for judgment after the second Friday of the term for the amount admitted by the defendant to be due in his affidavit of defense. Notwithstanding the defendant's admission,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

we think the plaintiff cannot take judgment at any other time than that named in the statute and rule of court; that is, on the second Friday of the term, or on the last day thereof. Of course, the plaintiff can make his election to take judgment for the amount admitted to be due, at any time within the term. He now asks for something more than an election to take judgment for the amount admitted to be due in the affidavit of defense; he asks for judgment immediately, and after the second Friday of the term.

Such a judgment, as is now asked for, may by special motion be entered on the second Friday of the term to which the process is returnable, or it will, by motion entered on the motion docket, be entered on the last day of the term, unless an adjournment of the court is had before that time for more than 10 days, in which event judgment may be entered on the day of such adjournment. We think the application to enter the judgment immediately should be refused.

RICE, J. Under section 4, chapter 106, Revised Code, page 789, provision is made for two kinds of speedy judgments. One on the last day of the term in default of affidavit of defense being filed; the other by statute and by rule of court making even a more speedy judgment, that is, on the second Friday of the term. The affidavit of defense, we understand, in this case, was filed on the first Thursday of the term, within the rule, and it gave the plaintiff from that time until the second Friday to elect as to one or more of the speedy forms of judgment, the first of these the plaintiff has failed to take advantage of. The other form of judgment, to my mind, is left to the last day of the term.

CURTIS et al. v. PIERSOL.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. JUDGES (§ 42*)—JURISDICTION—ADMINISTRATION OF ESTATES—TRANSFER TO EQUITY COURT.

Code Pub. Gen. Laws 1904, art. 93, § 234, confers on the orphans' court full power to take probate of wills, grant letters testamentary and of administration, direct the conduct and settling the accounts of executors and administrators, superintend the distribution of the estates of intestates, secure the rights of orphans and legatees, and to administer justice in all matters relative to the affairs of deceased persons, and that the courts of equity shall not interfere with such power, except on account of some special circumstances to which the power of the orphans' court may not be altogether adequate. *Held*, that the fact that one of the judges of the orphans' court was a nephew of the decedent and was named as remainderman in the decedent's alleged will was no ground for a transfer of the administration of the estate from the orphans' to the equity court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 190-200; Dec. Dig. § 42.*]

2. RECEIVERS (§ 16*)—CONTEST PROCEEDINGS—PROTECTION OF ASSETS.

Where decedent, prior to his death, had been adjudged a lunatic and his property transferred to a committee appointed by the equity court, where it remained at the time of his death, there was no necessity for the appointment of a receiver, pending proceedings for the administration of his estate and a contest of his will, since the protection of the property of the estate during the pendency of the controversy could be accomplished through the court of equity in the lunacy proceedings.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 24, 28; Dec. Dig. § 16.*]

3. JUDGES (§ 42*)—DISQUALIFICATION—APPOINTMENT OF ADMINISTRATOR.

Code 1904, art. 93, § 67, provides that, where the validity of a will is contested, letters of administration, pending such contest, may be granted to the person named as executor, or to the person to whom the largest portion of the personal estate may be bequeathed in such contested will, or to the person who would be entitled to letters of administration by law, as in cases of intestacy. Const. art. 4, § 7, prohibits a judge from sitting in a case wherein he is disqualified by interest or consanguinity. *Held*, that an order appointing a temporary administrator for a decedent's estate, pending a contest of his will, was not invalid, because one of the judges of the orphans' court was named as a remainderman and was a nephew of decedent; there being nothing to show that such judge, if sitting at the hearing of the application, participated in the determination thereof or signed the order.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 190-200; Dec. Dig. § 42.*]

Appeal from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

Action by Charles H. C. Curtis, Jr., and another against Harry A. Piersol, administrator pendente lite of the estate of Charles H. C. Curtis, deceased. From an order dismissing a bill in equity, praying for the removal of the administration to the equity court, complainants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Samuel S. Boggs, for appellants. Robert H. Bussey and T. Scott Offutt, for appellee.

PATTISON, J. This is an appeal from an order of the circuit court for Baltimore county, sitting in equity, dismissing the bill of the appellant.

[1] The bill alleges that Charles H. C. Curtis, father of Charles H. C. Curtis, Jr., and Mary T. Donelson, the appellants, died on the 28th day of January, 1911, after having first made what purported to be his last will and testament, which was filed for probate, but to which a caveat was filed before the same was probated. The bill further alleges that Harry A. Piersol, nephew of the said Charles H. C. Curtis, was appointed administrator pendente lite by the orphans' court of said county; that at the time of the said appointment H. Seymour Piersol, a nephew of Charles H. C. Curtis, deceased, and who, as the bill alleges, is "named as

a remainderman" in his uncle's alleged will, was sitting as one of the judges of said court. The bill then alleges that, before the appointment of said administrator, the plaintiffs "moved the court by petition, based upon the seventh section of article 4 of the Constitution of Maryland, inhibiting a judge, by interest and consanguinity, from sitting in a case wherein he is interested. The motion and petition of your complainants were denied by a divided court." It is also alleged by the bill "that the participation of H. Seymour Piersol, and sitting in said case, was clearly inhibited under and by the laws of Maryland," and that the appointment of Harry A. Piersol as such administrator was illegal and inoperative. The prayer of the bill then asks, among other things, that the equity court assume jurisdiction of the estate of Charles H. C. Curtis, deceased; that it restrain the said Harry A. Piersol from performing the duties of such administrator; and that a receiver be appointed to take charge of the personal and real estate of the said deceased under the direction of the equity court; and for general relief. The appellees demurred to the bill and the court below sustained the demurrer and dismissed the bill. It is from the passage of this order that the appeal is taken.

Section 234 of article 93 of the Code of Public General Laws confers upon the orphans' court "full power to take probate of wills, grant letters testamentary and of administration, direct the conduct and settling the accounts of executors, administrators, superintend the distribution of the estate of intestates, secure the rights of orphans and legatees and to administer justice in all matters relative to the affairs of deceased persons." As to such powers, "the courts of equity shall not interfere, except on account of some special circumstances to which the power of the orphans' court may not be altogether adequate." *Hewitt's Case*, 3 Bland, 180; *Alexander v. Leakin*, 72 Md. 202, 19 Atl. 533; *Macgill v. Hyatt*, 80 Md. 256, 30 Atl. 711.

[2] The facts alleged in the bill disclose no circumstances or conditions that warrant the interference of a court of equity. The case, as stated in the bill, falls within the ordinary powers of the orphans' court, and there is no necessity for the interference of a court of equity. Nor do the facts as alleged show the necessity for the appointment of a receiver, as prayed for in the bill. The decedent having been adjudged a lunatic, his property and estate, as alleged in the bill, is in the hands of a committee appointed by the equity court, and is thus in its custody and control; and, if need be, what is sought to be accomplished by a receiver—the protection of the property and estate of the decedent during the pendency of the questions in controversy—it would seem can be fully accomplished by and through the court of equity in the lunacy proceeding.

[3] The remaining question to be determined arises under the prayer asking the court to restrain the administrator pendente lite from performing the duties of such administrator, because of the alleged illegality of his appointment. Section 67 of article 93 of the Code of 1904 provides that "in all cases where the validity of a will is or shall be contested, letters of administration pending such contest may, in the discretion of the orphans' court, be granted to the person named as executor or to the person to whom the largest portion of the personal estate may be bequeathed in such contested will, or to the person who would be entitled to letters of administration by law, as in cases of intestacy." It is contended, however, by the appellant that the administrator named was illegally appointed, because, as alleged in the bill, H. Seymour Piersol, one of the judges of the orphans' court, nephew of the testator and one "named as a remainderman in his will" filed for probate, was sitting as judge at the time of the appointment of such administrator, although the appellant had moved the court and "by petition, based upon the seventh section of article 4 of the Constitution of Maryland, inhibiting a judge by interest and consanguinity from sitting in a case wherein he is interested." Neither this motion nor the order appointing the administrator appears in the record; nor is it disclosed thereby that such motion and order, or a copy of either of them, was ever filed with the bill. From the allegation in the bill, we cannot get a clear conception of the motion or the purpose for which it was made. As the order of the court appointing the administrator is not before us, it is not known to the court by what judges it was signed; nor is there any allegation in the bill enlightening us on this point. It is not shown that all the judges were sitting; yet, in the absence of any proof to the contrary, the presumption is that they were present. For all the court knows or can gather from the record, Judge Piersol, although sitting, may have been silent upon the appointment, and the order of appointment may have been signed only by the other judges; or it may be that he signed it with the other two judges. There is no allegation that there was any division of the court in the passage of the order. If the other two members of the court signed it, it was not necessary that he should have signed it at all; and, if he did sign with them, it could not have the effect of rendering the appointment void, and could in no wise affect the question of jurisdiction. The orphans' court had full jurisdiction to appoint such administrator, and it is clear to us that it was acting in the exercise of its jurisdiction in appointing him; and if in so acting they acted irregularly, and an error was committed by them in the appointment of the defendant, an appeal therefrom lies to this court to correct

the error. If an error was committed, the plaintiff should have availed himself of a direct appeal to this court from the action of the orphans' court in passing the order; but, failing to do so, he cannot resort to a court of equity to correct the wrong complained of. *Wannenwetsch v. Mayor and City Council of Baltimore*, 111 Md. 32, 73 Atl. 701; *Owners' Realty Co. v. Baltimore City*, 112 Md. 477, 76 Atl. 575.

We think it unnecessary to prolong this opinion with a further discussion of this question. Therefore, from what we have said, the court committed no error in sustaining the demurrer and dismissing the bill in this case.

Order affirmed, with costs to the appellee.



BOARD OF SCHOOL COM'RS OF ANNE ARUNDEL COUNTY v. HENKEL et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. MANDAMUS (§ 76*)—GOVERNMENT AND OFFICERS—JURISDICTION OF CIRCUIT COURT—STATUTORY PROVISIONS.

The circuit court had jurisdiction of mandamus proceeding to compel the board of school commissioners of a county to appoint six trustees for a public school in the county, where the plaintiff contended that all the vacancies should be filled under and by virtue of Acts 1896, c. 275, §§ 16-18, providing for the erection and maintenance of a school in that county with a board of six trustees, and where defendant contended that such act had been repealed by Code Pub. Gen. Laws 1904, art. 77, § 11 (Acts 1904, c. 584, § 11), which provided that the State Board of Education should carry the provisions of this article into effect, and decide all controversies arising under it, their decision to be final, since the real issue did not involve the proper administration of the public school system, but a purely legal question as to the repeal of a statute.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 158-160; Dec. Dig. § 76.*]

2. STATUTES (§ 159*)—REPEAL—IMPLIED REPEAL BY INCONSISTENT OR REPUGNANT ACT.

Repeal of a statute by mere implication is never favored by the courts, and it is only where the two acts are clearly irreconcilable, and not susceptible of standing together under any fair and reasonable construction, that such repeal will be declared.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 46*)—GOVERNMENT AND OFFICERS—STATUTORY PROVISIONS—REPEAL.

Acts 1896, c. 275, providing for the erection and maintenance of a school in a county and city, declared by section 16 that the district school trustees for the school should be composed of six persons to perform the duties assigned them by Code Pub. Gen. Laws 1904, art. 77, §§ 30-35, relating to duties of district school trustees, and that they should have the rights and powers conferred thereby upon district school trustees, and have the absolute power to appoint and remove teachers in such school without the approval of the county school commissioners. Section 17 classified the trustees, and section 18 provided that va-

cancies should be filled by the county board. Code Pub. Gen. Laws 1904, art. 77, relating to public education, and not expressly repealing Acts 1896, c. 275, §§ 16-18, provided by section 7 that the board of district school trustees should be composed of three persons appointed by the county board, and that their appointment of a principal teacher should be confirmed by the board and by section 27, that the trustees were to employ teachers subject to the confirmation by the board. *Held*, that Code Pub. Gen. Laws 1904, art. 77, § 7, being part of a general law relating to schools, and Acts 1896, c. 275, §§ 16-18, which related only to schools opened under that act, were not inconsistent or irreconcilable; and hence that the Act of 1896 was not repealed by implication.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 92; Dec. Dig. § 46.*]

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Mandamus by Louis B. Henkel and others against the Board of School Commissioners of Anne Arundel County. Mandamus directed to issue, and defendant appeals. Cause remanded without affirming or reversing the order appealed from, that order might be passed in conformity with opinion.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, URNER, and STOCKBRIDGE, JJ.

Clayton Purnell, for appellant. Robert Moss, for appellees.

PATTISON, J. The appellees, citizens and taxpayers of Anne Arundel county, Md., filed their petition in the circuit court for that county asking that a writ of mandamus be issued, directed to the board of county school commissioners of Anne Arundel county, commanding them to appoint, pursuant to chapter 275 of the Acts of the General Assembly of Maryland, passed at its January session, 1896, and in accordance with the provisions thereof, six district trustees for the White public school in the city of Annapolis mentioned in the petition. The petition alleged that each of the six trustees of said school had resigned, and that a vacancy existed in each of said offices. The petition further alleges that the board of county school commissioners, ignoring the provisions of chapter 275 of the Acts of 1896, appointed as trustees for said school three men, "under the pretense that said act of assembly is no longer in force, and that the same has been repealed." The school commissioners in their answer to the petition denied the existence of the vacancies in the board, as alleged in the petition, and alleged "that said board is composed of three persons, residents of the school district, as provided in section 7 of article 77 of the Code of Public General Laws, title 'Public Education.'" The answer further alleges "that sections 16, 17, and 18 of chapter 275 of the Acts of 1896 are inoperative and no longer in force, in that the provisions thereof are repealed by chap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter 584 of the Acts of the General Assembly of Maryland passed in 1904, which," as the answer alleges, "was a general scheme of legislation for the whole state, governing and controlling all public school officers, and providing for the conduct and management of all the public schools of the state." The answer further alleges that by section 11 of chapter 584 of the Acts of 1904 the power is conferred upon the State Board of Education to hear and determine all controversies "between those entrusted with the administration of our system of education and those involving the proper administration of the public school system," and that in so acting its power is summary and exclusive and its decision final; and it further alleges that the controversy in this case was referred to the State Board of Education for its decision, and that it decided adversely to the contention of the petitioners, "and advised that the respondents should take charge of the Annapolis school and proceed to conduct it as other schools of the same class are required to be conducted, under the provisions of the general law applicable to the entire state." This decision of the State Board of Education, the answer alleges, was final, and thus the circuit court for Anne Arundel county was without jurisdiction to hear and determine the issues presented by the petition and answer. In the record we find an agreement between the counsel for the plaintiff and the counsel for the defendant, whereby "it is agreed in this case that the office of board of district school trustees for the White public school in the city of Annapolis is vacant, and that, if the provisions of chapter 275 of the Acts of 1896 are operative and in force, the said board of district school trustees is composed of six members, but, if said Act of 1896 has been repealed by chapter 584 of the Acts of 1904 and subsequent legislation, said board of district school trustees is composed of three members, and the question of which act is in force is one of the questions submitted to the court for its decision in the above case."

[1] There are but two questions presented by this appeal:

(1) Did the circuit court for Anne Arundel county have jurisdiction to hear and determine the issues presented by the petition and answer?

(2) Were sections 16, 17, and 18 of chapter 275 of the Acts of 1896 repealed by chapter 584 of the Acts of 1904, as claimed by the appellant?

We will consider these questions in the order in which they are presented.

Section 11 of chapter 584 of the Acts of 1904, codified as section 11 of article 77 of the Code of Public General Laws of 1904, provides that "the State Board of Education shall, to the best of their ability, cause the provisions of this article to be carried

into effect," and "they shall explain the true intent and meaning of the law and they shall decide, without expense to the parties concerned, all controversies and disputes that arise under it, and their decision shall be final." It is under this provision of the law that the appellant contends that the power and jurisdiction is vested exclusively in the State Board of Education to hear and determine the issues presented by the petition and answer in this case, and that the circuit court for Anne Arundel county was without jurisdiction to hear and determine the same. It is contended by the appellees that the vacancies should be filled by the appointment of six persons as trustees, three men and three women, to be made under and by virtue of chapter 275 of the Acts of 1896 with the full powers therein conferred upon them; while it is contended by the appellant that sections 16, 17, and 18 of chapter 275 of the Acts of 1896 have been repealed by chapter 584 of the Acts of 1904, and are no longer operative, and that the vacancies should be filled by the appointment of but three persons as trustees, to be made under the last-named statute, with only the limited powers therein conferred upon them.

The appellant, in support of its contention that this question cannot be heard and determined by the circuit court for Anne Arundel county, relies upon the case of *Wiley et al., Trustees, v. Board of School Commissioners of Allegany County*, 51 Md. 401, *Shober v. Cochrane*, 53 Md. 545, and *Underwood v. School Board*, 103 Md. 181, 63 Atl. 221. In the first of these cases (*Wiley et al., Trustees, v. Board of School Commissioners of Allegany County*) a bill was filed praying for an injunction to restrain the board of county school commissioners of Allegany county from converting a public schoolhouse, which was at the time of the filing of the bill used for primary district school purposes, under the supervision of the complainants as trustees, to the use and purposes of a high school. The issue there presented was held to fall within the scope of the power conferred by section 11 of article 77 on the state board to decide all disputes arising under that article, and, as the power was comprehensive enough to deal with the issue in the case, it was held that the court of equity should not interfere with its exercise. In the second case (*Shober v. Cochrane*) *Shober* applied for a writ of mandamus to compel *Cochrane* not to interfere with or prevent him from discharging his duties as examiner and secretary and treasurer of the board of school commissioners of Allegany county and from receiving the emoluments thereof, and to yield up said office to the petitioner. In that case the board of school commissioners, appointed by the circuit court for Allegany county, at the time of its organization, January 1, 1879, elected J. W. S. *Cochrane* examiner and secretary and treasurer of the

board. He entered upon the duties of the office and continued to serve until the 6th day of January, 1880, regularly performing the duties of his office. In January, 1880, after the expiration of the term for which said board of school commissioners had been appointed, and while holding over under their original appointment, the circuit court, in which the power of appointment was at that time lodged, having failed to appoint their successors, they elected Shober as examiner and secretary and treasurer. This appointment resulted in a controversy and the whole controversy was submitted to the State Board of Education, before whom all parties concerned, including the school commissioners, appeared and were heard, and the State Board adjudged and determined in favor of Cochrane. It was then that Shober applied for the writ of mandamus, which was refused him, and upon appeal this court filed a per curiam order affirming the order of the circuit court, upon the ground that "the power to decide the matter in dispute was vested in the State Board of Education, and its decision thereon was final and conclusive."

In the case of *Duer v. Dashiell*, 91 Md. 671, 47 Atl. 1040, in which a mandamus was asked for requiring the appellant therein, who had been the secretary, treasurer, and examiner of the former board of school commissioners, to deliver the books and papers of the office to the appellee who was elected to the same office by the new board, this court, in speaking of the two cases just cited, said: "Both *Wiley's* and *Shober's* Cases were disputes between functionaries of the department of public education over which it was the purpose of section 11 of article 77 of the Code to give the State Board of Education jurisdiction. Neither of these cases involved, as the one before us does, the important legal question of the effect of an act of the Legislature repealing the law under which a board of school commissioners were appointed upon the tenure of office of a subordinate official appointed by the board while they were still in office. We do not think it was the purpose of the Legislature in enacting section 11 to withdraw the determination of purely legal questions like this from the courts and commit them to the Board of Education for decision. The real issue in this case is not one involving the proper administration of the public school system, but it is a question of legal effect of the passage by the Legislature of the Act of 1900, c. 29, upon the status of a subordinate official appointed by a school board which that act legislated out of office. The circuit court therefore had jurisdiction to entertain and pass upon the application for the mandamus and its order directing the writ to be issued will be affirmed."

In the case of *Underwood v. School Board*

a bill in equity was filed against the board of county school commissioners of Prince George's county, the secretary and treasurer of the board, and Mrs. Nally, to enjoin the school board and the secretary and treasurer from paying Mrs. Nally the salary as teacher of a public school in that county for the time therein stated, and to enjoin Mrs. Nally from receiving the same. The facts of that case were: Miss Queen, afterwards Mrs. Nally, was a regularly appointed teacher in a public school of said county, and while so acting on the 23th day of December, 1903, sent a letter to each of the three trustees, telling them she was to be married on the 26th of that month, and on that day she did marry Henry Nally. In her letter she stated, "I will continue to teach until the end of the scholastic year, June 15th, 1904," but prior to the last-named day, on June 9, 1904, she again wrote to the trustees saying: "If satisfactory to you, I will teach at this school another scholastic year. I trust my act meets your approval." On August 13th following the trustees notified her in writing that her resignation was accepted, and on the same day appointed another person as principal of the school. Upon appeal to the county board, it decided that she had not resigned her school, and consequently the appointment of the new teacher could not be confirmed. Whereupon the trustees on September 9th notified Mrs. Nally that her services as teacher of the school would not be required after the 10th of October following. Upon the receipt of this notice, she requested them to furnish her with the reasons of her removal, and in assigning their reason therefor the trustees stated that it "was for the best interest of the school." She again appealed to the county board, but upon this appeal the trustees were sustained, and an order was passed confirming the new appointment. From the decision of the county board an appeal was taken by Mrs. Nally to the State Board of Education, to which board the county board forwarded copies of the letters sent to Mrs. Nally by the trustees. The State Board held, upon appeal, that the reason assigned by the trustees that it was for the best interest of the school did not constitute a reason as provided for by the statute, and also that the alleged notice was not in conformity with the law. On receipt of the resolution so passed by the State Board, the county board recognized Mrs. Nally as the teacher of the school, and again she entered upon her duties as teacher. It was then that the injunction above mentioned was asked for. It was there held, Judge Boyd speaking for the court: "That there can be no doubt that the State Board had power to advise the county board, and it was the duty of the latter to follow the advice of the State Board on the subject; * * * and it is right that such controversies should be settled by some tri-

bunal connected with the public school system. When one applies for the position of teacher, he makes himself subject to the laws governing them. * * * It must have been very injurious to this school to have had such a controversy and great confusion was caused by the conflicting action of the trustees and the county board. It is well, therefore, that there is a tribunal having jurisdiction over the state to settle such controversies and to guide the county board in the discharge of their duties. Of course, there may be occasions when it is proper and necessary to apply to the courts as in *Duer v. Dashiell*, 91 Md. 660 [47 Atl. 1040], where a purely legal question was involved."

The case of *Underwood v. School Board*, like the cases of *Wiley* and *Shober*, was a dispute between functionaries of the department of public education, over which, as was said in *Duer v. Dashiell*, it was the purpose of section 11 of article 77 to give the State Board of Education jurisdiction. In all three of those cases the questions presented involved only the proper administration of the public school system, and were therefore unlike the questions presented in the case of *Duer v. Dashiell* and in the present case. In the case of *Duer v. Dashiell* the question there involved was the effect of an act of Legislature repealing the law under which a board of school commissioners were appointed upon the tenure of office of a subordinate official appointed while they were still in office. In this case the question involved is the effect of the passage of chapter 584 of the Acts of 1904 upon sections 16, 17, and 18 of chapter 275 of the Acts of 1896, and upon the determination of it depends whether the aforesaid sections of chapter 275 of the Acts of 1896 are still in force and operative, and are to be followed by the appellant in this case in the filling of the vacancies in the local board of trustees hereinbefore mentioned.

In this case, as in the *Duer v. Dashiell* Case, the real issue is not one involving the proper administration of the public school system, but is a purely legal question. The circuit court, therefore, had jurisdiction to entertain and pass upon the application for the mandamus asked for, and, as it ordered the writ to be issued, we will now consider whether it was right in so doing. It is not contended that sections 16, 17, and 18 of the Acts of 1896 are repealed by any express provisions contained in the Acts of 1904, but that it is repealed by implication, the provisions of the latter act being inconsistent and irreconcilable with the former, as it is contended by the appellant.

[2] It is the well-established rule of law in this state "that the repeal by mere implication of a former by a subsequent statute is never favored by the courts, and it is only where they are clearly irreconcilable and not susceptible of any such fair interpreta-

tion as would allow of their standing together that such repeal will be declared." *Higgins v. State*, 64 Md. 419, 1 Atl. 876; *Snowden v. State*, 69 Md. 208, 14 Atl. 530; *Mayor, etc., of Cumberland et al. v. Magruder et al.*, 34 Md. 386; *Garitee v. Mayor and City Council*, 53 Md. 435; *State v. Northern Central Ry. Co.*, 44 Md. 167. "It is only when the two acts are repugnant and plainly inconsistent with each other that the rule applies. If the two acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the latter act operates as a repeal of the former act." *Frostburg Mining Co. v. C. & P. R. R. Co.*, 81 Md. 35, 31 Atl. 700. And again, it is said in the case of *State v. Falkenham*, 73 Md. 467, 21 Atl. 871: "As respects subsequent legislation, the rule becomes but the declaration of the common law that local laws or special laws shall not be held repealed except by the clearly indicated purpose on the part of the Legislature."

[3] In considering the question here presented, we think it right and proper that we should refer to sections of chapter 275 of the Acts of 1896, other than sections 16, 17, and 18, in order that the character, purpose, and object of this legislation may be better understood. This act provided for the erection and furnishing of a school building to be built upon a lot of land in the city of Annapolis owned and held by the county school commissioners of Anne Arundel county. In the act certain persons were named in a building committee, in whom was vested certain power and authority mentioned therein. For the purpose of contributing towards the erection and furnishing of said school building, the school commissioners of Anne Arundel county were authorized and directed to issue bonds in the name of the school commissioners, with the indorsement thereon of the county commissioners of said county, to the amount of \$12,000, and the mayor, counselor, and aldermen of the city of Annapolis, for the purpose of contributing towards the erection and furnishing of said building, were also authorized and directed to issue bonds in the name of the city of Annapolis to an amount not exceeding \$6,000; and an act subsequent thereto (Act of 1898, c. 372) was passed authorizing and directing the school commissioners and the mayor, counselor, and aldermen of the city of Annapolis to issue additional bonds for the purpose of further contributing to the completion and furnishing of said building; the additional amounts so contributed by them respectively being apportioned in the same manner as in the original act of 1896. This last-named act made it "the duty of the board of school trustees of Annapolis public school and the board of county school commissioners of Anne Arundel county to establish and maintain, in addition to the primary and grammar school, a high school in

the city of Annapolis. It is thus shown that the erection and furnishing of this school building was the result of the contributions of both the county school commissioners and the city of Annapolis, and was not built by money contributed by the school commissioners alone, as in the case of most buildings erected for public school purposes in this state. In the furtherance of the objects and purposes of this statute, section 16 provides that the district school trustees for said school shall always be composed of six persons, three of whom shall be men and three of them women, and those who were first to act as such trustees are therein named. These, by the statute, are directed, within 30 days after the 1st day of May of the year 1906, to meet and enter upon the duties assigned them by chapter 5 of article 77 of the Code of Public General Laws, and "at their first meeting they shall appoint a chairman to hold office for one year and shall give notice of such appointment to the secretary of the board of county school commissioners; they shall have all the rights and powers, and shall discharge all the duties conferred and imposed by chapter 5 upon district school trustees, *except that they and their successors shall have the absolute power of appointment and removal of the teachers of said district school* without the approval of said board of county school commissioners." Section 17 classifies the trustees so named in section 16, placing in each class one man and one woman, the first class to hold office for one year, the second for two years, and the third for three years. Section 18 provides that vacancies in said board of district school trustees "shall be filled by the board of county school commissioners; each such appointment to fill a vacancy caused by the expiration of the term of office, shall be for the term of three years from the first day of May when such term expires, and each such appointment to fill any other vacancy shall be for the unexpired portion of the vacated term; such appointees shall be citizens of Annapolis, who will take an active interest in the management of said school, a woman shall always succeed a woman and a man shall always succeed a man; so that equality in that respect shall always be maintained among the trustees, and as far as possible equality of representation shall always be maintained among them in respect of either political views in making appointments to fill vacancies in their number."

It is section 7 of chapter 584 of the Acts of 1904, codified as section 7 of article 77 of the Code of Public General Laws, that the appellant contends repeals sections 16, 17, and 18 of chapter 275 of the Acts of 1896. That section provides that: "The board of district school trustees shall be composed of three persons, *residents of the school district and county where said school may be located,*

who shall be appointed by the county school commissioners on the first day of May (August in the amended act of 1892) or at their first meeting thereafter, *which must be held during the month of May in each year,* and who shall meet within thirty days after their appointment and enter upon the duties assigned them in chapter 5 of this act. At their first meeting they shall appoint a chairman and shall give notice of their appointment to the secretary of the board of county school commissioners. *When the trustees appoint a principal teacher, and the appointment shall be confirmed by the board of county school commissioners, the said principal teacher shall be ex officio secretary of the board of district trustees,*" etc.

The only amendments or modifications thereby made to the provisions of section 7 of article 77 as it stood at the time of the passage of the Act of 1896, c. 275, are shown by the words written in italics; that is, with the elimination of the words italicised the section will then appear as it stood prior to the passage of the Act of 1896. Both by section 16 of the Act of 1896 and section 7 of the Acts of 1904 the trustees appointed thereunder are directed within 30 days after their appointment to meet and enter upon the duties assigned them by chapter 5 of article 77 of the Code of Public General Laws. By reference thereto it will be found in section 27 thereof—the only section in which we are interested in the determination of the question before us—that at the time of the passage of the act of 1896 the local board of trustees, among other duties thereby imposed upon them, were "to employ the teacher or teachers, subject to the confirmation by the board of county school commissioners," but it will be observed that the Act of 1896 specially provides that the powers of the trustees appointed under that act shall not be limited to the appointment of teachers, subject to approval of the commissioners, but that they and their successors shall have the absolute power of appointment and removal of such teachers without the approval of the said board of county school commissioners. It is also true that since the passage of the Act of 1896, c. 275, no material change has been made in the above-quoted language from section 27 of chapter 5 of article 77, but, like section 7 of said article, it practically remains the same as it was at the time of the passage of the act of 1896, the only modification being that the trustees shall appoint "the principal teacher" and not "the teacher or teachers," as originally provided, subject to the confirmation of the school commissioners.

It will thus be seen that the Act of 1904, c. 584, is no more inconsistent with the special Act of 1896, so far as the questions here involved are affected thereby, than was the statute it repealed and re-enacted with amendments which was in full force and ef-

fect at the time of the passage of said special act. The special statute passed at such time was to apply only to the school to be opened as the result of its special provisions. The passage of it had no effect upon the general statute, nor was it so intended. The general statute continued to apply to all schools to which it applied before the passage of that act. This school, created by the special statute and by the provisions of which the costs and expenses of the erection and furnishing of the school building were borne in part by the school commissioners, and in part by the city of Annapolis, was not intended to be included within the class of schools to which the above-cited provisions of the general law applied. In 1910, by the passage of chapter 386, the management and supervision of the school commissioners over high schools of the state were intended to be enlarged, and it was specially provided that nothing in that act should be construed to repeal the provisions of sections 16, 17, and 18 of chapter 275 of the Acts of 1896, applying to the Annapolis public high school.

We do not think that the general act of 1904, containing no express provisions repealing the special act of 1896, and containing no provisions more inconsistent with such special law than the statute it repealed and re-enacted, can have the effect of repealing such special law. The two statutes are not irreconcilable. The former had application to a particular school, the one mentioned in this controversy, while the latter applied to a general class of schools which did not embrace the school here involved.

But, as the order of the lower court directing the mandamus to issue is incomplete in its directions as to the appointment of the trustees as was conceded in the argument before us, we will, without affirming or reversing the lower court in passing that order, remand the case, that an order may be passed in conformity with this opinion and the Act of 1896, c. 275.

Cause remanded without affirming or reversing the order appealed from, costs to be paid by the appellants.

MERRILL v. PUTNAM.

(Supreme Court of New Hampshire. Sullivan. April 2, 1912.)

1. WILLS (§ 371½*)—PROBATE PROCEEDINGS—PARTIES.

It was error to dismiss an appeal from a decree in a proceeding in probate court to prove a will in solemn form, because certain persons were not properly made parties to the proceedings below.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 838; Dec. Dig. § 371½.*]

2. WILLS (§ 371½*)—PROBATE PROCEEDINGS—REVERSAL—SUBSEQUENT PROCEEDINGS.

On it appearing that a superior court improperly dismissed an appeal from a decree

allowing a will to be proved in solemn form, the case should not be sent back to the probate court, but should be brought forward on the superior court docket for trial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 838; Dec. Dig. § 371½.*]

3. WILLS (§ 219*)—PROBATE PROCEEDINGS—PERSONS INTERESTED.

That a will contained a provision for the benefit of testator's widow shows that she was sufficiently "interested" in the will to prosecute a proceeding to prove the will in solemn form.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 527-531; Dec. Dig. § 219.*]

Transferred from Superior Court, Sullivan County; Wallace, Judge.

Petition by Abbie Putnam to prove Samuel Putnam's will in solemn form. From a decree allowing prosecution of the petition, Robert T. Merrill, executor, appealed to the superior court, where the appeal was dismissed, and whence the case was transferred. Case discharged.

Samuel Putnam died in 1909, testate. Upon petition of his widow, his will was proved in solemn form; but the statutory appointments of agents for nonresidents and guardians for minors were not made. Immediately after the decree, the widow filed a waiver of the provisions of the will in her favor and took her share in the estate under the statute. Abbie Putnam, who is a daughter of Samuel and the present appellee, then appealed from the decree allowing the will. The appeal was dismissed by the superior court because of the lack of appointment of guardians and agents. Thereafter Abbie sought to be substituted for her mother as petitioner in the probate court, and this appeal was taken from an order to that effect.

John E. Allen and Charles H. Hersey, both of Keene, for plaintiff. Edward R. Buck, of Windsor, Vt., and Hurd & Kinney, of Claremont, for defendant.

PEASLEE, J. As the facts are understood, due notice of the proceeding to prove the will in solemn form was given in the first instance, so as to bind all but minors and persons out of the state. This is conceded by the plaintiff in his last brief, wherein he recites that the usual notice was given. By that notice, Abbie Putnam was made a party to the proceeding in the probate court. She entered a formal appearance when she appealed from the decree. Upon that appeal, it was held in the superior court that the proceeding in the probate court was invalid for want of proper proceedings as to minors and nonresidents, and the appeal was dismissed. The probate court then proceeded with proof of the will in solemn form. A question arose as to the right to maintain the petition, and the present appeal is from an order on that question.

[1] It was error to dismiss the first appeal, because certain persons were not prop-

erly made parties to the proceeding in the probate court. *Adams v. Adams*, 64 N. H. 224, 9 Atl. 100. The rule is the same as in appeals from laying out highways. *Bickford v. Franconia*, 73 N. H. 194, 60 Atl. 98, and cases cited.

[2] It is apparent that the case ought not to be sent back to the probate court. The first appeal should be brought forward upon the docket of the superior court, the order of dismissal should be stricken off, and the case should stand for trial upon its merits. It does not appear whether the defects in the original proceeding have been remedied, but apparently such is the fact. If further action to that end is necessary or advisable, it can be taken in the superior court.

[3] It is now urged that the original petition was fatally defective, because the widow was not "interested" in the will. The grounds for this contention are not disclosed: and the fact that the will contained provisions for the benefit of the wife shows that she could claim an interest under it. This was sufficient to give her a standing in the probate court.

Case discharged. All concurred.

BELLOWS FALLS CANAL CO. v. TOWN OF WALPOLE.

(Supreme Court of New Hampshire. Cheshire. April 2, 1912.)

1. TAXATION (§ 499*)—ABATEMENT OF TAXES—BURDEN OF PROOF.

Under Pub. St. 1901, c. 56, § 14, which provides for taxation of land to the "person claiming the same"—that is, to the resident owner, or "to the person who is in possession and actual occupancy thereof if such person will consent to be taxed for the same"—the burden was on a water company, in petitioning for abatement of taxes against a dam, water rights, etc., to show, not only that they had parted with rights or interests in the property, but also that they were not in possession and occupation of the property, and did not consent to be taxed for it.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 920-924; Dec. Dig. § 499.*]

2. TAXATION (§ 81*)—WATER POWER COMPANIES.

A water company is not entitled to abatement of taxes, because it has granted perpetual easements in its reservoir; land being taxable under Pub. St. 1901, c. 56, § 14, to the person in possession or actual occupancy, if he consents, and the company having a right of action under section 30 against the grantees of the easements for any taxes they agreed to pay.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 169; Dec. Dig. § 81.*]

Transferred from Superior Court, Cheshire County; Plummer, Judge.

Petition by the Bellows Falls Canal Company adversely to the Town of Walpole to abate taxes. Transferred from superior court. Case discharged.

The plaintiffs own a dam across the Connecticut river between Walpole, N. H., and Bellows Falls, Vt., the flowage rights connected therewith, some real estate at the Vermont end of the dam, together with a canal on the Vermont side, through which water is brought to the mill gates, and a right to build a dam in New Hampshire upon land at the easterly end of the dam. The water power is all used in Vermont under certain instruments executed by the plaintiffs with various parties prior to April 1, 1910.

Subject to the defendants' exception, the plaintiffs offered in evidence certain instruments, which for convenience are designated as class A, as follows: Bellows Falls Canal Company to Adams Gristmill, February 28, 1832; Bellows Falls Canal Company to J. T. Moore, September 2, 1872; Bellows Falls Canal Company to Moore & Thompson, December 31, 1881; Bellows Falls Canal Company to Bellows Falls Electric Company, August 13, 1897 (on lease form as in class B, "to their use forever" being inserted in place of 99 years); Bellows Falls Canal Company to International Paper Company, January 10, 1898. Subject to the defendants' exception, the plaintiffs also offered in evidence certain instruments, which for convenience are designated as class B, as follows: Bellows Falls Canal Company to Rockingham Paper Company, December 31, 1881; Bellows Falls Canal Company to Robertson Paper Company, November 29, 1886; Bellows Falls Canal Company to Wyman, Flint & Sons, November 29, 1886. With the single exception noted above, the instruments in class A purport to be conveyances in fee of certain parcels of land in Vermont, together with mill privileges described in proposals annexed, and to be used as therein set forth; the grantees yielding and paying therefor a perpetual yearly rental. The instruments in class B purport to be leases of land in Vermont, with mill privileges described in the annexed proposals, for terms of 99 years; the lessees yielding and paying therefor an annual rental. The annexed proposals particularly describe the extent of each privilege, stipulate the terms and conditions upon which the leased and granted rights are to be exercised, and provide that all taxes are to be paid by the lessees and grantees.

The defendants offered to show that none of the foregoing instruments are recorded in New Hampshire, but are on record in the office of the town clerk at Bellows Falls, and that the only knowledge possessed by the selectmen of Walpole for 1910, prior to April 1st of that year, as to the situation between the Bellows Falls Canal Company and the other parties to the instruments, was that the latter were openly using the land in Vermont and the water drawn from the canal in Vermont as lessees or otherwise. The

evidence was excluded, and the defendants excepted.

None of the grantees and lessees named in the instruments ever made any return to the selectmen of Walpole of any interest in any part of the water power. The return of the Bellows Falls Canal Company recited simply "property." Exclusive of the subject-matter of the instruments in class A, and of any interest in or created by those instruments, the taxable value of the plaintiffs' property in Walpole did not exceed \$150,000. The defendants moved to exclude from the case the evidence offered as to the instruments hereinbefore referred to. The motion was denied pro forma, and the defendants excepted. From the statements of counsel, it appeared probable that a full hearing on all questions of fact as to the value of the property involved in the suit would be protracted, complicated, and expensive.

Upon the foregoing facts, at the request of the parties and without a hearing on the merits, the court ruled pro forma that, under the instruments in classes A and B, the plaintiffs were not taxable for any of the property described therein, or on any interest in the property created thereby, and that their petition for abatement should be granted to the extent of \$150,000, to which ruling the defendants excepted; and the questions raised by this and the other exceptions were reserved without hearing any further evidence as to the value of the plaintiffs' property; it being agreed that the case should stand for further hearing on the facts, if the court's ruling should be held incorrect.

Streeter, Demond & Woodworth, of Concord, for plaintiffs. Taggart, Tuttle, Burroughs & Wyman, of Manchester, and Orville E. Cain, of Keene, for defendants.

BINGHAM, J. [1, 2] This is an appeal by the plaintiffs from a tax assessed against them in 1910 upon certain real estate situated in the town of Walpole. It appears that, prior to the conveyances and leases referred to in classes A and B, the plaintiffs were the owners of the reservoir created by the dam and flowage rights on the Connecticut river at Walpole, and that they were such at the date of the assessment of the tax in question, except to the extent that they had parted with certain rights or easements in the property by the above-mentioned conveyances. It is because of the creation of these alleged rights or easements in the reservoir that the plaintiffs contend they should not be taxed for the full value of the reservoir, and that they are entitled to an abatement to the extent that the easements entered into the valuation which was made the basis of the tax.

If we assume, for the purposes of this case, that under the conveyances in class A

the grantees acquired perpetual easements in the plaintiffs' reservoir, which upon request the selectmen could be required to appraise and assess separately to the respective owners (P. S. c. 58, § 2), this would not establish that the tax was improperly assessed against the plaintiffs.

In this state, real property is taxable to the "person claiming the same"; that is, to the resident owner, or "to the person who is in the possession and actual occupancy thereof, if such person will consent to be taxed for the same." P. S. c. 56, § 14. The burden of proof was upon the plaintiffs. *Glidden v. Newport*, 74 N. H. 207, 209, 66 Atl. 117. It was therefore incumbent upon them to show not only that they had parted with certain rights or interests in the property, but also that they were not in the possession and occupation of the property, and did not consent to be taxed for it. This they failed to do. In fact, their evidence and that offered by the defendants tended to prove that they were in the possession and occupation of the property and consented to be taxed for it. The record title was in them, so far as the registry of deeds disclosed. They returned an inventory of their property, without notifying the selectmen that they had parted with any interests in it; and the grantees made no claim of ownership, so far as the selectmen knew, and filed no inventory with them, as required by chapter 91, Laws of 1909. It also appears from the proposals, which are part and parcel of the conveyances, that the plaintiffs covenanted and agreed to construct and forever keep in repair and free from obstructions the principal canals leading from the dam, and to forever maintain the dam so as to turn the water into the canals, which obligations of necessity required the plaintiffs to retain the possession and occupation of the property.

In view of this situation and of the further fact that the grantees agreed with the plaintiffs to assume and pay all the taxes assessed upon the premises conveyed, in addition to the yearly rental that was reserved, and that the law gives the plaintiffs a lien upon the granted premises for the taxes assessed thereon against them, with a right of action to recover the same (P. S. c. 56, § 30), we are of the opinion that justice does not require that the taxes in question should be abated. *Granite State Land Co. v. Hampton*, 76 N. H. 1, 7, 8, 79 Atl. 25; *Morrison v. Manchester*, 58 N. H. 538, 555; P. S. c. 59, § 11.

The defendants' exception to the evidence offered by the plaintiffs is overruled; their exceptions to the refusal to receive the evidence offered by them and to the ruling of the court are sustained.

Case discharged. All concurred.

PAGE v. CITY OF PORTSMOUTH.

(Supreme Court of New Hampshire. Rockingham. April 2, 1912.)

TAXATION (§ 495*)—APPEALS—VALIDITY.

On a tax appeal, the matter in issue is whether the petitioner's tax is greater than it should be, and not whether the assessors omitted to give him the proper statutory notice, or failed to comply with other provisions of the law; and so a tax case, transferred from the lower court on an agreement that if notice be essential to the validity of the tax it should be abated, must be discharged.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 889; Dec. Dig. § 495.*]

Transferred from Superior Court, Rockingham County; Wallac, Judge.

Petition by Calvin Page against the City of Portsmouth for the abatement of a tax. Transferred from the superior court on agreement that, if notice to plaintiff, prior to assessment, is essential to the validity of the tax, it is to be abated and case discharged.

Calvin Page and John W. Kelley, both of Portsmouth, for plaintiff. Samuel W. Emery, Jr., of Portsmouth, for defendant.

YOUNG, J. The determination of the question transferred is not material to the matter in issue, and has not been considered for that reason. The matter in issue in a tax appeal is whether the petitioner's tax is greater than it should be (*Granite State Land Co. v. Hampton*, 79 Atl. 25; *Winnipisogee, etc., Co. v. Laconia*, 74 N. H. 82, 65 Atl. 378; *Conn. Valley Lumber Co. v. Monroe*, 71 N. H. 473, 479, 52 Atl. 940), and not whether the assessors omitted to give him the statutory notice (*Crowell v. Londonderry*, 63 N. H. 42, 49), or failed to comply with the other provisions of law in respect to making the assessment. *Bickford v. Franconia*, 73 N. H. 194, 197, 60 Atl. 98; *Campbell v. Windham*, 63 N. H. 465, 3 Atl. 422.

Case discharged. All concurred.

L. T. & J. E. LOVELL v. BOSTON & M. R. R.
(Supreme Court of New Hampshire. Hillsborough. April 2, 1912.)

APPEAL AND ERROR (§ 1214*)—DETERMINATION—REVERSAL.

In an action against a railroad company for negligently injuring plaintiff's horse which it was transporting, the trial court directed a verdict for plaintiff for the sum named in a limited liability contract. There was an appeal by plaintiff, defendants not excepting. Held, that the directed verdict having been found erroneous on the ground that the question of the validity of the contract should have gone to the jury, the evidence not being conclusive that the contract was valid, an entire new trial was necessary, and on second trial plaintiff could not take advantage of that part of the former verdict in his favor and recover merely upon proof of the amount of his damage, the question for determination being the liability of the carrier as such, either under

the contract or under the general common carrier's liability.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4715; Dec. Dig. § 1214.*]

Transferred from Superior Court, Hillsborough County; Plummer, Judge.

Action by L. T. & J. E. Lovell against the Boston & Maine Railroad for injuring plaintiffs' horse. There was a judgment for plaintiffs, and defendant excepted. Transferred from the superior court. Exception sustained.

See, also, 75 N. H. 568, 78 Atl. 621, 34 L. R. A. (N. S.) 67.

The court "ruled that the only question to be tried was as to the value of the horse, and that the matter of liability, or the validity of any contract under which the horse was being shipped at the time, were not in issue, both having been settled in the former trial." The defendant excepted.

Doyle & Lucier, of Nashua, for plaintiffs. Hamblett & Spring, of Nashua, for defendant.

PEASLEE, J. The question now presented in this case is how far, if at all, the issues of fact were settled by the former trial. At that trial it was ruled that the plaintiffs could recover but \$100, and a verdict was ordered for them in that sum. This was, in effect, a ruling that the evidence was conclusive upon these matters. It was based upon a written contract for limited liability. Upon exception it was held that the ruling was erroneous. The result was to set aside the order excepted to. No attempt was made to save any part of it, and it is not apparent how there was anything to save. Unless the order was correct, nothing had been tried. The verdict depended upon the order. If the order was erroneous, there was no verdict. Since there was no verdict nothing was concluded, and the case stood for trial as though no proceeding had been had, save that two questions of law had been determined.

The plaintiffs now seek to separate out the verdict that the defendant is liable and retain the benefit of that part of the order, while relieved from the part which limited their damages. It is evident that the whole order was based upon the theory that the written contract was binding as matter of law. As this was not so, the foundation for the order as to liability as well as damages was removed, and neither is of any further validity. The fact that there was no exception to the order of a verdict that the defendant was liable is not material here. It is true, as the plaintiffs claim, that the defendant did not except to the order. The defendant made no claim that the order was erroneous. That position was taken by the plaintiffs, and sustained by the court. The proposition that the order could not stand

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep's Indexes

having been established, it was then open to either party to urge any valid claim based upon the avoidance of the order. Error having been found in the proceedings, the question is whether there shall be a new trial of the whole case, or whether a part of the verdict can be saved. *Lisbon v. Lyman*, 49 N. H. 553, 600.

The plaintiffs insist that, when the error is corrected, the application of the correction shall be limited to such phases of the case as will be favorable to them. Argument is not necessary to show the unsoundness of this contention. The effect of the error must be wholly removed from the case. This involves a new trial of all that was based upon the error. The error consisted in holding that the contract was conclusively established, and the liability found was one growing out of the contract. If there was no contract, there was no liability as a common carrier. The question how the horse was shipped—whether under a valid limited contract, or under a general common carrier's liability, or under no contract at all beyond a mere bailment—is still open, and involves (or may involve) material issues as to the duty imposed upon the defendant. The invalidity of the special contract, because of which the former order was set aside, consisted in the time and manner in which the contract was entered into, and not in the substance of the contract itself. The evidence not being conclusive that the contract was not made in violation of Vermont law, and a subsequent ratification not having been proved beyond question, it followed that it was error to take the question of the existence of the contract from the jury. This was all that the former trial and transfer of the case settled. Whether at that trial a verdict that the defendant was liable as a common carrier and for unlimited damages could have been ordered and sustained is a question which has never been decided by or presented to either court. The proposition presented was that the evidence was conclusive in the defendant's favor. The denial of this contention did not establish the antithetical one that the evidence was conclusive in favor of the plaintiffs. After the former decision, the case stood precisely as it would have if at the first trial the presiding justice had denied the defendant's motion for a directed verdict. Unless further proceedings were then had, the whole trial would have gone for nothing. That the motion was granted in the superior court, which ruling was later set aside here, does not change the ultimate effect of what was done. In the end the motion was denied. If this had happened at the trial, the cause could then have proceeded to a verdict of the jury, in accordance with their views of the weight of the evidence. The lapse of time between making the motion in the superior court and its final denial in this court

renders further proceedings with the first jury impracticable, and necessitates a retrial of the whole case.

The ruling at the last trial assumed that it had been settled that the limited contract was invalid; but, as before pointed out, all that was determined was that the evidence was not conclusive that the contract was valid. Its validity still remains to be tried on such evidence as the parties may produce and subject to the legal rules laid down in the former decision.

Exception sustained. All concurred.

SPRINGER v. PULLMAN CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. CARRIERS (§§ 413, 397½*) — BAGGAGE — CARE REQUIRED.

Where baggage is delivered into the possession of a carrier, it becomes an insurer against all loss, except such as results from the act of God or the public enemy, but for the loss of personal effects which a passenger retains in his own possession while occupying a berth in a sleeping car the carrier is only liable for negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1583-1588, 1519-1528; Dec. Dig. §§ 413, 397½.*]

2. CARRIERS (§ 417*) — SLEEPING CAR COMPANY — LOSS OF PERSONAL EFFECTS.

Plaintiff, on entering defendant's car, placed a grip containing valuable personal effects under his berth, and, when he awakened next morning, the grip was missing. When he retired, the upper berth in his section was unoccupied, but was occupied during the night by a passenger who left the car at an intermediate point while plaintiff was asleep. There was no evidence explaining how the grip disappeared, and the only evidence of negligence was that of another passenger that, when he boarded the train after plaintiff had retired, the porter was on the platform, and later during the night he saw the porter in the wash-room of the car. There was no proof, however, that while the porter was absent his post was not filled by the conductor. *Held* insufficient as a matter of law to show actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 417.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Carl Springer against the Pullman Company to recover the value of certain personal baggage lost from a sleeping car in transit. Verdict for plaintiff for \$2,000, and defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Richard H. Hawkins and Howard T. Wilcox, for appellant. Churchill B. Mehard, W. H. Falls, and Samuel S. Mehard, for appellee.

STEWART, J. The damages here sought to be recovered are not for loss of baggage

which the passenger had intrusted for transportation to the carrier's exclusive possession, but for the loss of personal effects which the passenger retained in his own possession while occupying a place in the sleeping car. The distinction with respect to the carrier's liability in the two cases is well established.

[1] In the one where the baggage is delivered into the possession of the carrier, the carrier becomes insurer against all loss, except such as results from the act of God or the public enemy; in the other, liability only attaches when the loss is shown to have resulted from the carrier's negligence in failing to use reasonable care in the protection of the passenger's property. This distinction is too familiar to require any citation of authorities in its support. It results from this established rule of law that mere proof of loss of baggage which is taken by a passenger into a sleeping car does not make out either an absolute or prima facie case of liability against the car company. Our own case of *American Steamship Company v. Bryan*, 83 Pa. 446, although the action there was against a steamship company, while here it is against a sleeping car company, is quite as illustrative of the principle as any of the cases called to our attention, and more authoritative here since it is an adjudication of our own court. In that case the claim was for loss of personal luggage which the passenger had not intrusted to the steamship company, but which he had taken with him into his stateroom, and which had been stolen therefrom. On the trial of the case the jury was instructed that the company, with respect to this particular luggage, was not responsible as common carrier—that is to say, insurer—but was answerable only for negligence; and the one question in the case was whether the company had exercised the ordinary care and caution which it owed to its passengers. This court on review of the case entered into a full and careful consideration of the evidence to determine the one question whether there was any evidence of negligence—that is, want of reasonable care and diligence—that warranted a submission to the jury; and the final determination of the case rested on that one question alone. In the latest New York case on the subject—*Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616—the court puts the liability of the steamboat company in such cases on the same footing with that of the innkeeper, distinguishing the carriage by the steamboat company from that by sleeping car, but that only gives greater emphasis to what was decided in *American Steamship Co. v. Bryan*, *supra*. If in Pennsylvania we apply to steamship companies a rule which holds them liable only for loss of luggage through negligence on their part, for so much the greater reason should the rule apply to

sleeping car companies. Now what are the facts in this case?

[2] The plaintiff, having secured in New York City his transportation over the Pennsylvania Railroad to New Castle, Pa., purchased a lower berth in one of the Pullman sleeping cars which went to make up the train on which he proposed to travel. When entering this car at Jersey City he was carrying two pieces of luggage, a suit case and a satchel. The latter contained personal jewelry which he valued at \$2,203, and wearing apparel of the value of \$63.50. Both pieces of luggage he gave to the porter, who placed the suit case underneath the seat occupied by the plaintiff, and the satchel on the seat, because too large for the space under the seat. Plaintiff retired about the time the train reached Trenton. Before retiring, he opened and examined the satchel, found its contents safe and undisturbed, and then placed it under the berth as far as it would go. Its size preventing it going entirely under the seat, he left it protruding in the aisle; but to what extent does not appear. Plaintiff testified that he soon thereafter fell asleep, and remained asleep until the train next morning was approaching Greensburg, when he arose to find that the satchel was missing. Having been continuously asleep, he knew nothing as to occurrences during the night. When he retired at Trenton, the upper berth in his section was unoccupied, and not made up. He was informed the next morning by the porter that this had been occupied by a passenger who must have got aboard at an intermediate point after plaintiff had gone to sleep, and who had evidently left the car at an intermediate point while plaintiff was asleep; for it was unoccupied when plaintiff awakened. Diligent but unrewarded search was made for the satchel through the entire car; all the baggage in the car undergoing examination. Plaintiff himself testified to no fact or circumstance which could in the remotest way explain the disappearance of the satchel. If the case rested on his testimony alone, it could hardly be contended that there was sufficient evidence of negligence to warrant a submission to the jury, except as we were to apply the rule of *res ipsa loquitur*, which, in effect, would be to hold the company an insurer against theft. From his own testimony it appears that the company adopted the same precaution against loss of luggage which like companies everywhere adopt. It had placed in charge of the car a conductor and a porter whose duty it was to be watchful and vigilant. The testimony of plaintiff does not suggest a suspicion that either of these appropriated the satchel, nor for that matter does any of the evidence, nor does plaintiff's own testimony, involve either in any negligence whatever.

On this branch of the case we have the testimony of a single witness. When the

train reached Philadelphia, a Mr. Patterson, an acquaintance of plaintiff, became a fellow passenger, occupying the berth immediately opposite the plaintiff's. It is the testimony of this witness that is relied upon as showing negligence on the part of the porter. His testimony adds nothing by way of explaining how or in what manner the satchel disappeared. The sole purpose for which it was offered was to show that the porter had not been continuously and uninterruptedly in the aisle of the car or some corresponding position where he could have had a view of the car from the one end to the other between Jersey City and Greensburg. The witness testified that when he boarded the train at Philadelphia, as he recalled the circumstances, he gave his grip to the porter, who was then on the platform. He was asked if he had any recollection of seeing the porter elsewhere during the night, and he replied: "Why, I believe in the washroom." This question followed: "Do you remember seeing him more than once?" The answer was: "No; I do not." Outside this testimony there is absolutely nothing in the case upon which a charge of negligence could rest. The evidence that in the morning the passenger's shoes were found to have been polished during the night does not connect the porter with the polishing, and if it did, it fails to show that, when he polished them, he was not in a place where he could have had a full view of the car. Were we to concede, which we cannot, that reasonable care and vigilance to protect against loss of baggage requires that the porter should throughout the entire route be standing as sentry in the aisle of the car, or constantly moving back and forward through the car as guard or watchman, even then the testimony of Mr. Patterson would be insufficient to establish negligence. The negligent act relied on must have some relation to the loss, and it must appear to have been the proximate cause. Was the jury to be left to infer that plaintiff's satchel was stolen while the porter was on the platform at Philadelphia admitting passengers to the car, or to infer that it was stolen while he was in the washroom? The length of time the porter was in either place does not appear. For all that does appear, it may have been but momentarily. Not only so; but, as against an intruder, it was quite as much a protection to passengers for the porter to be on the platform with the rear door of the car fastened, as it would be were he in the car. If the rear door were unlocked when this occurred, it was for the plaintiff to show the fact. Plaintiff testified that besides the porter there was a Pullman conductor on the car. Was the jury to be left to infer that, while the porter was on the platform or in the washroom, no employé of the company was exercising surveillance of the car? The witness Patterson must have encountered the conductor as well

as the porter. If his testimony was introduced to show negligence because of the porter being on the platform when he entered the car, why was he not interrogated as to conditions inside the car with respect to watchfulness and supervision when he entered it? We may not presume negligence on the conductor's part, and yet the porter being subordinate to him, if it were negligence in the porter to be on the platform, it would be the conductor's negligence in permitting it, except as he took upon himself the duty of the porter within the car. Can there be any reasonable inference from the evidence that he did not do so? In the case of *American Steamship Co. v. Bryan*, supra, the facts which were adjudged sufficient to warrant a submission of the question of negligence were much stronger than we have here, and yet two of the judges dissented from the decision of the court. In that case it was shown that, under the rules of the company, a watch was kept during the night in the saloon of the boat by the stewards or waiters taking turns. To secure their vigilance, they were required to report every hour to the officer on deck, and, of course, for this purpose they had to leave their posts. The court held that it was a question for the jury to say whether this amounted to ordinary vigilance which the company owed the passengers, inasmuch as the watchmen might be expected to take some time to make such report, "to loiter on their way, to stop and have a few words with the officer about the weather and the speed of the vessel." It there appeared that on the morning the larceny was committed the steward had stopped on his way at the cook's galley, and there drank a cup of coffee. "There was ample time in the interval as the fact showed," says Mr. Justice Sharswood, in his opinion. "For some one to enter the stateroom of the plaintiff and other passengers and carry off several valises." Was this ordinary and proper diligence? he inquires; could not some other mode have been adopted of watching the watchmen than this which might leave the saloon entirely unguarded at considerable intervals? No such questions arose in this case. Not only was there no evidence here as to the length of time the porter was absent from his post, or that when absent his post was not filled by another, but no question was made as to the rules, regulations, and requirements of the company being entirely sufficient to meet the requirements of ordinary care. The only negligence asserted was that of the porter in having been seen once in the washroom and once when the car was at rest upon the platform.

In view of all the facts of the case, it seems impossible that the theft, for theft it undoubtedly was, was committed by an intruder. The person who took the satchel must have been either a passenger or an employé. It could hardly have been one of the

latter class, since their attention had not been called in any way to the fact that the satchel contained valuables of any sort. Why should one of them without opportunity of knowing the contents select for plunder the one satchel in the room that carried such rich treasure? We may assume from the unusual value of its contents that this satchel was the richest, and, so far as appears, it was the only one disturbed. The evidence affords a more reasonable explanation. It does not appear how many passengers left that car that night at the intermediate stopping places; but the evidence shows that some did. To any one so leaving the car the plaintiff's satchel was exposed, since it protruded into the aisle. Certainly such a one had larger opportunity to take the satchel, and escape with it undetected than any passenger who remained in the car, or any servant; and the evidence to our mind makes it most likely that it was taken in this way. If it was so taken, will it be contended that that was an occurrence which ordinary vigilance on the part of the company would have prevented? To so hold would be to impose on the company the duty of seeing that no passengers left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this. On the whole, we are of opinion that the evidence of negligence as the proximate cause of the plaintiff's loss was not sufficient to warrant a submission of the case to the jury. As the case was submitted the jury was left to conjecture that which the plaintiff was required to prove. This being our conclusion, it is unnecessary to consider and decide the several other questions which have been raised. The second specification of error complains of the refusal of the court to enter judgment non obstante.

This assignment is sustained, and the judgment is accordingly reversed.

GLEW v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

MASTER AND SERVANT (§ 222*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—ORDERS OF PRINCIPAL—EVIDENCE.

In an action by a servant for personal injuries, evidence showing that plaintiff, a motorman in defendant's employ, on the day of the accident, was instructed to run his car loaded with old wheels over a certain track which was out of repair, that on suggestion that it would be dangerous so to do he was told by the superintendent that he should do as he was ordered, or he would "learn what would happen to him," and that the track separated

whereby he was injured, justifies a verdict for plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. § 222.*]

Appeal from Court of Common Pleas, Washington County.

Action by Thomas Glew against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts appear in the following opinion by McIlvaine, P. J., overruling motion for judgment non obstante veredicto:

"This motion raises but a single question, and that is, Did the court err in refusing the defendant's request to give the jury binding instructions to find in its favor?

"The plaintiff was an employé of the defendant company. He was a motorman engaged to run a freight motor car whenever and wherever directed by the superintendent of the department in which he was employed. The defendant company operates the street railways in the city of Pittsburgh and the neighboring boroughs, and the interurban cars that run into Washington county. It has a department known as the supply department, with a store at Homewood. J. A. Laughlin is the superintendent of that department, and has entire control of it. In his department he has three motor freight cars, which he uses in distributing the supplies which he keeps in his store to the different points on the defendant's system at which they may be needed. As the calls for supplies come at irregular intervals and whenever needed, the services of the plaintiff in running the motor car are rendered upon the express order of the superintendent, and he comes and goes as the superintendent directs. On the 5th day of May, 1909, the plaintiff was sent out with his motor car from the Homewood store for the purpose of getting some old car wheels at Rankin station, and also of getting a gondola load of coal at Glenwood station, the gondola car when loaded with coal to be attached to the freight motor car. While at Glenwood station he was called by telephone by the store at Homewood, and the superintendent, through his assistant, directed him, after he had gotten his load as ordered in the morning, to proceed to Braddock avenue in Turtle Creek borough, go along that avenue to the factory of the Westinghouse Air Brake Company, and there get certain castings, and then return with his load to Homewood. The railway tracks on Braddock avenue were out of repair, and the plaintiff when talking over the phone to the store at Homewood suggested this fact to the superintendent or his representative, and said it would be dangerous to run the kind of a load that he was hauling over those tracks, when he was told, as he claims, that he should proceed to do as ordered, or he would learn in the morn-

ing what would happen him. He carried out the directions of his superintendent, loaded the old car wheels at Rankin station into the box car, and took the loaded gondola of coal hooked to his freight car, and started for Braddock avenue for the purpose of getting the castings as directed. When on Braddock avenue, as he alleges, the track separated, and allowed his gondola car, which was running in front, to drop down and break an axle, and this sudden stop of the gondola car caused a shock to the freight motor car which was running behind it, and this shock displaced the old car wheels and caused one of them to fall on the plaintiff's foot and injure it. He alleged at the trial that the negligence of the company in not keeping their tracks in repair was the proximate cause of the injury to his foot. No defense was made by the defendant company as to the charge that it was negligent in not keeping its tracks on Braddock avenue in proper repair. They rested their whole defense on what they claimed was the contributory negligence of the plaintiff in running his car over tracks which he himself knew were dangerous; and at the close of the testimony their request to the court was to charge the jury as a matter of law that the plaintiff was guilty of contributory negligence in running his car over Braddock avenue with the knowledge he had of its condition, and that their verdict should be for the defendant company on that account. The refusal to so charge and leaving the question of whether or not the plaintiff was guilty of contributory negligence to the jury is the matter that now is complained of.

"In arguing this case the counsel for the defendant stated expressly that the tracks on Braddock avenue were out of repair, and they had no defense to make against the plaintiff's charge that they were negligent in this regard. They claimed, however, that, the plaintiff having himself said in his conversation over the telephone to his superintendent that it would be dangerous to run his cars over that track and then afterwards having done it, this was negligence on his part, and the court should have found as a matter of law that it was negligence.

"Now, there can be no dispute about the rules, first, that an employee of a railway company, such as the defendant, assumes all the risks that are incident to the business in which he is engaged; second, that where he knows of a dangerous condition in the tracks of the company, and voluntarily runs his car over the dangerous tracks, he assumes all the risks of doing so, unless the danger is so slight or the risk so little that a man of ordinary prudence would have assumed it. But these general rules to which we have just referred have their limitations. First, if the defects grow out of a want of ordinary care and vigilance on the part of the rail-

road company in providing or maintaining a reasonably safe track, and are not so serious but that with care and prudence the track may be safely used, and at the request of the master the servant continues to use them and is injured, notwithstanding the exercise of care and prudence, he may hold the master liable. Again, if the servant suggests the danger and the master says or does that which leads the servant to believe that his fears are not well founded, and that the master's judgment is that, notwithstanding the defect, the tracks can be safely used, the servant has a right to rely upon the superior judgment of his master, and, if he does and injury happens, the master is liable, notwithstanding the servant's previous knowledge of the defect. Now, applying these limitations to the general rule to the facts in this case, it appears to us that it clearly raised a question of fact for the determination of the jury. It is true that the plaintiff said on cross-examination that he knew that the Braddock avenue tracks were in a dangerous condition, and that he protested against running his cars loaded as they were over those tracks, but he alleges that the superintendent or his representative insisted on his doing it, and added that he knew what would happen if he would disobey these orders. Now, what is the proper construction to be put upon this conversation? The defendant claims that the proper construction is that the plaintiff knew of the dangerous situation, and that he took the language of the superintendent or his representative to be a threat that he would be discharged if he did not run over the dangerous track, and that rather than lose his job he risked being injured as he was. The plaintiff's contention was that his conversation simply meant that the Braddock avenue track was out of repair, but that the superintendent thought it was not necessarily dangerous to run over, as the company at that time was running many trains a day over it of heavy interurban cars, and that there had no accident happened, and it would be as safe to run the plaintiff's cars over it as it was to run these heavy cars, and that the plaintiff had a right to infer from what the superintendent said that he believed that he, by exercising care, could safely do what he was ordered to do, and that he would not have said what he did had he thought he was placing an extra hazardous risk upon the plaintiff, and after having had this conversation with his superintendent that he concluded he would do the best he could, never thinking that he would be injured as he was, and that what happened to him was not what he expected. Under these contentions, it struck us at the trial, and does yet, that the court would have erred had it said as a matter of law that the plaintiff was guilty of contributory negligence. The fact that the person injured

was aware of the danger is not sufficient to render him guilty of contributory negligence as a matter of law, but the question should be submitted to the jury.' 29 Cyc. 640.

"Again, it is clear from the testimony, as we view it, that the plaintiff did not voluntarily run his car over this dangerous track. He did it upon the order of the superintendent of the department in which he was working—the vice principal of the defendant—and the jury was the proper tribunal to say whether he had a right by that order to infer that the superintendent thought he could safely pass over the tracks, and, if that inference was justifiable, to also say that the plaintiff as employé trusted to the judgment of his superior. If that were the case, then the true rule would be that laid down by Mr. Justice Mestrezat in *Williams v. Clark*, 204 Pa. 416, 54 Atl. 315, which we gave to the jury for their guidance and which reads as follows: 'We think the facts in this case bring it within the well-recognized rules laid down in the text-books and in our own decisions. The true rule in this case, as in all other cases, is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous.'

"We recognize the fact that this is a close question, but we have always in cases of this kind resolved the doubt in favor of a trial by jury, rather than by the judge; and whether or not *Thomas Glew*, the plaintiff, under all the circumstances which led up to his running his cars over *Braddock avenue*, exercised ordinary care, under these circumstances, was a question of fact, and in our opinion it would have been error on the part of the court to say as a matter of law he was guilty of contributory negligence in doing what he did, and the motion for judgment *n. o. v.* must therefore be overruled.

"And now, January 17, 1911, this motion came on to be heard, and was argued by counsel, whereupon, upon due consideration, it is ordered, adjudged, and decreed that the motion be overruled, and judgment be entered for the plaintiff on the verdict of the jury."

Argued before *FELL, C. J.*, and *BROWN, MESTREZAT, POTTER, ELKIN, MOSCH-ZISKER, and STEWART, JJ.*

R. W. Irwin and *Jas. A. Wiley*, for appellant. *W. S. Maxey* and *James M. Clark*, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned president judge of the common pleas.

SULZNER v. CAPPEAU-LEMLEY & MILLER CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. CONTRACTS (§ 95*)—VALIDITY—"DURESS."

While under both the civil and common law threats did not constitute duress unless they were of such a character as to induce a well grounded fear in the mind of a firm and courageous man, the rule now is that any contract produced by actual intimidation is void whether arising from or resulting merely from personal infirmity or from circumstances which might produce a like effect on persons of ordinary firmness.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2268-2278; vol. 8, p. 7645.]

2. CONTRACTS (§ 95*)—DURESS—PRESUMPTIONS.

A person is supposed to possess ordinary firmness, and not to be subject to duress, unless it is shown that, by reason of age or other sufficient cause, he is weak or infirm.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

3. CONTRACTS (§ 95*)—"DURESS"—THREATS OF PROSECUTION.

Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract, unless the threats are made under such circumstances as to excite fear of imminent and immediate imprisonment.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 431-440; Dec. Dig. § 95.*]

4. CORPORATIONS (§ 114*)—STOCK—TRANSFER—DURESS.

That plaintiff assigned certain corporate stock to defendants because of their threats to procure the arrest of plaintiff's son, plaintiff having been afforded ample time in which to consult an attorney, did not constitute such duress as would avoid the transfer.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 466, 470-478; Dec. Dig. § 114.*]

5. JUDGMENT (§ 199*)—JUDGMENT NON OBSTANTE VEREDICTO—PREREQUISITES.

Where defendant made no request for binding instructions and no question of law was reserved, Act April 22, 1905 (P. L. 286), did not authorize the entry of a judgment non obstante veredicto for defendant on the whole record on vacation of the verdict for plaintiff.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

6. APPEAL AND ERROR (§ 1175*)—ASSIGNMENTS OF ERROR—FINAL JUDGMENT.

In the absence of an assignment of error complaining of the judgment for plaintiff appealed from, the final judgment on reversal would not be rendered in favor of defendant,

though plaintiff had produced no evidence sufficient to sustain its verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from Court of Common Pleas, Allegheny County.

Replevin to recover certificate of stock by Joseph F. Sulzner against the Cappeau-Lemley & Miller Company. Judgment for plaintiff, and defendant appeals. Reversed.

The court charged in part as follows:

"The plaintiff alleges, and he must prove his allegations to you by the weight of the evidence, that he was induced to execute these papers by what is known as duress. He alleges that the defendants, or their attorney, threatened him that his son would be sent to the penitentiary, that he was not in good health, and that he became bewildered and did not really know what he was doing when he signed these papers. Now, as I said to you before, the burden is upon him to establish that proposition, and if he has established that he was practically compelled to sign these papers by threats to send his son to the penitentiary, and that threat was such as would have operated upon the mind of an ordinary person so far as for the time being to unsettle him, then you can find that the contract, which these papers indicate, was not the contract of Joseph F. Sulzner, made freely and voluntarily. If that be true, your verdict ought to be for the plaintiff. So that is the crucial question for you to determine.

"If you find, on the other hand, that he did not enter into this contract voluntarily, but that he acted under duress, a threat to prosecute his son and cause his imprisonment, and that that was done in order to force it out of the hands of the plaintiff, then your verdict should be for the plaintiff."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles A. O'Brien, for appellant. Harvey A. Miller and U. G. Vogan, for appellee.

MOSCHZISKER, J. The plaintiff deposited a certificate for 2,500 shares of the stock of a mining company with the defendants for the purpose of sale. A few days later a meeting took place at the office of the defendants in relation to this sale, and certain other persons appeared and claimed to be purchasers of portions of the stock through a son of the plaintiff and another man who they asserted acted as his agents. The plaintiff recognized these claims, accepted in cash what the alleged purchasers declared to be the unpaid balance due, signed a receipt for the purchase money, and executed appropriate papers to carry out a proper division and transfer of the stock. Subse-

quently he instituted this action of replevin to recover the certificate for the stock in question. At the trial of the cause the plaintiff did not deny the identity of the papers executed by him, but asserted that they were obtained by duress. This issue was submitted to the jury, and they found a verdict in favor of the plaintiff for the value of the stock, judgment was entered thereon, and the defendant has appealed.

The appellant states the questions involved to be: (1) Was the charge of the court correct and adequate on the question of duress? (2) Was the plaintiff entitled to recover on the whole evidence in the case? We shall consider the latter question before passing upon the former.

There is no sufficient testimony to show that the plaintiff was either old or infirm at the time of the transaction complained of. The only evidence bearing upon that point was a statement by him that a few months previous thereto he had been in Texas for his health, "about my nervous system." The alleged coercion was thus described by the plaintiff: "Mr. Taylor says, 'Mr. Sulzner, are you aware that your son has sold 1,000 shares to Mr. Volquarts of this stock?' I says: 'No, sir; I don't know anything about it.' He says, 'He has,' and he says also: 'Mr. Kirker sold 1,000 shares to Mr. Cappeau-Lemley. George sold his at 19 cents, and Cappeau-Lemley for 26 cents.' I said, 'I won't stand for anything like that, because,' I said, 'they had no business.' I said: 'Why didn't you tell me all this before you got my stock here, because this wasn't the deal we were to get now? You were to give me my money for it.' And then Mr. Taylor says, 'Mr. Volquarts, tender \$125 to Mr. Sulzner, the balance of \$190 which George gave a check for \$65 on account.' 'Well, now,' I said, 'this is a snap judgment you are taking on me.' I says, 'I don't know anything about this.' He says, 'Well, here is the money.' And he says then, 'Mr. Lemley, you tender \$260;' and he says: 'I don't think I have that much in the office. I will go in and see.' And he went in the office and brought out \$260, and then laid that down to me. And Mr. Taylor says, 'Now, Mr. Sulzner, we have tendered you this money for 2,000 shares;' and he says, 'Take that,' and he had a paper in his hand; and he says, 'We will put your son in the pen.' He says, 'It is either take that or take the consequences.' Then I broke down, and started to cry. I got so bewildered. * * * After that they had me so confused I didn't know what I was doing. I wanted to go home, and I picked up the money, and I says to George, I says: 'George, you are getting me into all kinds of trouble. You had no business doing this.' And I took the money up and went home." The plaintiff further said that he took the money and signed the papers

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"to save my son from being arrested." The son described the incident practically as his father, adding: "Mr. Taylor was walking around there flashing the paper, going to send me to prison, send me to the penitentiary, * * * and father got all bewildered and broke down, did not know what to do, and he said, 'You've got me into this, and I have got to pay or you will go to prison.' I said, 'There is nothing to it at all.'"

[1] Under both the civil and common law, threats, in order to constitute duress, had to be of "such a character as to induce a well-grounded fear in the mind of a firm and courageous man," but "the doctrine which is now approved by the judicial mind, both of this country and of England, is that any contract produced by actual intimidation ought to be held void, whether arising from a result of merely personal infirmity or from circumstances which might produce a like effect upon persons of ordinary firmness." *Jordan v. Elliot*, 12 Wkly. Notes Cas. 56, 59.

[2] A person is supposed to possess ordinary firmness unless it is shown that by reason of age or other sufficient cause he is weak or infirm. *Union National Bank v. Dersham*, 15 Wkly. Notes Cas. 541. "The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent and without immediate means of protection, and such as would operate upon the mind of a person of reasonable firmness." *Motz v. Mitchell*, 91 Pa. 114, 117.

[3] Ordinarily, when no proceedings have been commenced, threats of arrest, prosecution, or imprisonment do not constitute legal duress to avoid a contract. The threats must be made under such circumstances that they excite the fear of imminent and immediate imprisonment. *Moyer v. Dodson*, 212 Pa. 344, 61 Atl. 937; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Hilborn v. Bucknam*, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; *Sieber v. Weiden*, 17 Neb. 582, 24 N. W. 215; *Wilkerson v. Hood*, 65 Mo. App. 491; *Russell v. McCarty*, 45 Ga. 197. The decision in *Jordan v. Elliot*, 12 Wkly. Notes Cas. 56, cited by the appellant, does not control the present case. There the plaintiff, who was an infirm widow, 77 years of age, knew of the defendant, as a man of violent disposition. His threat was to put her son in jail before night, and at the time of the execution of the papers she was laboring under great agitation. This court in its opinion states: "The circumstances which surrounded the old lady, and which induced, or which compelled her, to execute the paper in controversy, were of an extraordinary rough, impudent, and fraudulent character;" and, further, that she had a "conviction that she was dealing with a dangerous man whose

will it would not be safe to resist." Although the English case of *Williams v. Bayley*, L. R. 1 H. L. 200, is referred to, the law of that case was not adopted as necessary to the decision of *Jordan v. Elliot*. After citing it, we expressly stated: "How aptly these authorities bear on the case in hand I need not say, for any one who reads the evidence will at once see that Mrs. Elliot was thoroughly overcome by fear, produced by the conduct of the plaintiff, that in the execution of the note in suit she was anything but a free and voluntary agent."

[4] The plaintiff had been president of the mining company whose stock was in controversy, and so far as the evidence shows he was a man of ordinary firmness. He himself was not threatened with arrest at any time, and, upon the occasion when he signed the contract which he is endeavoring to avoid, both the plaintiff and his son were at liberty to come and go as they chose, and had ample time to consult an attorney, had they so desired. The evidence as presented was not sufficient to sustain a finding that the plaintiff's signature had been obtained by duress, and, had the defendant requested binding instructions, he would have been entitled thereto, but the record shows no such request or no question of law reserved.

[5, 6] Under these circumstances, the defendant was not within the act of April 22, 1905 (P. L. 286), and had no right to judgment non obstante veredicto upon the whole record; and, since there is no assignment of error complaining of the judgment for the plaintiff, we will not enter a final judgment the other way. However, the charge of the trial judge was inadequate, in that it did not sufficiently define the applicable rules of law as we have stated them.

The last two assignments of error, which complain of the refusal to enter judgment non obstante veredicto, are overruled. The first two, which go to the charge, are sustained. The judgment is reversed with a venire facias de novo.

McDONALD v. ELLSWORTH COLLIERIES CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

MASTER AND SERVANT (§ 279*)—NEGLIGENCE OF SERVANT—INJURY TO THIRD PARTY—EVIDENCE.

In an action for the death of plaintiff's husband, evidence justifying a finding that the death was caused by the negligence of one of defendant's servants who released brakes on loaded coal cars, whereby they ran down a grade and struck other cars on which he had notices that decedent was working, authorized a verdict for plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

Appeal from Court of Common Pleas, Washington County.

Action by Zarildia McDonald against the Ellsworth Collieries Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following opinion by McIlvaine, P. J., overruling defendant's motion for judgment non obstante veredicto, states the case:

"In this case the husband of the plaintiff, Elizabeth McDonald, while working for the Pennsylvania Railroad Company, was injured by a car running over him, so that he died. The plaintiff claims that the death of her husband was caused by the negligence of Angelo Sylvester, who was an employé of the Ellsworth Collieries Company, acting in the line of his duty at the time he negligently caused such injury, and that therefore the defendant company is liable to her and her children for the pecuniary loss they sustained by reason of her husband's death. The defendant company denied any liability for the act of Angelo Sylvester for the reason that at the time he performed the act complained of he was acting as a volunteer for the Pennsylvania Railroad Company, and at the suggestion of the railroad employé who was injured. There is no doubt that Angelo Sylvester was on the pay roll of the Ellsworth Collieries Company, and that he performed the duty of trimming coal cars that had been loaded at their tipple, and, after having trimmed them, of seeing that they were moved down to the point on the siding where the railroad company took them for transportation. As to the manner in which the accident happened that resulted in the death of McDonald, two theories were presented at the trial, both supported by testimony. These theories were given to the jury in the charge of the court in these words:

"Now, gentlemen, there are two theories in this case that have been laid before you by counsel, each claiming that the evidence before you supports its theory. The plaintiff's theory is that McDonald went down to those six cars in the line of his duty to couple the air brake hose, and that he was engaged in that duty, and that, when he went down there, these other eight or nine cars were standing up the track some distance, and that there were no signs of them at that time being moved, and that he went in there under circumstances that justified him in believing that it was perfectly proper for him to do as he did, and that while he was in there fixing those cars, with his leg exposed outside the line of the cars (where some of the witnesses that were standing at the telephone booth saw them), Angelo Sylvester notwithstanding McDonald was there between the cars where he might have been seen or where his leg might have been seen if he had looked, or where he might have seen him going just before he went in between the cars, turned those eight or nine

cars loose, releasing four brakes, all of the brakes that were on the cars, allowing them to go down there with force, thus endangering McDonald's life, and that the natural and probable result of such action on his part took place, namely, McDonald was knocked down and run over and injured. And the plaintiff further claims that Angelo Sylvester while he was doing this was acting in the line of his duty, doing the work that he had been doing previously under the direction of the defendant coal company and while in their pay, and that, that being true, under the law, it is responsible for the negligence of its servant. Now, gentlemen, if that was all true, then there would be a right of action here; that is, if you believe McDonald was there in the line of his duty working for the railroad company, and that at the time he went in there he had no intimation that those eight cars above would be disturbed in any way, and that while he was in there Angelo Sylvester went on those cars and let them loose under circumstances showing that he knew or ought to have known that McDonald was down there, and ran those cars down by gravity without retaining any control of them so that he could stop them before they would disturb the six cars, and you further find that at that time he was a servant of the Collieries Company and was acting in the line of his duty and doing a thing there that they had assigned him to do or that he was accustomed to do under their directions—why then I say there would be a right of action here on the part of the widow for negligence in having injured her husband in a way that caused his death, negligence on the part of Angelo Sylvester which could be, under these facts, imputed to the company. Now, that is the plaintiff's claim.

"Now, the defendant's claim is quite the converse of that. They claim first that McDonald was responsible for what took place there. They claim, further, that Angelo Sylvester at the time he moved those eight cars down there was not acting in the line of his duty for the coal company, but he was acting simply at the direction of McDonald himself as a matter of accommodation to him, and that it was the railroad's business to see that those eight cars were gotten down there, and that, when Sylvester did it, he was merely complying with the request of McDonald himself who was a railroad employé, and that he brought this injury upon himself. They claim that when McDonald got off the engine, which brought the 26 coke cars down from Cokeburg and went up in the direction of this booth where these 8 cars were standing, and that he then asked Sylvester to drop one car down which was all that was necessary to make out their load when added to the 6 and 12 that were below. They claim that Sylvester told him he could not drop one car down. The for-

eigner, not being well versed in English expressed it in this way: "Because the track was bad." But I think we can fairly infer that what he undertook to express in his broken English was that the track as it got down so near to the bridge was almost level, and that one car loosed from the front end of those nine cars would not run down there by gravity, and that that is what he meant. But at all events he said that he told him he could not do that, but that he would run the eight down there, and then when the eight were down he could cut off the one (the greater weight of the cars which were farther up on the grade forcing them down), and that he turned them loose in that way. Now Sylvester claims also that he did not know that McDonald had gone down to the six cars; that he supposed that McDonald was waiting till he did what he was asked to do; that he was not there; and that the track down there was clear of everything except the six cars, and some boys were about there, whom he ordered away before he let the eight go, and that the eight went down there, and, as he intended they should, with force, striking the six cars and shoving all of them down onto the level place beyond the bridge, and that that was not an uncommon thing to do, and I suppose there would be no negligence in that if they were sure the track was clear. Now, if you believe the testimony of the defendant, why, then, the plaintiff could not recover for two reasons. In the first place, if McDonald had asked Sylvester to run those cars down and Sylvester told him he was going to do it, then it would be negligence on the part of McDonald to ignore the information he had in regard to that matter and go in between those cars where he could not see what was coming, because that would be taking a risk upon himself even if he might have expected the cars to be run down under control—there was still danger of them bumping, and it is not safe to couple cars—that is apparent—when there is a liability of another train bumping up against the cars you are coupling, so he would be guilty of contributory negligence. And, on the other hand, he could not recover, because, if that was the way the thing was done, Sylvester, who did the negligent act complained of, would be acting for him and to accommodate him; and if, as the defendant claims, these cars were standing there, these eight cars, for the railroad company to take away, and the railroad company was moving them down there for its purpose, and Sylvester was acting merely at the request of McDonald and with him and for him, then any negligence of Sylvester would be the negligence of a man that was working with McDonald, a fellow servant, and the defendant Collieries Company would not be liable.

"Now gentlemen, it appears to the court that the dispute here is on a question of fact. There is testimony here that tends to sustain each of these claims, and it is pretty hard to tell just where the colliery company's duties in assembling those cars stopped and where the railroad company's duty commenced; but it is somewhere because evidently from the testimony the colliery company maintained control over those cars for a time, because they had men employed to trim them and to drop them down, and, while they were trimming them and dropping them down and acting within the line of that direction, why then they would be servants of the colliery company doing that for which they were being paid and any negligence on the part of one of its employes that was the direct cause of an injury to a third party—that is, a party that was not in their employ—it would be liable for."

"We then left to the jury to determine the question of fact—that is, whether Angelo Sylvester when he turned the cars loose that caused the accident was acting in the line of his duty as an employé for the coal company, the defendant company, or whether he was acting for the time being as an assistant to McDonald who was an employé of the railroad company. The motion for judgment non obstante veredicto asks us to set aside the finding of the jury that Angelo Sylvester at the time he did the act complained of was an employé of the coal company, and to find that he was acting as a fellow servant with McDonald, an employé of the railroad company. After a careful reading of the testimony, we feel that for the court to so decide would be usurping the powers of the jury. The testimony clearly raised the question of fact which was submitted to the jury, and, they having found against the defendant company, we are clearly of the opinion that the verdict of the jury should stand, and that judgment should be entered thereon in favor of the plaintiff and against the defendant.

"And now, June 27, 1911, the defendant's motion for judgment non obstante veredicto is overruled, and judgment will be entered in favor of the plaintiff and against the defendant on the verdict of the jury, on the payment of the jury fee."

Verdict for plaintiff for \$6,120, and judgment thereon.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. W. Irwin and Jas. A. Wiley, for appellant. T. H. W. Fergus and Victor J. Levy, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge McIlvaine.

BOROUGH OF HOUSTON v. WASHINGTON & C. RY. CO. et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

ELECTRICITY (§ 4*) — ELECTRIC COMPANIES—USE OF STREETS—CONTRACTS.

Under Act March 19, 1903 (P. L. 84), authorizing corporations using electrical currents to enter into contracts with each other for the use of the same poles, wires, and conduits, an electric railway company has a right to string its wires within the limits of a borough upon the poles of an electric light, heat, and power company, under a contract with the latter, though its wires are located on streets occupied by the light, heat, and power company, which are not part of the railway route; and a bill in equity by the borough to restrain such action will be dismissed, when there is no violation of either the ordinance granting permission to the railway to occupy the streets, or that granting permission to the light, heat, and power company, and where the interference with public travel would be the same, whether the line was strung on the poles of the railway company following its lines of track, or on the poles of the light, heat, and power company.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. § 4;* *Municipal Corporations*, Cent. Dig. §§ 1482-1485.]

Appeal from Court of Common Pleas, Washington County.

Bill in equity by the Borough of Houston against the Washington & Canonsburg Railway Company and another for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

McIlvaine, P. J., filed the following opinion in the court of common pleas:

"Facts Found.

"(1) The plaintiff is a municipal corporation, having been chartered by a decree of the court of quarter sessions of this county on May 13, 1901.

"(2) The Washington & Canonsburg Railway Company is a corporation which holds its charter under the provisions of the act of assembly, approved May 14, 1889 (P. L. 211), and some years ago constructed an electric street railway from Washington, through the borough of Houston, to the town of Canonsburg, a distance of about nine miles. The Pittsburgh Railways Company is a corporation of similar character, and under a contract with the first-named company operates its road from Washington, through the borough of Houston, to Canonsburg.

"(3) The Canonsburg Electric Light, Heat & Power Company is a corporation having its office in the borough of Canonsburg, and maintains electric lines from Washington, through Houston, to Canonsburg for the purpose of supplying light, heat, and power to those who may see fit to patronize it.

"(4) Two of the streets in Houston borough, which run north and south and parallel to each other, are known, respectively, as Grant street and Pike street; two other of the streets of the borough, which run east and west and parallel to each other, crossing

the first two named streets, are known, respectively, as Main street and North avenue. The Washington & Canonsburg Railway Company's track going from Washington enters the south side of the borough of Houston on Grant street and runs north to Main street, where it turns at right angles onto Main street and runs east to Pike street, where it turns to the north and runs along Pike street on its way to Canonsburg, passing over North avenue. The Canonsburg Electric Light, Heat & Power Company's poles and lines also enter the south side of the borough of Houston on Grant street, run alongside of the Electric Railway Company's track down Grant street, passing over Main street and running to North avenue, where they make a turn to the east and run to Pike street, and there again follow the line of the railway company's track. The distance between Grant street and Pike street is about 315 feet; the distance from Main street to North avenue is approximately 1,500 feet.

"(5) The defendant companies' franchise in the borough of Houston was given by an ordinance, duly passed, which is known in the ordinance book as Ordinance No. 10, and grants to the Washington & Canonsburg Railway Company the privilege to enter upon, use, and occupy, for the purpose of its railway, the following described route in the said borough of Houston: Grant street from the southern entrance to Main street; thence along Main street to Pike street; and thence along Pike street to the northern boundary of the borough. The words of the first section of the ordinance, which are particularly relevant to this case, are as follows: 'To construct, maintain and use for the term mentioned in its charter, a proper street railway track, with the necessary sidings and turn-outs, the right to use electricity or other motive power, except steam or horse power, on the whole or any part of its line hereby authorized to be constructed, and also to erect, maintain and use on said streets an overhead electric system for the supply of motive power and to use thereon such overhead system and to complete said electric system by suitably connecting the rails of the road at their ends or by connecting the rails with supplemental ground wires.' One of the conditions on which the franchise was granted was that 'the overhead wires shall be supported by smooth, symmetrical wooden poles which shall be kept neatly painted and be placed along the curb lines and so far as possible on property lines.'

"(6) The franchise granted to the Canonsburg Electric Light, Heat & Power Company is found in an ordinance which in the ordinance book of the borough is No. 27. The first section of that ordinance provides 'that authority be and is hereby granted to the Canonsburg Electric Light, Heat & Power Company, its successors and assigns, to con-

struct, operate and maintain lines for the transmission of electricity for furnishing light, heat and power, including the necessary poles, wires and fixtures, upon, along and over the streets, lanes, alleys and highways within the limits of the borough of Houston, subject to the general regulations of said borough.' The second section provides that 'all poles erected under this ordinance shall not be less than twenty-five feet in length from the curb line and located under the direction and supervision of the street committee of council and where required by said committee and in constructing said line and making repairs to the same the work shall be done in such manner as to interfere as little as possible with the free use of the streets, alleys and highways of said borough,' and provides further 'that no wire shall be strung under the provisions of this ordinance nearer to the surface of the ground than twenty-five feet, except by special permission in writing from the street committee.' Under this ordinance, and under the supervision of the street committee or commissioners of the borough, the electric light, heat and power company constructed its lines from the south line of the borough along Grant street to North avenue, down North avenue to Pike street, and from Pike street to the northern boundary of the borough, and have been, since its construction some months before the filing of this bill, operating said line.

"(7) On the 27th day of August, 1909, the Canonsburg Electric Light, Heat & Power Company entered into a written contract with the Washington & Canonsburg Railway Company, whereby the right was given to the electric light and power company to erect its poles along the line of the railway company's track and on their right of way between Washington and Houston borough, and between Houston borough and Canonsburg. The fifth paragraph of that agreement, which covers a number of matters not relevant to this case, provides as follows: 'The party of the first part [that is, the electric company] hereby agrees to permit the party of the second part [that is, the railway company] to erect upon the main line of poles of the party of the first part [that is, the electric company] carrying its high tension line or lines through the borough of Houston not to exceed two sets of three wires each in the same relative location on such poles as the high tension lines that the two companies occupy along the route from Tylerdale to Meadowlands upon condition that the party of the second part pays the party of the first part for the cost of all the poles and the setting of the same which the party of the second part thus occupies in said borough, and the party of the second part is to pay one-half the expense of the cross-arms necessary for supporting said wires and pay the expense

of the maintenance of any of the poles of the party of the first part which the party of the second part thus occupies in Houston borough.'

"(8) Some time before the filing of plaintiff's bill, the Pittsburgh Railways Company, which operates the street railway line, desired to string another high tension line through the borough of Houston, and in doing so, in place of following the line of their track from the corner of Main and Grant street down Main street and along Pike street to the corner of Pike street and North avenue, they strung the line, under the contract just referred to, on the poles of the electric light, heat and power company, which were erected from the corner of Main and Grant streets along Grant street to North avenue, and down North avenue to Pike street, where connection was made with the line along the track of the railroad. The stringing of this line was finished (but no current of electricity passed through it) on the 2d day of September, 1910, the same day that the plaintiff presented its injunction bill in this case, praying that an injunction be awarded preliminary to final hearing, and thereafter to become perpetual, restraining the said Washington & Canonsburg Railway Company and the said Pittsburgh Railways Company, defendants, from attaching their wires, or the wires of either of them, to poles or otherwise permanently locating them on or within that portion of Grant street, in the said borough of Houston, lying between Main street and North avenue and that portion of North avenue lying between Grant street and Pike street in said borough, and from passing currents of electricity through the said wires while located on the portions of streets last above designated; and also praying that the said defendants be required to remove the wires already strung, as aforesaid, along said portions of Grant street and North avenue. The court, on the presentation of the plaintiff's bill and the necessary injunction affidavits and bond, granted the usual five-day injunction, and at the time fixed for hearing the plaintiff moved the court to continue the injunction granted as a preliminary injunction until final hearing; and the question now for decision on the facts found is whether or not this motion should be granted.

"Conclusions of Law.

"First. That the contract of August 27, 1909, by and between the Canonsburg Electric Light, Heat & Power Company and the Washington & Canonsburg Railway Company, referred to in the seventh finding of fact, was authorized by the provisions of the act of assembly, approved March 19, 1903 (P. L. 34); and under that contract the defendants had a right to string their wires upon the poles of the electric light, heat and power company from Main street along

Grant street and down North avenue to Pike street—it not appearing in the evidence that in stringing said wire they in any way violated any of the provisions of Ordinances Nos. 10 or 27.

"Second. That the plaintiff's motion to continue the preliminary injunction until final hearing should be refused.

"Comments.

"The act of 1903 provides as follows: 'Section 1. Be it enacted, * * * that it shall and may be lawful for corporations for what purpose soever formed and lawfully using electrical current within this commonwealth, to enter into contracts with each other for the use of the same poles, wires and conduits, or for the purchase and sale of electrical current, or for the lease and operation of each other's systems, on such terms and conditions as they may agree upon: Provided, that nothing in this act contained shall be construed to give to any company any rights to erect or maintain poles, wires or conduits upon any street or road not already so occupied, unless the consent of the local authorities shall have been first obtained.'

"It will be observed: (1) That both of these corporations had a right to string wires on poles through the borough of Houston for the purpose of carrying electric currents for the furnishing of power. (2) That the distance from the corner of Main street and Grant street to the corner of North avenue and Pike street was about 1,800 feet, whether you went down Main street and along Pike street, the way the railway track ran, or down Grant street and along North avenue to Pike street, the way the electric light, heat and power company's poles ran. (3) That the railway company had a right to string such wires as they thought were necessary to carry the current required to operate their road between the points named, and also that the electric light, heat and power company had a right to string similar wires to carry electricity to furnish power, such as they might think was necessary. (4) That the routes from the corner of Main and Grant streets to the corner of Pike street and North avenue, whether you went by the way of Main street and Pike street or went by the way of Grant street and North avenue, had erected thereon and were occupied by poles and wires used for one and the same purpose.

"This being the case, the traveling public on these different streets would be interfered with just the same, and for the same distance, whether the line was strung on the poles of the railway company following the line of their track, or on the poles of the electric company along the route that they occupied; and, in our opinion, what was done by these two companies, under the contract that existed between them, in no way

conflicted with the provisions of the act of 1903, which provides that nothing in the act contained shall be construed to give any company any rights to erect or maintain poles, wires, or conduits upon any street or road not already so occupied, unless the consent of the local authorities shall have been first obtained. Clearly the two routes to which we have referred were already occupied by the two contracting parties, and occupied for one and the same purpose, to wit, the carrying of electric wires on poles for the purpose of transmitting electricity, which was to be used to furnish power; and, as there is no allegation in the bill, and as there was no evidence produced at the hearing which shows, that this wire of the railway company, which was strung on the poles of the electric company, was strung in a manner to offend against the terms of either of the ordinances to which we have referred, we are clearly of the opinion that the plaintiff is not entitled to the preliminary injunction for which it prays."

Exceptions to the adjudication were dismissed, and a decree filed dismissing the bill.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, MOSCH-ZISKER, and STEWART, JJ.

Irwin Cummins and Boyd & E. E. Crumrine, for appellant. R. W. Irwin and James A. Wiley, for appellees.

PER CURIAM. The decree dismissing the plaintiff's bill is affirmed on the opinion of Judge McIlvaine.

Appeal of BORLAND et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 509*)—ACCOUNTING—DECREE—BILL FOR REVIEW.

At the death of a partner who was indebted to the firm, the indebtedness having been carried on the books for some time and finally charged to profit and loss, written notice was given to his widow and to his administrators of the indebtedness, without any reply from them. Among the papers of the firm, there came into the possession of the administrator c. t. a. of a surviving partner a paper, described as an agreement between the partner first mentioned and the decedent of the administrator c. t. a., and also described as "notice of dissolution." This agreement was subsequently lost. The two decedents were not interested together in any other venture. *Held*, that the widow and children of the first-mentioned partner have no standing to maintain a bill of review to open a decree confirming the report of an auditor as to the distribution of assets after the filing of an account by the administrator c. t. a., which petition was not filed until 26 years after the death of the husband and father of petitioner and 4 years and 9 months after the absolute confirmation of the auditor's report.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2219, 2233, 2234; Dec. Dig. § 509.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

2. EXECUTORS AND ADMINISTRATORS (§ 509*)—ACCOUNTING—DECREE—BILL FOR REVIEW.

A petition by the widow and children of a deceased partner for review of a decree confirming an auditor's report as to distribution of assets after an accounting by an administrator c. t. a. of a surviving partner is barred by limitations, where it is not filed until 28 years after the death of petitioners' decedent and 4 years and 9 months after the absolute confirmation of the report of the auditor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2219, 2233, 2234; Dec. Dig. § 509.*]

Appeal from Court of Common Pleas, Allegheny County.

Petition for review in account of the Fidelity Title & Trust Company, administrator c. t. a. of the estate of James M. Bailey, surviving partner of Phillips, Nimick & Co. From an order dismissing the petition, Katharine B. S. Borland and others appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Morton Hunter, for appellants. Richard H. Hawkins and John E. McCalmont, for appellees.

BROWN, J. [1] In 1873 the firm of Phillips, Nimick & Co. was formed for the purpose of manufacturing iron and steel. Its members were William K. Nimick, Alexander Nimick, James M. Bailey, David Borland, and Hugh McDonald. McDonald subsequently transferred his interest in the partnership to the other four members of the firm. William K. Nimick died in 1875; but, by special agreement, his estate continued his interest in the partnership, and in 1887 Charles E. Speer, trustee under his will, transferred that interest, in pursuance of an order of the orphans' court, to Alexander Nimick and James M. Bailey. David Borland died intestate March 3, 1884, and his administrator wound up his estate by filing a final account. Alexander Nimick executed a deed of assignment for the benefit of creditors in 1891 and died in 1898. James M. Bailey died in 1903. In May, 1905, the Fidelity Title & Trust Company filed its account as administrator c. t. a. of Bailey, surviving partner of the firm of Phillips, Nimick & Co. This account was referred to an auditor for distribution of the assets in the hands of the administrator, amounting to \$108,568.83, and these were distributed equally between the surviving trustee under Alexander Nimick's deed of assignment and the trustees under the will of James M. Bailey; the auditor having found that, by various assignments, the other three original interests in the partnership had been transferred to and become vested in James M. Bailey and Alexander Nimick. The report of the auditor was confirmed absolutely on October 19,

1905, and distribution was thereupon made by the accountant. On July 27, 1910, more than 26 years after the death of David Borland and 4 years and 9 months after the absolute confirmation of the report of the auditor distributing the balance in the hands of the appellee as administrator c. t. a. of Bailey, surviving partner of the firm of Phillips, Nimick & Co., the widow and children of Borland presented their petition to the court below, asking that the decree confirming the report of the auditor be opened to enable them, or the estate of their decedent, to participate in the distribution of the assets admitted by the accountant to have been in its hands as the representative of Bailey, the surviving member of the firm. Two material averments in the petition were that no settlement had ever been made for the partnership share or interest of David Borland in the firm of Phillips, Nimick & Co., and the petitioners had no notice of the filing of the account by the administrator of the surviving partner or of the distribution made by the auditor until July 15, 1910.

If David Borland was a member of the firm of Phillips, Nimick & Co. on March 3, 1884, it was dissolved that day by his death; but it is by no means certain that he was a partner at the time of his death. On the contrary, it appears that when he died he was indebted to the firm in the sum of \$900, which was carried on the books for some time and finally charged to profit and loss. Notice in writing was given to his widow and to his administrator of this indebtedness; but there was no reply from either of them intimating that there was an unsettled partnership account. This is not to be overlooked when now, after a lapse of more than 26 years from Borland's death, his widow and children for the first time insist that he was a member of the firm at the time of his death. If he had been, it was the right of his administrator to call upon the surviving members at any time within 6 years for an accounting; but the administrator did nothing at all indicating a belief, either by himself or by the widow and children of the deceased, that he had continued, up to the time of his death, to be a member of the firm. During all the more than 20 years following the 6 years after his death, not a thing was done nor a word spoken by his administrator or his widow and children which even intimated that they regarded him as having been a member of the firm at the time of his death. It does not consist with human experience that the widow and children would have held their peace for more than a quarter of a century if they believed the husband and father had continued to be a partner until his death, and would have waited until this late day to claim a portion of the partnership assets. Increased doubt as to Borland's membership

in the firm at the time of his death grows out of the testimony that among the papers of Phillips, Nimick & Co. that came into the possession of the appellee was an "agreement between David Borland and J. M. Bailey, and notice of dissolution." This agreement was lost; and the court below, though not having the benefit of its contents, assumed that it related to the affairs of Phillips, Nimick & Co., as it was among the papers of that firm; and it did not appear that Borland and Bailey were interested together in any other business venture. Commenting on the testimony as to this lost agreement, a conclusion of the learned chancellor, not assigned as error, is as follows: "Standing alone, it would not be sufficient to establish the transfer, but, considered in connection with the delay in making claim, especially for 5 years after the death of the last surviving member of the firm, and 26 years after the death of Mr. Borland, it is at least sufficient to make the claim quite doubtful. If Mr. Borland did not part with his interest in the firm, why did not his administrator demand a settlement of the firm's affairs, or why did his heirs remain silent for 26 years after his death? The extreme laches on their part has not been satisfactorily explained. The law does not look with favor on stale claims; and in view of the fact that petitioners had at least constructive notice of the filing of the account of the Fidelity Title & Trust Company, and of the hearings before the auditor, together with the lapse of 21 years between the death of Mr. Borland and the filing of the account, without any demand for an accounting, we are of opinion that this request for a review comes too late."

The appellants may not have had actual notice of the filing of the appellee's account, nor of the report of the auditor making distribution, but they had constructive notice of each; for such notice was given by due legal advertisement, and this was sufficient. *App et al. v. Dreisbach*, 2 Rawle, 287, 21 Am. Dec. 447; *Priestley's Appeal*, 127 Pa. 420, 17 Atl. 1084, 4 L. R. A. 503; *Ferguson v. Yard*, 164 Pa. 586, 30 Atl. 517.

The relief asked for by the appellants,

after the unusually great lapse of time in presenting their petition for it, could not have been granted by the court below, unless there was first clearly established the membership of the deceased in the firm at the time of his death. This fundamentally material fact was not so established; and the petition was properly dismissed for the reason stated in the above-quoted extract from the opinion of the court.

[2] An additional reason given by the court below for dismissing the petition is that the statute of limitations bars the relief sought. Under the facts as developed, this was not error. There was no proof that Bailey had ever held himself out to the appellants or to any one else as a liquidating partner, having partnership assets in his hands, to a portion of which Borland's estate would be entitled on an accounting. On the contrary, everything done by him and Alexander Nimick subsequently to Borland's death was inconsistent with the admission of their partnership with him at the time of his death, and was in hostility to the claim now made by his widow and children. The statute, therefore, ran from his death. "And in reason and justice, why should not the statute close upon partners, who, for six years after dissolution, take no steps to ascertain the balance between them? On what principle should such an account remain open for all time? As soon as dissolution takes place, they stand no longer in any relation of trust or confidence to each other. The implied authority given by each to the other ceases, and they are no longer agents, one for the other; and, the objects of their association having come to an end, the time for a settlement has arrived. Six years is a fair time to allow for closing their affairs, and is a reasonable time for demanding a settlement as in an analogous case." *McKelvy's Appeal*, 72 Pa. 409. Other cases recognizing this rule are *Hamilton v. Hamilton's Executors*, 18 Pa. 20, 55 Am. Dec. 585; *Guldin v. Lorah*, 141 Pa. 109, 21 Atl. 504; *Garretson v. Brown*, 185 Pa. 447, 40 Atl. 293.

Appeal dismissed at the costs of appellants.

J. P. MORGAN & CO. v. HALL & LYON CO.
(Supreme Court of Rhode Island. May 14, 1912.)

1. CORPORATIONS (§ 484*)—POWERS—CONTRACT OF GUARANTY.

While a corporation is not ordinarily bound by a contract of guaranty for the benefit of third parties, such guaranty is binding when given to further any object for which the corporation was created, or when reasonably necessary or proper in the conduct of its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

2. CORPORATIONS (§ 484*)—CONTRACTS—NOTICE—GUARANTY.

Where the act of the treasurer of a corporation in guaranteeing the payment of all money drawn on a letter of credit issued to a woman was an act which might have been reasonably necessary to carry out the purposes of the incorporation, the company issuing the letter was not put upon notice that the transaction was one of accommodation and that the act of the treasurer was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

3. GUARANTY (§ 89*)—ACTION—PRESUMPTION.

Where, in an action to recover upon a contract guaranteeing the payment of the amounts drawn against a letter of credit, it appeared that the party to whom the letter was issued had drawn the full amount for which it called, the presumption was that she drew the money under some arrangement made with its correspondents by the company issuing the letter.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 102; Dec. Dig. § 89.*]

4. GUARANTY (§ 16*)—CONSIDERATION—LETTER OF CREDIT.

It was a sufficient consideration for a contract guaranteeing the payment of amounts drawn upon a letter of credit issued to a third party that the money stated in the letter was made available to the third party.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 14-17; Dec. Dig. § 16.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by J. P. Morgan & Co. against the Hall & Lyon Company. From a decision for defendant, plaintiffs bring exceptions. Exceptions sustained, and defendant given an opportunity to show cause why judgment should not be entered for plaintiffs.

Dexter B. Potter and Edward A. Stockwell, both of Providence, for plaintiffs. C. M. Van Slyck and Frederick A. Jones, both of Providence, for defendant.

VINCENT, J. This is an action at law, brought by J. P. Morgan & Co. to recover from the defendant corporation damages for breach of its written guaranty of a letter of credit issued by the plaintiffs to Emily Alpers; the guaranty being signed by the defendant corporation, by its then treasurer, George C. Lyon. The guaranty is as follows: "Guarantee. Letter of Credit No. N——. New York, Aug. 19, 1907. Whereas, J. P. Morgan & Co. have given to Miss Emily Alpers their circular letter of credit,

No. N—— for £200, or Fcs. 5,050, we hereby guarantee and agree, on demand, to pay said J. P. Morgan & Co. the amounts drawn against said letter of credit, together with usual charges. In case this credit be either lost or stolen, we hereby authorize J. P. Morgan & Co. to send the usual circular to their correspondents, notifying them of the loss, and to take such precautions as they may deem advisable for the prevention of fraud, agreeing to pay any expenses attending the same, and in case of the cashing of any drafts by any banker, under the usual precautions, and before the receipt of any circular, we agree to indemnify J. P. Morgan & Co. for any loss therefrom. Hall & Lyon Co., Geo. C. Lyon, Treasurer." The letter of credit was issued in August, 1907, and was for £200 sterling. Against this letter of credit six drafts were drawn, three of which drafts are still unpaid, to wit, one for £17, one for £54, and one for £100. The amount due on this letter of credit in United States money, at the then current rates of exchange, was \$845.98, not including interest.

The case was tried in the superior court without a jury, and a decision was rendered for the defendant, whereupon plaintiffs filed their bill of exceptions upon two grounds: (1) That the said decision was against the law; and (2) that said decision was against the evidence and the weight thereof. The defendant contends that, the Hall & Lyon Company being a trading corporation, the act of its treasurer in signing the guaranty was without authority, and so simply an act for the accommodation of a third party to whom the letter of credit was issued, and therefore that it was ultra vires as to the defendant corporation, and also that the plaintiff took such guaranty with notice of its character. The plaintiffs deny both of these propositions, and claim: (1) That the guaranty was issued by the treasurer of the defendant company under full apparent authority to bind the defendant company; that his act was not ultra vires, there being no evidence that such guaranty was for the accommodation of a third party; (2) that the plaintiffs took the guaranty in good faith without notice, actual or constructive, there being nothing surrounding the transaction to suggest inquiry as to the validity or purpose thereof; and (3) that the defendant knew that the guaranty was accepted in good faith, and in the belief that it would be recognized, and the drafts drawn on the letter of credit would be paid by the defendant, and therefore the defendant became bound to make such payment. There is nothing in the testimony tending to show whether or not Emily Alpers was in any way or manner connected with the defendant company.

[1] It is, no doubt, the general rule that a corporation is not ordinarily bound by a contract of guaranty for the benefit of third

parties, but that such guaranty may be given in the accomplishment of any object for which the corporation was created, or when the particular transaction is reasonably necessary or proper in the conduct of its business. *Clarke & Marshall, Private Corporations*, §§ 184-184c; *Thompson on Corporations*, §§ 2218-2226.

[2] There is also good authority for the position that whenever an act may, under any circumstances, be reasonably necessary to carry out the purposes of incorporation, the party dealing with the corporation has a right to assume, without notice to the contrary, that the act is binding upon it. *Green's Bryce's Ultra Vires*, p. 37 et seq., 40a. The defendant corporation might properly guarantee a letter of credit under some circumstances, as, for instance, if it were sending some one abroad to purchase goods; and the plaintiffs would have the right to assume, both from previous dealings with the defendant and from lack of notice, that the guaranty was in furtherance of the defendant's legitimate business. Taking into consideration the well-known fact that drug stores keep on hand and offer for sale a large variety of articles which cannot be classified as drugs, and the further fact that women have been employed, in recent years, in a great variety of occupations, including heads of departments, buyers, and in many other positions connected with mercantile business, we do not think that the issuance of the letter of credit in the name of a woman would be sufficient to put the plaintiffs upon inquiry.

There was nothing in the transaction which was calculated to excite the suspicion that the letter of credit was a matter of accommodation, and there was no testimony upon that point. So far as appears, the letter of credit was issued and the guaranty obtained in good faith from an officer of the defendant company having, apparently, the required authority to act as he did. The plaintiffs had no actual or constructive notice that the letter of credit was to be used for purposes unconnected with the defendant's business. Under these conditions the plaintiffs would be entitled to the presumption that in guaranteeing the letter of credit the treasurer of the defendant company was acting within his authority.

We do not think that there is anything in the case of *Cook v. American Tubing & Webbing Company*, 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193, which should restrain the court from finding the defendant liable. In that case certain claims were allowed and certain others disallowed. Claims which bore upon their face the evidence that the transaction was for the accommodation of third parties were disallowed, while others which did not bear such evidence, and were not surrounded by circumstances calculated to arouse suspicion, were allowed. The court

said in that case: "We need not consider the question whether the assignment of accounts was a form of security which the general manager was authorized to make. Whether he could do so or not, * * * there was nothing in his offer to do so which was calculated to excite the suspicion that the loan was required for any purpose other than the ordinary uses of the webbing company. Whether, if the security had been real, the complainant could hold it, is not now material. The loan was made in good faith to an officer having apparent authority to contract it, the lender had no actual or constructive notice that it was procured with fraudulent intent to appropriate the money lent, and we must consider the claim a valid one against the webbing company and its assets in the hands of the receivers." This language of the court seems to us to cover the case at bar. There was nothing in the transaction which was calculated to excite the suspicion or apprise the plaintiffs that the proceeds of the letter of credit were to be devoted other than for the purposes of the defendant company.

[3] The defendant contends that there has been no breach of contract by the defendant; that assuming that the contract upon which the suit is brought was a contract within the power of the corporation to make, and within the power of the treasurer of the corporation to make in its behalf, upon the record, there is no liability from the defendant to the plaintiff. With this contention of the defendant we cannot agree. The defendant in and by its guaranty promised to pay to the plaintiff "the amounts drawn against said letter of credit." Letters of credit only become useful and serviceable to the traveler, through the general credit of the party issuing the same, or through some arrangement made with bankers within the territory to be traversed. In the case before us it is admitted that Emily Alpers received upon her letter of credit the full sum for which the same was issued. The conclusion is therefore inevitable that she received the money by virtue of some arrangement between the plaintiffs and their correspondents abroad. What those particular arrangements were does not seem to us to be important in the present controversy.

[4] The plaintiffs undertook to furnish to Emily Alpers a letter of credit for a certain amount of money, to be drawn by her at such times and in such amounts as she might determine, and this undertaking the plaintiffs performed. Under these conditions the defendant guaranteed to pay such amounts to the plaintiffs as might be drawn upon said letter. The consideration for the guaranty was to make available to Emily Alpers the sum of money expressed in the letter, and inasmuch as there has been no failure of consideration we cannot see why the defendant should not pay the balance

due to the plaintiffs in accordance with its agreement.

The plaintiffs' exceptions are sustained, and an opportunity will be given to the defendant to appear and show cause, on June 3, 1912, at 10 a. m. why judgment for the plaintiffs in the sum of \$845.98, with interest, should not be entered.

FOX v. ARTESIAN WELL & SUPPLY CO.
(Supreme Court of Rhode Island. May 11, 1912.)

APPEAL AND ERROR (§ 113*)—REVIEW—JUDGMENTS REVIEWABLE.

Const. Amend. art. 12, § 1, gives the Supreme Court final revisory and appellate jurisdiction upon all questions of law and equity, and Gen. Laws 1909, c. 272, § 2, gives the Supreme Court general supervision of all inferior courts, and jurisdiction to entertain a bill of exceptions to correct errors or abuses in the superior court. *Held*, that the action of a superior court in vacating a nil dict judgment for plaintiff within six months from its rendition was reviewable by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

Action by Henry M. Fox against the Artesian Well & Supply Company. Order granting a motion vacating a judgment nil dict for plaintiff, and plaintiff brings exceptions. On defendant's motion to dismiss the bill of exceptions. Motion denied.

See, also, 79 Atl. 681.

Joseph C. Cawley and Frederick J. Berth, both of Providence, for plaintiff. Tillinghast & Lynch, of Providence, for defendant.

PER CURIAM. The plaintiff obtained a nil dict judgment against the defendant in the superior court, which was vacated by said court upon motion of, and for cause shown by, the defendant, within six months from the rendition of said judgment. To this action of the court the plaintiff excepted, and has prosecuted his bill of exceptions to this court. The defendant moves to dismiss said bill of exceptions, upon the ground that the action of the superior court in vacating said judgment is final and conclusive, and not subject to review by this court.

The plaintiff claims that the judge of the superior court, who caused said judgment to be vacated as aforesaid, in so doing did not exercise, but did abuse, his judicial discretion in the premises. Under article 12 of amendments to the Constitution of Rhode Island (section 1), "the Supreme Court shall have final revisory and appellate jurisdiction upon all questions of law and equity," and under Gen. Laws 1909, c. 272, § 2, "the Supreme Court shall have general supervision of all courts of inferior jurisdiction to correct and prevent errors and abuses therein when no other remedy is expressly provided." Thereunder this court has jurisdiction

to entertain a bill of exceptions brought for the purpose of correcting alleged "errors or abuses" in the superior court. The bill of exceptions in question is brought for the correction of an alleged abuse of judicial discretion by a justice of the superior court, and comes within the purview of the statute aforesaid.

The defendant's motion to dismiss is therefore denied.

CLARY v. WOLF.

(Supreme Court of Rhode Island. May 11, 1912.)

1. CONTRACTS (§ 28*)—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

In assumpsit for work and labor claimed to have been performed under a contract, evidence held insufficient to establish any contract, not showing any meeting of minds.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

In assumpsit for work and materials furnished in building steps on defendant's estate, the erroneous admission of a question as to whether defendant ultimately intended to have the steps built was harmless, though erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157; Dec. Dig. § 1050.*]

3. WORK AND LABOR (§ 4*)—RENDITION AND ACCEPTANCE OF SERVICES—RATIFICATION.

Where an artisan, without an order from the owner of an estate, built steps leading down to the sea, and she requested him to remove them, the fact that her tenants used the steps did not constitute a ratification, rendering her liable for payment; the steps not being in the place that she desired them placed, and not leading to the place where it was her intention to construct a bath house.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 3-7; Dec. Dig. § 4.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Assumpsit by James Clary against Annie T. Wolf. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained, and case remanded for new trial.

James J. McGovern, of Providence, for plaintiff. Frank H. Wildes, of Providence, for defendant.

VINCENT, J. This is an action on the case in assumpsit, brought to recover the sum of \$56.35 for labor performed and materials furnished in the building and setting of a flight of steps, connecting different levels, upon a lot belonging to the defendant at Riverside. The case was tried to a jury in the superior court, and a verdict was rendered for the plaintiff for the amount claimed. The defendant's motion for a new trial, before the trial judge, was denied. The case now comes to this court upon defendant's ex-

ceptions: (1) That the justice presiding erred in his decision denying the defendant's motion for a new trial; (2) that the justice presiding erred in permitting the plaintiff's counsel to ask the defendant if she "intended to have these steps fixed at all events"; and (3) that the justice presiding erred in the portion of his charge to the jury regarding the subsequent ratification of the contract by the defendant.

The defendant was the owner of an estate at Riverside, situated near tide water, upon which there was a dwelling house or cottage. Between the cottage and the water was a bank, which required, for convenient passage from one level to the other, a flight of steps. Upon the lower level, and near the water, it was the intention of the defendant, at some later period, to erect a bath house. The plaintiff, for several years, had been employed by the defendant, from time to time, in and about certain other of her property, located in the city of Providence, making small repairs, which were uniformly done under her immediate direction and supervision. In the spring of 1909, while one Olney Aldrich, an employé of the plaintiff, was doing some repair work at the defendant's house in Providence, it is alleged that the defendant made some remarks to him, in effect, that she would need some steps upon her Riverside estate, and requested him to go there and take some measurements. Upon this request, and without any further report to or conference with the defendant as to cost, location, etc., the plaintiff built and set the steps upon the defendant's estate. The defendant refused to pay the bill when presented, and she testifies that she ordered the plaintiff to remove the steps: (1) Because she had not ordered them; (2) because they were not satisfactory; and (3) because they were not located where she desired to have them.

[1] The plaintiff, in support of his claim, alleges and testifies that subsequent to the time when the order for the steps was given to Aldrich, to wit, May 20, 1909, the defendant called at his office for the purpose of paying a bill for some other work, and while there made some statements which were interpreted by him as a ratification of the order previously given to Aldrich; that she made some inquiries as to whether the measurements had been taken, and expressed dissatisfaction upon learning that the work had not been completed. There is a conflict of testimony as to just what was said between the parties, after the plaintiff had finished the steps; but there is no dispute on the part of the plaintiff that he proceeded to do the work and furnished the materials upon the simple request of the defendant to take measurements and her alleged subsequent ratification of the contract. It is undisputed that the plaintiff had not previously done any new or original work for the defendant, and that such service as he had

before rendered to her related to minor repairs, which had been performed under her especial direction and supervision.

Taking the testimony for the plaintiff alone, we do not see anything which would amount to a contract authorizing the plaintiff to proceed with this work, after making the necessary measurements, without some further act or direction on the part of the defendant. The plaintiff does not claim any personal knowledge of the original contract with the defendant, but says he understood that such a contract had been made with Aldrich. He claims, however, that she ratified such contract in a later interview with him.

Upon this point the plaintiff testified as follows: "Q. 21. Now, what did she say to you? A. Finding fault with me because the work was not done according to orders. She was present at my office, and on that day, which I can give the date, if you desire it, she made a payment of \$10 on a previous account that was due me, and found fault then because I hadn't completed the stairs; and the reason that I gave to her, and the only reason, was the inclemency of the weather preceding that date. * * * Q. 47. Now, you state that at that time she came in and found fault. A. I did. * * * Q. 49. Can you remember the exact words she said? A. The conversation was fairly lengthy. I do not know as I can give the details of it, but a synopsis of it. Q. 50. See if I can recall to you the statement that was made. Was not this the statement: 'Have you been down to Riverside, to my place?' A. No, sir; that was not mentioned in those words. I am positive of that. * * * Q. 57. And the only thing at your office, she complained that you had not gone down? A. That I did not do the work. Q. 58. And what work, did she say, at your office? A. Building the steps. Q. 59. Was there any agreement or contract made at your office? A. No contract. The agreement, so far as she told me, was to build the steps immediately. She had the cottage let. * * * Q. 97. Can you recall the exact conversation that you had on the 20th by which she authorized you to do this work? A. * * * The conversation is so involved I cannot tell it in detail. Q. 98. Kindly state what you can remember of the conversation. A. Miss Wolf wanted to know if the steps at Riverside had been placed there yet. Q. 99. I am talking about the exact words. Can you remember them? A. I cannot tell you in detail. Q. 100. Any exact words by which you assumed to have authority to build those steps. A. I am telling you; this woman found fault because I hadn't the work done there as ordered. She was in a hurry for them, on account of the fact that she had let the cottage, and there was a tenant who wanted to move in and use the place. * * * Q. 105. And didn't she ask you to go down and estimate? A.

No, sir. * * * Q. 107. And isn't that all the conversation that she had with you in regard to the steps in 1909? A. In substance; yes, sir. Q. 108. That she wanted you to go down and figure on the steps? A. And finding fault because they had not already been built or completed. * * *

Olney Aldrich, the man with whom it is claimed the contract for the steps was made, testified to some conversation with the defendant, regarding steps, while he was doing some work for her at her house in Providence: "Q. 13. What was said at that time? A. She said she wanted a pair of steps built from the Riverside house, and wanted to know when I could go down and measure for them. * * * Q. 17. Did she order the work done at that time? A. She told me to go down and measure for the work; yes, sir. * * * Q. 51. All she asked you to do was to take measurements for the steps? A. Yes, sir."

The foregoing testimony of the plaintiff and his employé, Aldrich, comprises substantially all of the testimony upon which the plaintiff bases his claim of a contract to build the steps. The plaintiff had no personal knowledge of any contract through Aldrich; but he relies principally, so far as his testimony goes, upon the subsequent ratification at his office. He claims that the ratification of the contract was contained in some conversation of the defendant with him. His testimony upon that point, however, amounts to nothing more than his conclusions drawn from the language of the defendant, which he can now neither repeat nor remember. Aldrich, the employé, in answer to the question, "Did she order the work done at that time?" referring to the time when the defendant asked him to make measurements, said: "She told me to go down and measure for the work; yes, sir." It is evident that this witness simply concluded that the request to make measurements was equivalent to an order to go on and complete the work, without further reference to the defendant.

Taking into consideration other undisputed testimony that the plaintiff had never before done any original work for the defendant, that the defendant did not know that the steps were being made or had been placed in position until she received the bill for them, that she was not consulted as to the place where they were to be located, that the place where they were located was not ready for their reception, and that the bath house, in connection with which the steps were to be used, had not been built, we do not find that there was that meeting of minds which is the essential feature of a contract. The court can hardly find that there was a contract, and base such finding upon the interested opinion of the plaintiff as to the force and legal effect of the defendant's language, which he has now forgotten.

based upon the ruling of the trial court, admitting the following question: "Q. 105. You intended to have these steps fixed, at all events?" This question was objected to by the counsel for the defendant, the objection was overruled, and the witness answered: "From him? Q. 106. No; from some one. A. Yes, sir; I did." While we cannot see that the ultimate intention or mental attitude of the defendant is either important or material, we cannot say that the answer to the question could have been appreciably injurious to the defendant's case.

[3] The portion of the judge's charge excepted to contains in our opinion reversible error, and is as follows: "Now, gentlemen, if you find that no request was made, that this staircase was built by him at his own volition, under a mistake, and that since that time there has been no ratification of the contract at all, or, as she says, she ordered him to take it away, then your verdict should be for the defendant. As I say, unless there has been some ratification of that contract; and he says there has, because since that time this property has been let to tenants who could, if they wanted to, use the staircase in question. If that be so, and you find that although there was no request in the beginning to build this staircase, and he built it under a mistake, if you find that subsequent to that time, that even though she ordered him to remove it, and he did not do it, and she went on after that time and used that staircase, or permitted her tenants to use that staircase, then your verdict should be for the plaintiff."

There is no evidence that the defendant or her tenants made any use of the steps. There is testimony showing that the steps could not practically be used without considerable filling about the bank, and that there was no occasion to use them, for the reason that the bath house, to which they were designed to afford access, had not been erected. If the defendant knew nothing of these steps until after they had been placed upon her lot, and within a reasonable time she gave notice to the plaintiff to take them away, she would have done all that she was required to do under the circumstances. She could not very well remove them herself, and there being no evidence that she either used them, or permitted her tenants to use them, we cannot find any proof of ratification through the use of the steps. The defendant had a perfect right to rent her estate, and we believe that it would be unreasonable to place upon her the burden of a constant oversight of her tenants, to see that they did not use the steps which, from the want of proper surroundings, were neither available nor led to anything which a tenant might require or could enjoy. The fact that the tenants *might* have passed over these steps at some time would not amount to their acceptance by the defendant. We think that the portion of the charge referred to would be

[2] The defendant's second exception is

likely to mislead the jury in reaching its verdict.

The second exception of the defendant is overruled. The other exceptions of the defendant are sustained. The case is remitted to the superior court for a new trial.

SANTANGINI v. BLISS.

(Supreme Court of Rhode Island. May 14, 1912.)

EXECUTION (§ 451*) — DISCHARGE OF POOR DEBTORS.

Where debtors took out a citation to their committing creditor, and their petition was denied because they had disposed of their property in fraud of their creditors, they were not entitled to a second citation, where the only change of circumstances alleged was the making of a common-law assignment for the benefit of creditors, and it did not appear that the assignee had obtained control of the property fraudulently disposed of, or of any other property.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1806-1861; Dec. Dig. § 451.*]

Petition for writ of prohibition by Andrea Santangini against George N. Bliss. Petition granted.

The petition for writ of prohibition herein is as follows:

"To the Honorable Supreme Court:

"Andrea Santangini, of the city and county of Providence and state of Rhode Island, complains of George N. Bliss, justice of the district court of the Seventh judicial district, and for cause thereof sheweth unto your honors: That on the 10th day of February, A. D. 1912, your said petitioner recovered judgment in an action for deceit against Sabastiano De Gasbarro, alias, and Teresa Di Ciccio, alias, both of Providence, in said county, for the sum of \$90 and \$23.64 costs of suit, in the superior court within and for the county of Providence, and that execution in said case was issued the 13th day of February, A. D. 1912. Your petitioner further prays that on the 4th day of April, A. D. 1912, the bodies of said defendants were committed to the Providence county jail under and by virtue of said execution. And your petitioner further avers that on, to wit, the 23d day of April, the said defendants and each of them petitioned the Honorable Frederick Rueckert, justice of the district court of the Sixth judicial district, that they and neither of them had no real or personal estate wherewith to support themselves or to pay jail charges, and that they and each of them prayed the said justice of the district court of the Sixth judicial district to administer unto them a poor debtor's oath and deliver to them certificate thereof, as provided in chapter 326 of the General Laws of Rhode Island 1909. And your petitioner further avers that said Hon. Frederick Rueckert, justice of the district court of the Sixth judicial district, then and there

ordered a citation issued, returnable the 30th day of April, A. D. 1912, at 9 o'clock a. m., at the district court of the Sixth judicial district, in said Providence, and caused the said Andrea Santangini, the creditor at whose suit the said defendants were committed to jail, then and there to appear to show cause, if any he had, why said defendants should not be admitted to take the poor debtor's oath as prayed for. And your petitioner further avers that on the said 30th day of April, A. D. 1912, at 9 o'clock in the forenoon, the said petitions were heard by the said justice of the district court of the Sixth judicial district, and the said justice of the district court then and there denied and refused the said petitions, and the said Sabastiano De Gasbarro and Teresa Di Ciccio were then and there recommitted to the said Providence county jail. And your petitioner further avers that at the time of the hearing before the said justice of the district court of the Sixth judicial district the said Sabastiano De Gasbarro and Teresa Di Ciccio then and there made and executed an assignment of all their estate, of every kind and wherever same may be situated, excepting what is exempted from attachment by law, to one James McCusker, warden of the Providence county jail, and produced the same in court, and presented them to the Honorable Justice Rueckert, who was then and there hearing said petitions.

"And your petitioner further avers that the said Sabastiano De Gasbarro and Teresa Di Ciccio on, to wit, the 7th day of May, A. D. 1912, petitioned the said respondent, Hon. Geo. N. Bliss, justice of the district court of the Seventh judicial district, alleging, amongst other things, as follows: 'And whereas, a change in the circumstances of said petitioners has taken place since said petitioners took out their last citation to said creditor on a like petition, and which petitions were denied, said change of circumstances being this: That said petitioners on, to wit, the 2d day of May, 1912, made, executed and delivered a general assignment of all their property of every kind in trust for the benefit of all their creditors.' Now, therefore, your said petitioner alleges that, inasmuch as there has been no change of circumstances since the taking out of the first citation, within the meaning and contemplation of section 11, c. 326, of the General Laws 1909. And whereas, the said justice of the district court of the Seventh judicial district is without power and authority to act in the matter; and whereas, the said Hon. George N. Bliss, justice of the district court of the Seventh judicial district has caused the said petitioner, Andrea Santangini, to be notified to appear at the said jail the 15th day of May, A. D. 1912, at 11 o'clock a. m., to show cause, if any he has, why the said defendants should not have the benefits of said oath: Now, therefore, your petitioner

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prays that a writ of prohibition may issue out of this honorable court, enjoining and prohibiting the said Hon. George N. Bliss from hearing or granting the said petitions of Sabastiano De Gasbarro and Teresa Di Ciccio until further orders of this honorable court. And your petitioner further prays that this honorable court may grant unto him such other relief as in the opinion of this honorable court shall be proper under the circumstances. And as in duty bound will ever pray. Andrea Santangini."

Anthony V. Pettine, of Providence, for petitioner. Charles H. McKenna, of Providence, for respondent.

PER CURIAM. Inasmuch as the magistrate, on the hearing of the first petition for the taking of the poor debtor's oath, refused the petition on the ground that the petitioning debtors had committed fraud upon their creditors in the disposition of their property, and as the only change of circumstances now alleged in the second petition of the same debtors is the making of a common-law assignment for the benefit of creditors, but it does not appear that the debtors' property disposed of in fraud of their creditors has been brought under the control of the said assignee, or that any other property has been actually conveyed to the assignee for the benefit of creditors, we fail to see how any such change of circumstances has been brought about by said assignment as will warrant the further proceeding by the magistrate in the matter of granting permission to take the poor debtor's oath.

The writ of prohibition will issue as prayed in the petition.

ANDREWS v. O'REILLY.

(Supreme Court of Rhode Island. May 11, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 431*) —ACTION AGAINST ADMINISTRATOR—CONDITIONS PRECEDENT.

Where plaintiff, on death of defendant, does not file the suit as a claim in the probate court, as required by Gen. Laws 1909, c. 314, § 3, and Court and Practice Act 1905, § 883, he cannot maintain the action though he summons in the administratrix without amendment of his declaration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819, 1854, 1856; Dec. Dig. § 431.*]

2. EXECUTORS AND ADMINISTRATORS (§ 431*) —ACTION—DISMISSAL.

Where plaintiff, by failure to allege and prove the filing of a pending suit as a claim against defendant's estate in the probate court and its disallowance, cannot maintain the suit against defendant's administratrix, who is summoned therein, the court is required to dismiss the action on motion of the administratrix, showing that plaintiff cannot truthfully make the necessary averments.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819, 1854, 1856; Dec. Dig. § 431.*]

3. STIPULATIONS (§ 7*) — AGREEMENT BETWEEN COUNSEL—RULE OF COURT.

Under the express provisions of superior court rule 28, an oral agreement between counsel as to what points should or should not be raised in the case then pending in the superior court is invalid.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 14; Dec. Dig. § 7.*]

4. ATTORNEY AND CLIENT (§ 86*)—RETAINER OF ATTORNEY—WAIVER OF LEGAL REQUIREMENTS.

The retainer of an attorney in a suit brought against an administratrix, who herself is not authorized by statute to waive the filing of a claim in the probate court, gives him no implied authority to waive the prosecution of the claim according to law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 155-160; Dec. Dig. § 86.*]

Exception from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Clarence C. Andrews, administrator, against Francis L. O'Reilly, in which Irene K. O'Reilly, administratrix, was summoned after his death. Motion to dismiss granted, and plaintiff excepts. Remitted to superior court, with direction to enter judgment of dismissal upon the decision.

Bassett & Raymond, of Providence (R. W. Richmond, of Providence, of counsel), for plaintiff. John J. Heffernan and James H. Rickard, Jr., both of Woonsocket, for defendant.

PARKHURST, J. In this case there was a motion to dismiss, which was granted by Presiding Justice Tanner in the superior court, and the plaintiff brings the case here upon bill of exceptions; the only exception being to the granting by the court of the motion to dismiss.

The circumstances of the case are as follows: The writ was dated August 30, 1909. The case was entered September 20, 1900. Various demurrers and pleas were filed, several amendments to the declaration were allowed, amended declarations were filed, demurrers and pleas withdrawn, etc., but the pleadings have never been closed. The suit was an action of debt on a judgment obtained against the Woonsocket Opera House Company, and was brought against the defendant as a stockholder in that corporation, in the endeavor to enforce an alleged stockholder's liability under the statutes then in force relating to such liability. The defendant, Francis L. O'Reilly, died August 5, 1905, and Irene K. O'Reilly was appointed his administratrix, and the first publication of her notice of appointment was September 14, 1905. The plaintiff never filed this pending suit as a claim in the probate court, as required by the statute. Gen. Laws 1909, c. 314, § 3; Court and Practice Act, § 883. The plaintiff summoned in the administratrix, but never amended the declaration in any

way, and never put anything upon the records of the superior court indicating that he had a right to prosecute the case against the administratrix, either by amending the declaration or in any other manner. On March 27, 1908, a motion to dismiss was filed on behalf of the administratrix, alleging that she was not subject to the jurisdiction of the court, because the claim had never been filed, and that there was nothing upon which the plaintiff could maintain this suit as against her: The motion was heard and granted by Presiding Justice Tanner on January 13, 1912.

[1, 2] The action was rightly dismissed upon the motion, as above set forth. The plaintiff summoned in the administratrix, and should have then made such amendments as would show that he had a cause of action against the administratrix. One of the things the plaintiff must allege and prove in a case against the administratrix is that a claim was filed in the office of the probate clerk and disallowed. The motion to dismiss showed to the court that the plaintiff could not truthfully make the necessary amendments. The court, in summoning in the administratrix, had no opportunity to know the facts. The first and only opportunity that the administratrix, in this case, had to object to being made a party, was by motion after service of process. This motion set forth the objections which the administratrix had to being made a party. As there was no ground to make the administratrix a party, the administratrix was properly discharged upon motion. It was not only the right, but the duty, of the judge to act upon this matter upon motion, and so save the state and the parties the great expense of litigating the intricate questions of law arising upon the pleadings in the case, since failure to prove the proper filing of the claim and its disallowance, under the statute above cited, must have led to the dismissal of the action upon the motion for a nonsuit, even if the case had been allowed to come to trial.

[3] It was admitted by the plaintiff that the claim had not been filed, and the only excuse is contained in two affidavits, in which it is claimed that Mr. Heffernan, the attorney for the administratrix, told the attorneys for the plaintiff that he would not raise the point that the claim had not been filed. Mr. Heffernan denies that these affidavits are true. The judge acted upon the motion in favor of the administratrix. But the affidavits are entirely immaterial. All that they suggest in any way is that there was an oral agreement between counsel as to what point should or should not be raised in a case then pending in the superior court. Such oral agreements are invalid under rule 28 of the superior court, as follows: "All agreements of parties or attorneys touching the business of the court shall be in writing,

unless orally made or assented to by them in the presence of the court when disposing of such business, or they will be considered of no validity."

[4] It cannot be said that these affidavits show a waiver by the administratrix of the filing of the claim in the probate court. The affidavits do not show that Mr. Heffernan possessed any authority, more than what is implied by his retainer as attorney in this case. The retainer of an attorney in a lawsuit brought against an administratrix does not give him any implied authority to waive the proper prosecution of the claim according to law. The statute contains no provision which authorizes the administratrix to waive the filing of the claim as provided by the statute above cited. See *Thompson v. Hoxsie*, 25 R. I. 377, 381, 55 Atl. 930.

For these reasons, this court is of the opinion that the suit was properly dismissed upon the motion by the presiding justice of the superior court, and the plaintiff's exception is therefore overruled. The case is remitted to the superior court, with direction to enter its judgment of dismissal upon the decision.

CILLEY v. LIMEROCK R. CO.

(Supreme Judicial Court of Maine. April 20, 1912.)

EMINENT DOMAIN (§ 271*)—TRESPASS ON DEFENDANT'S LAND—RIGHT OF ACTION.

In an action for damages for building a railroad upon and across the plaintiff's land, plaintiff must show possession of the premises described, that defendant committed the alleged acts of trespass, and resulting damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 725-736, 741; Dec. Dig. § 271.*]

Exceptions from Supreme Judicial Court, Knox County.

Action by Jonathan P. Cilley against the Limerock Railroad Company. Verdict for defendant, and plaintiff excepts. Judgment on verdict.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, HALEY, BIRD, and HANSON, JJ.

Jonathan P. Cilley, pro se. Arthur S. Littlefield, for defendant.

PER CURIAM. The acts complained of are alleged to be the building and maintaining of a railroad upon and across the plaintiff's close. At the conclusion of the plaintiff's evidence the defendant informed the presiding justice that it would offer no further evidence, and moved that a verdict for the defendant be directed, which was done. The case comes up on an exception to that ruling, and another exception to the exclusion of certain testimony relating to the value of the locus.

We think the ruling directing a verdict for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendant was correct. It was incumbent upon the plaintiff to show: (1) That he had either the actual or constructive possession of the premises described in his writ; (2) that the defendant committed the alleged acts of trespass on the premises; and (3) the damages resulting to him on account thereof.

The plaintiff did show that he had a title to 1³⁶/₁₃₈ of the premises described in his writ, containing one-fourth of an acre, and mentioned in the evidence as the "Cook quarry." The exact location, however, of the Cook quarry upon the face of the earth was in issue, and if the decision of the question now before us depended upon whether or not the plaintiff had sufficiently established its location, we should be in much doubt and uncertainty about it. But our decision does not depend upon the determination of that question, for the plaintiff wholly neglected and omitted to prove the alleged acts of trespass. No evidence whatever was introduced tending to show that any of the acts complained of were committed by the defendant or by any one else. This was undoubtedly an inadvertent omission on the plaintiff's part, but it is nevertheless fatal to his case.

Accordingly the ruling directing a verdict for the defendant was right. Inasmuch as the plaintiff failed to prove the acts of alleged trespass, a consideration of the other exception (to the exclusion of testimony relating to the value of the locus) is immaterial. The entry must therefore be:

Exceptions to the ruling directing a verdict for the defendant overruled. Judgment on the verdict.

GRANT v. BANGOR RY. & ELECTRIC CO.
(Supreme Judicial Court of Maine. May 9, 1912.)

1. STREET RAILROADS (§ 114*)—INJURY TO PEDESTRIAN—NEGLIGENCE OF MOTORMAN.

In an action against a street railway company for death of plaintiff's child by being struck by a street car, evidence *add* to show that the motorman failed to exercise that degree of care which the situation demanded, especially in failing to reduce the speed of the car and having it under control as demanded by the exigencies of the occasion.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

2. DEATH (§ 24*)—INJURY TO CHILD — CONTRIBUTORY NEGLIGENCE OF MOTHER.

Where a mother was obliged to go to a nearby market for something for supper and left her five year old child with a nine year old daughter on the sidewalk, telling the latter to watch the child, which she promised to do, and the young child was struck by a street car during her absence, the mother was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 24.*]

3. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—CAPACITY OF CHILD—QUESTION FOR JURY.

Though the court can say, as a matter of law, that there is an age at which a child cannot exercise any care under the circumstances, and also an age when the court can say, as a matter of law, that a child is capable of exercising some care under the circumstances, between these limits are the ages where it is for the jury to determine the capacity of the child to exercise care for itself.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. STREET RAILROADS (§ 114*)—INJURY TO CHILD ON TRACK—CARE OF CHILD.

In an action for the death of a child about five years old struck by a street car, evidence *held* not to show want of due care on the part of the child.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.*]

On Motion from Supreme Judicial Court, Penobscot County.

Action by Elizabeth Grant, administratrix, against the Bangor Railway & Electric Company, to recover damages at common law for personal injuries sustained by her intestate, who was her child five years and three months old, by reason of being struck and run over by a street car of the defendant and which resulted in the death of the child a few hours after the injury. The declaration in the writ alleges that the deceased child "endured great conscious mental and physical suffering from the effects of her said injuries for a long period of time, to wit, from the time of receiving her said injuries until the time of her death," and the evidence shows that the child was conscious after her injuries and underwent great suffering. Verdict for plaintiff for \$1,508. The defendant filed a general motion for a new trial. Overruled.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Fellows & Fellows, of Bangor, for plaintiff. E. O. Ryder, of Bangor, for defendant.

CORNISH, J. This is an action on the case brought by the plaintiff, as administratrix of the estate of Ida Bernice Grant, her deceased child five years and three months old, to recover damages at common law for injuries sustained by her intestate by reason of being struck and run over by a car of the defendant on Harlow street in the city of Bangor, about 5:30 p. m. July 13, 1910, from which injuries the child died a few hours later. The case is before the law court on defendant's motion to set aside the verdict as against the evidence.

The following facts are fairly established:

Mrs. Grant lived on the second floor of the National block on the corner of Harlow and Franklin streets. Harlow street runs in a general northerly and southerly direction, and the car in question was on its reg-

ular route, having come into Harlow street from Cumberland street at a point 482 feet north of the place of the accident, and was passing southerly along the center of Harlow street toward Center street. Harlow street is one of the busy streets of the city, and the surroundings are such that motormen have special instructions not to run too fast on that street. The accident occurred about five feet below the Prospect street crossing, and in front of the playground in the yard of the high school. At this point the city was excavating a reservoir, so that the entire sidewalk and a portion of the street itself was blocked by the excavated earth, leaving a space of only two or three feet between the outside of this pile of earth and the track of the defendant. This narrow space was the walk in use. Cumberland street makes a sharp descent into Harlow street, and from the junction there is a continuous downgrade of $2\frac{1}{2}$ per cent. on Harlow street past the place of accident toward Center street. The motorman had been in the employ of the defendant since May 30, 1910, was a spare hand, and had been on this run three days.

Mrs. Grant, the mother, was obliged to go to a nearby market to purchase something for supper and left her five year old child for a few minutes on the sidewalk with the junction to stay there, which the child promised to do. At the same time she called her older daughter, a girl of nine, and told her to watch her sister, which she also promised to do. The mother was gone only about 10 minutes, but the accident happened before her return.

It appears that the child did not remain where she was left, but walked along the sidewalk to the excavation and was seen standing by the reservoir about five or six feet from the track and eight feet from the crosswalk on Prospect street. She was looking into the reservoir with her back toward the approaching car. Then, in the language of an eyewitness called by the defendant: "She started across the track slowly until she was about in the middle of the track, when she turned slightly, and she saw the car, and she didn't know whether to continue and go across or come back. She seemed kind of dazed, and the car struck her on the forehead and knocked her down and run over her."

It further appears from the motorman's own testimony: That, as soon as he turned into Harlow street from Cumberland street, he saw the child standing near the track by the reservoir, and he watched her as she stood there all the time he was coming down the street, his vision being unobstructed. That he was coasting along Harlow street with the power shut off; that the car was moving in his judgment about 7 or 8 miles an hour. That he did not apply the brakes until he saw the child start to cross the street. That he was then about a car length

or 30 feet distant. That he immediately put on the brake and reversed the power, but it was too late. The car struck the little girl where she was in the center of the track and ran over her. Reversing the power caused a fuse to blow out, which locked the wheels, and the car slid a distance of $2\frac{1}{4}$ car's length, or 75 feet, before it stopped. That the rail was wet and muddy owing to the work that was going on.

Witnesses for the plaintiff made the speed much greater than 7 or 8 miles an hour, some calling it 15 or 20, and others simply stating that the car was going very fast, so fast as it came out of Cumberland street and continued its course down Harlow street as to attract their attention. The distance which the car went after the accident would seem to confirm this view; the motorman making it 75 feet, other witnesses more than 100.

Such is the picture, and as is usual in this class of cases, where it is fairly drawn, the legal conclusions that follow are quite apparent.

[1] 1. Defendant's negligence:

From the above statement of facts it is difficult to resist the conclusion that the motorman failed to exercise that degree of prudent and watchful care which the situation demanded, especially in using that degree of precaution in reducing the speed of the car and having it under his immediate control which the exigencies required.

The speed at which a car may be properly run and the kind of control which should be exercised over it must depend to some extent upon the surrounding circumstances and the situation ahead. No specific rate can be arbitrarily fixed. A speed of 13 miles an hour on Upper Main street in Lewiston under the there existing conditions was not considered necessarily dangerous and reckless in *Malia v. St. Ry. Co.*, 107 Me. 95, 77 Atl. 541, while a much less rate was demanded where the track was near the sidewalk and private driveways were in frequent use in *Butler v. Railway Co.*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267, or in approaching public street junctions, as in *Denis v. Railway Co.*, 104 Me. 39, 70 Atl. 1047. A similar degree of caution should be observed in passing public playgrounds or where children are in the street. "The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected, and among these may be reckoned the risks arising from the heedlessness and indiscretion of children in the street." *Collins v. So. Boston R. R.*, 142 Mass. 301, 7 N. E. 356, 56 Am. Rep. 675.

The motorman, in the case at bar, admits that he saw this little girl as she was standing only 5 or 6 feet from the track when he was nearly 500 feet away. She stood there facing away from the car and apparently unaware of its approach. With the in-

discretion of childhood, she might be expected to step across the track; at least, it might not be unexpected. Yet, with this combination facing him, a street crossing, a nearby playground, an obstruction on one side of the street, and a little child perilously near the track and apparently oblivious of the approaching car, the motorman maintained his speed up to such a rate and to within such close proximity that when the child turned and attempted to walk across the tracks he could not sufficiently control the car to avoid collision. His efforts then were too late. And yet, it was not the unexpected, but what might reasonably be expected, which happened, and the reasonably prudent motorman would have foreseen it and guarded against it, either by stopping the car completely or by having it under such control that he could stop it almost instantaneously. This man did neither.

Nor does the alleged wet and slippery condition of the rails afford sufficient excuse. If that condition existed, it was known to no one better than to the man who had been running on this same circuit during the past three days while work upon the reservoir had been in progress, and therefore greater care was imposed upon him to counteract that condition by extra precautions, and by running his car at a lower speed and under better control than usual.

Upon the question of defendant's negligence, we think the verdict of the jury cannot be said to be manifestly wrong.

[2, 3] 2. Contributory negligence on the part of the mother:

The second point raised in defense is that no recovery can be had because the child was negligently permitted by her mother to be upon the street unattended at the time of the accident. The standard of age at which a child is chargeable with parental negligence cannot be absolutely fixed, although within certain limits it may be approximately determined. "There doubtless is an age where the court can say as a matter of law that a child cannot exercise any care under any circumstances. There is also an age where the court can say as matter of law that a minor is capable of exercising some care under circumstances like those in question. * * * The limits of these two classes are not settled by our decisions." *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 43, 78 N. E. 382, 383.

The test, of course, is the capacity of the child to exercise care for itself. In the application of this test it has been held that a child of 19 months was of such tender age as to be incapable of exercising such care as a matter of law (*Gibbons v. Williams*, 135 Mass. 333); so a child of 20 months (*Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449); of 2 years (*Wright v. Railroad Co.*, 4 Allen [Mass.] 283); of 2 years and 4 months (*Callahan v. Bean*, 9 Allen [Mass.] 401); of 3

years and 10 months (*Cotter v. Railroad Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 287).

On the other hand, such capacity has been held to be possessed by a child of 9 years (*Brown v. Railway Co.*, 58 Me. 384); of 10 (*Colomb v. Railway Co.*, 100 Me. 418, 61 Atl. 898); and of 12 (*Gleason v. Smith*, 180 Mass. 6, 61 N. E. 220, 55 L. R. A. 622, 91 Am. St. Rep. 281). Between these two extremes lies a zone with shadowy and indefinite boundaries.

But, however young the child may be, the negligence imputable to the parent or custodian from the mere presence of the unattended child in the place of danger is only *prima facie* and not conclusive. *Gibbons v. Williams*, *Grant v. Fitchburg*, *Wright v. Railroad Co.*, *Callahan v. Bean*, *supra*, and *O'Brien v. McGlinchy*, 68 Me. 552.

The facts and circumstances in explanation of the child's presence are always to be considered. No hard and fast rules as to the care of children can be laid down, and the financial condition of the family and the other cares devolving upon the parents are not to be ignored.

As is said in *Thompson on Neg.* vol. 1, p. 306, in discussing this question: "Small children have a right to light, air, and exercise, and the children of the poor cannot be constantly watched by their parents."

In the case at bar, the family, which was apparently in limited circumstances, consisted of the mother and two girls, aged five and nine, and they occupied a second story tenement. The mother had been calling upon a friend the afternoon of the accident, having the younger child with her and leaving the older at home. Just as she reached home, she found that she was obliged to go to a market a short distance off in order to obtain something for supper. Instead of taking the little child with her again, she left her in the care of the nine year old sister with strict instructions as to watchfulness. She expected to be and was gone less than 10 minutes. To hold that, under these circumstances, the mother did not use that degree of care which an ordinarily prudent woman in her station in life and under the same circumstances would exercise is too severe, and such has been the tendency of the decisions, where the question has been held to be for the jury and a verdict in favor of the plaintiff has been allowed to stand.

To illustrate:

A mother allowing a child 2 years and 10 months old to go with her sister, a child of 5 years and 4 months, to play in a vacant lot at the side of the house, and the lot being unfenced and unguarded and fronting on a public street. *McNeil v. Boston Ice Co.*, 173 Mass. 570, 54 N. E. 257.

The mother of a child 3 years old, having hung out the clothes in the yard, while the

child was playing therein, went into the house to set the table for dinner and left the child playing alone inside an open gateway leading into the street. *Creed v. Kendall*, 158 Mass. 291, 31 N. E. 6.

A boy between 4½ and 5 years old was permitted, by a sick mother, who had two younger children, to play about the room, but while she was asleep he escaped from the house, first to a neighbor's, and then to the street. *Slattery v. O'Connell*, 153 Mass. 94, 26 N. E. 430, 10 L. R. A. 653. A boy of 4 was permitted to walk in the streets of a city under the care of his sister, who was nearly 11. *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675. Of like effect are *Hewitt v. Taunton Street Ry. Co.*, 167 Mass. 483, 46 N. E. 106; *Ingraham v. Street Ry.*, 207 Mass. 451, 98 N. E. 692.

We have not overlooked a line of decisions, many of which are cited by the learned counsel for the defendant, in which the court held that the parent or custodian did not exercise reasonable precaution in the care of the child. Such are *Callahan v. Bean*, 9 Allen (Mass.) 401; *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, 9 L. R. A. 259, 23 Am. St. Rep. 842; *Grant v. Fitchburg*, 160 Mass. 16, 35 N. E. 84, 39 Am. St. Rep. 449; *Cotter v. R. R. Co.*, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 267. But a careful study of the facts in these cases differentiates them from the cases before cited. It is simply a question as to whether the facts of a particular case place it below or above the required standard. The Massachusetts court recognizes the distinction which is one of fact and makes each case as it is brought up fall into one class or the other as the facts may dictate. Applying the same rule here, we have no hesitancy in saying that the case at bar belongs to the class where the jury were justified in finding that the mother exercised reasonable care.

[4] 3. Want of due care on the part of the child:

This question arises only on the assumption that the intestate was of sufficient age and intelligence to be permitted to go alone upon the street on which electric cars were frequently running. If she had not attained that age and intelligence and there was no want of due care on the part of the mother, then this point is not involved.

Here, again, there is a zone between two limits which cannot be exactly fixed. *Sullivan v. Boston Elevated Ry.*, 192 Mass. 37, 78 N. E. 382, *supra*.

If the jury found in the case at bar that the intestate was capable of exercising care, then they must have found that she used that degree of care which the ordinarily prudent child of her age would have exercised under the same circumstances, and

that finding we are not disposed to disturb.

It appears that she was standing near the track looking into the excavation, that others were about, that she was facing away from the car, and apparently unaware of its approach. There may have been a reason for this. Perhaps the gong was not sounded. The motorman testified that he used it, but many of the witnesses both on and off the car, and including some for the defendant as well as the plaintiff, did not hear it. Probably she did not. Under these conditions, she walked towards and over the track. She did not dart across quickly, as if to dodge ahead of the car, but walked slowly with her head down. The only want of care which could be attributable to her would be her failure to look up the line to see if a car were coming. That is all that could be expected of an adult, and the law is not so unreasonable as to require so high a degree of watchfulness on the part of a child of five as of a mature man. The measure of care required was that degree or extent which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. That measure the jury have found she fulfilled.

The cases cited by the defendant are clearly distinguishable because of their peculiar facts. In some the child was more mature, as a child of 8 years, in *Morey v. St. Ry.*, 171 Mass. 164, 50 N. E. 530; of 9 in *Young v. Small*, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457; and of 10, in *Colomb v. St. Ry.*, 100 Me. 418, 61 Atl. 898; while in *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282, and *Murphy v. Boston Elevated*, 188 Mass. 8, 73 N. E. 1018, the children, though only between 5 and 6 years of age, were on the street by the permission of the parents and so conducted themselves as to be considered reckless even for that age in attempting to run across the street and to dodge a closely approaching car in one case and a team in the other. The case at bar more nearly resembles *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188, and *Sullivan v. Railway Co.*, 192 Mass. 37, 78 N. E. 382, *supra*.

It is the opinion of the court that the jury were warranted in their findings upon all branches of the case, and the entry must therefore be:

Motion overruled.

SHATNEY v. SHATNEY.

(Supreme Court of New Hampshire. Coom. April 2, 1912.)

1. DIVORCE (§ 62*)—JURISDICTION—RESIDENCE OF PARTIES.

Under Pub. St. 1901, c. 175, §§ 3, 4, libellant in a divorce suit must be a resident of the state at the time the libel is filed, and the facts that defendant is such a resident and

that the cause of action arose in this state are not sufficient to give jurisdiction.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 208-216, 220; Dec. Dig. § 62.*]

2. DIVORCE (§ 62*)—JURISDICTION—RESIDENCE OF PLAINTIFF.

Where a husband, who has resided for more than a year in this state, files a libel for divorce, and the wife, though a resident of another state, files a libel in answer thereto, asking for a divorce, the residence of the husband gives the court jurisdiction.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 208-216, 220; Dec. Dig. § 62.*]

3. DIVORCE (§ 62*)—JUDGMENT—DECREE FOR INNOCENT PARTY—STATUTORY PROVISIONS.

Under Pub. St. 1901, c. 175, § 5, which provides that a divorce shall be decreed in favor of the innocent party for certain causes, the court, having jurisdiction of a husband's libel for divorce because of the husband's residence, in answer to which the wife, a nonresident, has filed a libel for divorce, is required to grant a divorce to the wife, when she is, and the husband is not, the innocent party.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 208-216, 220; Dec. Dig. § 62.*]

Exceptions from Superior Court, Coos County; Pike, Judge.

Action for divorce by Mertie E. Shatney against John E. Shatney. Libel dismissed in the superior court, and plaintiff excepts. Case discharged.

After the defendant had begun proceedings for divorce on the ground of desertion, the plaintiff filed this libel, in which she sets herself up as a resident of Maine, charges him with extreme cruelty and adultery, and prays for a divorce, alimony, and the custody of the minor children. She admits that she left the defendant, but says that he drove her away.

Libby & Coulombe, of Gorham, for plaintiff. Leon D. Ripley, of West Stewartstown, and Thomas F. Johnson, of Colebrook, for defendant.

YOUNG, J. [1] The matter in issue in a cause of this kind is the status of the parties (*Ditson v. Ditson*, 4 R. I. 87), and the only jurisdiction the court has of such a cause is that conferred upon it by statute (*Parsons v. Parsons*, 9 N. H. 309, 317, 32 Am. Dec. 362). Consequently the test to determine whether it has jurisdiction of the plaintiff's libel is to inquire whether the allegations are sufficient to bring it within the provisions of sections 3 and 4, c. 175, Public Statutes. As those sections have been construed, the libelant must be a resident of this state at the time the libel is filed. *Kimball v. Kimball*, 63 N. H. 598, 4 Atl. 702. The facts that the defendant is such a resident and that the cause of divorce arose here are not sufficient to give the court jurisdiction. *Burgess v. Burgess*, 71 N. H. 293, 51 Atl. 1074.

[2, 3] Although the court did not err in dismissing the plaintiff's libel, it does not follow that it could not have given her the

relief for which she prays, if her libel had been filed as an answer to the defendant's; for at the time his libel was filed he was, and for more than a year had been, a resident of this state. His residence gave the court jurisdiction of his status, notwithstanding the plaintiff was a nonresident (*Sworoski v. Sworoski*, 75 N. H. 1, 70 Atl. 119); and when it has such jurisdiction, the statute provides that it shall grant the divorce, not to the libelant, if he is not innocent, but to the innocent party. P. S. c. 175, § 5. That is, the statute provides that the divorce shall be given to the libelee, who asks for it, when the libelee is, and the libelant is not, an innocent party.

There is nothing to show that it would be inequitable to permit the plaintiff to file her libel as an answer to the defendant's; and if the court permits that to be done, and finds that she is the innocent party, within the meaning of section 5, c. 175, Public Statutes, it will give her a divorce, and make such orders in relation to alimony and the custody, maintenance, and education of the minor children as may be just. P. S. c. 175, §§ 13-18.

Case discharged. All concurred.

WHITTEMORE v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Cheshire. April 2, 1912.)

CARRIERS (§ 356*)—PASSENGERS—TICKETS—EJECTION.

Plaintiff had a return ticket over two railroads, and attempted to use the same one day after its limit had expired. The conductor of the first road accepted the ticket, and told plaintiff it was good for the entire return trip; but the conductor on defendant's line refused to accept it, and put plaintiff off at H., after he had refused to pay fare. Plaintiff then purchased a ticket from H. to destination, and boarded the train from which he had been ejected; but the conductor refused to allow him to ride on that ticket, unless he paid his fare from the junction to the place where he was ejected, which he refused to do, and was compelled to walk to his destination, because he did not have money enough to pay the fare demanded. *Held*, that if plaintiff thought his ticket entitled him to ride to his destination, and refused to pay his fare for that reason, he might recover for the carrier's fault in refusing to accept him as a passenger at H., since, the carrier having terminated plaintiff's journey at that point, it was bound to accept him as a passenger there; but if plaintiff knew, or ought to have known, that his ticket was worthless, or if he refused to pay fare because he thought he would not be put off until the train reached H., he could not recover, since he did not break his journey at H., if his refusal to pay fare was a part of a scheme to ride from the junction to his destination for less than the regular fare.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409, 1410, 1423-1432; Dec. Dig. § 356.*]

Transferred from Superior Court, Cheshire County; Plummer, Judge.

Action by Ansel J. Whittemore against the

Boston & Maine Railroad. Case transferred to Supreme Court without ruling. Case discharged.

Case. September 29, 1909, the plaintiff bought a ticket from West Swanzy to Brattleboro, Vt., and return, good only on September 29th and 30th, which entitled him to ride on the defendants' trains between West Swanzy and South Vernon, Mass., and on their trains or those of the Grand Trunk Railway between South Vernon and Brattleboro. The plaintiff rode to Brattleboro the day he purchased the ticket, and remained there until the morning of October 1st, when he took a train for South Vernon. The first conductor accepted the plaintiff's ticket for that part of the journey, and told him it was good for the entire return trip; but the conductor of the train from South Vernon refused to accept it, and put the plaintiff off at Hinsdale, after he had refused to pay fare. The plaintiff thereupon purchased a ticket from Hinsdale to West Swanzy, and boarded the train from which he had been ejected. The conductor asked the plaintiff to show his ticket, and refused to allow him to ride unless fare was paid from South Vernon to Hinsdale. This the plaintiff refused to do, claiming that he did not have money enough to pay the fare demanded, and the conductor thereupon ejected him from the train. The plaintiff then obtained from the Hinsdale station agent a refund of the money paid for the ticket to West Swanzy, and walked to the latter place, a distance of about 14 miles. The plaintiff claimed that he had business which required his presence that day in West Swanzy, that he did not have sufficient funds to hire a team for the journey, and that the walk aggravated a physical ailment from which he suffered, thus causing the injury for which he seeks to recover. The question whether, upon any view of the foregoing facts, it can be found that the defendants were in fault, was transferred from the October term, 1911, of the superior court.

Joseph Madden, of Keene, for plaintiff. Edgar J. Rich and Charles H. Blatchford, both of Boston, Mass., and John E. Allen, of Keene, for defendant.

YOUNG, J. If the plaintiff thought his ticket entitled him to ride to West Swanzy, and refused to pay his fare for that reason, it can be found that the defendants were in fault, not for putting him off when the train reached Hinsdale, but for refusing to accept him as a passenger from Hinsdale to West Swanzy. In that case the defendants terminated the plaintiff's journey at Hinsdale, and from that time they owed him the same duties they owed to, and his rights were the same as those of, every other member of the community. Consequently, although they

acted within their rights when they put him off, they could not refuse to permit him to resume his journey on that train merely because he refused to pay what he thought was an unjust demand.

If, however, the plaintiff either knew or ought to have known that his ticket was worthless, or if he refused to pay his fare because he thought he would not be put off until the train reached Hinsdale, he cannot recover; and the amount of money had with him is relevant to the issue of why he refused to pay his fare. The plaintiff did not break his journey at Hinsdale, if his refusal to pay his fare was any part of a scheme to ride from South Vernon to West Swanzy for less than the regular fare; for section 6, c. 160, Public Statutes, which provides that a person who refuses to pay his fare shall be put off at a station, was not enacted to enable him to defraud the railroad. *Caher v. Railway*, 75 N. H. 125, 71 Atl. 225. In a word, if the plaintiff refused to pay his fare because he thought his ticket was good, it may be found that the defendants were in fault; but that cannot be found if his refusal was any part of a scheme to obtain transportation for less than the regular rate.

The defendants had not extended the plaintiff's ticket when he attempted to use it, and the interstate commerce act forbade the extension of it at that time. Consequently they are not bound by the acts of the conductor, who attempted to extend it, even if he was their employé. The question of the measure of damages was not transferred, and has not been considered.

Case discharged. All concurred.

STATE et al. v. GREAT FALLS MFG. CO.
(Supreme Court of New Hampshire. Carroll.
April 2, 1912.)

**1. WATERS AND WATER COURSES (§ 109*)—
GREAT BONDS—TITLE OF STATE.**

In the absence of a legislative grant, the state's title in great ponds extends to the highest water line; and a littoral proprietor cannot justify drawing the water down to low-water mark, as against the public, on the ground that it is merely exercising its proprietary rights as a littoral landowner.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 118, 119, 121; Dec. Dig. § 109; * *Public Lands*, Cent. Dig. §§ 35, 36.]

**2. WATERS AND WATER COURSES (§ 109*)—
GREAT PONDS—RIGHTS OF LITTORAL LAND-
OWNERS.**

A littoral proprietor at the outlet of a great pond, the bed of which inside of the high-water mark is in the state, may use the water in a reasonable manner, and may use the pond for a reservoir; but whether a use, consisting of drawing the water below the natural level at all seasons of the year, is unreasonable depends on the facts, since such act may seriously interfere with the rights of public boating, fishing, and bathing, or may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

result in a public nuisance, or it may occasion the public little or no inconvenience.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 118, 119, 121; Dec. Dig. § 109.*]

3. WATERS AND WATER COURSES (§ 114*)—UNREASONABLE USE OF WATERS OF GREAT PONDS—PLEADINGS.

A bill in equity by the state, in behalf of the public, to enjoin a littoral proprietor from using the water of a great pond, so as to lower the surface thereof below the natural level, which alleges that defendant intends to continue to lower the pond, regardless of the rights of the public, sufficiently charges that defendant does not exercise its rights in a reasonable manner, in view of the public rights; and a demurrer to the bill is properly overruled.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 124, 125; Dec. Dig. § 114.*]

Transferred from Superior Court, Carroll County; Chamberlin, Judge.

Bill in equity by the State and another against the Great Falls Manufacturing Company. A demurrer to the bill was overruled, and defendant excepted, and the cause was transferred. Overruled.

William H. Sawyer, of Concord, for plaintiffs. Choate, Hall & Stewart, of Boston, Mass., and Kivel & Hughes, of Dover, for defendant.

WALKER, J. The state, in behalf of the public, seeks to have the defendant enjoined in its use of the outflow of Lovell pond in Wakefield, "so that it may not draw, divert, or use the same in any such manner whatsoever as to lower the surface thereof below the natural level of said pond at any and all the respective seasons of the year." Lovell pond is a "great pond"; and it is alleged that the title to the pond and the soil under it is vested in the state for the benefit of the public. The defendant is a manufacturing corporation, and obtains its power in part from Lovell pond. It is also alleged in the bill that it wrongfully diverts the water of the pond so "as to greatly lower the same below the natural and usual level thereof at all the respective seasons of the year," and as a consequence "a large strip of land has been left uncovered by the waters thereof, between the natural shore line of said pond and the line of said pond as thus lowered, whereby the public rights of fishing, boating, and bathing in said pond, and the rights of the riparian owners to the convenient and unlimited access to the waters of said pond from the shores thereof, have been greatly impaired," and that the defendant intends to continue to so lower the waters of the pond, "regardless of the rights of the public." The defendant demurred to the bill, upon the grounds (1) that it is not alleged that the defendant has lowered the pond below the natural level at low water, and (2) that the state has no title in the waters of said pond, or in the shore line above

the line of natural low water. The court overruled the demurrer, and the defendant excepted.

The defendant's contention, as stated in the demurrer, is that it has the legal right to lower "the waters of said pond below the natural and usual high-water level thereof at all seasons of the year," and thus to cause "a strip of land to be left uncovered by the waters of said pond between the natural high-water shore line and the natural low-water shore line." The plaintiffs claim that the defendant, as a littoral proprietor at the outlet of the pond, has no such right, and that its acts under such assumed right should be restrained.

[1] So far as the defendant's contention is based upon the state's want of title to the land between the lines of high and low water, it cannot be sustained. In the absence of a legislative grant, the state's title in great ponds in this state extends to the high-water line.

The case of *State v. Sunapee Dam Co.*, 70 N. H. 458, 50 Atl. 108, 59 L. R. A. 55, is a strong authority for the proposition that the title of the state in the great ponds extends to high-water mark. The defendant was incorporated in 1820, and was empowered "to sink the outlet of said lake at the source of said Sugar river to the depth of 10 feet below the low water of said lake, and to erect and maintain a dam there, with suitable gates and flumes, to the height of said low-water mark." This evidently authorized the dam company to draw the water down to that mark. It was understood that it did not have that authority as an incident of its rights as a littoral proprietor; hence it sought and obtained a special legislative grant for that purpose. But if the state's title only extended to low-water mark, the grant did not operate to confer upon it any additional rights. If the defendant's contention is sound that it owns the bed of the lake between high and low water mark, the proprietors of the dam company could have done without legislative authority what the defendant in this case claims the right to do by virtue of its ownership of land at the outlet of the pond. The fact that such special legislation was deemed necessary 90 years ago is evidence of much weight upon the question of the location of the boundary line between the state and the landowners bordering on a great pond. It has a tendency to show that there was a general understanding that the boundary was the line of high-water mark; and that when it was said that the title of the littoral owners extended to the "water's edge" (*State v. Gilman-ton*, 9 N. H. 461; *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 4, 25 Atl. 718, 18 L. R. A. 679), the idea intended was that it was limited by the high-water mark.

In *State v. Sunapee Dam Co.*, supra, this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interpretation was adopted. It was there held that a charter, conferring the right to control within definite limits the outflow from a body of water held by the state in trust for public use, is a legitimate exercise of legislative power; and a lowering of the water level to the point authorized by such charter (the low-water mark), if done in a reasonable manner, does not constitute an infringement of public or private rights which can be restrained by equity. In the opinion (70 N. H. 481, 50 Atl. 109, 59 L. R. A. 55), it is said: "And certainly the littoral proprietors, as such, can have no better ground of complaint" than the public have, "because, as is well understood, in public waters there is no private ownership in the soil below ordinary high-water mark. The primary ground of their grievance, and the one from which all the others follow, is the uncovering of a portion of the land underlying the water between the high and low water mark. 'But,' as is said by the defendants' counsel, 'the state, and not these individual plaintiffs, is the owner of the lake and of the soil to high-water mark, and had a right to confer its use and enjoyment upon its grantee.'"

In *Dolbeer v. Company*, 72 N. H. 562, 564, 58 Atl. 504, 506, it was determined that "the pond in the plaintiff's land is public water, and his absolute ownership in the land ceases at the water's edge, or at high-water mark. * * * The bed of the pond inside of this line belongs to the public; but the plaintiff, as owner of the adjoining land, has certain rights in it and in the water." This recent judicial definition of the meaning of "water's edge," when used as a boundary of land adjacent to a great pond or lake, cannot be disregarded or overruled, in the absence of any convincing reason that it is wrong, or that the court, in the *Sunapee Dam Case*, was misled in deciding that private ownership was bounded by high-water mark. Assuming that the defendant has no greater rights in *Lovell* pond than those ordinarily possessed by littoral proprietors, it is clear that its absolute ownership of the basin of the pond opposite its land is bounded by the line ordinarily made by the water when the pond, in its natural condition, is full. It cannot justify drawing the water down to low-water mark, as against the public, upon the ground that it is merely exercising its proprietary rights as a littoral landowner. Whatever rights it has below high-water mark are qualified rights, even in that portion of the shore opposite its own land. It cannot remove or draw off from the land the water between the high and the low water lines, under a claim of ownership of the adjoining shore land thereby exposed.

[2, 3] But, while its legal title in the land is thus limited, it is still entitled to the use of the water of the lake in a reasonable manner; and it is probable that the conten-

tion in this suit will be best settled by the application of that doctrine, which has often been announced in this state. The most recent decision by this court upon the question thus presented is *Dolbeer v. Company*, supra, where it is said (72 N. H. 565, 58 Atl. 506): "As owner of the adjoining land, the plaintiff had the right to build wharves and other structures into the pond for his own use, to an extent that would not unreasonably interfere with the rights of the public in the pond. As an incident of the ownership of the land on which a dam can be built which will control the flow of water from the pond, he has the right to a reasonable use of the pond for a reservoir." The defendant therefore, upon the allegations of the bill, has "the right to a reasonable use of the pond for a reservoir," and that would seem to be the extent of its rights. As the question of reasonable use in such cases is principally a question of fact, it cannot be held that the defendant's act in drawing the water of the pond below the natural level at all seasons of the year is unreasonable, or is in excess of its right. It may seriously interfere with the rights of public boating, fishing, and bathing, or may result in a great public nuisance; on the other hand, it may occasion the public little or no inconvenience or annoyance. Its effect in these respects must be determined as a fact, under all the circumstances, from competent evidence, before the court will interpose to restrain the defendant's management of its dam. The question is not so much one of title to the pond as one of the reasonable management and usufruct of the water in its egress from the dam at the outlet of the pond. The allegation of the bill, that the defendant intends to continue to lower the pond, "regardless of the rights of the public," is a sufficient allegation that it does not manage its dam in a reasonable manner in view of the public rights. The demurrer was properly overruled.

Exception overruled. All concurred.

CREIER v. TOWN OF FITZWILLIAM.

(Supreme Court of New Hampshire. Cheshire. April 2, 1912.)

1. HEALTH (§ 16*)—CARE FURNISHED PATIENT BY BOARD OF HEALTH—LIABILITY OF TOWN.

Under Laws 1899, c. 100, §§ 1, 2, which provide that the board of health shall assist quarantined persons, and that all expenses shall be "deemed an expenditure for the protection of the public health," plaintiff, whose house is quarantined, and whose wife, without contract with the board of health, assists in caring for the patient, cannot recover, where the board of health has not declared that any part of such expenses shall be deemed an expenditure for the protection of public health.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. §§ 13, 14; Dec. Dig. § 16.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TOWNS (§ 45*)—LIABILITY—DESTRUCTION OF PROPERTY—BOARDS OF HEALTH.

A member of a town board of health, destroying infected bedding, does not act as agent for the town, but as a public officer, under legislative authority, for the protection of the public.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 79, 80; Dec. Dig. § 45.*]

3. TOWNS (§ 45*)—DESTRUCTION OF PROPERTY—DISINFECTION—LIABILITY OF TOWN AUTHORITIES.

Where a member of a town board of health destroys infected bedding, acting as a public officer under legislative authority, and while in the discharge of a public or governmental duty, the town is not liable therefor, in the absence of a statute making it liable.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 79, 80; Dec. Dig. § 45.*]

Exceptions from Superior Court, Cheshire County; Mitchell, Judge.

Action by John Creier against the Town of Fitzwilliam. Judgment in the superior court for defendant, and plaintiff excepted. Exceptions overruled.

In December, 1907, one Hautaula, a boarder in the plaintiff's family, was taken sick with the smallpox. A physician, who was also a member of the board of health of the defendant town, was first called to treat him, and subsequently the patient was quarantined by the board in the plaintiff's house. A nurse and medical treatment were provided. The plaintiff's wife assisted in caring for the patient, but the board made no contract with her or her husband to employ her or to pay her for her services. As the protection of the public required the destruction of the bedding used by Hautaula when he was taken sick, it was destroyed by the board of health. The court ruled that the plaintiff could not recover for the services of his wife, or for the bedding destroyed, and he excepted.

Conrad W. Crooker, of Keene, for plaintiff. Orville E. Cain, of Keene, for defendant.

WALKER, J. [1] The plaintiff cannot recover of the town for the care furnished by his wife to the patient, because she was not employed by the health officer in charge of the case, and the board of health has not decided that any part of this expense should be "deemed a legitimate expenditure for the protection of the public health." *Laws 1899, c. 100, §§ 1, 2; Pettengill v. Amherst, 72 N. H. 103, 54 Atl. 944.*

[2, 3] When the officer destroyed the infected bedding, he was not acting as the agent of the town, but as a public officer, under legislative authority, for the benefit and protection of the public. He was as much a public officer as highway surveyors, police officers, and firemen (*Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Barbour v. Ellsworth, 67 Me. 294; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499*), for

whose act while in the discharge of a public or governmental duty, even if wrongful, the town is not responsible, in the absence of a statute making it responsible therefor. *Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604; O'Brien v. Derry, 73 N. H. 198, 60 Atl. 843; Gates v. Milan, 76 N. H. 135, 80 Atl. 39, 35 L. R. A. (N. S.) 599.* As no statute has been found making towns liable for property destroyed by health officers, the plaintiff cannot recover for this item of his specification.

Exceptions overruled. All concurred.

MADDEN v. BOSTON & MAINE R. R.

(Supreme Court of New Hampshire. Cheshire. April 2, 1912.)

1. RAILROADS (§ 453*)—RIGHT OF WAY FIRES—DEATH OF CHILDREN—RAILROAD COMPANY'S LIABILITY.

A railroad company was not liable for the death of a child by fire communicated to her from the burning of a railroad's right of way, in the absence of proof of a breach of some duty which the railroad company owed to such child.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.*]

2. RAILROADS (§ 453*)—RIGHT OF WAY FIRES—DEATH OF CHILDREN—TRESPASSER.

Where intestate, a child of tender years, died as the result of a fire communicated from defendant's right of way to her clothing, and it was disputed whether she was on the right of way when she caught fire, or on her father's adjoining premises, but no one saw her when her clothing caught fire, she being first seen on the right of way enveloped in flames, and there also being nothing to show how she caught fire, or how long she had been there, she would be treated as a trespasser.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.*]

3. RAILROADS (§ 482*)—RIGHT OF WAY FIRES—INJURIES TO CHILDREN.

Where intestate, a girl of tender years, dies as the result of fire communicated to her clothing from defendant's right of way, on which she was a trespasser, evidence held insufficient to show that defendant's servants knew or should have known of her presence or peril until it was too late to save her.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

4. RAILROADS (§ 453*)—RIGHT OF WAY—BURNING GRASS—WATCH FOR TRESPASSERS.

A railroad company is entitled to burn the dry grass by the side of its track, without keeping watch for casual trespassers who might possibly get into the flames and be injured.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.*]

5. APPEAL AND ERROR (§ 970*)—EVIDENCE—MATTERS OF DISCRETION.

Exception to the exclusion of evidence of the declarations of intestate an hour after the accident, explaining how she caught fire, presents no error for review on exceptions,

as the declaration may have been excluded as a matter of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.*]

Transferred from Superior Court, Cheshire County; Plummer, Judge.

Action by Charles A. Madden, as administrator, etc., against the Boston & Maine Railroad for negligently causing the death of plaintiff's intestate, a girl about six years old. Case transferred from superior court on plaintiff's exceptions to a verdict ordered for defendant. Overruled.

At the time of the negligence alleged, the defendants' section crew were burning the grass on a bank within the right of way, at a place in Winchester opposite the premises where the intestate lived with her parents, which were separated from the railroad way by a stone wall. The evidence was conflicting whether the fire spread to the premises where she lived, but, if it did, it was only for a few feet close to the wall; and there was no evidence whether such burning took place before or after she got on fire. When the child was first seen after catching fire, she was on the railroad's right of way, running from the fire, and her screams attracted the notice of the trackmen, who were working on the track. There was evidence that she was then from 15 to 20 feet from the men. There was no other evidence of the place at which, or the manner in which, she caught fire. The court ruled that there was no evidence from which the jury could find that she was not a trespasser at the time she caught fire, and the plaintiff excepted.

The child had several sisters, who were all young. There was evidence that on a few occasions the trackmen had seen them sitting on the wall, and that once, several months before, they were seen playing on the track. There was no evidence that the child had been seen by any one from the time she left the house, shortly before the accident, to the time when her screams were first heard by the trackmen. Two of the crew were watching the fire where it was set. By reason of the railroad curve and the cut, they were not in sight of the place where the child was first seen by the trackmen. The plaintiff offered evidence of a statement, made by the deceased to her father about an hour after the accident, as to how it occurred. The evidence was excluded, and the plaintiff excepted. The court ordered a verdict for the defendants, subject to the plaintiff's exception.

Joseph Madden, of Keene, for plaintiff.
John E. Allen, of Keene, for defendant.

WALKER, J. [1] One of the facts it was essential for the plaintiff to prove or establish by a preponderance of evidence was that the defendant was guilty of a breach of some duty it owed to the intestate, which natural-

ly resulted in her injury. But its duty to her, if she was a trespasser when her injury occurred, would not be the same it would if she was not a trespasser.

[2] It was a matter in dispute at the trial whether she was on the defendant's land when she caught fire, or on her father's premises. According to the testimony, no one saw her when her clothing caught fire; and she was first seen on the defendant's land enveloped in flames. How she caught fire was not disclosed by the evidence; nor did it appear where she was at that particular time. As ruled by the court, there was no evidence that the deceased was not a trespasser when she caught fire. She was first discovered on the defendant's right of way after her clothing was on fire. How long she had been there is not disclosed by the evidence; and it would be the merest conjecture to suppose that the fire came in contact with her while she was upon her father's premises, and that she then escaped over the wall onto the defendant's land. She must be treated as a trespasser.

[3] The only evidence that the defendant's servants actually knew of her presence was that when they were attracted by her screams she was only some 15 feet from them; and from this it is argued that they must have known she was about there before she caught fire. In the absence of any evidence that she had occupied that position for more than an instant of time, or where she caught fire, or that she had done anything before screaming to attract the attention of the men engaged in their work on the track, it cannot be reasonably inferred that they knew of her presence in their vicinity before she caught fire. The evidence is not sufficient to authorize a finding that they knew she was in a place of danger until she was in imminent peril.

[4] Nor does the evidence have any legitimate tendency to show that the workmen ought to have known that she or other little children were liable to be there. It does not appear that the defendant's way was frequented by children. It had not been used as a playground; and there was no reason to anticipate that children would trespass upon it when it was being burned over. It is argued that the fire was attractive to children, and that the defendant, knowing this fact, ought to have anticipated that they would trespass upon its way to play with the fire. But this assumption is not universally true; for many children are repelled by the sight of a conflagration. It is impossible, without other evidence, to account for the presence of the deceased on the defendant's way. What induced her to go there is problematical; and it cannot be inferred that she was there because the fire attracted her, in order to draw the further inference that the railroad men ought, in the exercise of reasonable care, to have

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

known of her presence in time to warn her of her danger. When she screamed, nothing could be done to save her. If, therefore, it would have been the defendant's duty to warn her of her danger, or to drive her from its land, if its servants had known or ought to have known of her presence (*Hobbs v. Company*, 75 N. H. 73, 70 Atl. 1082, 18 L. R. A. (N. S.) 93; *Buch v. Company*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163), the fact that it cannot be charged with that knowledge prevents the application of that doctrine, and shows that her injury is not attributable to its violation of any duty it owed to her. It had a right to burn the dry grass by the side of its track, without keeping watch for casual trespassers who might possibly get into the flames and be injured. *Shea v. Railroad*, 69 N. H. 361, 41 Atl. 774. Whether, if it had known the deceased was present, it would have been its duty to protect her from being burned by the fire, on the ground that the fire was "active intervention" by the landowner, it is unnecessary to consider.

[5] The exception to the exclusion of evidence of the declaration of the little girl an hour after the accident, explaining how she caught fire, presents no question of law for the court. The evidence may have been excluded by the court as a matter of discretion. "Much must be left to the discretion of the court in admitting or rejecting such testimony." *Dorr v. Railway*, 76 N. H. 160, 162, 80 Atl. 336, 337.

Exceptions overruled. All concurred.

LIVERMORE et al. v. WELLS et al.
(Supreme Court of New Hampshire. Hillsborough. April 2, 1912.)

WILLS (§ 578*)—CONSTRUCTION—CODICIL.

By the second clause of a holographic will, testatrix directed that her shares in certain designated corporations and her shares and bonds and any other evidences of indebtedness be sold, and, after all bequests were paid, that the remainder be divided among the children of her brother and sister and their heirs. By a codicil she designated defendant as her residuary legatee. *Held*, that the proceeds of stocks, bonds, coupons, checks, and a note payable to testatrix, acquired subsequent to the execution of the will, passed under the second clause of the will, and not under the codicil.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1258-1265; Dec. Dig. § 578.*]

Transferred from Superior Court, Hillsborough County; Chamberlin, Judge.

Bill by Thomas L. Livermore and others, as executors of the will of Elizabeth A. Livermore, against Harriet E. Wells and others, for the construction of the will. Case transferred, without ruling, from the Superior Court.

The second clause of the will is as follows: "My shares in the New Hampshire Insurance Company, in the Souhegan Nation-

al Bank of Milford, my railroad shares, government bonds, and any other bonds or written evidences or printed of property may be sold and after all bequests are paid the remainder may be divided among the children of my brother * * * and the children of my sister * * * and Laura R. Manning * * * and their heirs." A codicil to the will is as follows: "Herein I designate Mrs. Harriet E. Wells to be my residuary legatee and so appoint." The will was holographic and undated, but was executed on or prior to September 10, 1893. The testatrix died November 8, 1910.

In addition to the property described in the will, the inventory disclosed stock of the American Can Company and of the American Telephone & Telegraph Company, bonds, coupons from bonds, checks payable to the decedent, a promissory note payable to her, and cash on hand, all acquired subsequent to the execution of the will. The executors, as interested parties, pray for instructions as to whether the property last enumerated passes under the second clause of the will or under the codicil.

Thomas L. Livermore, Joseph P. Livermore, and Charles H. Manning, pro se. Burnham, Brown, Jones & Warren, of Manchester, for Charles B. Manning and others.

BINGHAM, J. The intention of the testatrix, as disclosed in her will, was that the proceeds of the stocks, bonds, coupons, checks, and note in question should go under the second article of the will to the beneficiaries there named, and the executors are so advised.

Case discharged. All concurred.

JONES v. CHARLES WARNER CO.

(Superior Court of Delaware. New Castle. May 13, 1912.)

1. JUSTICES OF THE PEACE (§ 31*)—JURISDICTION—AUTHORITY.

Within his statutory jurisdiction the authority of a justice of the peace is as complete as that of the Superior Court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 71; Dec. Dig. § 31.*]

2. JUSTICES OF THE PEACE (§ 130*)—CONCLUSIVENESS OF JUDGMENT.

Where, in actions within the jurisdiction of a justice of the peace, matters of account, demand, or cause of action cognizable before a justice are pleaded as a set-off and entered by the justice in his docket as required by statute, his judgment, unreversed, is conclusive, and will bar another action based on such matters.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 989, 1153; Dec. Dig. § 130; Action, Cent. Dig. § 571.]

3. JUDGMENT (§ 622*)—MERGER AND BAR—SPLITTING CAUSES OF ACTION OR DEFENSES—COUNTERCLAIM.

In actions for the price of goods, for goods sold and delivered with warranty, or for the price of work and labor done under a contract,

defendant may either avail himself of any breach by plaintiff, or may sue for the damages independently, and the former suit and recovery against him will be no bar to the latter suit, unless in the former suit he availed himself of his remedy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1186; Dec. Dig. § 622.*]

4. JUSTICES OF THE PEACE (§ 37*)—JURISDICTION—CONSEQUENTIAL DAMAGES.

Where plaintiff purchased mortar from defendant of a quality suitable for use in the erection of a garage, but the mortar was not of a satisfactory quality, damages purely consequential were not within the jurisdiction of the justice of the peace.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 98-115; Dec. Dig. § 37.*]

5. JUDGMENT (§ 622*)—As BAR—RECOUPMENT.

As recoupment must defeat plaintiff's action in whole or in part, no recovery being authorized for any excess, defendant has his election as to whether he will interpose the same in plaintiff's action growing out of the same transaction; but, if he exercises his privilege of recoupment, he cannot thereafter maintain a separate action for such damages, or any part thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1186; Dec. Dig. § 622.*]

6. JUSTICES OF THE PEACE (§ 130*)—SET-OFF—RECOUPMENT.

Rev. Code 1852, amended to 1893, p. 744 (14 Del. Laws, c. 93) § 8, providing that, in actions before a justice of the peace, defendant must plead as a set-off any account, demand, or cause of action cognizable before a justice, has no application to matters of damage in the nature of recoupment or defense, cognizable before a justice, which the defendant might interpose at his election, and such matters are not required to be pleaded as a set-off.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 989, 1153; Dec. Dig. § 130.*]

7. SALES (§ 428*)—ACTION FOR PRICE—DEFENSES—DEFECTIVE QUALITY.

In an action for the price of mortar, it was competent for defendant, in defense of the action or in reduction of plaintiff's demand, to plead and prove that the mortar was not suitable for the purpose for which he bought it, and that it was of no value to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1214-1223; Dec. Dig. § 428.*]

8. JUDGMENT (§ 540*)—CONCLUSIVENESS—ESTOPPEL.

A former judgment on the merits between the same parties is conclusive as to any issue actually litigated and determined, however erroneous, and which issue is essential to the maintenance of a second action between them, though it be brought on a different cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 540.*]

9. JUDGMENT (§ 622*)—RES JUDICATA—ESTOPPEL.

Where, in an action before a justice of the peace for the price of mortar sold, the buyer availed himself of the defense that the mortar was unsuitable for the purpose intended, and was beaten on such issue, the judgment was a bar to a subsequent suit by the buyer against the seller to recover, not only damages arising from the alleged uselessness of the mor-

tar, but also consequential damages not within the jurisdiction of the justice.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1186; Dec. Dig. § 622.*]

Action by John Jones against the Charles Warner Company. On plaintiff's demurrer to defendant's pleas of estoppel by judgment in bar. Demurrer overruled, and judgment of respondeat ouster entered.

Argued before PENNEWILL, C. J., and BOYCE, J.

Ward, Gray & Neary, of Wilmington, for plaintiff. Josiah O. Wolcott and Christopher L. Ward, both of Wilmington, for defendant.

BOYCE, J. (delivering the opinion of the court). This is an action on the case for the recovery of damages, alleged to have been sustained by the plaintiff by reason of the failure of the defendant company to sell and deliver ready-mixed mortar of the quality suitable for use in the erection and construction of a certain building.

The plaintiff's amended declaration contains three counts, and the sixth, seventh and eighth pleas, filed by the defendant, are directed to the said three counts respectively.

The plaintiff has demurred to the pleas, and our present consideration is on the demurrer.

The averments in each of the counts are, in substance, that the said ready-mixed mortar was purchased by the plaintiff, at the special instance and request of the defendant company, for the building of a certain garage, known to the defendant company, and was paid for by the plaintiff; that it was not of suitable quality for the use for which it was purchased and used, but on the contrary was unsuitable for said purpose, whereby it became and was of no use or value to the plaintiff, and he has thereby been put to great expense, in and about the building of said garage, and has expended large sums of money, in and about the purchase of stone, bricks, and other materials, and in the service and employment of laborers, mechanics and other persons, in and about the construction and erection of said garage and for other purposes incurred in and about the same; and that by reason of the premises great damage has resulted to him, the plaintiff.

Each of the defendant's pleas, in bar of the action, aver that the plaintiff is estopped from alleging as he does in his several counts, for the reason, it is alleged in substance, that prior to bringing the present action, the defendant herein brought an action against the plaintiff herein before a justice of the peace for the balance of the price of the mortar mentioned in the three counts of the plaintiff's amended declaration; that the said defendant in that action appeared and defended against a recovery for the price on the ground that the said mortar was not suitable for the purpose for which it was bought, and produced testimony to show that

It was unsuitable for said purpose and was of no value to him; and that such being his defense, judgment was rendered against him by the justice in favor of the plaintiff in that action for the amount of its demand, which said judgment was not appealed from and has not been reversed, and which the defendant therein has since paid, and satisfaction has been entered on the record thereof. The record of the justice of the peace is set forth in each of said pleas, and it does not show that the defendant therein (the present plaintiff) brought forward any account, demand, or cause of action, and pleaded it as a set-off, and that an entry thereof was made by the justice as required by section 8, c. 99, Revised Code (1898) 744 (14 Del. Laws, c. 93). There is in each of said pleas the simple averment, dehors the record, that the defendant in said action (the present plaintiff) appeared and defended the said action in the manner as alleged in said pleas.

The question for our determination is whether the said judgment recovered before the justice of the peace by the present defendant in the action brought by it against the present plaintiff to recover the balance of the purchase price of the said mortar, is a bar to the present action for the reason alleged in said pleas.

Contention was made by counsel for the defendant, in this action, that whether the defense set up by the defendant, in the action before the justice of the peace, is to be considered as a counterclaim in the nature of recoupment, or for unliquidated damages arising out of the alleged failure to deliver suitable mixed mortar for said building purpose, or strictly as a defense in bar to said action. It was an issue before and within the jurisdiction of the justice, passed upon and determined by him, and that his judgment is final and conclusive upon said issue. And it was insisted that the mere fact that the damages claimed by the defendant in said action were unliquidated did not take the issue of fact presented out of the jurisdiction of the justice of the peace, citing *Gruell v. Clark*, 4 Pennewill, 321, 54 Atl. 955, *Barr v. Logan*, 5 Har. 52, *Cannon v. Matthews*, 3 Houst. 97, *Spahn v. Willman*, 1 Pennewill, 125, 39 Atl. 787, and *Colesberry v. Stoops*, 1 Har. 448. And it was further contended that in an action upon a contract for the sale of goods, the defendant may show, in bar of the action, that the consideration had failed by proving that the goods in question were of no value, citing *Bye v. McCauley & Son Co.*, 7 Pennewill, 115, 76 Atl. 621, *Armstrong v. Columbia Wagon Co.*, 6 Pennewill, 274-278, 66 Atl. 366, *Leonard & Co. v. Johnson Forge Co.*, 8 Pennewill, 104-108, 50 Atl. 541, affirmed in 3 Pennewill, 844, 51 Atl. 305, 94 Am. St. Rep. 86, 57 L. R. A. 225, *Hall v. Cannon*, 4 Har. 360-362, and *Davis v. Bonnewell*, 1 Houst. 460.

[1] This court has said that, within his statutory jurisdiction, the authority of a

justice of the peace is just as complete for all purposes of hearing such cases, determining or deciding them, and making up his record, as is the authority of this court. *Johnson v. State*, 6 Pennewill, 450, 67 Atl. 785.

[2] There is no doubt that in actions before and within the jurisdiction of a justice of the peace, when matters of account, demand, or cause of action, cognizable before the justice, are brought forward and pleaded as a set-off, and entered by the justice upon his docket as required by the statute, his judgment is conclusive and will bar another action based on such matters, unless the judgment be reversed.

[3] It has been held by this court that as well in actions for the nonpayment of the price of goods sold and delivered under a contract, as in actions for goods sold and delivered with warranty, or in actions for the price of work and labor done under a contract, the defendant may, at his election, either avail himself of any breach of the contract by the plaintiff causing damage to him, in reduction of the damage claimed and sustained from any breach of it by the plaintiff, or he may sue the plaintiff for the same independently, and the former suit and recovery against him shall be no bar to the latter, unless in the former suit he availed himself of his right and privilege to prove and claim the amount of such damage in reduction of the amount of damages demanded by the plaintiff in it from him. *Tomlinson & Co. v. Quigley*, 5 Houst. 168.

[4] The cause of action declared upon by the plaintiff in this action, all the essential averments in the declaration being considered as a whole, clearly embraces matters of damage not cognizable before a justice of the peace. There is included in the declaration not only the element of damage arising from the alleged uselessness of the mortar, but the further element of damage in consequence of the use of said mortar. Damages purely consequential in character are not matters within the jurisdiction of a justice of the peace. In the present case, the alleged consequential damages are of necessity based upon the alleged inferiority or uselessness of the said mortar. And while in the action before the justice for the recovery of the price of the mortar, the defendant therein was not bound to exercise his privilege of defending said action on the ground that the mortar was worthless and of no value to him, and especially so in view of the consequential damages which he alleges he has sustained by reason of using the mortar, yet it appears from the pleadings in the present action that he did so defend the said action before the justice of the peace.

[5] Recoupment is limited in its application as a defense to defeating the plaintiff's action in whole, or in part, and no recovery

can be had for any balance or excess. Recoupment of matters of damage growing out of the same transaction and for which a separate action could be maintained, is allowable by way of defense, after notice, at the election of the defendant, instead of compelling him to resort to a cross action for such damages. Whenever a defendant has a claim for such damages, he may, at his election, exercise his privilege to recoup. He is not compelled to do so, and if he does he cannot subsequently maintain an action for such damages, or any part thereof.

[6] A proceeding as by notice of recoupment before a justice of the peace is perhaps unknown here, and we know of no machinery whatever for such a proceeding before a justice of the peace. The statute to which we have referred requires that "in every action before a justice of the peace within his jurisdiction, it shall be incumbent on the defendant, if he has against the plaintiff any account, demand, or cause of action, cognizable before a justice of the peace, to bring it forward and plead it as a set-off; and the justice shall enter on his docket the nature and amount of such counter-claim," etc. A defendant failing to do so is forever barred by the statute from recovering the same. It seems apparent that matters of damage in the nature of recoupment, or defenses, cognizable before a justice of the peace, which the defendant, in actions before a justice of the peace, may, or may not, at his election, rely upon in defense of the whole or a part of the action against him, are not matters within the contemplation of the statute requiring them to be brought forward and formerly pleaded as a set-off.

[7] It appears from the pleas filed in this action that the defendant in the action before the justice, who is the plaintiff here, both alleged and produced testimony to support his allegation that the said mortar was not suitable for the purpose for which he purchased it, and that it was of no value to him. Although such averment is dehors the record of the justice, the demurrer admits the fact pleaded. In the action for the price of the mortar, we think it was competent for the defendant therein in defense of the action, or in reduction of the plaintiff's demand, to avail himself of the privilege of showing that the mortar was not suitable for the purpose for which he bought it, and that it was of no value to him. The quality of the mortar is an essential and traversable fact in the present case, and if it was put in issue by the defendant in the action before the justice of the peace, as alleged in said pleas, which must now be taken as admitted on the record, we think it was not a set-off, in contemplation of the statute, which of necessity had to be brought forward and pleaded,

and an entry thereof made on the justice's docket as required by the statute; but it was a matter going to the consideration or value of the mortar which it was competent for the defendant to show in defense of the action, or in reduction of damages claimed by the plaintiff therein, and which, being made an issue, it was competent for the justice to both hear and determine. Although the present action is different from that before the justice, it is nevertheless between the same parties and necessarily based on the alleged inferior quality of said mortar. The present action cannot be maintained without showing that the said mortar was in fact unsuitable for the purpose for which it was bought and used, which issue of fact was before the justice in the action for the recovery of the price of the mortar.

[8] The rule is general that a former judgment on the merits, between the same parties, in a court of competent jurisdiction, is conclusive and final as to any issue actually litigated and determined in the former action, however erroneous, and which issue is essential to the maintenance of a second action between them, though it be brought upon a different cause of action. *Worknot v. Millen's Adm'r*, 1 Har. 139; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Sawyer v. Woodbury*, 7 Gray (Mass.) 499, 66 Am. Dec. 518; *Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94; *Harrison v. Remington Paper Co.*, 140 Fed. 385-400, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Howell v. Goodrich*, 69 Ill. 556; *O'Conner v. Varney*, 10 Gray (Mass.) 231; *Merriam v. Woodcock et al.*, 104 Mass. 326; 23 Cyc. 1216, 1288; *Herman on Estoppel*, 214, 237; *Bigelow on Estoppel*, 152.

[9] The plaintiff in this action, having availed himself of his right and privilege to show before the justice that the mortar was unsuitable for the purpose for which he bought it, and being obliged in his present action to rely on the same alleged fact, considered and adjudicated by the said justice of the peace in the former action, we think he cannot now controvert said fact, and that he is barred and estopped from showing any defects in the said mortar and from maintaining his present action.

The demurrer is overruled. Judgment of respondent ouster is entered upon the election of the plaintiff.

LAYTON v. HUDSON.

(Superior Court of Delaware. Sussex. Oct. 20, 1911.)

1. NEGLIGENCE (§ 121*)—FIRES—BURDEN OF PROOF.

In an action for negligence in setting fire, the burden of proving that the negligence alleged caused the damage to plaintiff, by a pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ponderance of the evidence, is on the plaintiff; such negligence never being presumed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

2. NEGLIGENCE (§ 21*)—FIRES—NOTICE TO ADJOINING PROPERTY OWNER—OMISSION—NEGLIGENCE PER SE.

18 Del. Laws, c. 93, § 1, provides that it shall not be lawful for any person to set fire to any grass, brush, or other substance, where the burning thereof will in any manner endanger any timber or other property, without first giving sufficient notice to the owners or occupiers of such timber as will enable them to take necessary steps to guard against such damage as they may deem proper of his intention to set fire to such grass, brush, or other substance, and using all due necessary precaution on his part to prevent any damage or loss to the timber or property of others. *Held*, that the setting of fires without giving the notice prescribed is negligence per se.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

3. NEGLIGENCE (§ 21*)—FIRES—NOTICE—FAILURE TO GIVE.

Where an adjoining property owner fires brush on his land, without giving the notice to his adjoining owners required by 18 Del. Laws, c. 93, § 1, he is not relieved from liability for damages caused by the escape of fire by proof that he used proper care and caution in starting and controlling the same.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

4. NEGLIGENCE (§ 21*)—FIRES—ESCAPE—NOTICE.

Where defendant set fire to grass, brush, and other substances on his own property, and the burning thereof in no manner endangered timber or other property of the plaintiff, and defendant thereafter exercised proper care and caution in the control of the fire, he was not liable for damages caused by the burning of plaintiff's property, though he did not give the notice required by 18 Del. Laws, c. 93, § 1.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 28-30; Dec. Dig. § 21.*]

5. DAMAGES (§ 112*)—FIRES—ESCAPE—BURNING TIMBER—DAMAGES.

In an action for damages due to the escape of fire from defendant's land, burning plaintiff's timber, plaintiff's measure of damage was such a sum as would compensate him for the injury he sustained, as shown by the difference between the value of his property immediately before the fire, including the timber, young and old, and its value thereafter.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

Action by Landreth L. Layton against Parker H. Hudson to recover damages for injuries alleged to have resulted to plaintiff by reason of defendant's negligence in setting fire to brush on his land. Verdict for defendant.

Action of trespass on the case (No. 7, June term, 1910), to recover damages for injuries alleged to have resulted to the plaintiff by reason of the negligence, etc., of the defendant, in setting fire to brush, etc., on the lands of the latter.

The facts appear in the charge of the court.

Argued before WOOLLEY and RICE, JJ.

Daniel J. Layton, Jr., and James M. Tunnell, both of Georgetown, for plaintiff. Woodburn Martin and Charles W. Cullen, both of Georgetown, for defendant.

RICE, J. (charging the jury). Gentlemen of the Jury: This is an action of trespass on the case. Landreth L. Layton, the plaintiff, seeks to recover from Parker H. Hudson, the defendant, damages for alleged injuries to his property, caused by the alleged negligence of the defendant.

The plaintiff claims that the defendant in the latter part of March, 1910, either himself or through another acting under his direction, or by his permission, set fire to brush or combustible matter upon the part of his land that was west of and in the immediate vicinity of the plaintiff's premises.

The plaintiff sets forth in several ways in eight counts in his declaration that the defendant was negligent in starting a fire at a time when the brush or other combustible matter was very dry; that a strong wind was blowing over the brush at the time; that the defendant had not plowed the ground around the brush; that he had not employed a sufficient number of persons to assist him in keeping the fire under control; that he did not give notice to the plaintiff or his tenants on the land on which timber was on this occasion burned; and that the defendant had not given sufficient notice to the plaintiff or the occupant of the land as required by the statute of this state—and claims that he has been damaged to the extent of \$100.

The defendant claims that the fire, set by his servant under his direction, on the property of the defendant did not cause the fire on the land of the plaintiff and the resultant damage thereby as alleged by the plaintiff, but that a fire was communicated to the property of the plaintiff from another fire, for which the defendant was in no way responsible, and he further contends that the plaintiff did not suffer any damages by the fire on his (the plaintiff's) land, from whatever place it may have been communicated to the land of the plaintiff.

[1] The basis of this action is the negligence of the defendant or of his servant by his direction or authority. The burden of proving the act of negligence, which caused the alleged damage to the plaintiff is upon the plaintiff, and such negligence being never presumed, must be proved to the satisfaction of the jury, by the preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the evidence, and not merely the larger number of witnesses.

[2] There is a statute in this state, being chapter 93, volume 18, Laws of Delaware, which in part is as follows:

"Section 1. That from and after the passage of this act it shall not be lawful for

any person to set fire to any grass, brush, or other substance, where the burning thereof will in any manner endanger any timber, either standing or felled, or other property, without first giving sufficient notice to the owners or occupiers of such timber and property as will enable them to take such necessary steps to guard against such damages as they may deem proper, of his intention to set fire to such grass, brush or other substance, and using all due and necessary precaution on his part to prevent any damages or loss to the timber or property of others.

"Sec. 2. That any person violating section 1 of this act shall * * * be liable in a suit for damages that may be sustained by any one on account of his failure to comply with the provisions of this act."

[3] Thus one of the issues of fact for the jury in this case to determine from the evidence, is whether the defendant or his servant did or did not set fire to grass, brush, or other substance at a place on his property where the burning thereof, did in any manner endanger any timber, or other property of the plaintiff. And if you find that he did do so, and that the defendant did not give sufficient notice, to the plaintiff or the occupier of the land of the plaintiff, upon which the timber or other property was burned, of his intention to set fire to such grass, brush or other substances, as would enable him or them to take such necessary steps as they may have deemed proper to guard against such damage, and we may say to you that the defendant does not claim that he gave any notice to either the plaintiff or the occupier of his land in question. That failure to give such notice in itself is negligence, and if the plaintiff's property was damaged as a result of such negligence on the part of the defendant, he (the defendant) is liable, and the defendant is not relieved of this statutory duty to give notice or of its corresponding liability, even though he used proper care and caution in starting the fire and controlling the same.

[4] But if, on the other hand, you find from the evidence that the defendant set fire to grass, brush or other substance on his own property, the burning whereof in no manner endangered timber or other property of the plaintiff, without giving notice thereof to the plaintiff or his tenant, and thereafter exercised a proper care and caution in its control, the defendant is not liable.

[5] If you find that plaintiff's timber or other property was damaged by any act of negligence of the defendant, as we have defined it to you, then your verdict should be in favor of the plaintiff "for such a sum as would compensate him for the injury he thereby sustained, as shown by the difference between the value of his property immediately before the fire, including timber, young and old, and its value thereafter." Bullock v. Porter, 1 Boyce, —, 77 Atl. 943.

Your verdict should be for the defendant however, if you find (1) that the fire on the plaintiff's property was not caused by the defendant or his agent; or (2) that the fire on the plaintiff's property was not caused by any negligent act of the defendant or his agent; or (3) that the plaintiff suffered no damage as a result of the fire, by whomsoever started.

Verdict for defendant.

GISMONDI v. PEOPLE'S RY. CO.

(Superior Court of Delaware. New Castle.
Nov. 21, 1911.)

1. STREET RAILROADS (§ 112*)—PERSONS ON TRACK — DEATH — CHILDREN—NEGLIGENCE —BURDEN OF PROOF.

In an action for the death of a child, struck by a street car, the burden is on plaintiff to establish that the child's death resulted from the defendant's negligence, as alleged in the declaration.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 227, 228; Dec. Dig. § 112.*]

2. NEGLIGENCE (§ 119*)—DIFFERENT ACTS—PROOF.

Where evidence is offered to establish different acts of negligence alleged to have caused the injury sued for, the evidence must be sufficient to show to the jury's satisfaction that one of such acts was the proximate cause of the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

3. NEGLIGENCE (§ 121*)—PRESUMPTION—BURDEN OF PROOF.

Negligence is never presumed merely from the fact that an accident occurred, but must be proved by the party alleging it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

4. NEGLIGENCE (§ 63*)—"INEVITABLE ACCIDENT."

An accident which could not be prevented by the exercise of ordinary care and prudence is an "inevitable accident," for which no recovery of damages can be had.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 80, 81; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3571-3573.]

5. STREET RAILROADS (§ 102*)—INJURIES TO PEDESTRIANS — CHILDREN—INEVITABLE ACCIDENT.

Where plaintiff's decedent, a child of tender years, moved from a position of safety to a position of danger near or on the railroad track, on which a car was running, so suddenly as to make it impossible for the motorman to stop the car before the accident, or if the motorman, after he saw, or by the exercise of ordinary care could have seen, the child in a position of danger, did everything that a reasonably careful man would do under like circumstances to prevent the accident, the railroad company would not be liable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 186, 194, 203; Dec. Dig. § 102.*]

6. STREET RAILROADS (§ 81*)—PERSONS ON TRACK—DUTY OF RAILROAD COMPANY.

A street railroad company must see that its servants operate its cars at a reasonable

speed, that proper warning is given of the approach of a car, and that the speed is slackened, or the car stopped, if necessary, when danger is seen or known in time, to prevent accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

7. STREET RAILROADS (§ 81*)—OPERATION—"ORDINARY CARE AND CAUTION."

A street railroad company is bound to operate its property with "ordinary care and caution"; such term being understood to import all the care and caution which the particular circumstances of the case reasonably require, and such as a reasonably careful man would exercise under like circumstances, the amount of care varying with the ordinary liability to danger and accident and to do injury to others in the operation and use of the railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

8. TRIAL (§ 306*)—CONFLICTING EVIDENCE—DUTY TO RECONCILE.

Where the evidence is conflicting, the jury should reconcile it, if possible, and, if not, should give credence to that part which they believe most worthy of belief.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 731, 742; Dec. Dig. § 306.*]

9. DEATH (§ 95*)—DAMAGES—CHILDREN.

In an action for the death of a child, the measure of damages is the sum which the child would probably have earned during her life, and would have saved from her earnings and left as her estate for the benefit of her next of kin; the jury being governed by the reasonable rules governing human experience in the acquisition and retention of property under the circumstances of such a life as that of the deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

Action by Ettore Gismondi, administrator of Anina Gismondi, deceased, against the People's Railway Company, to recover damages for decedent's death, alleged to have been caused by defendant's negligence. Verdict for plaintiff for \$100.

Argued before BOYCE and RICE, JJ.

W. W. Knowles, of Wilmington, for plaintiff. Robert H. Richards, of Wilmington, for defendant.

RICE, J. (charging the jury). Gentlemen of the jury: In this action Ettore Gismondi, administrator of Anina Gismondi, deceased, is seeking to recover damages, from the People's Railway Company, the defendant, for the death of Anina Gismondi, which he alleges to have been caused by the negligence of the defendant company.

The negligence of the defendant, of which the plaintiff complains, is set forth in the three counts of the plaintiff's declaration. The counts and the acts of negligence therein alleged are in part and in substance:

First. That the defendant carelessly and negligently operated and ran one of its cars without ringing a bell, sounding an alarm, or giving any notice of warning of its approach,

while the said Anina Gismondi, who was then and there about two years old, and in the exercise of due care, was lawfully crossing the track of the said defendant as aforesaid, and by reason of the premises the said Anina Gismondi was run over and killed.

Second. That the defendant carelessly and negligently operated and ran one of its cars at an unreasonable, dangerous, and excessive rate of speed so as to be unable to check its car, or have the same under proper control and management, while the said Anina Gismondi, who was then and there about two years old and in the exercise of due care, was at the time and place lawfully crossing the track of the said defendant, and by reason of such negligence on the part of the defendant the said Anina Gismondi was run over and killed.

And the third count is in substance the same as the other two with the exception that the negligence complained of is that the defendant, at the time and place described in the declaration, "carelessly and negligently propelled and ran one of its cars at a high and dangerous rate of speed without slowing up or slackening the speed of said car, or without attempting to slow up or slacken the speed of said car," and that by reason thereof the said Anina Gismondi was then and there killed.

And in each of said counts it is alleged that the accident complained of happened on the 31st day of August, in the year 1910, on West Sixth street at or near its intersection with Scott street, in this city, and that the People's Railway Company, the defendant, was at that time, and still is, engaged in operating certain lines of street railway in the city of Wilmington, county of New Castle and state of Delaware.

It is admitted that the People's Railway Company, the defendant, was operating the car at the time and place in question, and that Anina Gismondi was struck and killed by the car.

The plaintiff claims that about 3 o'clock on the afternoon of August 31, 1910, the decedent, a two year old child, was struck, knocked down, run over and killed by a railway car operated by the defendant company; that the child while in the act of crossing the track of the defendant, at a place opposite her late home at No. 1802 West Sixth street, which is situate between Scott and Lincoln streets, had stopped about half way between the rails and was stooping over picking up something from the ground; that the car in question, while proceeding in a westerly direction, had reached or was passing over Scott street on the down grade from Du Pont street to Lincoln street; that it approached, reached, and crossed over Scott street without giving a warning of its approach at a very high rate of speed, estimated between 15 and 22 miles an hour; and

that it had continued in a westerly direction towards Lincoln street, without any attempt to slow or slacken its speed, and had proceeded some distance, when the fender of the car struck and knocked the child down, the wheels of the car on the southerly rail passing over her body, the car after the accident going between 50 and 80 feet before it was stopped.

The defendant contends that the car in question was going westerly, at a moderate rate of speed; that as it approached Scott street, the bell of the car was rung, as a warning, and as it passed over Scott street the speed of the car was slackened to from 4 to 6 miles an hour; that when the car was passing Scott street Anna Gismondi, the deceased, was standing in the street near the southerly curb; that the car proceeded with a clear track ahead, but as the car approached and was very near a point opposite to where the child was standing, she suddenly started to run diagonally across the street, in the same direction as the car was going, and ran into the running board of the car, and was knocked down, and rolled under the wheels on the southerly side of the car; that the car passed over the child, and it was stopped from 8 to 25 feet beyond where the accident happened; and it further contends that from the time the child started to run across the street, until it ran into the car, the time was so short that it was impossible for the car to be stopped before the accident happened. In other words and in short, the defendant contends that it was an unavoidable accident, and that the defendant is not guilty of the negligence charged by the plaintiff.

[1] This action is based upon the negligence of the defendant company. In order to recover, the burden is upon the plaintiff to show to your satisfaction that the death of his intestate resulted from the negligence of the defendant company, as alleged in the declaration. *Heinel v. People's Ry. Co.*, 6 Pennewill, 431, 67 Atl. 173.

[2] The only negligence alleged in the declaration is that the defendant failed to give timely and suitable warning of the approach of its car, that it operated its car at an excessive rate of speed, and that it failed to slacken the speed of its car before the accident. For the plaintiff to recover in this action it must be shown to your satisfaction that some one or more of the above mentioned acts of negligence were committed by the defendant at the time of the accident, and that the accident was proximately attributable thereto.

[3] Negligence is never presumed merely from the fact that an accident occurred; it must be proved by the party alleging it.

[4] Any accident which could not be prevented by the exercise of ordinary care and prudence is what is called an inevitable accident, and recovery for damages resulting therefrom cannot be had.

[5] If the jury should believe from the evidence that the plaintiff's intestate moved from a position of safety, to a position of danger near or upon the track of the railway on which the car was running, so suddenly as to make it impossible for the motorman to stop the car before the accident, the defendant cannot be held liable for the injury resulting from the accident; so if the motorman after he saw, or by the exercise of reasonable care could have seen, the child in a position of danger, did everything that a reasonably careful and prudent man would do under like circumstances to prevent the accident, the defendant would not be liable. *Heinel v. People's Ry. Co.*, 6 Pennewill, 428, 67 Atl. 173.

[6] It is the duty of the defendant to see that its servants operate its cars at a reasonable rate of speed, that proper warning be given of the approach of the car, and that they slacken the speed of the car (or stop it if necessary) when danger is imminent and could, by the exercise of reasonable care, be seen or known in time to prevent accident, and if you believe that the defendant as alleged by the plaintiff, failed in one or more of the above duties and the accident complained of happened as a result of such failure, your verdict should be for the plaintiff. *Di Prisco v. W. C. Ry.*, 4 Pennewill, 527, 57 Atl. 906.

[7] A railway company is bound under the law to operate and manage its road and property with ordinary care and caution. But the term "ordinary care and caution" must be understood to impart all the care and caution which the peculiar circumstances of the case, reasonably require, and such as a reasonably prudent and careful man would exercise under like circumstances. The care and prudence required will be increased or diminished according as the ordinary liability to danger and accident, and to do injury to others, is increased or diminished in the operation and use of the railway. *Neal's Adm'r v. W. & N. C. E. Ry.*, 3 Pennewill, 467, 53 Atl. 338.

[8] The evidence in this case is conflicting and it is your duty to reconcile it if you can, but if you cannot reconcile it, you should give credence to that part which you believe most worthy of belief, and reject that part which you believe to be unworthy.

It is your duty to find a verdict for that party on whose side the evidence preponderates, and by a preponderance of evidence, is meant the weight and value of the evidence, and not merely the number of witnesses called.

[9] If your verdict should be for the plaintiff, the measure of damages in this case is the sum which the jury may believe from the evidence the deceased would probably have earned during her life, and would have saved from her earnings and left as her estate, and which would have gone to her next

of kin. In determining this sum, the jury should be governed by the reasonable rules governing human experience in the acquisition and retention of property under the circumstances and environments surrounding such a life as was that of the deceased. *Neal's Adm'r v. Railway Co.*, 3 Pennewill, 467, 53 Atl. 338; *Tully's Adm'r v. Railroad Co.*, 3 Pennewill, 455, 50 Atl. 95.

Verdict for plaintiff for \$100.

WILLIAMSON et al. v. McMONAGLE.

(Court of Chancery of Delaware. New Castle. April 24, 1912.)

1. EASEMENTS (§ 58*)—OBSTRUCTION.

Where one's legal title to land is subject to an easement of passage to a certain width, he could not erect a gate so as to materially narrow such width.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

2. EASEMENTS (§ 58*)—OBSTRUCTION.

Where one's title to land is subject to an easement of passage to a certain height, he cannot, by the erection of a wind-break, so decrease the height that it is not sufficient and reasonable for the passageway.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

3. INJUNCTION (§ 138*)—PRELIMINARY INJUNCTION—SCOPE.

While a preliminary injunction is not ordinarily mandatory, and should be so framed as only to preserve the status quo pending the final decision, it will require the removal of an obstruction which effectuates the very injury to be ultimately remedied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 138.*]

4. INJUNCTION (§ 134*)—RIGHT OF PRELIMINARY INJUNCTION.

The right of a complainant seeking a preliminary injunction should be so clear that the denial of the right must be capacious and unconscionable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 303; Dec. Dig. § 134.*]

Bill by Lewis S. Williamson and another against Francis McMonagle to enjoin continuance of an obstruction of an alley. Preliminary injunction granted.

The bill was filed to restrain the obstruction of the right of way and easement of the complainants in and through an alleyway over land of the defendant by a gate erected in said alleyway. The case was heard on bill, affidavits and exhibits at the return of a rule to show cause why a preliminary injunction should not be granted.

Ward, Gray & Neary, for complainants. Caleb E. Burchenal, for defendant.

THE CHANCELLOR. The bill is to enjoin the continuance of an obstruction of an alley, to the use of which the complainants are entitled over land of the defendant, in common with the defendant. A predecessor in title of the complainant conveyed the bed of the alley to the predecessor in title of the de-

fendant, with the privilege to build above the alley, subject to the "full, free and undisturbed use and privilege for the said Joseph Smith [under whom the complainants are entitled], his heirs and assigns, to have and enjoy in the said passage or alley in common with the said William Smith [under whom the defendant is entitled] his heirs and assigns forever." The alley has been in continuous use for over one hundred years, and from the affidavits submitted on the hearing of the motion for a preliminary injunction it appeared to be undisputed that for at least thirty years the alley, four feet wide and twelve feet high (part of it having been built over as allowed by the deed), was so maintained unobstructed and used by the adjoining owners in common. Indeed, there is no evidence that it had been other than as it was at the time the obstruction was erected by the defendant. Shortly before the bill was filed the defendant erected near one end of the alley a board obstruction filling the whole end of the alley from the bottom to the top and from side to side, put a door in it about two and one-half feet wide and six feet high and locked the door, denying to the tenant of the complainants' property use of the alley for several days. Upon threats of law suit the defendant unlocked the door and the tenant has had ingress and egress by the alley through the door, but the obstruction remains. Until the obstruction complained of was built there never had been a gate in the alley.

[1] It is clear, then, that the defendant has the legal title to the bed of the alley, subject to the full use of the whole of the four feet in width as an alley or passageway. It is equally clear that the structure erected in the passageway narrows the width perceptibly and substantially and requires the users of the passageway to go through a narrow gate or door. This is so clearly a violation of the established and undisputed rights of the complainants that beyond question the complainant will ultimately obtain the relief sought, a removal of the obstruction.

Without passing on the question whether or not the defendant has a right to maintain a gate, it is certainly clear that he has no right to maintain the gate which he has erected, because it materially narrows the width of the passageway. Speaking generally, the servient estate is not burdened with more than is necessary for the reasonable and proper use of the right of way acquired by the owner of the dominant estate. 3 Kent Com. 418, 420.

"What is necessary for such reasonable and proper enjoyment of the way granted, and the limitations thereby imposed on the use of the land by the proprietor, depends upon the terms of the grant, the purposes for which it was made, the nature and situation

of the property subject to the easement and the manner in which it has been used and occupied." *Baker v. Frick*, 45 Md. 337, 341, 24 Am. Rep. 506.

This case related to gates erected across a right of way, and it was considered a question for the jury to decide in that case, the language of the grant not being such as to clearly exclude the use of a gate. See, also, *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 21, 48 Am. Dec. 409, and other cases cited.

[2] The defendant urges, however, that he had a right to obstruct the passageway by erecting overhead a wind-break to prevent the rushing of wind through the alley, and held that if the complainants had four feet clear in width and six feet in height, it was all that they were entitled to have, inasmuch as the right was to a use of the passageway as a foot passage. But it is uncontroverted that since the alley was covered in part by the erection of the building on the defendant's land, many years have passed with no change in the height of the way. This is evidence to show the extent and character of the right of the owner of the dominant tenement and also to show that to decrease the height of the passageway by erecting across the alley an over head wind-break would be an invasion of the rights of the complainant to a passageway four feet wide and twelve feet high. In the absence of some evidence, or other circumstance than has been produced, or pointed out, the Chancellor is unable to say that six feet is sufficient and reasonable height for the passageway. Therefore it must be held that the over head part of the structure was erected in violation of the rights of the complainants.

[3] The complainants ask that the injunction to be granted *pendente lite*, even on the hearing on *ex parte* affidavits, should be mandatory, and should require the defendant to remove the whole obstruction. Preliminary injunctions should not generally be mandatory, and should be so framed as to do no more than preserve the status quo pending the decision of the cause at the final hearing on proofs taken. This subject-matter was so fully considered recently by Chancellor Nicholson in *Tebo et al. v. Hazel et al.*, 74 Atl. 841, that it is not necessary to do so here. The Chancellor in his opinion quoted the language of Chancellor Zabriskie in the case of *Rogers, etc., Works v. Erie R. R. Co.*, 20 N. J. Eq. 379, to the effect that a recognized exception to the general rule exists where an easement is obstructed; for there the maintenance of the structure prevents the enjoyment of the right, and its removal is ordered as part of the means of restraining the defendant from interfering with the enjoyment of the right. An obstruction which effects the very injury which will ultimately be remedied should be removed by a preliminary injunction. *Black v. Good In-*

tent, etc., 31 La. Ann. 497. Indeed, the principle is recognized in other cases cited by Chancellor Nicholson in the case above referred to, and seems sound.

[4] There is the further recognized limitation on the use of a preliminary injunction, that the right of the complainant should be "so clear that the denial of the right must be either capitious or unconscionable." *West Side, etc., Co. v. Consolidated Subway, etc.*, 87 App. Div. 550, 551, 84 N. Y. Supp. 1052, 1053. Indeed, the complainants' counsel calls attention to a cause in this court in this county (*Fitzpatrick v. Beggs*, Chy. Record L, vol. 2, p. 481, and Chy. Record M. vol. 2, p. 85, etc.), wherein such a writ was awarded to remove an obstruction to an alley *pendente lite*.

In the case now before this Court it seems clear that the complainants are now entitled to an order in effect requiring the removal of the whole of the structure erected in the covered part of the alley, even though it be a mandatory preliminary injunction, because they have shown a clear right, undisputed by any contrary evidence, to an alley at least four feet wide and where now covered by the building, twelve feet high, and this clear right the structure violates. The defendant effects an interference with the rights of the complainants by continuing the structure erected by him and should, even in *limine* and *pendente lite*, be required to remove it. When this has been done the parties can have their respective rights determined without either being oppressed or injured. A bond with surety will be required of the complainants, and if the defendant eventually establishes his right to obstruct the alley by his wind-break he will have a way to obtain reimbursement for his losses in removing the obstruction.

Let an order be entered accordingly.

JESSUP v. STATE.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. CRIMINAL LAW (§ 696*)—TRIAL—MOTION TO STRIKE EVIDENCE.

A motion to strike out all the evidence as insufficient to establish a case against accused was properly denied, where any part of it was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

2. CRIMINAL LAW (§ 696*)—MOTION TO STRIKE—DEMURRER TO EVIDENCE.

A motion to strike the whole evidence on the part of the state in a prosecution tried by the court was in effect a demurrer to the evidence, and an attempt to obtain from the court an instruction as to the legal effect of the evidence to sustain a verdict for the traverser, which is not allowable in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

3. CRIMINAL LAW (§ 696*)—TRIAL—JUDGMENT—MOTION TO STRIKE EVIDENCE.

Where, in a prosecution for selling liquor illegally, tried by the court without a jury, defendant moved to strike out all the state's evidence, part of which was admissible, on the ground that all the evidence was not legally sufficient or admissible to prove or tend to prove defendant's guilt, the court having properly overruled such motion and made findings against accused, judgment of conviction was properly rendered thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Elizabeth B. Jessup was convicted of selling liquor illegally, and she appeals. Affirmed.

Argued before BOYD, O. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, UERNER, and STOOKBRIDGE, JJ.

Robert Moss and Daniel R. Randall, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BRISCOE, J. These three cases were argued together, and, as they present the same questions, they will be considered and disposed of by this court in one opinion. The questions are presented by a single exception, and that is to the ruling of the court, at the close of the state's testimony, in refusing, upon motion of the traverser, to strike out all the evidence upon the part of the state, which had been admitted, subject to exception.

The case was tried before the court sitting as a jury, and it appears from the record that, after the first witness was sworn on the part of the state, the traverser objected to his testimony as to the sale of the liquor to him at Carvel Hall Hotel, unless it was followed up by testimony legally sufficient to prove that the defendant was prima facie guilty of the offense charged in the indictment. The court had admitted all the evidence set out in the record, subject to exception, with leave to the defendant at the close of the state's case to move to strike out the whole or any part of it.

At the close of the state's case, the traverser submitted the following motion, as stated in the exception: "The defendant moves the court to strike out all the evidence of all of the state's witnesses, the said evidence having been admitted subject to exception, and all of the said evidence of all of the witnesses not being legally sufficient or admissible to prove or tend to prove that the defendant was guilty of the offense of selling or giving away whisky and wine to Aaron S. Merrill on December 24, 1910, at Carvel Hall Hotel, city, county, and state aforesaid." This motion was overruled by the court below, and the traverser, declining to offer further evidence, was then convict-

ed, upon the issue joined upon the plea of not guilty, and sentenced to pay a fine of \$50 and costs; and from this judgment she has appealed.

The testimony, which the traverser's motion sought to strike out, was all of the evidence offered by the state, and was as follows:

Aaron S. Merrill testified that he purchased at Carvel Hall Hotel, Annapolis, Md., on the 24th day of December, 1910, whisky and wine, and that it was delivered to him in a little room off from the bar by one of the hotel waiters, and he paid for the same, and at the time he purchased and paid for said whisky and wine he was a minor under the age of 21 years, and a midshipman attached to the United States Naval Academy, and that he was not a student of St. John's College. The witness testified on cross-examination that at the time he purchased the liquor he did not see Miss Elizabeth B. Jessup in that part of the hotel, and had never seen her at any time in that part of the hotel adjacent to the bar.

William J. Seeley testified that Miss Elizabeth B. Jessup was the manager of Carvel Hall Hotel, Annapolis, Md., on the 24th day of September, in the year 1910, and that as said manager she had the right to employ and discharge waiters and bell boys and minor help; that she employed him as chief clerk, upon recommendation of A. H. McCarty; that as such manager she paid all bills contracted in and about the management of the hotel, drawing checks for same on a fund in bank in the name of the Carvel Hall Hotel Company, and signing check: "Carvel Hall Hotel Company, E. B. Jessup, Manager." On cross-examination the witness testified that Miss Elizabeth Jessup received a regular monthly salary, the same as he did, he being chief clerk of the hotel, and that she did not have the right to discharge him, and did not have the right to employ or discharge the barkeeper, who also received a monthly salary, and that their salaries were paid them by the Security Land Company, a body corporate incorporated under the laws of the state of New Jersey, of which A. H. McCarty was manager, and that said company conducted the hotel, and all the liquor in the hotel for sale was kept at the bar.

The state further proved that the application of the Security Land Company to the mayor, counselor, and aldermen of the city of Annapolis for a liquor license was signed by Elizabeth B. Jessup, Agent. It was admitted in the case that the Security Land Company was a nonresident corporation of the state of Maryland, but licensed to do business in this state, certifying to Secretary of State of Maryland that its sole business in the state of Maryland was the renting and collecting rents from property known as Carvel Hall Hotel Company, and that Daniel R.

Randall was its agent on whom process could be served, and that all its directors and officers were nonresidents of the state of Maryland.

We have thus set out the evidence at length, because the ruling of the court, embraced in the exception, upon the motion to strike it out, presents the only legal question to be reviewed by us, as we do not understand that the correctness of the court's ruling upon the demurrer to the indictment is pressed, on this appeal. It is clear, we think, that the motion to strike out, as submitted to the court and set out in the bill of exception, is entirely too broad and general, and was properly overruled by the court for two reasons:

[1] The law is well settled that if the objection is a general one to all and each and every part of the evidence, and if any part of it is admissible, the court will overrule the objection. Mr. Wigmore, in his work on Evidence (1 Wig. § 18, p. 57), states the rule as follows: "The cardinal principle is that a general objection, if overruled, cannot avail." In *Pegg v. Warford*, 7 Md. 582, this court said: "A general objection to testimony which is per se applicable to the case for any purpose will not be sustained, though inapplicable for other purposes, and such general objection would leave the testimony to go to the jury as if no objection had been made at all. In other words, it would be virtually an offer generally of competent testimony." *Budd v. Brooke*, 3 Gill 220, 43 Am. Dec. 321; *Morrison v. Whiteside*, 17 Md. 458, 79 Am. Dec. 661; *Levy v. Taylor*, 24 Md. 282; *Burgoon v. Bixler*, 55 Md. 384, 39 Am. Rep. 417; *Luery v. State*, 116 Md. 284, 81 Atl. 681. In *Carroll v. Granite Mfg. Co.*, 11 Md. 399, the court used this language: "After evidence has been admitted, and an application is made to the court to exclude it, then the onus rests upon the party making the application to confine his objection to that portion of the evidence which is illegal. And the same rule applies when an offer is made of a mass of evidence, complex in its character, and the whole of it is objected to. In such case, if any part of it be admissible, it is error to exclude the whole."

In the case at bar the reason for the exclusion of the evidence stated in the exception is "that all of the said evidence of all of the witnesses not being legally sufficient or admissible to prove or tend to prove that the defendant was guilty," etc. This objection it will be seen, is too general, and related to all the evidence offered on the part of the state, and did not point out specifically the inadmissible parts of the evidence, or state in what way it had no legal application to the case. Some of the evidence objected to was obviously admissible, tending to prove the charge set out in the indictment; and for the reasons stated and upon

the authorities cited the court committed no error in overruling the motion to strike it out, in the form it was submitted.

[2] But, apart from this, the motion to strike out the whole evidence on the part of the state was in the nature of and in legal effect a demurrer to the evidence, and an attempt to obtain from the court an instruction as to the legal effect and legal sufficiency of the evidence to sustain a verdict for the traverser. In *Dick v. State*, 107 Md. 17, 68 Atl. 286, 576, the court said, upon a review of the cases in this state upon the subject: "It is well settled that this cannot be done in Maryland, where the jury in criminal cases are the judges of the law and the legal effect and legal sufficiency of the evidence and the court only determines the admissibility of the evidence." In the case at bar the precise language of a part of the motion to strike out the evidence is "that all the evidence of all of the witnesses legally sufficient to prove or tend to prove the guilt of the traverser," and as the jury in this state are the judges of both the law and the evidence, and unless there is error in the rulings of the court, their finding must stand. In *Ridgely v. State*, 75 Md. 512, 23 Atl. 1099, it was said: "No court in this state, whatever may be the rule elsewhere, can be required by counsel or jury in criminal cases to give instructions, either upon the law of the crime or on the legal effect of the evidence." The rule here stated is sustained and approved by a number of recent cases in this court. *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058; *Dick v. State*, 107 Md. 17, 68 Atl. 286, 576; *Garland v. State*, 112 Md. 100, 75 Atl. 631, 21 Ann. Cas. 28; *Luery v. State*, 116 Md. 284, 81 Atl. 681; *Esterline v. State*, 105 Md. 630, 66 Atl. 269. The law applicable to the facts of a case of this character has been settled by an unbroken current of authorities in this state and elsewhere, which will be found clearly and fully stated in the cases cited by the learned Attorney General of the state, upon his brief filed in the case, and are as follows: *Carroll v. State*, 63 Md. 551, 3 Atl. 29; *Peterson v. State*, 83 Md. 194, 34 Atl. 834; *Lochner v. State*, 111 Md. 660, 76 Atl. 586, 19 Ann. Cas. 579; *Esterline v. State*, 105 Md. 630, 66 Atl. 269; *Bishop, Stat. Crimes* (Ed. 1873) § 1024; 23 Cyc. 206, and cases there cited.

The traverser was indicted for a violation of section 46 of article 2 of the Local Code of Anne Arundel County (Acts 1910, c. 647), which makes it unlawful for any person, whether licensed to sell spirituous liquors or not, to sell, dispose of, barter, or give, directly or indirectly, within the corporate limits of the city of Annapolis, or within five miles thereof, any spirituous or fermented liquors, wines, or cordials of any kind, or in quantity whatever, to any youth or minor under the age of 21 years, without

the written order or consent of the parent or guardian of such minor, nor to any midshipman or student connected with or attached to the Naval Academy at Annapolis, or under orders to join or leave the said Academy, or preparing for admission to said Academy, nor to any student of St. John's College, without the written order of some professor of said college. And any person violating the provisions of this section shall be liable to indictment in the circuit court for Anne Arundel county, and upon conviction thereof shall be fined a sum not less than twenty dollars and not more than one hundred dollars and costs, and shall be confined in the county jail until such fine and costs are paid.

The undisputed evidence in this case is to the effect that the traverser was the manager of Carvel Hall Hotel, in Annapolis, and had the right to employ and discharge waiters, bell boys, and minor help. She employed the chief clerk, and as such manager she paid all bills contracted in and about the management of the hotel, drawing checks for the same on a fund in bank in the name of the Carvel Hall Hotel Company and signing the check, "Carvel Hall Hotel Company, E. B. Jessup, Manager;" that the salaries of the manager and the chief clerk and the bar-keeper were paid by the Security Land Company, a corporation of the state of New Jersey, but licensed to do business in this state; and that said company conducted the hotel, and all the liquor in the hotel for sale was kept at the bar. It was also shown that the application of the Security Land Company to the mayor, counselor, and aldermen of Annapolis for a liquor license was signed by Elizabeth B. Jessup, Agent.

Aaron S. Merrill testified that he purchased at Carvel Hall Hotel, on the 24th of December, 1910, whisky and wine, and that it was delivered to him in a little room off from the bar by one of the hotel waiters, and he paid for the same; that he was a minor under the age of 21 years and a midshipman attached to the United States Naval Academy.

[3] Now, without stopping to review in detail the evidence, upon which the verdict in each of these cases must have been based, it is sufficient to say, for the purposes of our conclusion, that the motion to strike out the whole evidence in all three cases was properly overruled, and this being so, and the findings of the court being against the traverser, the judgments were correctly entered by the court below. It follows that the judgment in each case must be affirmed. *Thomas v. Hunter*, 29 Md. 406; *Tinges v. Moale*, 25 Md. 486, 90 Am. Dec. 73; *New & Son v. Taylor*, 82 Md. 40, 33 Atl. 435; *Turner v. Egan et al.*, 116 Md. 85, 81 Atl. 877.

Judgment affirmed; appellant to pay the costs.

JESSUP v. STATE.

(Court of Appeals of Maryland. Jan. 9, 1912.)

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Elizabeth B. Jessup was convicted of illegally selling intoxicating liquors, and she appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Robert Moss and Daniel R. Randall, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BRISCOE, J. The judgment in this case will be affirmed, for the reasons given in an opinion filed in No. 47, October term, 1911. 83 Atl. 140.

Judgment affirmed, with costs.

JESSUP v. STATE.

(Court of Appeals of Maryland. Jan. 9, 1912.)

Appeal from Circuit Court, Anne Arundel County; Jas. R. Brashears, Judge.

Elizabeth B. Jessup was convicted of illegally selling intoxicating liquors, and she appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Robert Moss and Daniel R. Randall, for appellant. Isaac Lobe Straus, Atty. Gen., for the State.

BRISCOE, J. The judgment in this case will be affirmed, for the reasons stated in an opinion filed in No. 47, October term, 1911. 83 Atl. 140.

Judgment affirmed, with costs.

RIGGIN v. ROBINSON.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. TRUSTS (§ 63½*)—RESULTING TRUST—SALE AND CONVEYANCE.

Where an owner has vested his grantee with the legal title to lands, and such grantee conveys to one who pays the purchase price and orally agrees with the original owner that he may repurchase the land at any time within two years, there is no resulting trust created.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 91, 92, 98, 99, 100; Dec. Dig. § 63½.*]

2. MORTGAGES (§ 34*)—DEEDS (§ 6*)—ABSOLUTE DEED AS MORTGAGE.

Where an owner by a deed absolute in form and reciting a valuable consideration conveyed certain described land in fee simple, and the purchaser from such a grantee for a valuable consideration agreed orally with the original owner that he might re-purchase the land at any time within two years, the deed to the second grantee cannot be held to be either a mortgage, a deed of trust, or a conditional sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 83; Dec. Dig. § 34;* *Deeds*, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. TRUSTS (§ 372*)—CONSTRUCTIVE TRUST—FRAUD—ENFORCEMENT—SUFFICIENCY OF EVIDENCE.

Evidence in an action to compel the reconveyance of land conveyed to defendant by one

whom the plaintiff had vested with the legal title *held* sufficient to sustain a decree finding absence of fraud or undue influence.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 600-603; Dec. Dig. § 372.*]

Appeal from Circuit Court, Wicomico County; E. Stanley Toadvin, Judge.

Bill by William A. Riggin against Albert W. Robinson, executor. Bill dismissed, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

A. M. Jackson, for appellant. Ellegood, Freeny & Wailes, for appellee.

BRISCOE, J. On the 10th day of March, in the year 1893, the appellant by deed conveyed to John R. Twilley, of Wicomico county, certain property situate in that county. The deed is as follows: "In consideration of the sum of one hundred and seven dollars, I, the said Wm. A. Riggin, do grant unto John R. Twilley of county and state, a vacant lot of ground in the town of Sharptown in Wicomico county, adjoining the schoolhouse, and which the said Riggin obtained from Jonathan Riggin by will. Also a tract of land about two miles from Sharptown, containing thirty acres more or less (32) which Riggin obtained by the last will of Rhoda Robinson, recorded in the office of the register of wills for Wicomico county, to which reference is made, also a one-ninth interest in a water mill called the Robinson Mill, in fee simple." This deed was properly executed to pass real estate, and was on the 10th day of March, 1893, recorded among the land records of Wicomico county. On the 13th day of April, in the year 1898, John R. Twilley, the grantee in the last-named deed, by a duly executed conveyance, absolute on its face, in consideration of the sum of \$70 conveyed the identical property mentioned in the deed from Riggin to him to one James Robinson, of Wicomico county, and this deed was on the 10th day of May, 1898, recorded among the land records of Wicomico county. On the 15th of July, 1909, the appellant filed in the circuit court for Wicomico county a bill of complaint against James Robinson, now deceased, alleging that the property was conveyed by the grantor to Twilley as trustee for the purpose of making a sale of the same and the proceeds to be used in paying the grantor's indebtedness, and, when that was done, the residue of the property was to be reconveyed to the grantor; that he demanded a reconveyance of all the residue of the property not sold, but that it was not reconveyed, but, instead of doing so, it was conveyed to the appellee by deed dated the 13th day of March, 1898, intending thereby to defraud and to keep the plaintiff out of his lawful rights, control, and ownership of the land, and that the plaintiff has repeatedly

requested a reconveyance of the land to him from the appellee, but he has refused, and still refuses, to convey it. The bill further avers that John R. Twilley departed this life in the year 1900; that the plaintiff holds possession of the land, has continued to cultivate it, and to pay state and county taxes thereon. The prayer of the bill is, first, that the plaintiff may have said land conveyed back to him free, clear, and discharged of all incumbrances, title, claim, and interest of each and every party defendant hereto; second, that the parties may be decreed to convey the land to the plaintiff by a good and sufficient deed; third, that a proper person may be appointed to convey the land to the plaintiff by a good and sufficient deed, free, clear, and discharged from all right, title, interest, claim, and demand of the defendant or defendants herein named; and, fourth, that the plaintiff may have such other and further relief as his case may require. The defendant by his answer denies all of the allegations of fraud set out in the bill, or any intent of fraud on his part or on the part of Twilley, who has been dead for some years, as to the purchase, and states that he had no knowledge until after the conveyance to him of any of the alleged terms or conditions upon which the property was conveyed to Twilley, from whom he obtained it by deed. He also denies that he purchased it for an inadequate consideration, and avers that the defendant on the 12th of April, 1898, consented for him to purchase the land, and that he in perfect good faith, and for a good and valuable consideration bought the property, took control of it and rented it to other parties. He admits he did as a matter of favor, on or about the time of the execution of the deed, consent orally that the plaintiff might repurchase the land any time within two years from the date of the deed, upon his paying to him what he paid for it, and on account of the same, with interest and a reasonable sum of money for trouble that he might have on account of the same. He also avers that he stood ready and willing at any time within the two years to sell or reconvey the land to the complainant upon his complying with the parol understanding regarding the same, but that the complainant did not at any time within the two years pay or tender to him any part of the purchase money paid by him for and on account of the land; but, on the contrary, has since the execution of the deed written many abusive, insulting, and scurrilous letters to and about him, as well as about Twilley, in which he made numerous vile, malicious, and slanderous charges against both of them. The case was heard upon bill, answer, and proof, and from a decree of the circuit court for Wicomico county dismissing the bill of complaint this appeal has been taken.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The only question presented by the record in this case is whether upon the proof the plaintiff can obtain the relief asked by his bill.

[1] There are no facts in the case upon which a resulting trust to the grantor can be based. The consideration and purchase price was paid by the appellee to the grantor, and no money whatever was paid by the plaintiff. In *Groff v. Rohrer*, 35 Md. 327, it is said, where upon a purchase of property the conveyance of the legal estate is taken in the name of one person, whilst the consideration proceeds from another, the parties being strangers to each other, a resulting trust arises by virtue of the transaction, and the grantee will be but a trustee for the party from whom the consideration proceeds. *Mutual Ins. Co. v. Deale*, 18 Md. 45, 79 Am. Dec. 673; *Cooke v. Fountain*, 3 Swanst. 591.

[2] Nor do we find any proof or facts upon which the court could hold the deed here absolute in form to be either a mortgage, a deed of trust, or a conditional sale. *Hopper v. Smyser*, 90 Md. 366, 45 Atl. 206; *Dougherty v. McColgan*, 6 Gill. & J. 281; *Conway v. Alexander*, 7 Cranch, 218, 3 L. Ed. 321.

[3] There is no evidence in the record that any undue or fraudulent influence was exercised over the grantor as to either of the deeds. On the contrary, the evidence shows that the appellee did not desire to purchase the property, and it was only after the consent of the appellant that he decided to buy it. He directed the appellee by letter of the 12th of April, 1895, "to go ahead" with the purchase, provided he was given the space of two years from the date of the deed to redeem it. In his correspondence of June 25, 1900, and of January 11, 1904, the appellant recognized the right of the appellee to the property, and offered to purchase it from him, and the appellee was willing to comply with his oral agreement, to permit him to redeem upon payment of the purchase price, but there was no compliance by him. We entirely concur in the opinion of the learned judge who decided the case below that "there was no pressure or force exercised to induce the appellant to consent to a sale, but the whole transaction was a fair, equitable business transaction where all parties interested or concerned agreed to and accepted the transaction as their free and voluntary act. Throughout the whole transaction the appellee displayed a liberal and forbearing disposition and desire to aid and assist the plaintiff by permitting him to reside on the defendant's land adjoining, and extending the time to redeem. We can see nothing in the whole transaction tainted by fraud, either on the part of Twilley or Robinson." While a court of equity will at all times lend its aid to defeat a fraudulent transaction, fraud like any other fact must be established by satisfactory proof, and it will not be pre-

sumed. The proof in this case does not measure up to the legal requirements in cases of this character, and, being legally insufficient to support the allegations of the bill, the court below committed no error in dismissing the plaintiff's bill.

Decree affirmed, with costs.

COUDON v. UPDEGRAFF et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. TRUSTS (§ 88*)—EXECUTORS AS TRUSTEES—TAKING EFFECT OF TRUST.

Where the same party is made both executor and trustee under a will, a fund in his hands will be considered to be held in his capacity as trustee after the time limited by law for the settlement of the estate; the probate of the will and the taking out of letters testamentary being sufficient to show an acceptance of the trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 54-56; Dec. Dig. § 38.*]

2. TRUSTS (§ 158*)—COURTS OF PROBATE JURISDICTION—ACTION ON WILL—JURISDICTION.

Where a trust is created by a will, a court of equity, rather than the orphans' court, is the appropriate tribunal in which it should be administered, and an interested party may apply to that court to require the trustee to give bond for the faithful performance of his duties.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 205; Dec. Dig. § 158.*]

3. TRUSTS (§ 161*)—ADMINISTRATION—BOND—EQUITABLE JURISDICTION.

Under Code Pub. Gen. Laws 1904, art. 16, § 235, which provides that, where any person interested in a trust created by will or deed shall make it appear that it is necessary for the safety of beneficiaries that the trustee appointed shall give security, the court may order that a bond be given, a bill, which alleges that a surviving trustee has loaned a large sum out of the trust estate on call and without security, states a proper cause for the intervention of equity to require the trustee to give bond.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 209-211; Dec. Dig. § 161.*]

4. TRUSTS (§ 359*)—ADMINISTRATION—EQUITABLE JURISDICTION—NONRESIDENCE OF PARTIES.

Where a number of the parties to a bill by devisees to require a surviving trustee under a will to give bond and to have a distribution of the residuary estate are nonresidents, equity will take jurisdiction.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 554, 565, 566; Dec. Dig. § 359.*]

5. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the intention of the testator ascertained from the entire instrument, or from the instrument as read in the light of surrounding circumstances at its execution, must be given effect if it does not conflict with some rule of property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

6. WILLS (§ 440*)—CONSTRUCTION—EVIDENCE—WORDS OF WILL.

The words of a will are the best evidence of the testator's intention.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 956; Dec. Dig. § 440.*]

7. WILLS (§ 783*)—CONSTRUCTION—TIME OF ACCRUAL OF RIGHT TO LEGACY.

A testator devised corporate stock to trustees to be charged with payments to his wife under an antenuptial contract; the residue, with the exception of other charges for maintenance of the house, etc., remaining at her death, to revert to the residuary estate. He also provided that, if the dividends from the stock were insufficient, the trustees might supply any deficiency from the residuary estate. The will also provided that the residuary estate should be divided into five equal parts and distributed among the five children of the testator, but fixed no time of payment. *Held*, that the clause relating to deficiency must receive such a construction as will harmonize with the other provisions, and, as testator's language does not reasonably imply an intention to authorize the executors to retain the whole residuary estate for the protection of his wife, it will require the application of only such portion as may be necessary for that purpose, and, where it appears that the stock and the cumulation of dividends thereon are amply sufficient to care for the payments to the wife, a distribution of the residuary estate is warranted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.*]

8. WILLS (§ 684*)—TRUSTS—INCOME OR PRINCIPAL.

A dividend of corporate stock properly declared upon the earnings of the company is income, rather than principal, within a will giving the stocks on which the dividend was declared to trustees to make from the income regular payments to the widow of the testator for life and for maintenance of property, etc., with the remainder to his children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

Appeal from Circuit Court, Cecil County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Bill by Carrie C. Updegraff and others against Joseph Coudon, executor. From a judgment overruling a demurrer to the bill, defendant appeals. *Affirmed*.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Frederick T. Haines, for appellant. John S. Strahorn and James M. Munroe, for appellees.

BURKE, J. George P. Whitaker, a resident of Cecil county, died on the 30th day of December, 1890, leaving surviving him a widow and five children. He had made and executed a last will and testament, which was duly admitted to probate by the orphans' court of Cecil county on the 5th day of January, 1891, and by which he appointed Joseph R. Whitaker, Nelson E. Whitaker, and Joseph Coudon, executors, and to whom letters testamentary were granted on January 6, 1891. Nelson E. Whitaker has since died, and Joseph R. Whitaker resigned his office as executor, so that Joseph Coudon is now the sole surviving executor of the will. George P. Whitaker died seised and possessed of a large and valuable estate which has been, since the grant of letters thereon, ad-

ministered exclusively in the orphans' court of Cecil county. It appears by the sixteenth account of the surviving executor filed in that court in March, 1910, that the estate in his hands then amounted to \$279,595.62. The bill in this case asks: First, that the court assume jurisdiction of the trust created by the will of George P. Whitaker, interpret the will, and direct the trustee in the execution of the trust; secondly, that the trustee be required to give bond for the faithful discharge of his duties; thirdly, that the widow of the deceased, Mary L. Whitaker, one of the defendants, be required to make discovery of an antenuptial agreement made between herself and George P. Whitaker, and that Joseph Coudon, the surviving executor, be required to make discovery as to the investments and extent of the estate; and, fourth, that a division and distribution of the residue of the estate be made among those entitled. The defendants demurred to the whole bill, and also to certain parts thereof. The court overruled the demurrer to the whole bill and to all the parts, except the demurrer to such part of the bill which asked that Mary L. Whitaker, the widow, be required to make discovery of the antenuptial contract. The demurrer to this portion of the bill was sustained. This appeal was taken by the defendants from the ruling on the demurrer.

The substantial and controlling questions presented by the appeal are: First, has the court of equity, under the facts appearing in the record, jurisdiction to assume the administration of the estate and to require the executor as trustee to give bond? And, secondly, can a division and distribution of the residuary estate now be made?

A number of the parties to the suit, and who are interested in the residuary estate, are nonresidents of the state of Maryland. There is a trust created by the will, and the property embraced by the trust is granted to the executors as trustees, and there is imposed upon them certain active and specific duties with respect to the trust.

It is alleged in the bill, and admitted by the demurrer, that the surviving executor and trustee has loaned to the Whitaker Iron Company, a nonresident corporation, the sum of \$79,595.62, the money of the estate, "on call and without security."

[1] The property constituting the trust estate must be treated as being in the hands of the surviving executor in his capacity as trustee. It is well settled that, where the same party is both executor and trustee, a trust fund by operation of law will be considered in his hands in his capacity as trustee after the time limited by law for the settlement of the estate, and that the probate of the will and the taking out of letters testamentary will be considered as sufficient evidence of the acceptance by him of the

trust. This doctrine of transfer by operation of law has found expression in many adjudged cases in this court. *Seegar v. State*, 6 Har. & J. 162, 14 Am. Dec. 265; *Watkins v. State*, 2 Gill. & J. 220; *Hanson v. Worthington*, 12 Md. 418.

[2] It is equally well settled in this state that the orphans' court has no jurisdiction of the administration of a trust created by a will. *Conner v. Ogle*, 4 Md. Ch. 425; *Taylor v. Bruscup*, 27 Md. 219; *State use of Gable v. Cheston*, 51 Md. 352.

[3] There being a trust created by the will, a court of equity was the appropriate tribunal in which it should be administered, and any party interested in the trust estate had a right to apply to that court to require the executor as trustee to give bond. The provision of the will creating the trust falls within section 219, article 16, of the Code, which provides that: "In all cases where a trustee has been appointed by a will or deed to execute any trust, and any person interested in such trust shall make it appear to the court that it is necessary for the safety of those interested in the execution of the trust, that the trustee should give bond and security for the due execution of the trust, the court may order that such bond be given, on or before such day as the court shall name; and if the bond, with such security as the court shall approve, be not given by such trustee, then the court may remove such trustee and appoint one in his stead, who shall give such bond and security as the court may require." This section was intended to afford full protection to all persons interested in the trust property, and we are of opinion that the allegations of the bill are quite sufficient to authorize the court to exercise its power vested in it by the act.

[4] It has long been settled that legatees have a right to file a bill in equity against an executor for the recovery of their legacies, and where it appears, as it does in this case, that many of the parties are nonresidents, we can have no doubt that under the principles announced in *Alexander v. Leakin*, 72 Md. 199, 19 Atl. 532, and *MacGill v. Hyatt*, 80 Md. 253, 30 Atl. 710, this case is one which demands "the larger powers of an equity court properly and satisfactorily to deal with the subject-matter or the parties."

The question as to whether a division and distribution of the rest and residue of the estate can be made prior to the death or remarriage of the widow of George P. Whitaker involves a construction of his will.

By the second item of the will the testator referred to an antenuptial contract between himself and wife which he expressly affirmed, and he directed his executors to see that the money payments provided for in the contract were regularly made. The amount to which she was entitled under the contract is not stated in the will, nor does it appear in the record. He then devised and

bequeathed an estate for life, or during her widowhood to her in certain real and personal property. He then provided as follows: "I also give and bequeath to my said executors two hundred and fifty shares of the capital stock of the Whitaker Iron Company at Wheeling in West Virginia, in trust; the dividends from which are to be applied in the order and to the extent as follows: First, that there shall be regularly paid to my said wife, Mary L., so much thereof as may be necessary to fully comply with all the terms of said antenuptial contract; second, so much thereof as may be necessary to provide for the repairs, insurance, taxes and maintenance of the dwelling as heretofore provided for; third, that four hundred dollars be paid to my said wife annually in addition to the sum provided for and stipulated to be paid to her in said antenuptial contract, and the residue, if any, be held in trust and so invested as may seem best in the judgment of said executors, that the objects of said bequest may be regularly and promptly complied with during the life or widowhood of my said wife, and at and upon her death or the termination of her widowhood, whichever may soonest occur, I will that said two hundred and fifty shares of stock together with any residue of dividends of the same not then expended for the purposes hereinbefore set forth shall revert to my residuary estate; but should the said dividends arising from the said two hundred and fifty shares of stock be not sufficient at any time to enable my executors to make the payments and discharge the trust hereby created for the benefit and behoof of my said wife and hereinbefore provided, I hereby expressly authorize and empower them to supply any deficiency that may exist from time to time from my residuary estate."

In the third item he conferred power upon his executors to sell all his real and personal estate, except his stock in the Whitaker Iron Company and the George P. Whitaker Company. By the fourth item he gave to certain named grandchildren 10 shares each of the capital stock of the George P. Whitaker Company. This stock he directed to be delivered to them at the expiration of 5 years from his death.

The fifth item is as follows: "Fifth. It is my intention and desire, and I do hereby direct that all the rest, residue and remainder of my estate and property not hereinbefore devised and bequeathed shall be divided into five equal parts or shares, and that the same be distributed among my five children, namely, Caroline Naudain, Nelson E. Whitaker, Henry C. Whitaker and Cecil N. Whitaker and Edmund S. Whitaker, equally, share and share alike; and the advancements made to my said several children as will appear from the charges against them on my books at the time of my death I consider a part of my residuary estate, and the aggre-

gate indebtedness of my children as shall appear from my books shall be taken into account before making distribution, and from the distributive share of each child his or her indebtedness at the time of my death shall be taken and deducted," etc. He then provided that the distributive share of his son Edmund S. Whitaker should be held in trust, and the interest, profits, and income thereof paid to him during his life. This is followed by pecuniary legacies to certain designated persons.

[5] In the construction of a will, "the cardinal canon around which all others center is this: That the intention of the testator when ascertained from the whole instrument, or from the instrument as read in the light of surrounding circumstances existing at the date of its execution, must be given effect if that intention does not antagonize or conflict with some rule of law of property." *Woman's Foreign Missionary Society v. Mitchell*, 93 Md. 202, 48 Atl. 738, 53 L. R. A. 711.

[6] The best evidence of the testator's intention is found in what he has said in his will.

When the will is read in the light of these principles, the construction contended for by the appellants, viz., that the testator intended to postpone the division and distribution of the whole residuary estate until after the death or the remarriage of his widow, cannot be accepted: First, because such a construction would be an unreasonable one; and, secondly, because it does not accord with the plain meaning of what the testator has said in his will.

It would be a harsh and unreasonable thing, in the absence of language imperatively requiring it, to hold that the testator intended to tie up the whole of this large estate during the life or widowhood of his wife, and thereby deprive his children and the other legatees of the possession and enjoyment of any part of his estate for an indefinite time. He has not said that this was his intention, and, if he had intended this, it is reasonable to suppose that he would have so declared in plain language. On the contrary, the clear meaning and import of the language used show, we think, that this was not his intention. The specific legacies are given in absolute and unqualified terms, and the time of their payment is not expressly postponed, except in the case of the bequest to the grandchildren mentioned in the fourth item of the will. The shares of stock bequeathed to them he directed should be delivered to the legatees after the expiration of five years from his death.

There is a direct and absolute present gift to his five children in equal shares of all the rest, residue, and remainder of his estate. These children under the will take vested interests, and the pecuniary legacies were payable in one year after the testator's

death; there being in the will no time fixed for their payment, except in the one instance mentioned.

In disposing of the residuary estate, the testator used plain, direct, and unmistakable language. "It is my intention and desire, and I do hereby direct that all the rest, residue, and remainder of my estate, etc., shall be divided into five equal parts or shares and that the same be distributed among my five children," is the language used.

[7] The contention of the defendants is that this division and distribution of the entire residuary estate is postponed until the death or remarriage of the widow by the following clause in the second item of the will: "But should the said dividends arising from the said two hundred and fifty shares of stock be not sufficient at any time to enable my executors to make the payments and discharge the trust hereby created for the benefit and behoof of my said wife as hereinbefore provided, I hereby expressly authorize and empower them to supply any deficiency that may exist from time to time from my residuary estate." This clause must receive such a construction as will harmonize with the other provisions of the will and thereby effect the general intent of the testator. It was clearly his intention to make certain, secure, and permanent the provision made for his wife, and for that purpose the executors by the clause quoted were authorized and empowered to apply such portion of the residuary estate as might be necessary; but they had power to apply *only such portion* of that estate which might be required for that purpose. It could never have been his intention to have authorized them to retain the *whole* residuary estate. The language employed does not reasonably and fairly imply such an intention.

[8] At the time of the creation of the trust for the benefit of his widow, the stock of the testator in the Whitaker Iron Company consisted of 250 shares worth \$25,000. These shares constituted the trust estate. In 1901 a stock dividend was declared by the Whitaker Iron Company, whereby there was awarded to the executor and trustees another 250 shares of the stock of said company, thereby increasing the amount of said stock in the hands of the trustees to 500 shares worth \$50,000. If this stock dividend was based upon the earnings of the company, and the company had the power to so distribute it, and this power was validly exercised, then this extra 250 shares, declared as a stock dividend, must be treated as income from the trust estate. *Coast Line Dividend Cases*, 102 Md. 73, 61 Atl. 295.

It is alleged in the bill that the widow of George P. Whitaker is now over 80 years of age, and that in the 19 years of the administration of the trust not only has the income on the shares of stock placed in trust been sufficient to meet the requirements of the

will made in her behalf, but that a large surplus has been accumulated by the trustees from the dividends on the extra stock of the Whitaker Iron Company and from other sources, amounting now to \$79,595.62. Where it appears, as it does by this record, that the shares of stock and the accumulation of dividends held by the trustees are amply sufficient to gratify the provision of the will made for the benefit of the wife, we can see no reason why a division and distribution may not now be made by the court under a decree so framed as properly and safely to guard and make secure the provision made by the testator for his wife.

Decree affirmed; the costs to be paid out of the estate.

MINEOLA TRIBE NO. 114, IMPROVED ORDER OF RED MEN v. LIZER et al.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. INSURANCE (§ 784*)—FRATERNAL INSURANCE—DEATH BENEFIT—DISPOSITION BY WILL OF MEMBER.

Under Code Pub. Gen. Laws 1904, art. 23, §§ 210-223, providing for fraternal beneficiary societies, and declaring that a benefit shall not be assignable except to the beneficiaries named, and then only by the consent of the society, and the by-laws of a society providing that the benefit on a member's death, shall be paid to the widow, orphans or parents for their use, a member of the society has no property in the benefit and it cannot pass under his will attempting to dispose of the benefit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.*]

2. INSURANCE (§ 784*)—FRATERNAL INSURANCE—DEATH BENEFIT—DISPOSITION BY WILL OF MEMBER—"ATTESTED ORDER."

Under Code Pub. Gen. Laws 1904, art. 23, § 210, providing that a benefit shall not be assignable except to the beneficiaries and then only by the consent of the association, but the member may surrender his certificate and have a new one issue to any one or more of the beneficiaries as provided by the by-laws of the society, and the by-laws of a fraternal society providing that the benefit, on the death of a member, shall be paid to his widow, orphans or parents or "attested order," a will of a member disposing of his death benefit is not an "attested order," and the beneficiary under the will is not entitled to the benefit due under the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

Bill of interpleader by the Mineola Tribe No. 114, Improved Order of Red Men, against Alice S. Lizer (now Funk) and others to establish the ownership of a benefit fund. From a decree adjudging the ownership of the fund, the party aggrieved appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Joseph W. Wolfinger, for appellant. Wagaman & Wagaman, for appellee.

BRISCOE, J. A bill of interpleader was filed by the appellant, in the circuit court for Washington county, on the 25th of January, 1910, to establish the true owner or owners of the fund here in controversy, and alleging that the plaintiff was ready and desirous of paying the money into court, to avoid suits at law by the claimants thereof. The plaintiff disclaims any interest in the money and is ready and willing to distribute the fund to the proper owner or owners entitled to it.

The facts upon which the decision of the case must turn, briefly stated, are these: The Mineola Tribe No. 114, Improved Order of Red Men, of Leitersburg, Washington county, Md., is a fraternal and beneficial society or association, duly incorporated and holding its meetings and transacting its business in this state. It appears that one Thomas J. Ridenour, late of Washington county, deceased, was at the time of his death a member in good standing of this association, and by its by-laws (section 4, art. 19), upon the death of a member, the sum of not less than \$20 shall be paid by the society to the widow or heirs of the member for funeral expenses. And by sections 9 and 10 of article 14 of the order, it is provided: "That upon the death of a beneficial member should he leave a widow or orphans, parents, or attested order a contribution of (\$180.00) fathoms shall be presented by the sachem and keeper of wampum, in the name of Mineola Tribe No. 114, Impd. O. R. M., to such widow, orphans, or parents or attested order as the case may be for their use and benefit which shall be paid within one moon after the death of a brother. And in case the widow or orphans or parents are considered incompetent to take proper care of the wampum there shall be a guardian or trustee as the case may be, appointed, into whose hands shall be paid, the amount as provided in section 9, in trust for said beneficiaries, who shall report regularly and exhibit his account every six moons to the tribe, who may be removed at the option of the tribe." The bill further avers that Thomas J. Ridenour, late of Washington county, was, at the time of his death, a member of the society in good standing; that he departed this life on the 2d day of April, 1909, leaving a last will and testament in which he bequeathed to Alice S. Lizer, now Alice S. Funk, all the sick and death benefits which may be due him, at the time of his death from the order, and Joseph W. Wolfinger has qualified as executor of the will, which has been duly admitted to probate in the orphans' court of Washington county. The bill then avers that the fund is claimed and demanded by Wolfinger as executor, on behalf of Alice S. Funk, the legatee named in the will, and also by the children and heirs at law of Thomas J. Ridenour, deceased. Upon this

bill and exhibits, the court on the 31st day of January, 1910, passed a decree of interpleader, directing the fund to be paid into court to the credit of the cause, that the parties interplead, and that Joseph W. Wolfinger, executor, be the plaintiff and Frank J. Ridenour, Charles C. Ridenour, Sadie E. Wolcott, Gertrude E. Burkett, and Mollie Melott, children and heirs at law, of Thomas J. Ridenour, and Alice S. Funk, the devisee, be the defendants. The case was heard upon the bill, petition, and answer of the respective parties claiming the fund, and from a decree of the court, directing the fund to be paid to the children and heirs at law of Thomas J. Ridenour, this appeal has been taken.

[1] The essential facts of the case are admitted and conceded, by the pleadings, and the principal questions presented by the proceedings are: First, whether under a proper construction of the by-laws of the Mineola Tribe, a member of the order, can dispose of the benefits, or wampums, by will; and, secondly, whether a will is an "attested order," within the meaning and contemplation of the by-laws of the association.

In this case, we have the beneficiaries plainly named and designated in the by-laws (section 9, art. 14) of the order, to whom the money shall be paid, upon the death of the member, and they are "the widow, orphans, or parents or attested order, as the case may be, for their use and benefit, which shall be paid one moon after the death of a brother."

The fund or fathoms of wampum were a contribution by the order to be presented by the sachem and keeper of wampum in the name of the tribe, upon the death of the member, to the widow, orphans, or parents, as the case may be, for their use and benefit, and were not payable to the deceased or for his benefit. There being no provision in the by-laws of the association authorizing a member to dispose of the fund by will, and the fund not being his property, the will could not in any way operate upon it, and it cannot pass under his will to the legatee named therein.

In *Benefit Society v. Clendinen*, 44 Md. 429, 22 Am. Rep. 52, this court said, in considering the nature and extent of the interest of the member of a mutual benefit association in the proceeds of a policy of insurance, held, that the will did not operate upon it, because, as the insurance was not payable to the deceased or to his benefit, it was not his property and did not go as assets to his administrator. And to the same effect are the cases of *Yoe v. The Howard Association*, 63 Md. 91; *Cowman v. Rogers*, 73 Md. 403, 21 Atl. 64, 10 L. R. A. 550; *Thomas v. Cochran*, 89 Md. 402, 43 Atl. 792, 46 L. R. A. 160; *Condon v. Reserve Association*, 89 Md. 123, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Dale v. Brumbly*, 96 Md. 676, 54 Atl. 655; *Goodman v. Lodge*, 67 Md. 123, 9 Atl. 13, 13 Atl. 627.

The decisions of this court uniformly hold that these associations are of a beneficial character and have for their general object and purpose mutual aid and protection of the families and near relatives of the deceased members. While they differ as to the persons who may be named as beneficiaries and in their various insurance features as to whom the money shall be paid upon the death of the member, the contract of membership relates to the by-laws and rules of the association, and these are a part of the contract. We think it is clear that the member in this case had no property in the fund here in controversy that could pass under his will, and, as he left no widow surviving him, the money is properly payable to his children. Sections 9 and 10 of article 14 of by-laws of the tribe; article 23, §§ 210-223, of Code of Public General Laws of 1904.

[2] Manifestly, a will cannot be held to be "an attested order," within the meaning of the by-laws of the Mineola Tribe, whereby the member can dispose of the fund, because section 10 provides that, in case the widow or orphans or parents are considered incompetent to take proper care of the wampum, there shall be appointed a guardian or trustee to hold the fund in trust for the beneficiaries, who shall report to the tribe and who can be removed by the tribe.

Assuming, for the purposes of this case, that a beneficial member of the tribe can change and designate another as a beneficiary, by "an attested order," it is quite certain that this was not done in this case, in the lifetime of the member and with the consent of the tribe.

Section 210 of article 23 of the Code of Public General Laws, subtitle "Fraternal Beneficiary Societies, Orders or Associations," provides that a benefit shall not be assignable except to the beneficiaries named in the section, and then only by the consent of such association, attested by its seal and the signature of its supreme secretary and its supreme executive officer, but the member may surrender his benefit certificate and have a new one issued to any one or more of the beneficiaries named in the manner provided by the constitution and laws of such association. *Dale v. Brumbly*, 96 Md. 678, 54 Atl. 655.

There is no power conferred upon a beneficial member in the by-laws of the order to dispose of the fund or wampums, by will, and, as we have held that a will is not "an attested order" as contemplated by the tribe, the decree of the circuit court for Washington county, dated the 5th day of May, 1911, directing the fund to be paid to the children and heirs at law of Thomas J. Ridenour, deceased, in equal portions, will be affirmed; the costs in this court and the court below to be paid by the plaintiffs, under the decree of interpleader.

Decree affirmed, with costs.

BLAKISTONE et al. v. STATE et al.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. RECEIVERS (§ 153*)—TAXATION—ENFORCEMENT OF TAXES.

Where land or other property is under the control of a court of equity in receivership proceedings, the statutory remedies for the enforcement of taxes levied on the property are suspended, and payment must be secured through the authority of the court.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 276; Dec. Dig. § 153.*]

2. RECEIVERS (§ 153*)—TAXATION—ENFORCEMENT OF TAXES.

Where the collector of state and city taxes did not, during receivership proceedings, apply to the court for an order for payment of taxes on the property in the hands of the receivers located within the city, and took no steps to secure payment thereof, or of the penalty due for nonpayment, until after the termination of the receivership and the disbursement, under the order of the court, of the money in the hands of the receiver, the state and city must be deemed to have acquiesced in the proceedings, and could not claim delinquency penalties.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 153.*]

3. EQUITY (§ 339*)—RECEIVERS—PROCEEDINGS FOR ENFORCEMENT OF TAXES AND PENALTIES—PLEADINGS.

Where a case involving the liability of receivers of a corporation for delinquent tax penalties was heard on the petition of the state and the city in which the property of the corporation was located and the answer, the allegations of fact in the answer must be taken as true.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 685-696, 703-705, 710, 714; Dec. Dig. § 339.*]

4. JUDGMENT (§ 720*)—CONCLUSIVENESS OF ADJUDICATION—ENFORCEMENT OF TAXES AND PENALTIES.

The auditor, in consolidated suits for the foreclosure of mortgages executed by a corporation and for the appointment of receivers of the corporation, filed two accounts, in which taxes for a year, without including penalties, were apportioned between the receivers and the purchasers of the property under the foreclosure. The accounts were ratified in due course, without exception being filed thereto by either the state or the city in which the property was located, and a complete distribution was made pursuant to the order without objection. *Held*, that the state and city were bound by the order, and could not thereafter recover delinquency tax penalties.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 720.*]

Appeal from Circuit Court of Baltimore City; Chas. W. Henisler, Judge.

Consolidated actions by the Union Trust Company against the Belvedere Hotel of Baltimore, and by Lawrence Perin, a stockholder, in which George Blakistone and another were appointed receivers, and in which the State and the Mayor and City Council of Baltimore filed a petition for the payment of taxes. From an order fixing the liability of the receivers, they appeal. Reversed, and petition dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTISON, and STOCKBRIDGE, JJ.

J. Southgate Lemmon and J. Wallace Bryan, for appellants. Allan C. Girdwood and S. S. Field, for appellees.

PEARCE, J. The Belvedere Hotel of Baltimore, owned and operated by the Belvedere Building Company, a corporation, was, on February 10, 1906, decreed by the circuit court of Baltimore city to be sold to satisfy a first mortgage thereon, held by the Union Trust Company, trustee; and by the same decree George Blakistone and Edgar G. Miller were appointed receivers to take charge of the property until sold. A second bill was filed by the same plaintiff, as trustee under a second mortgage, on February 14, 1906, on this hotel, its furniture, and equipment, and a decree was passed on the same day for the sale of the furniture and equipment. These two cases were consolidated, and on March 10, 1906, Lawrence Perin, a stockholder of the defendant corporation, filed a bill in the same court, under Code Pub. Gen. Laws 1888, art. 23, § 264, and section 264a, as added by Laws 1896, c. 349 (being the insolvent law of Maryland), alleging the insolvency of the corporation, and that it owed about \$24,000 for overdue state and city taxes, which it was unable to pay, praying that it be adjudged insolvent, and that it be dissolved and its assets be distributed to those entitled. On March 21, 1906, these two consolidated cases were consolidated with the last-mentioned case of Lawrence Perin against the same defendant, and the same receivers were appointed in the three consolidated cases with all their previous powers and all such additional powers as could be conferred on receivers of a corporation under the insolvent law, but without prejudice to the rights of the Union Trust Company under the two cases first consolidated.

The hotel was subsequently sold July 2, 1907, and this sale was ratified August 20, 1907, and possession delivered to the purchasers September 1, 1907. This sale was not made by the receivers; the decree, above mentioned, authorizing them to sell subject to the mortgage of the Union Trust Company, having been reversed in *Union Trust Company v. Belvedere Building Co.*, 105 Md. 507, 66 Atl. 450, and the sale was made under another proceeding for foreclosure of that mortgage. The receivers' possession of the property therefore began March 21, 1906, and terminated September 1, 1907. The taxes for 1906 were paid by the receivers under an order of court, and on January 1, 1907, the state and city taxes for 1907 became due and payable.

On December 20, 1910, the state of Maryland and the city of Baltimore filed a petition in these consolidated cases, alleging that the taxes for 1907 had not been entirely paid; that on December 16, 1910, \$22,499.23 was paid on account thereof, the total being

\$23,176.90, leaving still due and unpaid \$677.57, which balance represented penalties and other charges made against said receivers on account of their failure to pay said taxes within the time prescribed by law; and that said receivers refused to pay the same, on the ground that said charges could not be lawfully made against them as receivers, and the petitioners prayed an order directing the receivers to pay said balance. An order nisi was passed on this petition, and the receivers filed their answer January 7, 1911, alleging that at no time between January 1, 1907, and August 20, 1907 (the date of ratification of said sale), had they in their possession, as receivers, sufficient funds of the defendant corporation to pay taxes for 1907 levied upon the property, and they were never ordered or directed to pay the same, and no application for payment was ever made until December 20, 1910; that some time subsequent to August 1, 1907, they offered to pay the taxes levied for 1907, with accrued interest thereon, but the city collector demanded the further sum of \$677.57, alleged to be for penalties for nonpayment of said taxes on or before May 1 and July 1, 1907, respectively, and, being advised that said penalties were not legally chargeable, they refused to pay them, or the bills of which they were part, and that the said taxes for 1907 were not paid until December 16, 1910, on which day, by an agreement with the city collector, they paid said taxes in full, with interest, reserving, however, the right to the petitioners to submit the liability of the receivers for these penalties to the court for its determination, further alleging the sale of the property and assets of the defendant corporation by the Union Trust Company, above mentioned, and its ratification August 20, 1907, and further alleging that on December 24, 1907, the auditor filed in said court "the receiver's third account, prepared as of July 1, 1907, showing a net balance in their hands of \$8,169.45," credited therein to the Union Trust Company to be applied to the 1907 taxes on the hotel property, the receivers being chargeable with the taxes from January 1, 1907, to July 1, 1907, the date of the sale of the hotel under foreclosure proceedings; "that on the same day the auditor filed an account in said foreclosure proceedings, crediting the Union Trust Company with \$9,104.14" as the proportion of state and city taxes for 1907 allowed the purchaser to July 2, 1907, and charging it with \$8,169.45, to be credited on account of 1907 state and city taxes, contra, accrued to July 2, 1907, "both of which accounts having been ratified and distribution made thereunder, by reason of which distribution the receivers have not in their hands any funds belonging to the defendant wherewith to pay said penalties." The matter was heard on this petition and answer under an agreement of counsel, filed December 17, 1910, that the liability of the

receivers for said sum of \$677.57 should be submitted to the circuit court of Baltimore city for its determination, and on August 1, 1911, a decree was passed, requiring said receivers to pay the same, and this appeal is from that order.

The appellants contend that this case is governed by the Casualty Company's Case, 82 Md. 535, 34 Atl. 778, in which this court held that no interest should be allowed on the claim for taxes, or on any of the other claims filed against the insolvent company. The question was disposed of in a very few words; the court saying: "It is not easy, if, indeed, it be possible, to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. Perhaps some of the numerous claims might, in strictness, be entitled to an allowance of interest under ordinary circumstances; but it does not appear that the amounts asserted to be due have been wrongfully withheld by the Casualty Company. The failure to pay, as far as we can see, has been the result of the company's insolvency. A penalty or damages in the way of interest ought not, therefore, to be added to the sums actually due."

It does not appear from the opinion in that case whether there was any claim made for a statutory penalty, as well as for interest on the taxes; but there is a natural inference from the fact that no mention is made of *such a penalty*, as well as from the whole tenor of the language we have quoted, that there was no claim made for any statutory penalty. We think it quite clear that the court, in using that language, had not in mind any such penalty.

In the paragraph of the opinion immediately preceding that part we have quoted, the court said: "We think no *interest* should be allowed on the claim for taxes, or on any other claims filed against the insolvent company. Whilst not precisely analogous, the case of *Hutchinson v. Liverpool, London, & Globe Ins. Co.*, 153 Mass. 143 [26 N. E. 439, 10 L. R. A. 558], supports this conclusion."

In the Casualty Company's Case, all the claims are grouped together and considered upon the same basis as to the allowance of interest, indicating that the court had in mind only the allowance of interest, as a matter within the discretion of the tribunal deciding the whole matter in issue, a question which Chief Judge Buchanan said, in *Newson v. Douglass*, 7 Har. & J. 433, 16 Am. Dec. 317, "has been found to be a subject not susceptible of the application of any fixed and general rule of law; each case depending upon its own peculiar circumstances."

We have carefully examined the case in 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558, supra, and cannot perceive that it is, in any respect, analogous to the case now before us. That was an action brought by a policy holder against the defendant corporation, upon a

policy insuring the plaintiff against loss by fire. The headnote of that case relating to interest is as follows: "Interest is not allowable on a partial loss under an insurance policy, where the loss is not liquidated, until demand has been made for its payment, although arbitration and limitation clauses, and proofs of loss have been waived, and a builder's certificate of the amount of loss presented." The court, in its opinion said: "We think the ruling in relation to interest was correct. It is not easy to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. But in this case it does not appear that the amount to which the plaintiff became entitled under the policy was payable at a fixed time after the loss occurred, or upon a certain event which had to take place, or that the amount has been wrongfully withheld by the defendant, or that the sum due was liquidated, or that until the bringing of the action a demand had been made for its payment." From the above citation, it is quite clear that the Supreme Judicial Court of Massachusetts was not dealing with interest in any other light than as discretionary with the court, and that that case was cited in the Casualty Company's Case only with reference to such interest, and not to a statutory penalty.

Again, in the closing sentence of the passage we have quoted from the opinion in the Casualty Company's Case, we think it is equally clear that the court merely intended to characterize the claim for interest as ~~the~~ *the nature* of a penalty for mere detention of money due, and that it had no reference to a statutory penalty for delinquency in payment after a date fixed for the incurring of such penalty upon taxes already overdue. Consequently we do not think that case governs the present. It does appear, moreover, from the opinion in that case (82 Md. 565, 34 Atl. 778) that the taxes were overdue when the company's assets passed into the hands of the receivers, a circumstance which materially discriminates that case from the present, and which affords a further reason for not accepting that as satisfactory authority for this contention of the appellants. The appellants also contend, earnestly and ably contend, that our statutes imposing penalties upon delinquent taxpayers were never designed by the lawmakers to apply to receivers of insolvent corporations in process of dissolution, and for this they cite *Central Trust Co. v. New York City & Northern R. Co.*, 110 N. Y. 256, 18 N. E. 94, 1 L. R. A. 260, where, in the course of the opinion, the court said: "An insolvent corporation in the hands of and operated by a receiver was not in the minds of the framers of the statute when providing for the enforcement of taxes from what may be termed a going corporation."

In that case, that was no penalty sought

to be enforced, so far as the report discloses. The railroad corporation was insolvent, and had been operated for several years by a receiver, appointed in proceedings for foreclosure of certain mortgages. He had in his possession funds derived from the operation of the railroad sufficient to pay certain corporation taxes due, and the Attorney General filed a petition in the receivership case for an order directing their payment by the receiver. The receiver contended that the corporation alone was answerable for these taxes, or at least that only such funds as should remain in his hands after payment of the mortgages could be applied to those taxes. His argument was that, as proceedings to enforce payment of those taxes were provided by the act which imposed them, all other remedies were excluded, and the Supreme Court so held; but the Court of Appeals reversed this decision, and ordered payment by the receiver, holding that, while those taxes, in a strict technical sense, were not liens on the property in the receiver's hands when first levied, yet, under the circumstances of insolvency, etc., the state had a permanent right to collect them from earnings of the property in the receiver's hands. It will thus be seen that the language cited by the appellant from the opinion in that case was used, not to restrict, but to enlarge and extend, the application of the ordinary methods for enforcing the payment of taxes due by insolvent corporations in the hands of receivers. We do not think, however, that it is necessary to express any opinion upon this contention of the appellants.

[1, 2] The appellants further contend that, as the collector did not at any time during the receivership make application to the court to order payment of these taxes, and took no steps to secure payment thereof, or of the penalty now claimed, until long after the receivership terminated and the disbursement, under the order of the court, of all money in their hands, the state and city must be taken to have acquiesced in the situation, and cannot now claim these delinquency penalties. We think this is sound, and that upon that principle this case should be determined.

When land or other property is under the control of a court of equity, it has long been settled that the ordinary statutory remedies for the enforcement of taxes levied upon, or payable in respect of, such property are suspended, and payment must be secured through the power and authority of the equity court. In such cases, while there is no statute declaring what is the duty of the collector, our decisions do plainly declare that there is a duty imposed upon him in the premises; and in *County Com'rs v. Clarke*, 36 Md. 219, that duty is stated as follows: "His plain and obvious duty was to apply to the court for the payment of the taxes due, and, as they had full power, the presumption is

that they would have directed their payment through their agents, the trustees, in a manner that would have occasioned no unnecessary delay, while at the same time the rights of all parties interested would have been properly protected."

If the collector in the case before us, or the state and city, had, in 1907, upon the refusal of the receivers to pay these penalties, then filed the petition which they waited to file until December 17, 1910, not only would this question of penalties have been then decided, but the state and city would have received whatever amount was determined to be due three years earlier than they did receive the taxes and interest which have been paid. The receivers recognized the duty imposed upon them by law when they offered to pay the amount *they were advised by counsel to be due*; but the state and city failed to discharge, through their agent, the collector, the duty which the court said, in 36 Md. 219, *supra*, rested upon him to apply to the court for the payment of the penalties claimed, as well as the principal and interest offered, and they should abide by the consequences of their own conduct.

[3, 4] But there is another ground which supports this conclusion. This case being heard on petition and answer, the allegations of fact contained in the answer must be taken as admitted, and among these allegations are the following: That on December 24, 1907, two accounts were filed by the auditor, one in the receivership case, and one in the foreclosure proceedings by the Union Trust Company, in which two accounts these taxes for 1907, *without including these penalties now claimed*, were apportioned between the receivers and the purchasers of the property under the foreclosure proceedings, as of the day of sale, July 2, 1907, both of which accounts have been ratified in due course, without exception being filed thereto by either the state or the city; and that complete distribution has been made thereunder, without objection on the part of any party whatever.

In *Marine Bank v. Heller*, 94 Md. 213, 50 Atl. 521, under an auditor's account distributing certain funds derived from various sources, and in the hands of receivers of an insolvent corporation, a certain sum was allowed for taxes upon the real estate of said corporation, which account was ratified, without exception being taken to the allowance of these taxes from that fund. Subsequently the real estate of the corporation was sold, and an account was stated, distributing the proceeds thereof among the preferred stockholders of the company; that stock being a statutory lien on the real estate and certain other property. The general creditors excepted to this account, alleging that the taxes had been erroneously allowed in the first account, and should now be de-

ducted from the proceeds of the sale of the real estate and be distributed among the general creditors. But it was held that the order ratifying the first account, from which no appeal was taken, constituted an adjudication of all the questions that might have been raised thereunder; and that the general creditors could not claim that the taxes were not properly payable from the fund distributed in that account.

The court cited in support of that conclusion *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205, *State v. Brown*, 64 Md. 199, 1 Atl. 54, 6 Atl. 172, *Trayhern v. Colburn*, 66 Md. 278, 7 Atl. 459, *Albert v. Hamilton*, 76 Md. 309, 25 Atl. 341, *Barrick v. Horner*, 78 Md. 258, 27 Atl. 1111, 44 Am. St. Rep. 283, and *Rogers, Brown & Co. v. Citizens' Nat. Bank*, 93 Md. 613, 49 Atl. 843, and said: "It was certainly within the power of the appellees to file objections to the allowance of these taxes in account A upon the grounds now urged. If they had done so, and the decision had been in their favor, it would have protected them, unless reversed on appeal. If adverse to them, they could have brought it here for review. They have had their day in court." We think that principle is conclusive in this case, and requires the reversal of the order appealed from.

Order reversed, and petition dismissed; the appellees to pay the costs above and below.

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. DURHAM.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. STREET RAILROADS (§ 90*)—INJURIES TO PERSON ON TRACK—EXCESSIVE SPEED.

Though a car of a street railway company which caused an injury to one crossing its track was going at an excessive speed, there can be no recovery on that ground, unless it was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 190-193; Dec. Dig. § 90.*]

2. STREET RAILROADS (§ 90*)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where plaintiff stopped his wagon about 25 or 30 feet from the crossing of a street railway to let a north-bound car pass, but neglected, as he approached the second track, to look and listen for a south-bound car, the curtains on his wagon being up, he was guilty of contributory negligence as a matter of law, and could not recover for injuries resulting from a collision, even though the south-bound car was going at an excessive rate of speed; his view being clear for over 300 feet.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

3. STREET RAILROADS (§ 90*)—INJURIES TO PERSONS ON TRACK.

Where those in charge of a street car saw plaintiff before he got on the track and the car, which was going swiftly, was visible

for 300 feet, they had the right to assume that he would stop in a place of safety, and not attempt to cross in front of a car.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 190-193; Dec. Dig. § 90.*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by William Durham against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PAT-TISON, URNER, and STOCKBRIDGE, JJ.

J. Pembroke Thom and Joseph C. France, for appellant. D. G. McIntosh, for appellee.

BRISCOE, J. It is not necessary to determine all of the questions raised by the record on this appeal, because, in the view we take of the case, we are of opinion that the court below committed an error in rejecting the defendant's third prayer, which is as follows: "The defendant prays the court to instruct the jury that, under the pleadings and evidence in this case, there is no evidence legally sufficient to entitle the plaintiff to recover and their verdict must be for the defendant."

The suit was brought by the appellee against the United Railways & Electric Company of Baltimore City, a corporation, and the defendant, in the court below, to recover damages for personal injuries received by him while driving his market wagon with a team of mules along Willow avenue, a public road in Baltimore county, near the city limits. The plaintiff on the 15th of October, 1909, the night of the accident, was driving up Willow avenue to the York road, in a covered wagon drawn by two mules, and it was in attempting to cross the railroad tracks at the intersection of Willow avenue, the terminal of the York road, and the turnpike that the accident occurred. At this point the York road runs north and south, and Willow avenue enters it from the east, and the plaintiff at the time of the accident was coming west on Willow avenue.

The plaintiff's account of the accident, as stated in his testimony, is as follows: "The last stop I made that evening was at Mr. Long's on the York road, and, just about the time I left there, I asked him the time of the day, and he said it was 10 minutes past 7. It was a dark night; so I came up Willow avenue, around up Willow avenue to the York road, to the railroad. When I first got to the railroad, there was a car coming, going to Towson, ringing the bell. I stopped, so did the car stop, and let off some passengers, and, when it started, I looked down the track. It was about the time of the evening when the cars run a little thick. I looked down the track, and saw no cars coming down the track. I looked up the track, and

didn't see any cars coming, and then I started across. When I pulled up on the first track I looked up the track again. I saw no car, and I didn't look any more until I got on this other track. I didn't drive fast. I had a right heavy wagon and in the neighborhood of 1,000 pounds in it. I saw the car about six or eight feet from me before it struck me. That is the last thing I remember. When the car struck me, I didn't even feel the shock of the car or anything of the kind." On cross-examination he testified that he had traveled on the same road as on the evening of the accident for about 20 years, and ever since he was 18 years old, and that the car was six or eight feet from him, when he first saw it. "Q. You kept looking to see whether the car was coming? A. No; I looked the first time, until I looked the second time. Then I saw the car was on me. Q. When you looked the second time, the car was on you? A. Yes, sir. Q. Then you looked before you got on the north-bound track and looked, did you? A. Yes, sir. Q. The next time you looked the car was on you? A. I was on the north-bound track when I looked up the track. I saw the car was not coming down. I didn't see it when I looked the first time, but, when I looked again, the car was right on me about six or eight feet from me." He further testified that the curtains of the wagon were down, that he was driving in a slow walk, and he supposed this obstructed the view, as it tore the curtain "right off when I went through." There was evidence that one could see a long distance up the track, but, if a car was coming up and one going down ahead of it, you could not see the car coming down. There was also evidence to the effect that the headlight and all the lights inside of the south-bound car were burning, but there was no light upon the wagon driven by the plaintiff. The motorman testified that he did not see the wagon and team until within 30 or 40 feet of it, and used every effort to stop the car and prevent the accident, when he discovered the situation of the plaintiff.

[1] The evidence as to the excessive speed of the car at the time of the accident is not very definite, but unless the improper speed was the direct and proximate cause of the injury, and that the injury would not have occurred but for the excessive speed, there could be no recovery upon this ground. *P. W. & B. R. R. v. Stebbing*, 62 Md. 517; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *B. & O. R. R. Co. v. State*, 62 Md. 479, 50 Am. Rep. 233.

[2, 3] Upon the proof we think this is a clear case of contributory negligence upon the part of the plaintiff, and there is nothing in the record to take it out of the operation of the rules and principles established by this court in *Meldling's Case*, 97 Md. 77, 54 Atl. 612, *McNab's Case*, 94 Md. 728, 51 Atl. 421, *Manfuso's Case*, 102 Md. 257, 62 Atl.

754, *Hatcher's Case*, 103 Md. 78, 63 Atl. 214, *Brehm's Case*, 114 Md. 302, 79 Atl. 592, *Hickox's Case*, 104 Md. 659, 65 Atl. 434, and *Winter's Case*, 115 Md. 69, 80 Atl. 651. While the plaintiff in this case stopped his wagon about 25 or 30 feet from the crossing in order to permit the north-bound car to pass, he neglected as he approached the second track to use that care and caution required of him; that is, to continue to look until the south-bound track, the real point of danger, was reached. If, as the proof shows, he drove to the second track where his view was obstructed by the south-bound car which had just passed, and proceeded in the manner testified to by him to drive across the second track, on a dark night, with no light on his wagon and with curtains down, he was guilty of negligence directly contributing to the accident.

In *Manfuso v. Western Md. R. Co.*, 102 Md. 257, 62 Atl. 754, it is said by the settled law of this state certain well-defined and imperative duties are imposed upon persons before they make the attempt to cross the tracks of a railroad company. They are bound under all circumstances to look and listen for approaching trains, and, if the crossing is one of more than ordinary danger and the view of the tracks is obstructed at or near the place of crossing, it is the duty of the traveler to stop, look, and listen before he attempts to cross, and if a person neglects these necessary precautions, and in consequence of such neglect is injured by the collision with a passing train, he will be held to have contributed by his own negligence to the occurrence of the accident, and will not be allowed to recover for any injury he may have sustained. In *Winter v. United Rys. Co.*, 115 Md. 69, 80 Atl. 651, we said: "The driver, when he halted at the north-bound gutter, was in a place of safety, and, if he had then exercised such reasonable care as might be expected of an ordinarily prudent driver, and waited for a few seconds until the west-bound car had gone far enough on its way to uncover the view of the street for a reasonable distance west, he would have seen the east-coming Madison avenue car, and could easily have allowed it also to pass before attempting the crossing and thus have prevented the collision. * * *" In *Hatcher v. McDermot*, 103 Md. 78, 63 Atl. 214, we held that the plaintiff was guilty of contributory negligence for crossing an electric railway on a public crossing without having again stopped, looked, and listened for a car, after he left a point about one hundred and thirty feet distant from the crossing, where he did stop, look, and listen, but where his view was obstructed to some extent.

In the case at bar the plaintiff was familiar with the crossing and the surroundings because he stated that he had traveled

the route for about 20 years. If he had stopped, looked, and listened, before attempting to cross the second track, after the north-bound car had passed, he could not fail to have seen or heard the approach of the car in time to have avoided the accident. He had an unobstructed view of over 300 feet up the south-bound track, to have seen the approach of the car, with full headlight, and all the inside lights burning brightly, had he stopped and looked. In *Sparr v. United Rys. Co.*, 114 Md. 320, 79 Atl. 585, it is said: "It is apparent that, if he had looked before entering upon the track of the railway, he would have seen the car approaching, and, if he did look and did see the car, he was guilty of negligence in attempting to cross in front of it. If, on the other hand, he did not see the car, it must have been because he did not look, and it was negligence on his part to venture to cross the track without observing the precaution of looking to see if a car was coming. Even if those in charge of the car saw the appellant before he got on the track, they had a right to assume that he would stop in a place of safety, and not attempt to cross in front of the car." And to the same effect are the cases of *McNab v. Rys. Co.*, 94 Md. 719, 51 Atl. 421, and *Heying v. United Rys. Co.*, 100 Md. 281, 59 Atl. 667.

Assuming, then, in this case, there was some evidence of excessive speed or negligence on the part of the appellee, there is no evidence to show that it has any causal connection with the accident itself, or showing that the injury was the direct consequence of such excessive speed. As was said by this court in *Heying v. Railways Co.*, 100 Md. 281, 59 Atl. 667, if the plaintiff was guilty of contributory negligence, the question of negligence *vel non* on the part of the defendant becomes immaterial; for if there was no negligence on its part there can be no recovery, and if there was, the same result would follow because of the plaintiff's contributory negligence. In the present case the evidence shows that the plaintiff's negligence was the last and final negligent act, and it becomes unnecessary to discuss further this branch of the case. *Heying v. Railways Co.*, 100 Md. 281, 59 Atl. 667; *P. W. & B. R. R. Co. v. Stebbing*, 62 Md. 517; *C. & P. R. R. Co. v. State*, 73 Md. 77, 20 Atl. 785, 25 Am. St. Rep. 571; *McNab v. Railways Co.*, 94 Md. 729, 51 Atl. 421; *Phillips v. W. & R. Ry. Co.*, 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334.

Being of opinion that the plaintiff in this case was guilty of contributory negligence, and that the case should have been withdrawn from the jury on that ground, the judgment will be reversed, and, as there can be no recovery, a new trial will not be awarded.

Judgment reversed, without a new trial, with costs.

**MARYLAND ELECTRIC RYS. CO. v.
BEASLEY.**

(Court of Appeals of Maryland. Jan. 11,
1912.)

1. RAILROADS (§ 847*)—CROSSING ACCIDENT.

In an action for damages in a collision with an electric car at a highway crossing, evidence that the automatic bell giving warning of the approach of trains rang frequently when there were no cars approaching, and frequently failed to ring when they were approaching, thereby showing practically a continuous behavior of the bell, was admissible under the rule that where the question is as to the availability of a contrivance designed for a particular purpose, evidence is admissible to show how the appliance served when put to the use for which it was designed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124–1137; Dec. Dig. § 847.*]

2. EVIDENCE (§ 145*)—COLLATERAL FACTS—ADMISSIBILITY.

The rule that collateral facts affording any reasonable presumption as to the matter in dispute existing before or after the suit may be proved is subject to the qualification that the time must not be too remote.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 434; Dec. Dig. § 145.*]

3. APPEAL AND ERROR (§ 970*)—QUESTIONS REVIEWABLE—DISCRETION OF TRIAL COURT.

Where the trial court admitted evidence of collateral facts as illustrating the question in issue, the court on appeal on reviewing the ruling will presume that the trial court exercised proper discretion, in the absence of plain evidence of abuse thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. § 970.*]

4. EVIDENCE (§ 359*)—PHOTOGRAPHS—ADMISSIBILITY.

A collision with an electric car occurred in June. The traveler in an action for injuries, referred in his testimony to trees in leaf at the time of the accident. The trees were trimmed after the accident and photographs were subsequently taken after there had been a fall of snow. *Held* that the admission of the photographs in evidence was not reversible error, since the trial court with the photographs and the witness who took them before it had some discretion in admitting them.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 359.*]

5. RAILROADS (§ 830*)—CROSSING ACCIDENT—CARE REQUIRED OF TRAVELERS.

Where a traveler approaching an electric railroad highway crossing knew that the automatic bell to warn travelers of the approach of cars was out of order and frequently rang when no cars were approaching, and frequently failed to ring when cars approached, he must exercise special care to look and listen for cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071–1074; Dec. Dig. § 830.*]

6. RAILROADS (§ 848*)—COLLISION AT HIGHWAY CROSSING—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

A traveler was struck by an electric car at a crossing at night. The undisputed evidence showed that a car when 600 feet from the crossing threw its light on the road on which the traveler was driving at a point 127 feet from the crossing. The driver when 10 feet from the track could have seen the headlight 450 feet from the crossing. The traveler testified that he heard no whistle or signal and no noise of an approaching car. There was testimony that repeated signals were given. *Held*

to show as a matter of law that the traveler was guilty of contributory negligence, precluding a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. § 348.*]

7. EVIDENCE (§ 588*)—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESS.

The testimony of one who could see and hear an object had he really looked and listened, that he looked and listened, but did not see and hear, is unworthy of credit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

Appeal from Circuit Court, Howard County; Jas. R. Brashears and Wm. Henry Forsythe, Jr., Judges.

Action by George Thomas Beasley against the Maryland Electric Railways Company. From a judgment for plaintiff, defendant appeals. Reversed, without awarding a new trial.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Charles A. Marshall and Robinson Griswold, for appellant. Robert Moss, for appellee.

PEARCE, J. This suit was brought by the appellee to recover damages resulting from a collision at Shipley Station, on the line of the Maryland Electric Railways Company, between one of the appellant's cars and a team of mules and wagon belonging to the appellee, one of the mules being killed, the wagon and load of peas destroyed, and the harness much broken and injured. The driver of the wagon also sustained injuries for which he has brought suit, the result of which, by agreement of counsel, is to abide the decision of this appeal.

The public road from Severn to Baltimore crosses the railways track at Shipley Station, and is used day and night by a very large number of teams hauling produce of all sorts to market. The county road at that crossing, going towards Baltimore, runs near North East and crosses the track at an angle of about 40 degrees. The approach of the railway to the station coming from Baltimore is through a deep cut, the course before entering the cut being nearly due south, but curving in the cut until it emerges from it, until at the crossing the course is about southeast. It appears from the testimony of the plaintiff, as a result of actual measurement by him, that a car approaching this crossing from Baltimore comes first into the vision of one at the crossing, or 10 feet therefrom, at a point 450 feet from the center of the crossing, as is shown on the blueprint used at the argument. There is an automatic bell at the station, the purpose of which is to warn travelers of the approach of trains, but there was evidence from a number of witnesses that it rang frequently when there were no cars approaching, and frequently failed to ring when they were approaching. Mr. War-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

then, who lived at Shipley in May, 1910, said it rang "continuously most of the time" though sometimes it acted properly, that it was a nuisance and disturbed him so much at night that he wrote to the company about it, it might have been a week or as much as two weeks before the accident, but he could not tell just how long. Mr. Stockett said he lived close to Shipley Station up to October, 1909, that he had known this bell to ring 24 to 48 hours on a stretch; that it became a nuisance and he complained to the company, and they gave him a key to the box so he could stop it, and he had stopped it as late as 10 o'clock at night. Mr. Kelley said he often heard it ringing when there was no car coming; that he had waited on that account as much as ten minutes before attempting to cross, and had become so hardened to it that he paid no attention to its ringing during the last year or so. He drove over that crossing the day of the accident, but could not say whether the bell then rang. Mr. Ford who lived about 200 yards distant said seven out of ten times when it would be ringing there would be no car coming; that he crossed there that day, but the bell was not ringing at that time. Richard Hall said he crossed there frequently, going to and coming from Baltimore, when the bell was ringing and there was no car coming. This was in the summer of 1910, but he could not say whether it was before or after this accident, and there was similar testimony from other witnesses.

Wesley Forrester, the driver of the team, testified that he left Mr. Beasley's about seven miles from Shipley about 9:30, June 14, 1910. The night was foggy. His mules walked most of the time and he could see their heads as he drove along; that he had been driving that road five or six years day and night and he knew this bell, and knew it often rang continuously whether cars were coming or not; that as he approached that night he stopped 30 or 40 yards from the track, and heard the bell ringing faintly, but heard nothing else; then went up to the tracks, stopped, looked in both directions, listened but saw nothing, and heard nothing except the bell, and then went on; that the first notice he had that the car was coming was when he saw the headlight right on top of him.

On cross-examination he said he stopped at the track two or three minutes before attempting to cross, and he had stopped at other times when the bell was ringing, as much as 10 or 15 minutes, and had waited until three or four other wagons came along and crossed before him. He said he was not asleep when he approached the crossing, and had not been asleep that night, but that he would not swear that as he came to the crossing he did not have his hands and his head down; that he did not hear either a station signal or a danger signal from the car, and

that he is positive he would have heard either or both, if they were given.

Harry Albaugh testified for the defendant that he left Baltimore on the 14th of June, 1910, on the 11:35 p. m. car; that he occupied the front seat on the front car on the right-hand side, the motorman being on the left; that the car had a bright headlight, and he could see blades of grass in the track 200 feet ahead; that he had been keeping notice of the whistle being blown, and just before they got to the curve approaching Shipley a real sharp whistle was given; that just as they came around the curve he saw the head of one mule going very slowly across the track; that he jumped and then saw both mules and saw a man "sitting in the seat with his head down and the reins in his hands carelessly like this (indicating)." The man on the wagon never made a move to get out of the way, and when he saw the car was going to hit them he moved back in the car, but facing front all the time; that he felt the car tremble as the brakes were applied; that the whistle was blown before the team was in sight, and after it was in sight six or eight times; that the bell was ringing all the time when the car stopped until the car backed into the siding, and began again as the Annapolis car approached; that the motorman slowed up before he hit the curve, and he judged the car after that was going about half as fast as before.

Allan T. Hopkins was on the right-hand side about the middle of the front car, there being two on the train, with a bright headlight; the whistle was sounded as they approached the curve, and again just as they came around the curve. He did not see the mules, but saw the motorman apply the brakes two or three seconds before the collision, and that the car was going at a moderate speed.

W. C. Kennedy was in the center of the first car with his window up. When the emergency brakes were applied he looked out and saw the heads of two mules on the track, and he judged the car was about 150 feet from the crossing; heard the whistle blow when the emergency brakes were applied and also before.

V. J. Vanous, the conductor in charge that night, said the regular crossing signal was blown just before they reached Shipley about 150 yards from the crossing, and the danger signal following from five to ten seconds later as well as he could judge.

Wm. T. Scible, the motorman on the car testified that he stopped at Linthicum, the station just north of Shipley, and after leaving Linthicum blew for Shipley, and at a reasonable distance blew for that crossing; that as he eased up on the car and swung round the curve he saw the tail end of the wagon on the track about 100 feet away; that he grabbed the brake with one hand and the whistle cord with the other and shut his eyes

to keep out the flying glass, and when he stopped, the wagon was smashed into pieces.

The blueprint already referred to was then put in evidence, and Mr. Layng, the engineer who made the plat testified to its accuracy, and said that when a car coming from Baltimore is 600 feet from the crossing, the headlight strikes the road 127 feet from the crossing, and when the car is 198 feet from the crossing, it strikes the road 49 feet from the crossing. He said there was no change in the surroundings affecting the vision of the light, as only a little had been cut out of the tops of the trees near the station above the line of vision. He also offered to exhibit certain photographs of the location taken after this trimming, which, on objection by the plaintiff, were excluded.

It should also be noted that the plaintiff testified with commendable frankness that the driver of that team at ten feet from the track could see further towards Baltimore than when right on the track, and, on cross-examination, after having stated in his examination-in-chief, that one ten feet from the track, could see down the track 450 feet, by his own measurement, said that if the driver had stopped ten feet from the track and had looked for the light, he should have seen it. There were six exceptions to the rulings on evidence and one to the rulings on the prayers. The first, second, third, fourth and fifth exceptions were taken to the action of the court in permitting a number of the plaintiff's witnesses to testify to the operation, at indefinite periods prior to the accident, of the automatic alarm bell at the crossing, and may all be considered as one exception. The sixth exception was taken to the refusal to allow the introduction in evidence of the photographs mentioned.

[1] The principle involved in the group of exceptions above, was considered in *Brooke v. Winters*, 39 Md. 509, and in *Maryland, Del. & Va. R. R. v. Brown*, 109 Md. 319, 71 Atl. 1005, and its application has been frequently discussed in the various courts of this country under varying circumstances. Without repeating here, we may refer to what was quoted in *R. R. v. Brown*, *supra*, from *Wigmore on Evidence*, as bearing generally upon the subject. Elliott, in his work on *Evidence*, vol. 1, § 87, referring more directly to the precise question here involved, says: "Where it becomes necessary to affect those charged with the duty of keeping highways, bridges or other structures in a safe condition, or of keeping only competent persons in their service, with notice of defects or *unfitness*, or *where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose or for practical use*, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the

other." This rule is illustrated in the following cases, among numerous others:

Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686, where in an action for injuries to an employé while operating a lift or elevator which it was his duty to operate, evidence was admitted showing that on a prior occasion the elevator behaved in the same manner as when he was injured, as tending to show some vice in its construction or defect in its maintenance, rendering its operation unreliable and dangerous, and that the employer knew, or should have known of this fact.

Myers v. Hudson Iron Co., 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176, where evidence was held admissible of former slips of the clutch gear designed to prevent slipping, by which slipping the plaintiff was injured, said former slippings being in the knowledge of the defendant.

Pittsburgh & Ft. Wayne R. W. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111, where evidence was held admissible of particular acts of carelessness on the part of a coservant to show his retention by the master after he knew of his carelessness.

McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812, where in an action for an injury by an employé because a piece of machinery he was operating jumped out of the socket, a person previously injured at the same machine was allowed to testify that this occurred frequently during his use of it. And to the same effect are *Baker v. Hagey*, 177 Pa. 128, 35 Atl. 705, 55 Am. St. Rep. 712, and *Perry v. Machine Co.*, 70 Vt. 277, 40 Atl. 731.

[2] The broad principle underlying all these cases, is well stated in *Brooke v. Winters*, 39 Md. 508, as follows: "The rule that excludes facts because they are collateral, does not apply to facts wherever existing if they may afford any reasonable presumption as to the matter in dispute. Whether they are facts before or after the suit, they are admissible, if they illustrate or explain the question in issue." One important qualification of this rule is that the time must not be too remote, and in this respect we think the evidence admitted, being of practically continuous behavior of the bell, comes within that requirement of the rule.

[3] It should also be noted that in all such cases, it will be presumed that the trial court did its duty and all reasonable presumptions necessary to uphold its rulings will be indulged. 1 Elliott on *Evidence*, § 127; and that the matter should be regarded as in the discretion of the trial court, unless there is plain evidence of abuse of that discretion. There is no such evidence here and there was no error in these rulings.

[4] As to the sixth exception relating to the admissibility of photographs taken some time after the accident and after a change of seasons, the authorities are not in harmony.

In *Dyson v. N. Y. & N. E. R. R.*, 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82, Chief Justice Beardsley said: "The picture represented the crossing in question and its surroundings, and presumably the court below found it was a correct representation of them. The change in the appearance of the locality by the falling of the leaves from the trees was of course open to explanation."

In *Chicago & Eastern Ill. R. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865, 105 Am. St. Rep. 135, the court said: "Photographs offered in evidence to explain a transaction are only competent when they are shown to have been taken so as to correctly exemplify the actual situation, circumstances and surroundings *at the time*. When the situation and surrounding circumstances are subject to change, photographs, to be of any value as evidence, must be shown to have been taken at the time, or when the situation and surroundings are unchanged."

In the case before us certain trees which were referred to by the driver as obstructing the vision, and which were in leaf at the time of the accident in June, had been since trimmed, though only in the tops, and there had been a fall of snow when the photograph was taken. It is not possible to lay down a general rule as to what changes shall require an exclusion of photographic representations of the locality, but the trial court with the photographs before it, and the witness who took them, ought to be conceded some discretion in admitting or rejecting them, and we should not feel warranted in reversing this judgment upon that ground, without clear proof that injury was thereby inflicted upon the defendant.

[5] This brings us to the rulings on the prayers.

It conclusively appears from the evidence that the automatic electric bell had been almost continuously out of order for some time before the accident; that it could not be relied on for the purpose for which it was provided, and that this was well known to the driver at and before the time of the accident. His own evidence shows he knew that when the bell was silent, this gave no assurance of safety, and that its ringing was no certain indication of danger.

The situation, therefore, as to him, was the same as if a bell had never been placed there, except that his knowledge of the untrustworthiness of the bell when he heard it ringing as he approached the track and later drove on it, demanded special care and caution on his part to look and listen for the danger of which the track itself was a warning.

[6] The defendant's third prayer, which was refused, asked that the jury be instructed "that, from the uncontradicted evidence in the case, the driver of the plaintiff's wagon was guilty of negligence directly contribut-

ing to the accident complained of, and therefore their verdict must be for the defendant." There is evidence strongly suggesting that he was asleep in his seat when he drove on the track, until, as he expressed it, "he saw the headlight right on top of him," but he denied that he had been or was asleep, though he would not deny that his head was down and his hands dropped. If this were the only basis of that prayer it could not be granted, because that remains a disputed fact for the jury. But that is not the only, nor is it the real, basis of the prayer. The uncontradicted testimony of Mr. Layng, the draftsman of the blueprint, is that when a car coming from Baltimore is 600 feet from the crossing the light is thrown plainly on the road on which Forrester was driving at a point 127 feet from the crossing, and the uncontradicted testimony of the plaintiff, Mr. Beasley, is that the driver when 10 feet from the track should have seen the headlight itself 450 feet from the crossing, as there was nothing to obstruct his view.

The driver himself testified that if the car was going to stop at the station he was sure it could not have traveled round the curve at the rate of 20 miles an hour, to the crossing, before he got over the track, and the testimony is uncontradicted that the car was going to stop at the station. The driver says he heard no whistle or signal, and no noise of an approaching car, but there is no contradiction of the testimony that repeated signals were given, nor of the fact that there were two cars on in the dead of night.

[7] It has been repeatedly held in this state that when one who can see and hear, says he looked and listened, but did not see or hear an object, which if he had really looked and listened, he must have seen or heard, such testimony is unworthy of consideration (*Helm's Case*, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215; *Medairy's Case*, 86 Md. 174, 37 Atl. 796; *Roming's Case*, 96 Md. 80, 53 Atl. 672; *Phillip's Case*, 104 Md. 458, 65 Atl. 422); and this is now declared in 1 Elliott on Evidence, § 127, to be the general rule. We cannot escape the conclusion that this prayer should have been granted, and this renders it unnecessary to consider the rulings on any of the other prayers, except those of the plaintiff which it follows should have been refused.

Judgment reversed, without awarding a new trial, costs above and below to be paid by the appellee.

BARNETT v. BARNETT et al.

(Court of Appeals of Maryland. Jan. 11, 1912.)

(1. WILLS (§ 597*)—ESTATE DEVISED—FEE SIMPLE.

Testatrix's will gave to her surviving husband entire control of a certain farm without power to sell or incur, and provided

that at her husband's death, and after debts were paid and a sum named paid to her daughter, an equal division of her property or its proceeds should be made among her five children, and, in the event of the death of any of them before the settlement of the estate, that their part should go to their children, and, if there were none, should be equally divided among the survivors, and that it was the testatrix's desire that her children should have their part of the estate "for their exclusive benefit or maintenance and at their death go to their children absolutely," but that, if any child marry and die without issue, the part of such child should revert to the surviving children. A codicil provided that testatrix desired "all of my children to have absolute control of their portion of my estate," and that she did not desire the property to be forced into the market at a sacrifice, but that it should be held at least five years, as the children could all agree to dispose of it to advantage within that time. *Held* that, at the husband's death, the children took a fee-simple, and not merely a life, estate; the word "absolute" as used in the codicil importing an exclusive control and title in the children. (citing 1 Words & Phrases, 38).

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 597.*]

2. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

Wills are construed more liberally than deeds in order to effectuate testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. WILLS (§ 597*)—ESTATE DEVISED—FEE SIMPLE.

To pass the fee, it is not necessary to use strictly technical language.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1319-1326; Dec. Dig. § 597.*]

4. WILLS (§ 441*)—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

For the purpose of effectuating testator's intent, his situation and the other circumstances existing when the will was executed may be properly considered in connection with the language of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.*]

5. WILLS (§ 600*)—ESTATE DEVISED—FEE SIMPLE.

If an estate is given to one generally or indefinitely with a power of disposition, he takes the entire estate absolutely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

Appeal from Circuit Court of Baltimore County.

Action between Amelia Emma Barnett and De Warren Beauregard Barnett and others. From the decree, Amelia Emma Barnett appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Crain & Hershey, for appellant. Robert W. Beach, for appellees.

STOCKBRIDGE, J. On December 5, 1888, Amelia Elizabeth Barnett executed her will for the express purpose of "making some disposition of my real estate." By this instrument she provided that, in the event of her husband surviving her, he should have

entire control of the farm belonging to her on the Reisterstown turnpike road, in Baltimore county, comprising about 63 acres, but without the power to sell the farm or any part of it, or to permit it to be incumbered by debts or mortgages, or to depreciate from neglect, and with the further expressed wish that her unmarried children should "have a comfortable support from the proceeds of the farm." At her husband's death, and after all debts were paid, and the sum of \$3,000 paid to her daughter, Amelia Emma Barnett, her will continues as follows:

"Then an equal division of my property, or if sold, an equal division of proceeds among my five children, Amelia Emma Barnett, Estella Virginia Barnett, Jessie Davis Barnett, De Warren Beauregard Barnett, Florence Lee Barnett, and in the event of the death of any of my children before the settlement of the estate, then their portion shall go to their children, but if they have no children, then their portion shall be equally divided among my surviving children, and to the children left by any of my other deceased children, should there be any. It is my desire that my children shall have their portion of my estate for their exclusive benefit or maintenance and at their death go to their children absolutely, but if any of my children should marry and die without children then their portion shall revert to my surviving children and children left by any of my deceased children."

Nine years after the execution of this will the testatrix executed a codicil in the following language:

"Finding portions of my original will not arranged to my entire satisfaction I desire to make some alterations.

"I desire all of my children to have absolute control of their portion of my estate. I also desire that my children shall be very guarded in advancing their money to anyone. Should any loan be made to secure themselves against loss and in the event of the death of any of my children without issue what remains of their portion shall revert to my living children and children of my deceased children should there be any.

"It is my express desire that there shall be no dissention among my heirs over the division of my estate, and I furthermore stipulate that my property shall not be forced into market and sacrificed, but shall be held at least five years unless they can all agree to dispose of same to advantage before the expiration of five years."

The testatrix died on the 1st July, 1900, leaving her husband surviving her, and he died in February, 1909. The children of the testatrix are all adults, and the record in this case discloses but a single question which this court is called to pass upon.

[1] That question involves a construction

of the will, and the determination whether the language of the will and codicil operate to vest in the children of the testatrix an absolute fee or a life estate only. The express terms of the will created in the husband of the testatrix a life estate, which has now been terminated by his death. The limitation upon sale imposed by the concluding words of the codicil, being a time limitation of five years, has now expired, more than the stipulated period having passed since both the execution of the codicil and the death of the testatrix.

[2-4] The rules of construction are simple and readily understood. Thus it has always been recognized that wills are to be construed more liberally than deeds, in order that the intention of a testator may be carried into effect, and therefore, in order to pass a fee, it is not necessary to make a strict use of technical expressions. Page on Wills, § 561. It is always the object of the court to ascertain, if possible, the intention of the testator, and to do that the particular situation of the testator, or other circumstances which existed at the time of the execution of the instrument, are always proper subject-matters of consideration in connection with the language which is actually employed. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72; *Levi v. Bergman*, 94 Md. 204, 50 Atl. 515.

The testimony in this case abundantly establishes the character of the relation which existed between Mrs. Barnett and her children to have been one of entire confidence. The subject-matter of the will and its provisions were talked over in the family as a matter of general interest and agreement prior to the execution of the will.

The provision for the life estate for her husband, if he survived her, was made in clear and apposite terms. It was only when she came to make the provision for the devolution of the property after his life estate that any question could arise. Even then it is by no means clear that it was the intent of the testatrix to create a life estate in the children, for the reason that express provision is made for a division of the proceeds of the property. But even if it be assumed that by reason of the strict construction of the language employed in the will there were created successive life estates in her husband, and then in her children, that doubt was entirely removed by the first paragraph of the codicil, where the language is plain and unmistakable. She there said: "I desire all of my children to have absolute control of their portion of my estate." It is true she does not use the words, "in fee," or "heirs," but the terms "absolute," or "absolute control," or "absolute disposal," have a well-defined signification in testamentary law. Thus it is said in the case of *Greenawalt v. Greenawalt*, 71 Pa. 487, that "absolute" is not

a word used to distinguish a fee from a life estate, but to distinguish a qualified or conditional from a fee-simple estate; and in the will which was under construction in *Jackson v. Babcock*, 12 Johns (N. Y.) 393, the term "absolute disposal," was held to vest a fee in the devisee. See, also, *Anders v. Gerhard*, 140 Pa. 153, 21 Atl. 253; *Dills v. Adams* (Ky.) 43 S. W. 680. And in the case of *Johnson v. McIntosh*, 8 Wheat. 588, 5 L. Ed. 681, it was said by Chief Justice Marshall that "an absolute must be an exclusive title, or at least a title which excludes all others not compatible with it." See, also, cases cited in 1 Words and Phrases, p. 38 et seq.

[5] But even as further indicating the intention of the testatrix in this case, the concluding words of the codicil, where a limitation of time is sought to be placed upon any alienation of the property, the language of the testatrix clearly indicates a power of disposal even within that time by the agreement of all of the parties, an intention entirely inconsistent with the creation of a life estate, and, if the devise in this case were to be treated in the nature of a general devise with a power, it would come under the ruling of this court in the case of *Welsh v. Gist*, 101 Md. 606, 61 Atl. 665, where the late Chief Justice McSherry said: That if "an estate is given to a person generally or indefinitely, with a power of disposition, such gift carries the entire estate, and the devisee or legatee takes, not a simple power, but the property absolutely." Without prolonging this opinion further, it is sufficient to say that the construction placed upon the will and codicil of *Amelia Elizabeth Barnett* by the circuit court for Baltimore county as set forth in the decree of July 22, 1911, was correct, and that decree will be affirmed.

Decree affirmed, costs to be paid out of the estate.

WEEKS v. NEWS PUB. CO.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. LIBEL AND SLANDER (§ 16*)—STATEMENTS LIBELOUS PER SE—INJURY TO CHARACTER—DEGRADATION.

It is not necessary, to constitute a libel, that the publication charge one with the commission of a crime or with having a contagious disease, but any words which impute to him conduct or qualities tending to injure his character, or to degrade him or which expose him to contempt, ridicule, or public hatred, are libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

2. LIBEL AND SLANDER (§ 97*)—PLEADING—DEMURRER.

Where a complaint alleged that defendant falsely and maliciously published of and concerning plaintiff a statement that he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

a black sheep, etc., meaning that he was a man of criminal character, and unfit to practice law, was one of the criminal classes, and of the company of the keepers of disreputable saloons, etc., a demurrer thereto admitted that the article was published, and that it was false and malicious, but did not admit that the words published in themselves, or as explained by the innuendo, were actionable, nor that they were, when read by themselves or in connection with the inducement or colloquium, capable of the meaning ascribed to them in the innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234-236; Dec. Dig. § 97.*]

3. LIBEL AND SLANDER (§ 86*)—"INUENDO"—OFFICE.

The office of an innuendo is to explain the words of a libel and to give them their true meaning, but it may not be used to introduce new matter or enlarge or add to the sense declared on, or impute to them a meaning not justified by the publication, either when taken alone or in connection with the inducement and colloquium.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 96.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3630-3634.]

4. LIBEL AND SLANDER (§ 86*)—PLEADING—"INUENDO"—"BLACK SHEEP."

A declaration for libel alleged as an inducement merely that plaintiff was an attorney at law, in good standing, etc. It then alleged a colloquium that defendant published an article of and concerning plaintiff "individually" and as an attorney at law, the libelous article reciting that, while a man may not be responsible if a "black sheep" here and there becomes his adherent, yet, when the "line up" is as general in character as in the present primary contest, the writer believed he was correct in putting down a list as P.'s friends, the list containing a reference to plaintiff as "Tom Weeks," counsel for "Willie" Downs," and in a separate paragraph stated, "We can safely add to this company an almost unanimous vote of the disreputable saloons, the gambling hells, and bawdyhouses, and others of that ilk, who from the nature of their trade require protection from those higher up." The declaration then alleged that by such article defendants meant to charge plaintiff individually and as an attorney at law to be a "black sheep" and a man of criminal character unfit to practice his profession as an attorney at law, and as one belonging to the criminal classes and of the company of the keepers of disreputable saloons, etc. *Held*, that the article did not refer to plaintiff as being of the company of those specified in the second paragraph, plaintiff being referred to merely as a "black sheep," which was not libelous, and, the innuendo not being justified by the writing, the declaration was demurrable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 205-208; Dec. Dig. § 96.*]

Appeal from Baltimore City Court.

Action by Thomas C. Weeks against the News Publishing Company. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, TURNER, and STOCKBRIDGE, JJ.

J. Booker Clift, for appellant. Leon E. Greenbaum, for appellee.

THOMAS, J. This was an action for libel against Frank A. Munsey, proprietor of the Baltimore News, and the News Publishing Company, a corporation, and the appeal is from a judgment on demurrer to the declaration in favor of the defendant the News Publishing Company; process not having been served on the other defendant. The narr. alleges that the plaintiff was "an attorney at law in good standing and repute in the practice of his profession in the courts of Baltimore city and elsewhere," and enjoyed in the community "a reputation as a moral, law-abiding, and respectable citizen * * * of professional integrity and honesty in the practice of law," and that the defendants on the 1st day of April, 1911, "falsely and maliciously printed and published, and caused to be printed and published, of and concerning the plaintiff individually and in his professional capacity as an attorney at law" in the Baltimore News, "a daily journal published in the city of Baltimore, the following false, malicious and wicked libel, to wit:

"There is a good old adage that you can judge a man by the company he keeps, and this ought to hold good in politics. A man may not be responsible if a black sheep here and there becomes his adherent, but when the 'line up' is as general in character as in the present primary contest, it must be accepted as defining a candidate's status. I believe I am correct in putting down the following list as Mr. Preston's friends: 'Judge Bill' Garland, 'Hon.' Harry Wolf, and 'Tom' Weeks, counsel for 'Willie' Downs; 'Sonny' Mahon; 'The' Kelly; 'Bob' Padgett; 'Hon.' George Kenig; all the 'Gas' Councilmen, including those indicted by the Grand Jury.

"We can safely add to this 'company' an almost unanimous vote of the disreputable saloons, the gambling hells, the bawdyhouses, and others of that ilk who, from the nature of their trade, require 'protection' from those higher up.

"In lining this gentry up for Mr. Preston I don't think I am crediting him with any Mahool votes. Now, what is the exhibit on the other side? Mr. Mahool cannot lay claim to please any of the 'elements' I have named, but he seems to have lined up with the great body of citizens who have never made politics a business, the sober workmen, the small business men and those of our leading citizens who have been free from political graft. He has also the bulk of the 'Old Guard' who fought with Wallis against the gentry I have enumerated; in fact, he has such a large majority of the decent people with him that the ward heelers, toughs and criminal classes hate him. 'We love him for the enemies he has made' in the cause of right and Justice.

"'Baltimore, March 30.'"

The declaration then charges that the defendants meant by said publication "that the said plaintiff, speaking of him individually and as an attorney at law as a 'black sheep,' was a man of criminal character and unfit to practice his profession as an attorney at law, as one belonging to the criminal classes, and as of the company of keepers of disreputable saloons, gambling hells, bawdyhouses, and others of that ilk, who from the nature of their trade require protection from those higher up, and intending thereby to bring the plaintiff into public scorn, contumely, and disrepute among his neighbors, clients, and acquaintances." To an honest and good man, who has won and enjoys public confidence and esteem, honor and character are no less sacred than life or property, and it is as much the duty of others to respect his title to the former as it is their obligation to avoid violating his right to the latter, and the law should be ample for their protection. There can be no doubt that if the article complained of contained a false charge that the plaintiff "was a man of criminal character and unfit to practice his profession," or that he "belonged to the criminal classes," such as "keepers of disreputable saloons, gambling hells and bawdyhouses," it would be libelous.

[1] Indeed, it may be stated as the settled law of this state that, in order to constitute a libel, it is not necessary that the publication should charge one with the commission of a crime or with having a contagious disease, but any words which impute to him conduct or qualities tending to injure his character, or to degrade him, or which expose him to contempt, ridicule, or public hatred, are per se libelous. In the case of *Hagan v. Hendry*, 18 Md. 191, Chief Judge Bowie quotes the statement in 1 Amer. Lead. Cases, 116 (Ed. of 1857), that "any publication injurious to the social character of another, and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel." In the case of *Snyder v. Fulton*, 34 Md. 135, 6 Am. Rep. 314, Chief Judge Bartol adopts the view of Chancellor Kent (1 Kent's Comm. 620) that "expressions which tend to render a man ridiculous, or degrade him in the esteem and opinion of the world, would be libelous if printed, though they would not be actionable if spoken. So, if they tend to injure his reputation and expose him to public hatred, contempt, or ridicule." And in the more recent case of *Goldsborough v. Orem & Johnson*, 103 Md. 681, 64 Atl. 40, this court, speaking through Judge Burke, said: "A false and malicious printed or written publication which imputes conduct, or qualities tending to disparage, or degrade the plaintiff, or expose him to contempt, ridicule or public hatred, or prejudice his private character, or credit are libelous per se." Similar statements may be found in *White v. Nickolls*, 3 How. 266, 11 L. Ed. 591; *Odgers*

on Libel and Slander, star pages 19 and 20; and 13 A. & E. Ency. of Law (2d Ed.) pp. 299, 220, where many cases, English and American, are cited in support of the rule.

But the real question presented by the demurrer in this case is not whether it is actionable to publish of an attorney at law a statement that he is a man of criminal character and unfit to practice his profession, or that he belongs to the criminal classes, but whether the article referred to is susceptible of the meaning ascribed to it in the declaration.

[2] The demurrer admits that the article was published by the defendant, and that it is false and malicious; but it does not admit that the words published in themselves, or as explained by the innuendo, are actionable, nor does it admit that they are, when read by themselves, or in connection with the inducement and colloquium, capable of the meaning ascribed to them in the innuendo. If it be conceded that the article, as interpreted by the innuendo, is actionable, the question whether the innuendo is good—that is to say, whether it is fairly warranted by the article when read in connection with the inducement and colloquium—still remains as a matter of law for the court.

[3] It is the office of the innuendo to explain the words of the libel, and to give to them their true meaning. It cannot, however, introduce new matter or enlarge or add to the sense of the words declared on, or properly impute to them a meaning not justified by the publication, either when taken alone or in connection with the inducement and colloquium. *Lewis v. Daily News Co.*, 81 Md. 466, 32 Atl. 246, 29 L. R. A. 39; *Dorsey v. Whipp*, 8 Gill, 462; *Haines v. Campbell*, 74 Md. 158, 21 Atl. 702, 28 Am. St. Rep. 240; *Avirett v. State*, 76 Md. 510, 25 Atl. 676, 987; *Barnes v. State*, 88 Md. 347, 41 Atl. 781; *Goldsborough v. Orem & Johnson*, supra. In the case of *Avirett v. State*, supra, Judge McSherry, after referring to the statement of Lord Tenterden, C. J., in *Harvey v. French*, 1 Cr. & M. 11, that "it is quite clear from all the modern authorities that a court must read words in the sense in which ordinary persons, or in which we ourselves out of court, reading the paragraph, would understand them," said: "They cannot be enlarged or extended by an innuendo, no matter how strongly an innuendo may impute an offensive meaning to them. *Commonwealth v. Snelling*, 15 Pick. (Mass.) 321. Whether an innuendo is good in law—that is to say, whether it is fairly warranted by the language set forth in connection with the inducement and colloquium—is obviously matter of law. *Solomon v. Lawson*, 8 Q. B. 828. As the innuendo cannot enlarge, extend, or add to the sense or effect of the words set forth, or properly impute an offense which the publication either in itself or in connection with the inducement and colloquium does not charge or fair-

ly imply, it follows that the innuendo, which is simply equivalent to *scilicet* or *id est*, and whose whole office is to explain the effect of the words used, cannot by enlarging the meaning of the words make an indictment good, which, without that innuendo, would be bad. If, therefore, the words set forth in the first count of the indictment, either in themselves or in connection with the inducement and the colloquium do not involve a charge against Judge Hoffman, the innuendoes cannot make them do so (*Solomon v. Lawson*, *supra*), and, if the innuendoes attempt to do this by assigning as the correct and natural meaning of the words a construction not fairly inferable from them, or not fairly deducible from the words as explained by the colloquia and the extraneous facts averred, the demurrer to that count should have been sustained."

[4] Applying these rules to the case at bar, we find that the inducement alleges merely that the plaintiff was an attorney at law in good standing, etc., while the averment of the colloquium is that the article was published of and concerning the plaintiff "individually" and as an attorney at law. The publication does not expressly charge that the plaintiff "was a man of criminal character and unfit to practice his profession as an attorney at law," or state that he "belonged to the criminal classes," such as "keepers of disreputable saloons, gambling halls and bawdyhouses, and others of that ilk." On the contrary, the apparent intention of the writer was to place the plaintiff in another and different class, for after naming a number of persons, including the plaintiff, as the friends of Mr. Preston, he then, in another paragraph, states that, in addition to the persons so named, Mr. Preston had as his supporters "an almost unanimous vote of the disreputable saloons, the gambling halls, the bawdyhouses, and others of that ilk who, from the nature of their trade, require 'protection' from those higher up." The statement that Mr. Preston was supported by the persons named in the first paragraph of the article, and that he would also receive the votes of those described in the second paragraph, does not imply that those mentioned in the first paragraph belonged to the same class as those referred to in the second. Reading the article as a whole, and allowing the words employed their natural significance, we fail to find anything in the publication itself, or in the inducement and colloquium, to justify the meaning ascribed to it in the declaration. The innuendo being therefore bad, in that it attempts to give to the article a meaning not fairly deducible from the publication, inducement, and colloquium, the demurrer was properly sustained.

The only charge that the article could be properly said to contain is that the plaintiff and the others named were "black sheep." But we are not required in this case to deter-

mine whether it would be libelous to publish of an attorney at law, engaged in the practice of his profession, a false statement in writing that he was a "black sheep." The declaration charges that the article meant that the plaintiff was a man of criminal character, etc.; and it is obvious that the term "black sheep" could not be given such a meaning, in the absence of some allegation to show that it was so intended and understood. It is said in *Bullen and Leake's Precedents of Pleading*, p. 305 (3d Ed.), that "where the words are innocent or uncertain in their natural meaning, and are actionable only in consequence of the peculiar meaning conveyed by them on the particular occasion, as calling a man a 'lame duck,' a 'black sheep,' or saying that he is 'forsworn,' or where words are used ironically, it is necessary to add an innuendo or statement of the meaning intended by the words, whereby they are rendered actionable. In cases of the kind it was formerly necessary to insert in the declaration, by way of inducement, a prefatory averment of the meaning of the words, and then by innuendo to allege that they were used to convey that meaning." This was changed by section 61 of the Common Law Procedure Act 1852, which made it unnecessary to have an introductory averment of the meaning of the words, and provided that the meaning could be stated in the innuendo. *Hemmings v. Gasson*, 27 *Law Journal*, Q. B. (1858) 252; *Bullen & Leake's Precedents of Pleadings*, *supra*. It is accordingly stated in *Odgers on Libel and Slander*, star page 23, that: "It is libelous to call a man a 'blackleg' or a 'black sheep.' But there should be an averment that these words mean a person guilty of habitually cheating and defrauding others." Following the former practice, *Parke, B.*, in the case of *McGregor v. Gregory*, 11 *M. & W.* 287, on page 295, said: "We think that the averment of the meaning of the term 'black sheep' is properly introduced by way of inducement." And this is the rule that still prevails in this state, where it is claimed that the words were used to convey a particular meaning other than that naturally and ordinarily ascribed to them. *Peterson v. Sentman*, 37 *Md.* 140, 11 *Am. Rep.* 534; *Brinsfield v. Howeth*, 107 *Md.* 278, 68 *Atl.* 566, 24 *L. R. A. (N. S.)* 583; *De Witt v. Scarlett*, 113 *Md.* 147, 77 *Atl.* 271. In 1 *Poe's P. & P.* (3d Ed.) § 173, Mr. Poe repeats the statement of the court in *Peterson v. Sentman*, *supra*, that "words will not be understood to impute a crime if, in their milder sense, they have another and harmless meaning, unless the connection in which they are used and applied would give them that effect." And the learned author, upon the authority of the cases cited in the note, adds that in determining whether "words are actionable or otherwise the rule is this: They take their actionable character from the sense in which

they appear to have been used, and that in which they are likely to be understood." This rule has been more recently recognized in *Brinsfield v. Howeth*, supra, and *De Witt v. Scarlett*, supra. Where, then, the words are ambiguous, or have an actionable and a nonactionable meaning, the actionable character sought to be given to them in the innuendo—that is to say, the sense in which the plaintiff avers they were used—must be supported by such an averment and colloquium as will warrant the defamatory meaning ascribed to them in the innuendo. 1 *Poe's P. & P.* supra; *Dorsey v. Whipps*, supra; *Brinsfield v. Howeth*, supra; *De Witt v. Scarlett*, supra.

As there is nothing in the article itself, or in the declaration, to justify the meaning ascribed to the publication in the innuendo, there was no error in the ruling of the court below on the demurrer, and the judgment appealed from must be affirmed.

Judgment affirmed, with costs.

STATE, to Use of *WELCH, v. BALTIMORE & O. R. CO.*

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. WITNESSES (§ 380*)—IMPEACHMENT—RIGHT OF PARTY CALLING WITNESS TO IMPEACH WITNESSES.

Where a witness, called on the faith of a statement made by him to the party or his attorney, gives testimony wholly variant therewith, proof of the statement is admissible within the discretion of the trial court, if the party has been taken by surprise, and the evidence is contrary to what he had just cause to expect.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1214; Dec. Dig. § 380.*]

2. EVIDENCE (§ 194*)—DEMONSTRATIVE EVIDENCE CONNECTED WITH CONTROVERSY—ADMISSIBILITY.

In an action for the death of a person struck by an engine, a shoe worn by decedent at the time of the injury is inadmissible in evidence, unless there is proof that it was in the same condition as it was at the time of the accident.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 679; Dec. Dig. § 194.*]

3. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

Where, in an action for the death of a person struck by a train, a witness testified that after decedent had been run over he was crying and said he was dying, the error, if any, in sustaining an objection to a question asked the witness as to how often decedent repeated that expression was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

4. EVIDENCE (§ 501*)—OPINION EVIDENCE—COMPETENCY.

The testimony of experienced engineers familiar with the tracks and a switch where a person was struck by an engine and killed, that a person looking out the side window of a backing engine with a tender in front

could see the switch, was properly excluded where the testimony was not confined to the conditions existing at the time of the accident as described by the engineer operating the engine.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292–2305; Dec. Dig. § 501.*]

5. EVIDENCE (§ 126*)—RES GESTÆ—DECLARATIONS—ADMISSIBILITY.

Declarations of a person struck by an engine made after he had been taken from the place of the accident and removed to a hospital as to the cause of the accident are inadmissible as *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 372–376; Dec. Dig. § 126.*]

6. RAILROADS (§ 359*)—TRESPASSERS—OBLIGATION OF TRAINMEN.

Trainmen backing an engine owe no duty to a trespasser until they become aware of his presence on the tracks in a position of peril.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

7. RAILROADS (§ 400*)—COLLISIONS—EVIDENCE—QUESTION FOR JURY.

In an action for the death of a trespasser on a track struck by an engine, evidence held to require submission to the jury of the issue of negligence of the trainmen in failing to exercise proper care on their becoming aware of decedent's peril.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 400.*]

8. APPEAL AND ERROR (§ 628*)—TRANSCRIPT OF RECORD—TIME TO TRANSMIT.

Where the failure to transmit the record on appeal in time prescribed by Code, art. 5, § 40, was partly due to the absence of appellee's counsel and on the return of counsel from his summer vacation the bills of exception were completed with reasonable dispatch, and were presented to the judge for signature by counsel for both parties, the appeal would not be dismissed because the transcript was not transmitted in time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2750–2764; Dec. Dig. § 628.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by the State of Maryland, for the Use of Emma A. Welch, mother and next friend of James Henry Welch, deceased, against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial awarded.

Argued before *BOYD, C. J.*, and *PEARCE, BURKE, THOMAS, PATTISON, URNER.* and *STOCKBRIDGE, JJ.*

Linwood L. Clark, for appellant. *Duncan K. Brent*, for appellee.

BURKE, J. On Sunday, August 15, 1909, James H. Welch, a boy about 14 years of age, and the son of the equitable plaintiff, was run over and fatally injured by the tender of a locomotive of the defendant company which was backing along a switch on Wells street, at or near the foot of Byrd street, in the city of Baltimore.

The suit was brought in the name of the state, for the use of the mother, Emma A.

Welch, a widow, to recover damages for her son's death which was alleged to have been caused by the negligence of the defendant. At the conclusion of the plaintiff's evidence, the court granted a prayer by which the jury were instructed that by the undisputed evidence in the case the deceased by his own negligence had directly contributed to the happening of the accident, and that their verdict should be for the defendant. In obedience to this instruction the jury rendered a verdict for the defendant, and from the judgment entered thereon the plaintiff has appealed. This is the second appeal in this case, the first being reported in 114 Md. 536.¹ In the opinion of Judge Schmucker in that case, the locality where the accident happened and how it happened as described by the witnesses are fully considered, and the rule of law proper to be applied to the case is clearly stated. What was said in that opinion relieves us from a full discussion of many of the questions presented on this appeal. The record presents 12 exceptions taken to the rulings of the court on questions of evidence, and these will now be considered.

[1] The first, second, third, and fourth exceptions present substantially the same question. They arose in this way. The plaintiff offered to impeach the credibility of the witness Zepp, whom he had placed upon the stand, and for this purpose read from the record in the former trial a number of questions and answers, and asked the witness if he had not so testified at that trial. He further offered to prove by John C. Davis, Jr., a stenographer who took the testimony at the first trial, that Zepp had testified to certain facts embraced in a question propounded to Davis.

There was no error in refusing to admit this character of evidence. In no case can a party calling a witness be permitted to impeach his general reputation for truth and veracity; but there are special circumstances under which he may be permitted to impeach or discredit him by showing that he had previously stated the facts in a different manner. The conditions under which this is allowable are thus stated in *Smith v. Briscoe*, 65 Md. 561, 5 Atl. 334: "If the witness has made to the party who calls him, or to the attorney of such party, a statement totally variant from his sworn testimony, and on the faith of such testimony he has been called, he may be asked if he made such a statement, and if he denies, we see no objection to the proof of such statement, not for the purpose of impeaching the general character of the witness, but for the protection of the party calling him. If a plaintiff calls a witness, relying upon statements made to him or his attorney, and when on the stand he proves the defendant's case, we think that the principles of justice require that the plaintiff should be able to show why he called him. There are

objections to either course, but the more objectionable one would be to hold the party bound by the evidence of such treacherous witness. We restrict such declarations to those made to the party calling him or to his attorney, and made in reference to the case pending, and do not extend them to statements made to others. It is upon the statements so made to the party to the suit or his attorney that the witness is called. If the witness under such circumstances make a false statement, he cannot complain that his falsehood is exposed. But it is not every statement that may be made even to the party litigant or his attorney that should be allowed to be contradicted by the party calling the witness. It should be left to the discretion of the judge before whom the case is tried below to allow it to be done. The court should be satisfied that the party has been taken by surprise, and that the evidence is contrary to what he had just cause to expect from the witness based upon his statements, and that such statements were about material facts in the case. It is not every light or trivial circumstance that would justify it."

A comparison of the testimony of this witness with those portions of his evidence given at the former trial and embraced in the questions propounded to him shows that there was no such substantial variance as to bring the case within the exception stated in *Smith v. Briscoe*, supra.

The same is true of the eighth and ninth exceptions where a like attempt was made to discredit the witness Clark.

[2, 3] We find no error in the rulings embraced in the fifth and sixth exceptions. In the fifth exception it is stated that the plaintiff proposed to introduce a shoe which the boy wore at the time he was injured. The shoe had been given to the undertaker, Mr. Slowman, by the keeper of the dead house at the University of Maryland. Before this shoe could have been admitted it should have been shown that it was in the same condition as it was when the boy was taken to the hospital. The witness Ackerman testified that after the boy had been run over, he was crying, and said he knew he was dying. He was asked how often did he repeat that expression. The court, upon objection, refused to permit the question to be answered. Evidently, no injury resulted to the plaintiff from this ruling.

[4] Nor do we find any error in the tenth, eleventh and twelfth exceptions. The plaintiff proposed to prove by Jefferson D. Sweltzer and John T. A. Stroup, two experienced engineers, both of whom had been in the employ of the defendant company as engineers, and who were familiar with the tracks and cross-over switch where the accident occurred, that a person looking out the side window of a backing engine with a tender in front, could see the switch. If the questions asked these witnesses had em-

¹ 50 Atl. 170.

braced the conditions existing at the time of the accident, as described by the engineer, Zepp, the evidence would have been proper; but as it was not confined to those conditions, it would have been misleading, and it was properly refused.

[5] The evidence shows that the injured boy was taken from the place of the accident on one of the engines of the defendant to Camden Station. At or about 20 minutes of 6 o'clock that afternoon he was taken by Robert L. Morgan to the Maryland General Hospital. He was then conscious, but died about 2 o'clock the following morning.

The plaintiff then asked Mr. Morgan the following questions: "Will you please state to the court and jury what he gave you as the cause of the accident?" The court refused to allow this question to be answered, and this ruling constitutes the seventh bill of exceptions. It is contended by the plaintiff that this statement was a part of the *res gestæ*, and should have been admitted; but under the settled law of this state, it was made at a time too far removed from the place of the injury to constitute a part of the *res gestæ*.

In *Baltimore City v. Lobe*, 90 Md. 310, 45 Atl. 192, the court referred to a number of cases on this subject and said: "All agree that to make the declaration a part of the *res gestæ* it must be so connected with the transaction as to be reasonably a part of it; it must not be the result of premeditation or design, but the 'immediate spur' of the transaction, and though it need not appear that it was spoken at the identical point of time when the principal fact happened, yet it must have been made so soon thereafter as fairly to be a part of the transaction, and therefore elucidating and explaining it. But if the declaration was made after the main occurrence had ceased, and there is no necessary connection between it and the principal event, it is then nothing more than a narrative of a past occurrence, and is not admissible as a part of the *res gestæ*." The statement sought to be given in evidence was made at Camden Station some time after the accident, and some distance from the place of its occurrence, and the court committed no error in refusing to admit it.

[6] The important question presented by this record is whether, under the principles announced in the former case, the equitable plaintiff had offered any legally sufficient evidence to take the case to the jury. The judgment in the former case was reversed, and a new trial awarded for error in the rulings upon evidence and in granting the plaintiff's first and the defendant's fourth prayer. The lower court in the trial of that case had admitted certain testimony upon the theory that it tended to show that the deceased was upon the tracks of the defendant company "by virtue of some implied license or permission from it." This testimony was

found to be inadmissible, and since the plaintiff's first prayer, which declared the defendant's duty to the deceased was based upon that testimony, the prayer was pronounced bad. The defendant's fourth prayer was held bad because it asserted "that the duty of the defendant's agents to exercise care to protect the plaintiff's deceased would begin only when they saw him in a situation of peril instead of when they became aware of his peril."

In view of what was said in the first appeal and of the evidence contained in this record, the deceased must be treated as a trespasser upon the defendant's tracks, and "its employes in charge of the backing engine owed him no duty until they became aware of his presence on the tracks in a position of peril."

[7] At the close of all the testimony at the first trial the defendant sought to take the case from the jury, and one of the prayers offered was identical in form with the granted prayer in this case. These prayers were refused, and the rulings were affirmed by this court.

At the first trial the plaintiff produced Charles A. Trump, who testified that he was an eyewitness of the accident and gave a detailed description of how it occurred. At the trial of this case the testimony of Trump, as given in the first trial, was read from the record in that case to the jury by consent of counsel. Commenting upon Trump's testimony Judge Schmucker said: "The plaintiff's witness, Trump, whose testimony for the purpose of the present inquiry must be taken as true, testified that the boy's foot was caught between the switch points and the rail when the engine was a block and a half away from him, and that he screamed and yelled and tried in vain to pull his foot loose, but he was held fast until the tender ran over him. As the engine and tender approached him they moved at the rate of but two miles an hour. Both the engineer and the brakeman who were on the engine testified that they were looking back in a direction in which they were moving all the time, and did not see the boy toward whom they were going until after the engine had passed over him. * * * If Trump's testimony that the boy was screaming and yelling from the time his foot was caught in the switch was true, those in charge of the engine might have been informed of his peril by hearing his cries of distress." Trump's testimony was held in the former case legally sufficient to have taken the case to the jury.

It follows that there was error in withdrawing this case from the jury, unless there be found in the present record some fact or circumstance which makes the ruling on the former appeal on this question inapplicable. This fact, it is argued, is found in the testimony of William H. Zepp, the engineer in charge of the locomotive and tender which

ran over the boy. He testified for the defendant in the former case; but on the retrial he was called by the plaintiff.

We have been unable to discover anything in the testimony of this witness that would make the ruling in the former case inapplicable. His testimony in which he refers to switches and targets is somewhat obscure and confusing; but assuming that he meant to testify, and that he did in fact testify that he did not see and could not see the switch in which the boy was caught, because his vision was cut off by the tender, that fact is not of itself sufficient to take the case out of the ruling of the prior case.

The argument in the former case was this: No duty was owed by the defendant to the deceased until its employes in charge of the locomotive and tender *saw* him in a position of peril, and since neither the engineer nor the other employes on the locomotive and tender saw the boy in a position of peril, therefore there could be no recovery. The answer to this argument was, first, the duty to use care arose from the moment the employes of the defendant became *aware* that the boy was in a position of peril on the track and was not limited to their *actually seeing* him in that position; secondly, they might have become *aware* of his perilous position by hearing his cries of distress.

The contention now made is that there can be no recovery, because it was physically impossible for the *engineer*, by reason of the facts stated in his testimony, to have *seen the switch*. This is fully answered by what was said in the former case. Besides, nowhere in the testimony of the engineer does he say that he did not see the boy on the switch, or that he did not hear his screams of distress. We are therefore of opinion that the court committed an error in granting the defendant's first prayer by which the jury were instructed to find for the defendant, and for this error the judgment must be reversed.

[8] The appellee has moved to dismiss the appeal upon the ground that the transcript of the record in the case was not transmitted to this court within three months from the time the appeal was taken as required by article 5, section 40, of the Code. The affidavits show that the failure to transmit the record in time was not wholly due to the fault, or want of diligence of the appellant, but was partly due to the absence of appellee's counsel from the city. Upon his return to the city from his summer vacation, the bills of exception were completed with reasonable dispatch and were presented to the judge for his signature by both the counsel for the plaintiff and the defendant.

We do not find that the counsel for the appellant, under the circumstances, was guilty of such want of diligence as would authorize us to dismiss the appeal.

Judgment reversed and new trial awarded, with costs to the appellant.

FORWOOD v. PRUDENTIAL INS. CO. OF AMERICA.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. INSURANCE (§ 297*)—REPRESENTATIONS—MATERIALITY.

Representations by an applicant for insurance that he did not use any malt liquors, wines, or spirits, and had never used malt or spirituous liquors to excess, are material to the risk as a matter of law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 676; Dec. Dig. § 297.*]

2. INSURANCE (§ 646*)—REPRESENTATIONS—BURDEN OF PROOF.

The burden is on an insurer to show the falsity of statements and answers in the application, and that they were material to the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

3. INSURANCE (§ 646*)—REPRESENTATIONS—BURDEN OF PROOF.

Where an insurer has proved the falsity of representations in the application which was signed by the insured, and contained a declaration that all statements and answers were true, and an agreement that they should constitute a part of the contract, the burden is on those claiming under the policy to show that the answers contained in the application were not the answers given by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.*]

4. INSURANCE (§ 376*)—CONTRACT—POWER OF AGENTS TO CHANGE OR MODIFY.

A provision of an insurance policy prohibiting any agent from changing or modifying its terms does not apply to conditions which relate to the inception of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

5. INSURANCE (§ 379*)—REPRESENTATIONS—FALSITY—MISTAKE OF AGENT.

Where answers in an insurance application must have been known to the applicant to be false, and the application was annexed to and made a part of the policy, and contained a declaration that the statements and answers were true, there could be no recovery, although true answers were given by the applicant and different answers copied in the application through the mistake or fraud of the agent, since he could have discovered this fact, and by failing to disclose it to the company he participated in the fraud or mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 999-1015; Dec. Dig. § 379.*]

6. INSURANCE (§ 665*)—REPRESENTATIONS—FALSITY—EVIDENCE.

Evidence in an action on an insurance policy *held* insufficient to show that the false answer in the application to the question as to whether insured had ever used malt or spirituous liquors was not the answer given by him to the medical examiner, and that he answered the question truly.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Annie M. Forwood against the Prudential Insurance Company of America.

From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

William L. Marbury and William L. Rawls, for appellant. German H. H. Emory and Morris A. Soper, for appellee.

BOYD, C. J. On the 16th day of December, 1909, the appellee issued an insurance policy on the life of William T. Forwood, the husband of the appellant, which was originally payable to the executors, administrators, or assigns of the insured, but the appellant was subsequently made the beneficiary. The insured died on the 21st of August, 1910, and, the appellee having declined to pay the policy, suit was brought thereon. In addition to the two general issue pleas, the appellee filed three special pleas, in the first of which it is alleged that the insured made application on or about the 2d of December, 1909, for the insurance, "and on or about the 4th day of December, 1909, did falsely and fraudulently represent and warrant to the defendant in continuation of said application, and as part thereof, which application constitutes a part of said policy of insurance, that he did not use malt liquors, wines and spirits." In the next plea (fourth) it is alleged that he falsely and fraudulently represented that he had never used malt and spirituous liquors to excess, and in the last (fifth) that he represented that he was engaged, and had been for a long time prior thereto, as a salesman of pianos and sewing machines, and that he was not then engaged, had never been engaged, and had no intention of engaging, in the manufacture, sale, and handling of malt and spirituous liquors. The three special pleas seem to be in due form, making the necessary allegations that the representations and warranties were false, etc., and issue was joined on them. The only exceptions taken were to the refusal to grant the plaintiff's first, second, and third prayers, and to granting an instruction drawn by the court. That instruction was: "The court instructs the jury that uncontradicted evidence in this case shows that the statements made at the time of signing the application for insurance by the insured, whether as contained in the application or as testified to by the wife of the insured as then made by him, were untrue, and, that these statements being material to the risk, their verdict must be for the defendant." A verdict was rendered for the defendant in pursuance of that instruction, and from the judgment entered thereon this appeal was taken. The defense made by the first two special pleas (numbered third and fourth) will be considered together. In the application for insurance, under the head of "Declarations Made to the Medical Examiner," there are the following

statements: "3A. State the quantity you use each day of malt liquors. None. Wines. None. Spirits. None. C. Have you ever used malt or spirituous liquors to excess? (if yes, give full particulars.) No." The evidence shows beyond all controversy, and it may be said to be without contradiction, that the statements made under 3A and the answer to C, as written on the application, were false. Fifteen or 16 witnesses testified to the habits of the insured; and, while some of them seemed to have had some difficulty in determining when a man could be said to be "drunk," all of them had seen him more or less under the influence of liquor, and some of them had frequently seen him in that condition. At times he became very noisy and unruly, and on one occasion, when he was arrested for indecent exposure of his person, he offered as an excuse before the recorder of Atlantic City that he was under the influence of liquor when it occurred. He was living at Atlantic City when he applied for this insurance and for several years before, but left about the time the policy was issued, and most of the witnesses who testified to his habits knew him there. Indeed, the appellant said that he drank a glass of beer or whisky whenever he felt like it. As the insured admittedly signed the application, it would be useless to discuss this branch of the case, were it not for the fact that the appellant contends that the insured did not answer the questions as the answers are stated in the application, but that they were written there by the medical examiner, and are simply conclusions of the examiner and his construction of what the insured said. In other words, it was, in effect, conceded that those answers, as they were written in the application, were untrue, but it is contended that they were not the answers given by the insured.

[1, 2] At least, since the case of *Mutual Life Insurance Co. v. Mullan*, 107 Md. 457, 69 Atl. 385, it cannot be doubted that such misstatements as are alleged to be in the application were concerning matters material to the risk, and the insured necessarily knew them to be false, if made as stated in the application. Mullan in his application stated that his habit as to the use of intoxicants was one glass of beer a day on an average, and that such had been his habit in the past. The testimony showed that he drank to excess, was quite frequently drunk, and had been treated for acute alcoholism. It was said in the opinion delivered by Judge Worthington: "The fact that Mullan drank intoxicating liquors very much in excess of 'one glass of beer a day on an average' was also material to the risk as a matter of law and the court below by granting the defendant's sixth prayer properly so instructed the jury." Again, it was there stated: "As we have already said, the fact that the applicant used intoxicants very much in excess of

one glass of beer a day on an average was palpably material to the risk." The burden was on the defendant (appellee) of proving the falsity of the statements and answers made in the application, and also, if untrue, that they related to some matter material to the risk. *Royal Arcanum v. Brashears*, 89 Md. 633, 43 Atl. 866; *Mullan's Case*, supra. But that burden has been clearly and fully met as to the statements and answers in the application, and they were material to the risk, and can be so determined by the court as a matter of law. *Bankers' Life Ins. Co. v. Miller*, 100 Md. 1, 59 Atl. 116; *Mullan's Case*, supra. See, also, other cases cited in *Mutual Life Ins. Co. v. Robinson*, decided by this court April 5, 1911, found in 115 Md. 408, 80 Atl. 1085.

[3] Inasmuch, then, as the appellee has, with evidence which is uncontradicted, met the burden originally on it, and inasmuch as the insured admittedly signed the application, which declared "that all the statements and answers to above questions are complete and true, and I agree that they shall form a part of the contract of insurance applied for," clearly the burden of showing that they were not the answers and statements of the insured, or that he qualified those statements and answers, but the agent of the company without his knowledge did not insert the qualifications, is shifted, and rests upon the appellant.

In *Globe Reserve Mut. Life Ins. Co. v. Duffy*, 76 Md. 293, 25 Atl. 227, it appeared that the medical examiner wrote down the answers to the various questions upon the printed application, and amongst others it was stated that the insured had no pulmonary and no kidney trouble. The evidence on the part of the insurer tended to prove that he had, and for some years prior to that had had, both of those troubles, from which he died in less than two months after the date of the policy. Judge McSherry said that, if the medical examiner was the agent of the company, it required no argument to show that it was not within the scope of his authority to mislead and deliberately impose upon his principal, and he then went on to say: "Notwithstanding this is so, there are many cases in which, to prevent fraud and gross injustice, an insurance company is estopped, on grounds of the highest public policy, to object that the statements made by its agents beyond the scope of their authority are false. But there must be no complicity on the part of the assured; because, if false answers be written in the application by the agent with the knowledge of the assured, the latter becomes an accomplice, and both perpetrate a fraud upon the company. In such a case it is obvious that a recovery could not be permitted upon a policy thus procured. And so, where false answers have been written by the agent without the knowl-

edge of the assured, but the latter has the means at hand to discover the falsehood and negligently omits to use them, he will be regarded as an instrument in the perpetration of the fraud, and no recovery could be had upon the policy." He cited *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, and several other cases, and then continued: "If the assured be neither an accomplice nor an instrument, and be imposed upon without fault on his own part by the agent of the company, his beneficiary will be entitled to recover, notwithstanding the statements are inaccurate or untrue. *Keystone Mut. Ben. Association v. Jones*, 72 Md. 363 [20 Atl. 195]."

In *Fletcher's Case* the Supreme Court said it was the duty of the insured to read the application he signed, and, after discussing that, added: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot, after his death, be avoided."

[4] It is true that the provision prohibiting an agent from changing or modifying the terms of a policy may not apply to conditions which relate to the inception of the contract, as illustrated in *Dulany v. Fidelity & Gas Co.*, 106 Md. 34, 66 Atl. 614, N. J. Mut. Life Ins. Co. v. Baker, 94 U. S. 610, 24 L. Ed. 268, and *Insurance Co. v. Mahone*, 88 U. S. 152, 22 L. Ed. 593, and it is said in *Dulany's Case* that: "If the actual facts were explained by the assured to the agent of the company through whom the policy was delivered to him and the premium collected, and that agent undertook to determine whether the facts were material to the risk, and wrote or instructed the appellant to write the answer appearing on the application, the company would be estopped to set up those facts to defeat an action to recover on the policy." It may well be, and undoubtedly is in many cases, that insurance companies are estopped from taking advantage of the acts of their own agents, who, either designedly or by placing a wrong interpretation on the meaning of terms used in a policy, misstate or conceal some of the facts which applicants for insurance have laid before them. It is unfortunately true that agents, in order to effect insurance,

sometimes write in the applications, or in some way report to their principals, statements which either are not justified by what the applicants say, or do not disclose the whole truth, as related by such applicants. Sometimes people may honestly differ as to whether a certain fact exists, or as to the necessity for a fuller disclosure, as may be illustrated by the question in the Mahone Case, *supra*, which was: "Is the party temperate and regular in his habits?" Such a question might be answered differently according to the way different persons regarded the subject.

[5] But in this case when the applicant was called upon to "state the quantity you use each day of malt liquors, wines, spirits," and answered to each, "None," it is clear he knew that was not true, whether we accept the testimony of the appellee's witnesses or that of the appellant. It is not pretended that such was the case. If, then, we apply the doctrine announced in Fletcher's Case, which was cited with approval in Duffy's Case, there can be no recovery, for the reasons stated by Judge McSherry in Duffy's Case which we have quoted above. As in Fletcher's Case, the copy of the application of Forwood was annexed to the policy, and he not only declared that "all the statements and answers to the above questions are complete and true," as made in the declaration to the medical examiner, but at the end of the statements which he gave to the agent he referred to those made to the company's medical examiner, and agreed that they should "become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained," etc.

[6] But, if there be any doubt about the law as applicable to the answers to the above (3A), can there be any as to the other (C): "Have you ever used malt or spirituous liquors to excess"? To that the reply, as stated in the application, was "No." How was that met by the appellant? The only witness who attempted in any way to contradict, modify, or explain the answers made by Mr. Forwood, as shown on the application, was the appellant, unless that can be said of William H. Johnson, who was the agent that obtained the insurance. His testimony in the record is as follows: "Q. Did Mr. Forwood on that occasion state that he took a glass of liquor or beer whenever he felt like doing so? A. He answered the question, 'None.' Then he put in afterwards that he did use a little in time of colds or anything like that. That was the only time he ever indulged. Q. What do you mean by time of cold? (Objected to. Objection sustained.) The Court: Ask him to state whether he explained what he meant as to whether he had a cold or the weather was cold. Witness: Just had a slight cold he said." A

very striking peculiarity about the testimony of the appellant is that, so far as the record discloses, she was not asked and did not say that the insured's answer to "C" was not "No." All of her testimony in chief on the subject of her husband's drinking was: "That the doctor asked the question and wrote the answer down. That witness heard the question asked Mr. Forwood, which is No. 3A; the question being, 'State the quantity you use each day of malt liquors, wines, and spirits.' That in answer to that question Mr. Forwood told the doctor the amount he took, he took a glass of beer or a glass of whisky occasionally whenever he felt like it, but he did not make a habit of getting drunk. That he said that he took a glass of beer or a glass of whisky whenever he felt like it, but he did not make a habit of getting drunk. That is what Mr. Forwood said. When that answer was given by Mr. Forwood, the doctor said to him, 'You don't make any habit of getting drunk?' Mr. Forwood said, 'Yes, sir.' Q. Was that answer true? A. I guess it was. Q. That answer was given to all the questions, malt liquor, wines, and spirits, was it not? A. Yes, sir." She was then asked about question marked "D," as to being in the liquor business, but no specific question appears to have been asked her about "C." Her cross-examination was in effect the same, and she was not then asked about the answer to "C." The two questions (3A and C) are by no means the same, and are intended to get information as to both matters inquired about. It might be true that an applicant did not use literally each day any malt liquors, wines, or spirits, and it might be that he had not used either for months or years, while it might be equally true that he had at one time used them to such excess as materially injured his health. Question C was, "Have you ever used," etc.? But, if we assume that she intended her testimony to apply to both 3A and 3C, it does not show that he did not answer C in the negative as stated in the application. He might have answered 3A as she said he did, and yet have answered C as the application shows. If she meant to say that he answered C by saying "He took a glass of beer or a glass of whisky occasionally when he felt like it, but he did not make a habit of getting drunk," and if that had been in the application, it was not true according to the testimony of many witnesses, and she does not say it was true. The nearest she came to saying so was when, in answer to the question, "Was that answer true?" she replied, "I guess it was." Surely when we remember the burden was then on her to show that the application did not properly state his answer, her statement, "I guess it was," would not be sufficient to overcome the overwhelming testimony of numerous witnesses, or be sufficient to justify the court in submitting that to the

jury. Many witnesses showed that he was in the habit of getting drunk.

If a beneficiary is to be permitted to prove that the application did not truly state what the insured said, notwithstanding the fact that he declared that such written statements were true, and had in his possession, attached to his policy, a copy of the application for some months which showed what he had been reported to the company as saying, it must at least be done in a positive and certain way, and not by the use of ambiguous expressions. It must be remembered that we are dealing with a subject within the knowledge of the applicant, and not necessarily, or even presumably, within the knowledge of the insurer. As reflecting upon the importance of such questions in the opinion of those in charge of this company, we will quote from the testimony of the medical director of the appellee. He testified: "That the company will not insure the lives of people who frequently become intoxicated, because it is a well-known fact that the rates for life insurance will not cover the additional mortality that it is known that this or any other company would have to provide for if the person insured is intemperate. By additional mortality witness means mortality above the rates of the amount provided for by the rates for insurance. That persons who are intemperate and frequently get drunk do not live as long as other persons. That the same is true with regard to the sale and handling of liquors." He also said, in answer to a question, that his company would not insure a man "if I knew it was habitual with him to become intoxicated once in every two months," and, again: "That witness' company does not insure persons who frequently become intoxicated, if it knows at the time such application is made such person becomes intoxicated. That witness considers the action and habits of a person very material to the risk assumed under the policy by the Prudential Company." Dr. Souder, the medical examiner, testified that he got the information which enabled him to write the answers from Mr. Forwood, that he asked Forwood the questions, and he made those answers. It is true that on cross-examination he said he could not give the details of the conversation that took place, could not give his exact words, as he did not remember that far back, but in answer to the question, "Tell us what he told you?" he said, "That is indicated by the answers, that he did not use those liquors; that he used none." On redirect examination he said: "That, if witness had seen anything there to indicate Forwood was a drinking man, he would have reported it, and he would not have recommended him as a first-class risk. If any one had told him anything different than what he had reported to the company witness would have investigated.

That witness is able to say that no person present, Forwood or any one else, made any statement in his hearing to indicate that Forwood was a drinking man."

So, without further reference to the testimony, it is clear that the appellant did not show that Mr. Forwood had made any statements at the time the answers were written in the application, which would relieve her of the barrier to recovery that the answer to question C furnishes, in view of the uncontradicted evidence that his answer to it was false. We will, therefore, affirm the judgment for the reasons we have given, without discussing the other ground relied on by the appellee, or the plaintiff's prayers, the rejection of which necessarily followed the instruction given by the court.

Judgment affirmed, the appellant to pay the costs.

HERR v. BOARD OF EDUCATION OF NEWARK.

(Court of Errors and Appeals of New Jersey.
April 26, 1912.)

(Syllabus by the Court.)

1. EMINENT DOMAIN (§ 152*)—PROCEEDINGS TO ASSESS COMPENSATION—ISSUES.

In condemnation proceedings, the proper issue for trial is the value of the land as a whole, regardless of any estates therein or of any liens thereon, or any easements or servitudes to which it may be subject.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 403-406; Dec. Dig. § 152.*]

2. EMINENT DOMAIN (§ 152*)—RIGHT TO COMPENSATION — OWNER OF PROPERTY NOT TAKEN.

The owner of a tract not taken by condemnation proceedings cannot be allowed for damages caused by the condemnation of land of another owner that is restricted by covenants for the benefit of the tract not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 403-406; Dec. Dig. § 152.*]

3. EMINENT DOMAIN (§ 238*)—PROCEEDINGS TO ASSESS COMPENSATION—APPEAL.

Under the act of 1900 (C. S. § 2182) regulating condemnation proceedings, the owner of any property right in the land sought to be condemned may appeal from the award of the commissioners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619; Dec. Dig. § 238.*]

4. EMINENT DOMAIN (§ 238*)—PROCEEDINGS TO ASSESS COMPENSATION—APPEAL.

Where the petition in condemnation proceedings makes parties the owners of land not taken who claim a right therein by reason of restrictive covenants in their favor, those owners may appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619; Dec. Dig. § 238.*]

Error to Circuit Court, Essex County.

Action by Charles F. Herr against the Board of Education of Newark. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Charles M. Myers, of Newark, for plaintiff in error. Riker & Riker, of Newark, for defendant in error.

SWAYZE, J. [1] The board of education of Newark sought to condemn lands formerly owned by Paul Buchanan, and devised by him to his wife for life, with remainder to his daughter, subject to a power of sale in his executors. It made parties to the proceedings the defendants in error, who were owners of land in the vicinity of the tract sought to be condemned, and it alleged that they might have a claim against the property by reason of restrictive covenants. The commissioners made an award to the executors of Buchanan, and awarded nothing to the defendants in error, who thereupon took an appeal. Separate issues were framed, and separate judgments entered, in favor of each. The principal argument was directed to the question whether the owners of land not a part of the tract actually taken, whose lands are benefited by restrictive covenants, are entitled to compensation when the land is condemned for a purpose, which, when effectuated, will amount to a violation of the restrictive covenants. An important preliminary question is the proper procedure under the statute of 1900. C. S. 2182. This is not left in doubt by our decisions. The question was thoroughly considered by this court in *Bright v. Platt*, 32 N. J. Eq. 362. In that case a railroad company, under a charter containing provisions for condemnation similar to those contained in the act of 1900, condemned land that was subject to a mortgage, but failed to make the mortgagee a party. An award was made to the mortgagors. Subsequently the amount of the award was paid into the Court of Chancery, and the mortgagors sought to obtain it for themselves upon the theory that the award having been made to them was for their interest only, and that the mortgagee had no interest therein. We held that the fund did not represent merely the estate of the mortgagors, but the whole value of the land; and we said that an interpretation of the act "which devolved upon these commissioners the duty of estimating the value of each particular interest in the land to be taken would not only do violence to the language of the provisions, but would also impose upon these appraisers obligations which, with their limited means of investigation, their want of knowledge of nice legal and equitable distinctions and their inability to settle authoritatively the rights of the parties, they could not conscientiously assume to discharge. Their simple duty is to ascertain what sum of money is an equivalent for the rights which the railroad company seeks to acquire, and the injuries it is to inflict by the construction and operation of its road." This decision has been consistently followed. In *Crane v. Elizabeth*, 36 N. J. Eq. 339, we held that the charter of Elizabeth which re-

quired compensation to be made to the owner or owners of the land did not require compensation to be made to mortgagees specifically. We used this language: "The action of the city authorities has thus the distinctive qualities of a proceeding in rem, a taking, not of the rights of designated persons in the thing needed, but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisal of the commissioners, the price of the thing is fixed, that price stands instead of the thing appropriated, and represents all interests acquired. The Legislature has not imposed upon the city officials the duty of searching out all these interests and assigning to each its just equivalent. It has contented itself with the simple direction that the fund shall be paid to him who is presumably entitled to it, the general owner of the land. Where no other claimant intervenes, that course will usually meet the ends of justice. But if, in any special case, this owner ought not, in equity, to receive the fund, the Court of Chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection." These cases establish the practice, and, where a railroad company had paid the award into court, it was held that it was entitled to have the lien of the municipality for taxes discharged out of the fund, although the municipality had not been made a party to the condemnation proceedings. In *re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549. In *Zimmerman v. Hudson & Manhattan R. R. Co.*, 76 N. J. Law, 251, 71 Atl. 127, a lessee sought to review the action of commissioners proceeding under the Act of 1900, upon the ground that they erred in reporting the value of the property taken and the damages sustained by the taking in a lump sum, instead of making a separate award of the moneys to be paid to the applicant for his leasehold interest, and of the amount to be paid to Hill, the owner of the fee. But the Supreme Court held that the commissioners had followed the rule laid down in *Bright v. Platt*, and refused to review their action. In *Pennsylvania R. R. Co. v. National Docks, etc., Co.*, 57 N. J. Law, 86, 30 Atl. 183, the same rule was followed. In *Daab v. Hudson County Park Commission*, 77 N. J. Law, 36, 71 Atl. 51, the Supreme Court held that section 7 of the Act of 1900 did not authorize a separate action at law by a lessee for the value of his estate in the lands condemned; that an action to recover the amount of the award must be one suit only for the whole amount.

[2] It cannot be said in this case that the proceeding was, in effect, a proceeding against the defendants in error to condemn their interests in the land. The petition was not framed in that aspect, but distinctly set forth that the defendants in er-

ror had a claim against the property sought to be acquired by reason of being owners of nearby restricted properties, or by reason of holding mortgages upon said properties. The proper issue, therefore, was the value of the Buchanan land as a whole, regardless of any estates therein or of any liens thereon, or any easements or servitudes to which it might be subjected. Whether or not the restrictive covenants operated to create equitable servitudes in the Buchanan land is not now in question. Separate issues were not justified to ascertain the separate damages of the owners of the nearby properties. "It is an established rule of law in proceedings for condemnation of land that the just compensation which the landowner is entitled to receive for his lands and damages thereto must be limited to the tract, a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance." *Currie v. Waverly, etc., R. R. Co.*, 52 N. J. Law, 391, 392, 20 Atl. 57, 19 Am. St. Rep. 442. Although this language was not necessary to the decision of that case, it was subsequently approved by this court as a correct statement of the law. *Bergen Neck R. R. Co. v. Point Breeze Ferry & Improvement Co.*, 57 N. J. Law, 163, 191, 30 Atl. 584. It has not been shaken by the decision in *Re Lehigh Valley R. R. Co.*, 78 N. J. Law, 699, 76 Atl. 1067. We there held that testimony which had been rejected by the trial court upon the ground that it related to damages to a separate tract was admissible, not to show the diminution of value of lands not taken, but to show that the land taken had a greater value because an advantageous use could be made of it in connection with the other parcels. That rule cannot be applied to a case where the tracts belong to different owners. The trial judge in the present case allowed testimony that the use of the Buchanan tract for a schoolhouse would affect the value of the property of the defendants in error. This amounted to allowing the owner of a tract not taken to recover damages for the injury to that tract. It involved a very different question from the value of his property right, if such he had, by way of servitude, in the tract actually taken. The judgment must therefore be reversed.

[3.4] Whether the reversal should result in a new trial upon a proper issue, or in a dismissal of the appeal, depends upon the right of the appellant to review the award. Section 9 of the act permits an appeal by the petitioner or owner of any of the land or other property. We think the language is broad enough to warrant an appeal by any one who has been made a party as an owner of a property right in the land. Section 10 of the act recognizes that all parties

who have appeared before the commissioners are entitled to notice of the appeal, and it logically follows that they may participate therein; otherwise the notice would serve no useful purpose. These provisions were obviously designed to give all parties interested a chance to review the action of the commissioners. If the word "owner" is limited to the owner of the bare legal estate, it may often happen that his interest is of the slightest possible value. The real party in interest may be a mortgagee holding a mortgage for the full value of the property, or a lessee having a term of years to come equal almost to a fee. In *Pennsylvania R. R. v. National Docks, etc., Co.*, 57 N. J. Law, 86, 30 Atl. 183, the lessee was held to be the owner with whom the company must attempt to agree before beginning proceedings to condemn, and the judgment was affirmed by this court. 57 N. J. Law, 457, 35 Atl. 1130. If, therefore, the defendants in error were owners of a property right in the Buchanan lot, they had a right to appeal and their appeal should not have been dismissed, but a proper issue should have been framed, provided, of course, that notices had been given to the parties in interest as the statute requires. It was not incumbent upon the trial court to determine upon a preliminary motion to dismiss the appeal whether or not the defendants in error were the owners of a property right in the Buchanan lot. It was enough that the record showed that they had been made parties as such. They were bound, of course, to make the owners of the fee parties to the appeal. The issue is the value of the land as a whole, and, inasmuch as the amount to be finally received by the owners of the fee depends not only on the total amount, but also upon the amount to be deducted for the value of any special interest of others in the land taken, the former are vitally interested. The case fails to show whether the owners of the fee were made parties to the appeal. The record must therefore be remitted for further proceedings in accordance with the views we have expressed.

DREISBACH v. ECKELKAMP.

(Court of Errors and Appeals of New Jersey.
March 28, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDING OF COURT.

Where a case is tried by the judge, a jury being waived, and his finding on the facts is excepted to, the exception will not be sustained if there was evidence supporting the finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. SALES (§ 263*)—WARRANTY OF TITLE.

The rule that, upon the sale of personal property, the vendor impliedly warrants the

title and that the subject of the sale is unincumbered, does not apply where the vendee is aware of the incumbrance, and it appears from the circumstances of the transaction that neither of the parties contemplated the conveyance of an unincumbered title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 746, 749-751, 763; Dec. Dig. § 263.*]

Error to Circuit Court, Hudson County.

Action by Oscar Dreisbach against Mary Eckelkamp. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles L. Carrick, of Jersey City, for plaintiff in error. John J. Fallon, of Hoboken, for defendant in error.

TREACY, J. This was a case tried by the court without a jury; the jury having been dismissed by consent. Plaintiff below brought suit for the purchase price of an orchestrion which he claimed to have sold to one Bewig, of whose estate defendant below is the executrix. The errors assigned are, first, that the lower court refused to nonsuit at the close of plaintiff's case upon the ground that there was no evidence from which a conclusion could be drawn as a matter of fact that there was a sale of the orchestrion, and also refused to enter judgment at the close of the case for the defendant on the same ground; and, second, that the court refused to nonsuit upon the ground that the orchestrion was sold under an implied warranty of title which was broken by the failure to remove a chattel mortgage, which was then an incumbrance upon it, and refused to enter judgment for defendant for the same reason.

[1] There was evidence in the case upon which a jury might have found that a sale of the orchestrion to Bewig had taken place. The court therefore was justified in so finding. The orchestrion was taken from Dreisbach's saloon by Bewig, and while Dreisbach himself was not permitted to testify as to the transaction, because of Bewig's death, another witness testified to a conversation between Dreisbach and Bewig, in which the former demanded the price of the orchestrion, stating that he was about to go to Germany, and the latter said he could only pay part of the price then, and suggested that the balance be allowed to stand until Dreisbach returned. This suggestion being refused, Bewig said that he would try to have the whole amount for Dreisbach before he sailed. There being evidence, therefore, upon which the court could find that there was a sale of the orchestrion to Bewig, a finding to that effect will not be disturbed.

[2] The rule that the existence of an outstanding incumbrance is a breach of the warranty of title which is implied upon a sale of chattels does not apply because the evidence shows that Bewig knew at the time of the sale of the orchestrion that there was a chattel mortgage upon it. Bewig was the collector for the brewery which held the

mortgage. In a conversation with Dreisbach which was testified to he told him that, if he (Bewig) could not pay him the entire purchase money, he would have an allowance made on the brewery mortgage, and this was agreed to by Dreisbach.

The court found that neither of the parties contemplated the passing of an unincumbered title to the orchestrion.

The judgment of the court below will be affirmed.

LEUTERITZ v. ICE CONSUMERS' & SUPPLY CO.

(Supreme Court of New Jersey. March 30, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A master is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of the work, and free from latent and concealed dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 203, 219*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

While the servant assumes all the ordinary and usual risks incident to the employment, and all risks which he knows, or may, in the exercise of reasonable care, know, to exist, he does not assume risks not incident thereto, nor the risks of latent or concealed dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543, 610-624; Dec. Dig. §§ 203, 219.*]

3. MASTER AND SERVANT (§ 205*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

In the absence of knowledge to the contrary, a servant has the right to assume that his master has exercised due care and diligence to fulfill the obligations imposed upon him by law, and he does not assume the risk consequent upon the failure of the master to discharge his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

4. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

Where a servant is put to work upon a slippery platform 14 feet above the ground, and the master has provided such platform with a guard rail made of "furring lath" 1½ inches wide and ¾ of an inch thick, which was fastened to its support by only one nail, and which guard rail broke and fell to the ground when the servant slipped and put his weight upon it, causing the servant to fall to the ground and injuring him, it was erroneous to nonsuit the servant, in an action to recover for such injuries, upon the ground that he assumed the risk, when it appeared from the proofs that the servant had made no examination of the condition of the railing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1006, 1068-1088; Dec. Dig. § 288.*]

Appeal from District Court of East Orange.

Action by Otto Leuteritz against the Ice Consumers' & Supply Company. Judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

for defendant, and plaintiff appeals. Reversed.

Argued November term, 1911, before
TRENCHARD, MINTURN, and KALISCH,
JJ.

Henry Carless, of Newark, for appellant.
McCarter & English, of Newark, for ap-
pellee.

TRENCHARD J. The judgment in this record was founded upon a nonsuit directed by the trial judge at the trial of the issue made by the pleadings. The action was in tort for damages for an injury suffered by the plaintiff. The agreed state of the case shows that, at the time the nonsuit was allowed, the evidence established the following facts: The defendant operated a factory for the manufacture of ice. The plaintiff worked in the defendant's factory as an "ice puller," and had been there so employed for four weeks prior to the accident. His duty was to operate the levers of the hydraulic press. In the performance of such duty, he was required to stand on a platform which was 14 feet above the ground, 3 feet wide, and 12 feet long. Standing there, he worked the levers, which released the cakes of ice, and he was required, as occasion demanded it, to go to the end of the platform and remove any particles of ice which interfered with the passage of the cakes of ice. At the back of the platform, as the plaintiff stood operating the levers, were two guard rails running the entire length of the platform. There was a post at each end and one in the middle. The posts were four feet high. The two guard rails were in four pieces each six feet long. Two of them were fastened on a line with each other at the top of the posts, and two in the same manner two feet from the floor of the platform. The lower guard rail was made of strips of wood known as "furring lath," 1½ inches wide and ¾ of an inch thick. These laths were nailed on the outside of the posts by one nail driven through the end of each strip into the posts. The plaintiff had not at any time before the accident made an examination of the condition of the railing. Just prior to the accident the plaintiff had been scraping the ice from the plates at the end of the platform. The platform was slippery on account of water and grease which dropped from the press. He was returning along the platform to the levers, when he slipped. In falling he caught hold of the lower railing to save himself. It broke and was torn loose, and fell with the plaintiff to the cement floor, 14 feet below, whereby the plaintiff was injured. The

learned trial judge seems to have granted the nonsuit upon the ground that the injury to the plaintiff was the result of a risk, which was inherent in his employment, and which the plaintiff assumed. This, we think, was erroneous.

[1] The rule of duty of the master applicable to the case admits of no doubt or dispute. He is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of the work, and free from latent and concealed dangers. *Electric Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427; *Comben v. Belleville Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473.

[2] While the servant assumes all the ordinary and usual risks incident to the employment, and all risks which he knows, or may in the exercise of reasonable care know to exist, he does not assume risks not incident thereto, nor the risks of latent or concealed dangers. *Conway v. Furst*, 57 N. J. Law, 645, 32 Atl. 380; *McDonald v. Standard Oil Co.*, 69 N. J. Law, 445, 55 Atl. 289.

[3] In the absence of knowledge to the contrary, a servant has a right to assume that his master has exercised due care and diligence to fulfill the obligations imposed upon him by law, and he does not assume the risk consequent upon the failure of the master to discharge his duty. *Christensen v. Lambert*, 67 N. J. Law, 341, 51 Atl. 702.

[4] In recognition of such duty in regard to the safety of the place of work, the defendant erected a guard rail to prevent the plaintiff falling from the slippery platform where he was required to work. The fact that the guard rail was of such frail material, and that it was fastened to the support with but one nail, taken in connection with the fact that it broke and fell to the floor when the plaintiff's weight was put upon it, would have justified the inference, if the jury had been permitted and had seen fit to draw it, that the defendant had not exercised due care in its construction. That such unsafe construction was not one of the ordinary perils which in the nature of things are incident to such service is so plain as not to require argument or illustration. It appeared that as a matter of fact the plaintiff had made no examination of the condition of the railing. Whether in the exercise of reasonable care he should have known of its unsafe construction was at most a jury question. It follows, therefore, that the nonsuit was erroneous.

The judgment of the court below will be reversed, and a venire de novo awarded.

BEALE v. McALISTER COAL CO.

(Supreme Court of New Jersey. April 10, 1912.)

**ANIMALS (§ 87*)—PERSONAL INJURIES—NEG-
LIGENCE.**

Defendant, owning a coalyard adjoining a house occupied by plaintiff, undertook to unhitch a gentle team in the yard. One horse, when unhitched, started to walk to the barn. The other horse, still attached to the wagon, started to the barn, and the wagon pole was driven through the partition fence, and through the wall of plaintiff's building and against her person, injuring her. The horse had never attempted to go to the barn before it was entirely released from the wagon during the five or six years it had been used by defendant. *Held*, that plaintiff's injuries were the result of the lawful act of defendant done without negligence, and defendant was not liable.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 223, 224; Dec. Dig. § 87.*]

Action by Minnie Beale against the McAlister Coal Company. There was a nonsuit, and plaintiff obtained a rule to show cause. Discharged.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

John J. Crandall, of Atlantic City, for the rule. Bourgeois & Coulomb, of Atlantic City, opposed.

GUMMERE, C. J. The present action was brought to recover compensation for injuries received by the plaintiff in an accident which occurred, according to the testimony submitted on her behalf, under the following circumstances: The defendant corporation is the owner of a coalyard which adjoins the house occupied by the plaintiff; the building being about two feet from the fence which separates the two properties. On the day upon which the accident happened, and about noontime one of the defendant's drivers returned to the yard with his wagon and team. He proceeded to unharness the horses, both of which were gentle, and, when the near horse had been entirely loosed from the wagon, the animal started to walk to the barn according to his usual custom. The off horse undertook to follow his mate, and, being still attached to the wagon by the inside trace, the effect of his forward movement was to steer the wagon in a sidewise direction toward the plaintiff's property, and to drive the wagon pole through the fence, and through the wall of the adjacent laundry shed at which the plaintiff was at work, and against her person, inflicting the injuries for which she seeks compensation. The defendant had owned the team for five or six years, and this was the first time any trouble of this sort had occurred with them. On these facts a nonsuit was directed, and we are now asked to set it aside on the ground that it was improvidently ordered.

We think the case made by the plaintiff exhibited no ground of liability on the part of the defendant to compensate her for the injuries she received. That the unharnessing of the team in the defendant's own yard was a lawful act goes without saying. That there was no reason to anticipate that the off horse would attempt to go to the barn before he was entirely released from the wagon, in view of his never having done so before during the whole preceding five or six years that he had been owned by the defendant, seems to us to be equally apparent. The facts, therefore, present a case in which a person has received injuries which are the result of the lawful act of another, done in a lawful manner, and without carelessness or negligence on his part. For injuries received under such conditions, the person whose act produces them is not legally responsible. *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Rep. 394; *Ulshowski v. Hill*, 61 N. J. Law, 375, 39 Atl. 904. The rule to show cause will be discharged.

**MAYOR, ETC., OF CITY OF MORRIS-
TOWN v. MORRIS & SOMERSET
CO. et al.**

(Court of Chancery of New Jersey. March 14, 1912.)

**1. EQUITY (§ 263*)—BILL—MULTIFARIOUS-
NESS—MOTION TO STRIKE.**

The rule against multifariousness is one largely of convenience, so that a bill will not be stricken for that reason unless it appears on the face thereof that the court would be embarrassed in making a decree which would do justice to all the parties on the facts.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 535-540; Dec. Dig. § 263.*]

**2. EQUITY (§ 263*)—BILL—MOTION TO
STRIKE—OBJECTIONS.**

Rule 209 requires that every demurrer, whether general or special, shall distinctly specify the ground or several grounds of demurrer, and rule 213 provides that a notice of motion to strike thereunder must state the particular ground or grounds of objection. *Held*, that a motion to strike a bill, because "it did not set out an equitable cause of action," was insufficient, where the defect was obscure or latent, or did not appear on the face of the bill.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 535-540; Dec. Dig. § 263.*]

Suit by the Mayor, etc., of City of Morristown against the Morris & Somerset Company and others. On motion to strike plaintiff's bill under rule 213. Denied.

Willard W. Cutler, of Morristown, for the motion. Charlton A. Reed, of Morristown, opposed.

HOWELL, V. C. The reasons given in the notice of the motion to strike this bill from the files can be reduced to (1) multifariousness; (2) want of equity. I do not think that either reason can prevail.

[1] The rule against multifariousness is one of convenience largely. In order that it may prevail, it ought to appear on the face of the bill that the court would be embarrassed in a making of a decree which should do justice to all parties on the facts set out in the bill. In this case I am of opinion that the corporations which are made parties are necessarily made parties, and that without them all the court probably would not be able to make a satisfactory decree. The latest exposition of the law on this subject is to be found in *See v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966, affirmed *Naumberg v. See*, 56 N. J. Eq. 453, 41 Atl. 1116, and *Shutts v. United Box Board & Paper Company*, 67 N. J. Eq. 225, 58 Atl. 1075.

[2] The other objection is to the want of equity in the bill. It is made in these general words "because the bill of complaint does not set out an equitable cause of action." In *Essex Paper Company v. Greacen*, 45 N. J. Eq. 504, 19 Atl. 466, Vice Chancellor Van Fleet held that a simple statement of want of equity in the usual language of a general demurrer would constitute a sufficient specification of that ground of demurrer in cases where the court finds on looking at the complainant's bill that his right to relief is doubtful or uncertain, but that, where the defect is obscure or latent to such an extent that the court on inspecting the complainant's bill could not readily discern it, there the objection would not be sufficiently stated. Rule 209 requires that every demurrer, whether general or special, shall distinctly specify the ground or the several grounds of demurrer, and rule 213, which provides for a substituted practice, requires that the notice under that rule must state the particular ground or grounds of objection. The present bill upon a cursory examination does not appear to me to be defective. A closer specification of the reasons might, however, disclose defects which are not on the surface.

For these reasons, the motion must be denied.

STATE v. NIESBBALSKI.

(Supreme Court of New Jersey. April 19, 1912.)

1. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a prosecution for a felonious assault, where accused was not apprehended until some four months after the offense, testimony that the detective who arrested accused did so on information received from codefendants, charged with the same offense, was improperly admitted, being hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

In a prosecution for a felonious assault, where accused was not found until four

months after the offense, and the only witness who identified him did not select him from a crowd, the admission of evidence that accused was arrested on information obtained from his codefendants was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

Error to Court of Quarter Sessions, Essex County.

Leonard Niesbbalski was convicted of felonious assault, while attempting to rob, and he brings error. Reversed.

Argued November Term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Harry Kalisch, of Newark, for plaintiff in error. Frederick A. Lehlbach, prosecutor of the pleas, of Newark, for the State.

GUMMERE, C. J. [1, 2] The plaintiff in error, the defendant below, and three other men were jointly indicted by the grand jury of Essex county for a felonious assault upon one Frederick Vetter, committed while attempting to rob the Thirteenth Ward Building & Loan Association of the city of Newark on the 10th day of December, 1909. By order of the court, there was a severance, and the defendant was tried alone.

On the evening of the day mentioned in the indictment, the building and loan association was holding a session in its room at the rear of a saloon occupied by one Krause, for the purpose of receiving dues, collecting loans, etc. About \$6,900 had been taken in, and the business of the meeting was about concluded, when suddenly 4 or 5 men rushed into the saloon with drawn revolvers shouting, "Hands up." Two of them went into the back room, and one of these went over to where the treasurer of the association was sitting at a table, and made a grab for the money which was in the table drawer. He only got a few dollars in his hand, and the treasurer then managed to get the rest of the fund into the association's safe, and locked it up there. During this proceeding, there were in the saloon some 10 or 12 men, among whom was Vetter; and, when it was learned that a "hold-up" was being attempted in the room of the association, an effort was made by them to arrest those of the gang who remained in the saloon. Four or five shots were fired, and Vetter was wounded in the head. All of the members of the gang succeeded in making their escape. On the 21st of the following April, more than four months later, the defendant was arrested by Detective Tuite of the Newark police force upon a complaint charging him with being one of the party engaged in the attempted robbery and the assault upon Vetter. He was taken to police headquarters, and Vetter, and some other of the witnesses to the occurrence, were brought down there together to see whether they could identify

him. He and one other man were placed before them, and Vetter picked out the defendant as being one of the men who took part in the holdup. Whether any other of the witnesses so identified him does not appear, except from the fact that they were none of them called by the state to testify at the trial. Vetter himself was called, and swore that the defendant, whom he pointed out in the courtroom, was one of the hold-up men. No other one of the persons who were present, either in the room of the building and loan association or in the saloon, at the time of the robbery and assault was called to identify the defendant as being one of the party. At the conclusion of Vetter's testimony, Detective Tuite was put upon the stand, and was permitted to testify, over objection, that the complaint upon which the defendant was arrested, and which charged him with being one of the persons engaged in the robbery and assault, was made by him, and upon information received by him from Victor Danowicz and Peter Nurzinski, two of the other defendants named in the indictment. The defense was an alibi; the defendant attempting to prove, both by his own testimony and that of other witnesses called by him, that he was in the city of New York at the time of the attempted hold-up. The trial resulted in the conviction of the defendant, and the validity of that conviction is now before us for review.

The principal reason for reversal argued before us, and the only one which requires consideration, challenges the competency of the testimony of Detective Tuite, which has been already recited. The purpose of its introduction seems to us not doubtful. It was uncertain, of course, how far the testimony of Vetter upon the matter of identification would commend itself to the jury, unless supported by other proof upon that point. The jury knew that he had been taken to police headquarters more than four months after the occurrence, for the purpose of making the identification, if he could, and, presumably, that he knew it was for that purpose he was taken there. They knew, further, that, instead of being called upon to pick out one man from a considerable number of others, only two men had been placed before him for the purpose of making his selection. They knew, also (or, at least, would have naturally inferred), that none of the other witnesses to the occurrence who had accompanied Vetter to police headquarters, and none of the others who were known to have been in the room of the building and loan association, or in the saloon, at the time of the holdup, were able to identify the defendant as one of the party engaged in it. It is manifest, we think, that it was because of the uncertainty whether, in view of all these facts and inferences, the minds of the jury

would be satisfied beyond a reasonable doubt that the defendant was one of the participants in the robbery and assault that the testimony of Officer Tuite was put in. Except for the purpose of strengthening Vetter's identification, it was absolutely immaterial. For that purpose, it was most valuable. By necessary inference, it was a declaration that both Danowicz and Nurzinski had told the witness that the defendant had been one of the party engaged in the holdup. No other conclusion can be drawn from the testimony of the witness that he made a complaint against the defendant, charging him with the offense laid against him in the indictment, upon information from the two codefendants. The effect of this testimony, therefore, was to lay before the jury statements of these two men, not made under the sanctity of an oath, and not subjected to the test of a cross-examination, implicating the defendant in the crime charged against the three of them. That such statements were not evidential against him is too plain for discussion. Their admission was harmful error, and for this reason the judgment under review must be reversed.

It will be so ordered.

PEER v. DIXON et al.

(Supreme Court of New Jersey. March 30, 1912.)

(Syllabus by the Court.)

1. OBSCENITY (§ 4*)—CONSTRUCTION OF ORDINANCE—"ELSEWHERE."

The words "or elsewhere," in an ordinance which provides, among other things, that "any person or persons who shall in any street, railroad depot, public place or elsewhere within the town of Boonton use obscene language," etc., construed to refer to places of the same character (that is, to places frequented by the public); and therefore a private yard abutting on a highway would not be included within its terms.

[Ed. Note.—For other cases, see *Obscenity*, Cent. Dig. § 4; Dec. Dig. § 4.*

For other definitions, see *Words and Phrases*, vol. 3, p. 2348.]

2. MUNICIPAL CORPORATIONS (§§ 639, 641*)—POLICE REGULATIONS—PROSECUTION.

The complaint and record of conviction are both defective in failing to set out that the language denounced by the ordinance was used in a public place, the omission of which in either invalidates the conviction.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 281-283, 1406-1409, 1411; Dec. Dig. §§ 639, 641.*]

Bird Alger Peer was convicted of violating an ordinance of the Town of Boonton, and brings certiorari. Proceedings under review set aside, with costs.

Argued November term, 1911, before TRENCHARD, MINTURN, and KALISCH, JJ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Willard W. Cutler, of Morristown, for prosecutor. Elmer W. Romine and Elmer King, both of Morristown, for defendants.

KALISCH, J. The prosecutrix in certiorari was convicted by a police justice of the town of Boonton upon a complaint charging her with a violation of section 1 of an ordinance of said town entitled "An ordinance to prevent vice and immorality and to preserve public peace and good order, and for other purposes." This section provides, among other things, "that any person or persons who shall in any street, railroad depot, public place or elsewhere, within the town of Boonton, * * * or make use of obscene language or profanity shall be subject to a fine."

The complaint, in substance, charges that the prosecutrix did violate section 1 of the said ordinance by making use of obscene language and profanity at the side of her front porch in her yard, on Old Boonton road, in the town of Boonton, by calling the complainant: (Here follows the obscene and profane language alleged to have been used by the prosecutrix). It will be perceived that this complaint does not charge that the obscene language or profanity was used in a public place. It fails to charge that the language denounced by the ordinance was used in any of the places specified by the ordinance.

[1] The obvious aim of the ordinance is to prevent the use of profane or obscene language on the public streets or in the public places of the town. A reasonable interpretation to be given to the word "elsewhere" in the ordinance, under the maxim, "Noscitur a sociis," would be that it included any other public place of like character as those specified in the ordinance, and which preceded it. *Livermore v. Board of Freeholders of Camden*, 31 N. J. Law, 512; *State v. Herring*, 70 N. J. Law, 34, 56 Atl. 670, 1 Ann. Cas. 51.

In *Anderson v. Camden*, 52 N. J. Law, 291, 19 Atl. 539, this court, in construing an ordinance similar in its import as the one sub judice, and where the words "or elsewhere" followed a designation of places where the prohibited conduct may occur, said: "It is true that the word 'elsewhere' follows and is coupled with the words 'streets and highways' in designating the place where the prohibited conduct may occur. But all these words must be construed together, and the word 'elsewhere,' following the words 'streets and highways,' must be regarded as signifying places ejusdem generis, namely, parks, squares, and places frequented by the public."

[2] It was necessary to the validity of the complaint that it should show upon its face that the place where the profane and obscene language was used was a public place. For it is the public character of the place

where the obscene or profane language is used which makes the use of such language an offense, within the meaning of the ordinance. The complaint fails in this regard. It is therefore fatally defective. The record of conviction is also fatally defective. The police justice found the prosecutrix guilty of using profane and obscene language in violation of section 1 of the ordinance of the town of Boonton. It does not set out the obscene or profane words for the use of which the prosecutrix was found guilty, nor the time or place when and where the same were used. The failure to do this is fatal to the validity of the conviction. *Handlin ads. State*, 16 N. J. Law, 96; *Keeler v. Milledge*, 24 N. J. Law, 142; *Buck v. Danzenbecker*, 37 N. J. Law, 359; *Hoeborg v. Newton*, 49 N. J. Law, 617, 9 Atl. 751; *Salter v. Bayonne*, 59 N. J. Law, 128, 36 Atl. 667; *Atlantic City v. Turner*, 67 N. J. Law, 520, 51 Atl. 691; *State v. Regan*, 67 N. J. Law, 106, 50 Atl. 591; *Orange v. McGonnell*, 71 N. J. Law, 418, 59 Atl. 97.

The proceedings under review must be set aside with costs.

FRITZ v. FRITZ.

(Court of Chancery of New Jersey. Feb. 29, 1912.)

GIFTS (§ 38*)—INTER VIVOS—UNDUE INFLUENCE.

Where a son, who had only shortly reached his majority, conveyed all of his property, which consisted of a tract of land, by way of gift to his father, who was a masterful man, the conveyance is invalid; it appearing that the son had no competent disinterested advice.

[Ed. Note.—For other cases, see *Gifts*, Cent. Dig. § 74; Dec. Dig. § 38.*]

Bill by Charles Fritz, Jr., against Marguerita Fritz. Decree for complainant.

Tennant & Haight, of Jersey City, for complainant. J. Emil Walscheld, of Union, for defendant.

GARRISON, V. C. The object of the bill in this suit is to have it decreed that a piece of property in the township of Union, Hudson county, N. J., belongs to the complainant.

The facts necessary to be considered in arriving at a decision are as follows:

Charles Fritz, Jr., was the son of Charles Fritz, Sr., and his wife, Agnes. The parents came to this country, leaving the boy with his grandparents at Darmstadt, Germany. He lived there with his father's people until 1897, at which time he was about 14 years of age. The father was engaged in the manufacture of trusses. The boy had broken his arm, and it had not mended properly. The father sent for the boy to come over here to receive expert surgical treatment, and be-

cause he had a place for him in his own business. Relatives and friends of the boy raised a sum of money, approximating \$400, and gave it to him, and he had this sum with him when he came to this country. His father had left his wife, the boy's mother, and was living with Marguerita Stock, whom he subsequently married, and who is the defendant in this suit.

When the boy reached this country, he had his arm examined by some surgeons selected by the father, and had an X-ray picture taken, and this is all that ever was done concerning the arm. The total expense could not have been more than \$50 or \$60, so that the father, out of the money which the boy brought to this country and gave him, had about \$400 left. The boy worked at various employments. In the early part of April, 1902, the land in question was purchased from a man named Limouze. Limouze testifies that the father told him that he feared trouble with his wife, since he had gone to live with this other woman, and that he suggested putting the title in the name of the boy; but that when Limouze, the real estate agent, learned that the boy was under age he suggested that it be taken in the name of the father as trustee for the boy. It is the fact that the title was made to Charles Fritz, Sr., as trustee for Charles Fritz, Jr. The money paid down was \$400, and the balance of the \$1,200 consideration money was represented by an \$800 mortgage, which was already on the property. There is testimony of impartial witnesses that the father at various times said that he had put the boy's money into this property, and said that the property was the boy's, and, when the boy was working upon the property, remarked that he was "working upon his own property." The father and the woman with whom he was living and the son (although the latter, perhaps, not continuously) lived upon the property in question down to the death of the father on the 24th of September, 1908; the boy working and giving his wages to his father.

On the 29th of October, 1907, Charles Fritz, Sr., as trustee for Charles Fritz, Jr., and Marguerita Fritz, the defendant, who had married him in the preceding February, made a deed to one Geitze, who acted as a conduit, and who made a deed to Charles Fritz, Sr., and Marguerita Fritz, his wife, and at the same time Charles Fritz, Jr., made a deed to Charles Fritz, Sr., and Marguerita Fritz, his wife. The effect of these transactions, so far as their legal significance was concerned, was to vest an estate by the entireties in Charles Fritz, Sr., and Marguerita, his wife. It appears from the testimony of Mr. Walschled that he was engaged by Charles Fritz, Sr., to draw the deeds in question, and that he did so, and that he explained to Charles Fritz, Jr., the contents of the deed from Charles Fritz, Jr., to

Charles Fritz, Sr., and wife. The complainant, at the time that this deed was made, was 24 years of age, and had no property excepting this.

His explanation of his signature to the deed is that he thought he was taking part in a transaction which resulted in money being raised on the property to pay assessments then due. I shall found no decree in his favor upon this contention. He signed the deed and acknowledged it, and the uncontradicted evidence convinces me that he had the same explained to him, and that he read it.

I find as a fact that the father was a masterful man, who dominated his son throughout the entire life of the father; that the son's money was the consideration money used in the purchase of the land in question; that the title which was taken in the name of Charles Fritz, Sr., as trustee for Charles Fritz, Jr., correctly represented the legal and equitable situation at the time that the property was purchased; that, either by the doctrine of resulting trusts, or by the acceptance of this deed by Charles Fritz, Sr., made to him as trustee, or by the effect of his signing the subsequent deed, which recites that he was trustee, the case is free from any violation of the statute of frauds, and the trust is clearly proven, manifested, and legally enforceable.

At the time that the deeds were made which vested the legal title in Charles Fritz, Sr., and Marguerita, his wife, the situation was that Charles Fritz, Sr., was the trustee for Charles Fritz, Jr., of the land in question; that the money which had gone into that property was the son's; that the father dominated the son; that the son had no independent advice concerning the making of the deed by him to his father, or, if given effect, transferred as a gift to his father all that he possessed in the way of property.

Under these circumstances and the findings of fact in this case, the doctrine of *Slack v. Rees*, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393 (Ct. of Er. 1903), clearly applies. In that case, it was laid down that, where a relation of trust and confidence exists between a donor and a donee, a deed of gift of all of the donor's property, which contains no power of revocation, will be set aside, if it appears that the donor did not have the benefit of competent and independent advice as to the effect of the deed. The purpose of the rule, as stated in that case, is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee, as it is to afford him protection against the consequences of voluntary action on his part, induced by the existence of the relationship between them, the effect of which upon his own interests he may only partially understand or appreciate. And in the later case of *Post v. Hagen*, 71 N. J. Eq. 234, 243, 65

Atl. 1026, 1027, 124 Am. St. Rep. 997 (Ct. of Er. 1906), which reaffirms and applies the same doctrine, it is pointed out that "proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was, furthermore, so disassociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction."

The principle applied in *Slack v. Rees*, supra, is, as therein shown, of ancient origin, and has since been applied and enforced in the following cases in the Court of Errors and in the Court of Chancery: *Albert v. Haebler*, 68 N. J. Eq. 664, 61 Atl. 380, 111 Am. St. Rep. 652 (Ct. of Er. 1905); *Post v. Hagen*, 71 N. J. Eq. 234, 65 Atl. 1026, 124 Am. St. Rep. 997 (Ct. of Er. 1906); *Walsh v. Harkey*, 69 Atl. 726 (Emery, V. C., 1908); *Monaghan v. Collins*, 71 Atl. 617 (Walker, V. C., 1908).

To the suggestion that the doctrine in question has been changed, modified, or weakened by the same court, as shown in the case of *Fretz v. Roth*, 70 N. J. Eq. 764, 64 Atl. 152 (Ct. of Er. 1905), I can only reply that the later cases, above cited, in the Court of Errors and in the Court of Chancery do not consider that such is the fact. It is true that in *Fretz v. Roth* the same elements were supposed to be present; that, the Court of Chancery in that case found that a wife, who was the dominant partner in the matrimonial relation, between whom and her husband, of course, a relation of confidence existed, had secured a lawyer to cause a conveyance to be made from her husband to her of all of his property, and that he did not have the benefit of independent advice, and did not understand the effect of what he was doing, and that there was no power of revocation, and that the deed should therefore be set aside. This decision of the Court of Chancery was reversed in the Court of Appeals; but I think it must be assumed that the reversal was based upon a different finding of fact, rather than upon an overruling of previous decisions announcing well-settled principles. Every factor which was found to be necessary to apply the principle in question is present in the case at bar.

The deed by the complainant will be avoided; the deed by the trustee to the defendant will be found to vest in her such title as the trustee had; and, since the trust is a dry one, and the cestui que trust is now of age, I see no reason why the legal title should not be vested in him at once.

The form of the decree, however, will be settled upon notice.

CONLON v. HORNSTRA et al.

(Supreme Court of New Jersey. April 1, 1912.)

(Syllabus by the Court.)

1. BONDS (§ 132*)—ACTIONS—PROOF OF SIGNATURE.

Proof by the subscribing witness of his signature to a bond is prima facie evidence of the due execution of the instrument.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. §§ 233-237; Dec. Dig. § 132.*]

2. PAYMENT (§ 65*)—EVIDENCE—PRESUMPTION AND BURDEN OF PROOF.

A bond for the payment of money in the hands of the obligee raises the presumption that the indebtedness evidenced thereby has not been paid; and a plaintiff suing thereon is not obliged to prove affirmatively that the money due thereon has not been paid.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 162-175, 196, 197, 199-201; Dec. Dig. § 65.*]

Appeal from District Court of Passaic.

Action by Thomas A. Conlon against Nick Hornstra and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued November term, 1911, before TRENCHARD, MINTURN, and KALISCH, JJ.

Andrew Foulds, Jr., of Passaic, for appellants. Scott & Conant, of Passaic, for appellee.

KALISCH, J. The plaintiff obtained a judgment against the defendants for the sum of \$355.90, in the district court of the city of Passaic, the court sitting without a jury. From this judgment the defendants appeal to this court and assign various reasons upon which they rely for a reversal thereof.

The state of the case agreed upon by the counsel of the respective parties recites, among other matters, the following: "The facts of the case are that the plaintiff, being the holder and owner of a promissory note (D-1) bearing date September 25, 1909, commenced suit thereon. On the trial day the defendants requested six months' time, and offered the bond (P-1) for the amount of principal and interest plus the costs of suit, which bond was accepted by and delivered to plaintiff. Default having been made in the payment of the bond, this suit was commenced thereon." The appellants' attack upon the validity of the judgment is wholly confined to alleged errors committed by the trial judge in the procedure before him which led to the judgment.

The appellants' first contention is that the court erred in admitting in evidence the bond (P-1) without sufficient proof of its execution and its delivery to the plaintiff. The plaintiff produced the bond, and the subscribing witness to the bond was called, and

he testified to the single fact that he was the subscribing witness. The plaintiff then offered the bond in evidence and rested. There was no objection made by the defendants to the receiving of the bond in evidence, and therefore it will be considered as having been properly received.

After the plaintiff rested the defendants made a motion for a nonsuit on the grounds that the execution and delivery of the bond was not proved, that there was no breach thereof shown, and that nothing was shown to be due. This raised the question as to the extent of the inherent probative force of the bond in evidence. If the defendants had intended to raise the question as to the sufficiency of the proof establishing the execution and delivery of the bond, the time to have done so was when the bond was offered in evidence, and, having failed to do so, it will be considered that the defendants waived all formal proof of its execution and delivery to the plaintiff.

[1] But it seems to us that the proof was sufficient, and that the bond was properly admitted in evidence. "Proof of the signature of the subscribing witness alone is prima facie evidence of the due execution of the instrument." *Servis v. Nelson*, 14 N. J. Eq. 94. By the strict rule of the common law it was a prerequisite to the admission of the instrument in evidence to produce the subscribing witness and if he were dead to prove his handwriting, unless the writing was an ancient one—30 years old. 1 Greenleaf on Evidence, 570, states a few other exceptions to the general rule which need not be considered here. There is no merit in the appellants' contention that there was no proof of the delivery of the bond to the plaintiff or of any breach thereof or of anything due thereon.

[2] The fact that the bond was and remained in the possession of the obligee, the plaintiff, and the further fact that the day of payment of the bond was anterior to the commencement of the action thereon by him, are sufficient to give rise to the presumptions that the bond was delivered to the plaintiff, that there was a breach of the condition thereof, in that the money due thereon had not been paid. "Where a bill, note, bond, or other written evidence of indebtedness is in the hands of the payee or obligee, the presumption arises that the indebtedness evidenced thereby has not been paid." 22 Am. & Eng. Enc. of L. (2d Ed.) 588, and cases cited; *Feln v. Meier*, 71 N. J. Law, 12, 58 Atl. 114. The motion to nonsuit was therefore properly denied.

The third and fourth grounds relied on by the appellants for a reversal of the judgment and argued in the brief of counsel are not raised by the state of the case, and therefore will not be considered.

Judgment will be affirmed.

LUBY v. MORRIS COUNTY TRACTION CO.
(Supreme Court of New Jersey. March 30, 1912.)

(Syllabus by the Court.)

1. STREET RAILROADS (§ 85*)—OPERATION—RIGHTS IN USE OF STREETS.

Street railway companies have no superior or predominate right to the use of the highways in which their cars run over the rights of other persons on foot or with vehicles, except that, because the cars are confined to the tracks, others using the highway must give way to them when occasion requires.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 193-195; Dec. Dig. § 85.*]

2. STREET RAILROADS (§ 85*)—OPERATION—RIGHTS IN USE OF STREETS.

A correlative duty devolves upon others using the highway to permit the passage of street railway cars when they observe or are informed that such passage is required.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 193-195; Dec. Dig. § 85.*]

3. STREET RAILROADS (§ 93*)—OPERATION—WARNING OF APPROACH OF CARS.

Such timely warning of the approach of a trolley car must be given as will enable others using that portion of the highway covered by its tracks to avoid danger from it.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

4. STREET RAILROADS (§ 103*)—OPERATION—CONTRIBUTORY NEGLIGENCE.

While it is the duty of others not to obstruct the track, yet a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of due care upon the part of the company.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.*]

5. STREET RAILROADS (§ 103*)—OPERATION—CONTRIBUTORY NEGLIGENCE.

An instruction to the effect that if the plaintiff drove along and upon the street railway track in a noisy wagon, so that he could not hear the gong of defendant's car approaching from behind, the plaintiff cannot recover, is erroneous, because the driving of a noisy wagon along and upon a street railway track does not in itself necessarily constitute such contributory negligence as will relieve the defendant from responsibility for an accident which might have been avoided by the exercise of due care upon the part of the defendant.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.*]

Appeal from District Court, Morris County, First District.

Action by Patrick Luby against the Morris County Traction Company. From a judgment for defendant, plaintiff appeals. Reversed, and venire de novo awarded.

Argued November term, 1911, before TRENCHARD, MINTURN, and KALISCH, JJ.

William W. Cutler, of Morristown, for appellant. Vreeland, King, Wilson & Lindabury, of Newark, for appellee.

TRENCHARD, J This suit was brought by the owner of a wagon and a team of horses to recover damages sustained by their being struck by a street railway car operated by the defendant company. The trial in the district court resulted in a verdict for the defendant. This appeal brings up for review the judgment entered thereon.

At the trial, the plaintiff contended, and his evidence tended to show, that his team was being driven along Speedwell avenue, in Morristown, along and upon the street railway track, and that, while in that position, and without warning, the defendant's car, approaching from behind, ran into the rear of the wagon, demolishing it, and injuring both of the horses, one of them so severely that it had to be killed. The defendant disputed the plaintiff's account of the accident; its evidence tending to show that it was due to the carelessness of the plaintiff's driver in suddenly and without warning turning into the track in front of the car. The defendant seems also to have contended at the trial, and here contends, that, even if the plaintiff's account of the accident is true, he cannot recover because the driver was negligent in driving a noisy wagon along and upon the track. There was evidence that the team was trotting, and that the wagon made a noise. The only reason for reversal argued is "that the trial judge charged the jury that the plaintiff could not recover if the plaintiff was driving upon the track in a noisy wagon, so that he could not hear the gong of the approaching trolley car." It seems that the learned trial judge so charged in effect, and the question of the propriety of that instruction must be determined in the light of the following familiar principles of law.

[1] Street railway companies have no superior or predominate right to the use of the highways in which their cars run over the rights of other persons on foot or with vehicles, except that, because the cars are confined to the tracks, others using the highway must give way to them when occasion requires. *Buttelli v. Electric Co.*, 59 N. J. Law, 302, 36 Atl. 700.

[2] A correlative duty, therefore, devolves upon others using the highway to permit the passage of street railway cars when they observe or are informed that such passage is required. *Buttelli v. Electric Ry. Co.*, 59 N. J. Law, 302, 36 Atl. 700; *Adams v. Camden & Sub. Ry. Co.*, 69 N. J. Law, 424, 55 Atl. 254.

[3] Such timely warning of the approach of a trolley car must be given as will enable others using that portion of the highway covered by its tracks to avoid danger from it. *Consolidated Traction Co. v Haight*, 59 N. J. Law, 577, 37 Atl. 135.

[4] While it is the duty of others not to obstruct the track, yet a violation of such

duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of due care. *Consolidated Traction Co. v. Haight*, 59 N. J. Law, 577, 37 Atl. 135; *Camden, etc., Ry. Co. v. Preston*, 59 N. J. Law, 264, 35 Atl. 1119.

[5] In the light of these principles, it will be seen that the instruction to the effect that if the plaintiff drove along and upon the track in a noisy wagon, so that he could not hear the gong of the defendant's car approaching from behind, the plaintiff could not recover, was erroneous. The driving of a noisy wagon along and upon a street railway track does not in itself necessarily constitute such contributory negligence as will relieve the defendant from responsibility for an accident which might have been avoided by the exercise of due care by the defendant. Yet such was the effect of the instruction. Even if the wagon was noisy, the question of the driver's contributory negligence was still for the jury, and it could not lawfully be withdrawn from them, as was done in effect. The circumstance that the wagon was noisy would make it more difficult for the defendant to give the driver notice, but a noisy wagon is not debarred from the use of the public streets.

The judgment under review will be reversed, and a venire de novo awarded.

PADDOCK v. HUDSON COUNTY BOARD OF TAXATION.

(Supreme Court of New Jersey. April 11, 1912.)

(Syllabus by the Court.)

OFFICERS (§ 4*)—TENURE OF OFFICE—CIVIL SERVICE LAW.

The relator held a clerkship in the office of the board of taxation of Hudson county since 1906. The board had a larger clerical force than it needed for the proper transaction of its business, and therefore, for the purpose of economy, it decided to dispense with the services of the relator and two other clerks, and dismissed them. *Held* that, though the relator was in the paid service of the state and within the protection of the Civil Service Law (Comp. St. 1910, p. 3795), it did not preclude the board of taxation from abolishing the clerkship and dismissing the relator, when done in good faith and for the purpose of economy.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 5; Dec. Dig. § 4.*]

Application by James C. Paddock for rule to show cause why peremptory mandamus should not issue to Hudson County Board of Taxation. Rule discharged.

Argued November term, 1911, before KALISCH and TRENCHARD, JJ.

Richard Doherty, of Jersey City, for relator. Boyd MacLean and William D. Edwards, both of Jersey City, for respondent.

KALISCH, J. The relator was an assistant clerk in the office of the board of taxation of Hudson county. He had been in the employ of the board in the same capacity since 1906. For some time prior to the dismissal of the relator from his clerkship, the board, it seems, had under consideration the great cost of conducting its business, and, for the purpose of reducing the expenses and in the interest of an economical administration of the office, and at the same time having due regard to the maintaining of efficient and proper service, decided to dispense with the services of some of its clerks. The board had a clerical force, consisting of eight or nine clerks, at an annual expense of \$16,000. Its first step was to request the board of chosen freeholders of Hudson county that the appropriation going into effect December 1, 1911, be reduced by the amount of \$5,100, and subsequently, on July 1, 1911, the board of taxation, by resolution, directed that the services of three of its clerks, one of whom was the relator, should be dispensed with from and after August 1, 1911.

The board of taxation, in justification of its action, contends: First. That the relator is not within the provisions of the Civil Service Law of this state. Section 11 of that law provides: "The classified service shall include all persons in the paid service of the state or the municipalities thereof that may adopt the provisions of this act, not included in the unclassified service." Comp. Stats. p. 3799. Hudson county had not, at the time of the employment or dismissal of the relator, adopted the act; and it is further contended the relator was not in the paid service of the state. There is no merit in the claim that the relator was not in the paid service of the state. The mere fact that the county paid him his salary does not, according to the reasoning, in *Pierson v. O'Connor*, 54 N. J. Law, 36, 22 Atl. 1091, make him less a person in the paid service of the state.

Second. It is claimed that the testimony shows that the relator was not discharged nor removed, but that his office was abolished for the purpose of economy. A fair reading of the testimony seems to bear out this claim. It was not the design of the Civil Service Law to perpetuate offices, regardless of the fact whether they were needed or not. The very spirit of good government intends that useless offices, drawing revenue from a municipality or state, should be abrogated; and it would be regarded as a betrayal of a solemn trust for a body politic to convert offices contemplated under the Civil Service Law into sinecures or pension places. The testimony satisfies us that the relator's office was abolished for the purpose of economy, and without any discrimination on account of politics, but in good faith; and hence was justifiable.

It is further to be observed that the action of the county board, recommending to the finance board that the appropriation be cut down to the amount of the annual salaries of the three clerks dismissed, is strong evidence of good faith on the part of the board of taxation to get rid of unnecessary expense, and is almost a conclusive answer to the relator's claim that he was improperly removed or discharged.

The rule to show cause will be discharged.

STATE v. MERKLE.

(Supreme Court of New Jersey. April 10, 1912.)

1. BRIBERY (§ 10*)—SOLICITING A BRIBE—EVIDENCE—ADMISSIBILITY.

Where, on the trial of accused for soliciting a bribe while a member of the board of education of a town as the consideration of his vote for the reappointment of prosecutor as principal of a public school, the evidence showed that accused voted against the reappointment on the ground that prosecutor's record of efficiency was poor, evidence that the rating of prosecutor as shown by the report made by the supervising principal to the board was the lowest of any principal in the town was admissible on the question of motive inducing accused to vote against a reappointment.

[Ed. Note.—For other cases, see *Bribery*, Cent. Dig. § 9; Dec. Dig. § 10.*]

2. CRIMINAL LAW (§ 1186*)—REVIEW.

Where accused availed himself of Criminal Procedure Act (2 Comp. St. 1910, p. 1863) § 136, permitting one to bring up the whole record to review the rulings of the trial court, he was not entitled to a reversal unless he suffered manifest injury by the rulings.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

3. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The error in excluding evidence of a fact proved by other evidence, and not contradicted by the state, is not prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

4. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINIONS.

On the trial of a member of the board of education of a town for soliciting a bribe to influence his vote for the reappointment of a principal of a public school, a question on the cross-examination of the principal which called for his opinion as to the effect which would have been produced on the mind of another member of an alleged combination of the members of the board to solicit bribes for their votes by the communication to him by the principal of accused's statement that such other member demanded money as a consideration for his vote to reappoint the principal was properly excluded as calling for an opinion without probative force.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.*]

5. WITNESSES (§ 830*)—CROSS-EXAMINATION.

Where, on the trial of a member of the board of education of a town for soliciting a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

bribe to vote for the reappointment of prosecutor as principal of a public school, the defense was that accused voted against the reappointment because of prosecutor's inefficiency, and the prosecutor testified that the supervising principal had always recommended his school and his work, a question on cross-examination whether the supervising principal had not presented to the board a report showing that prosecutor's discipline was bad was not an apt question to test the credibility of the witness, in the absence of anything to show that prosecutor had knowledge of the making of the report, and its exclusion was not error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

6. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of oral evidence of the existence of a report is harmless error, where the report itself is subsequently put in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

7. CRIMINAL LAW (§ 1032*)—APPEAL—OBJECTIONS BELOW—INDICTMENT.

Under Criminal Procedure Act (2 Comp. St. 1910, p. 1834) § 44, providing that every objection to any indictment for any defect of form or substance shall be taken by demurrer or motion to quash before the jury shall be sworn, an objection that an indictment for soliciting a bribe is defective for failing to aver the name of the person from whom accused solicited the bribe cannot be raised for the first time in a court of review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2327, 2628, 2642; Dec. Dig. § 1032.*]

8. CRIMINAL LAW (§ 1159*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.

A court of review in a case brought up under Criminal Procedure Act (2 Comp. St. 1910, p. 1863) § 136, permitting accused to bring up the whole record and to subject to review the rulings of the trial court, may not reverse the conviction on the ground that the verdict is not supported by a preponderance of the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Error to Court of Quarter Sessions, Hudson County.

Sylvester Merkle was convicted of soliciting a bribe, and he brings error. Affirmed.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Joseph M. Noonan, of Jersey City, for plaintiff in error. Pierre P. Garven, Prosecutor of the Pleas, of Jersey City, for the State.

GUMMERE, C. J. The defendant was convicted in the Hudson quarter sessions on an indictment charging that on May 16, 1909, while he was a member of the board of education of the town of West New York, he solicited a bribe as the consideration of his vote and influence for the appointment of one Warren F. Hannis to the position of principal of a public school in the town. The entire record of the proceedings had at the trial has been returned with the writ of error pursuant to section 136 of the Criminal Procedure Act (Comp. St. p. 1863).

When the case was moved for trial, and before the jury was impaneled, a motion to quash the indictment was made upon the ground that it contained no averment that Hannis was, or was about to become, a candidate for the office of school principal, or that there was any vacancy in that office to be filled; and on the further ground that the indictment lacked legal certainty, in that it charged the defendant with directly and indirectly soliciting the bribe. The court overruled the motion to quash, and directed the trial of the indictment to be proceeded with, and this was accordingly done. The case made by the prosecution, briefly stated, was that Merkle went to Hannis shortly before the expiration of the latter's term as school principal, informed him that a combination had been entered into by five members of the board of whom he (Merkle) was one, to control the appointment of the principals in the schools of the town of West New York, and that he (Hannis) could have a reappointment by paying \$100 to the combine before the next meeting of the board; that Hannis did not comply with the demand for the money, and that at the next meeting of the board he failed of reappointment; Merkle being one of the members to vote against him. The defense was a denial of the charge of soliciting a bribe, and a justification of Merkle's conduct in voting against the reappointment of Hannis, upon the ground that the latter's record of efficiency as shown by the statement prepared by the supervising principal of schools, and submitted to the board, was so poor as to make it inadvisable to continue him longer in the school service.

[1] The principal causes of reversal argued before us are directed at the overruling by the court of questions asked by counsel of the defendant on the cross-examination of the prosecuting witness Hannis and on the direct examination of the defendant himself. The purpose of these questions was to bring out the fact that the "rating" of Hannis as shown by the report made by the supervising principal to the board was the lowest of any of the school principals in the town. It is difficult to understand upon what ground this line of testimony was excluded, for manifestly such testimony was both competent and relevant upon the question of the motive which induced Merkle to vote against the reappointment of Hannis. But the mere fact that the rulings complained of were erroneous will not justify a reversal of the conviction before us.

[2] The defendant, instead of seeking a review upon a strict bill of exceptions, has seen fit to avail himself of the beneficent provisions of section 136 of the Criminal Procedure Act, which permits a defendant to bring up the whole record of the proceedings had upon the trial, and to subject to the scrutiny of a court of review all rulings of the trial court either admitting or rejecting

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testimony, whether objection was made thereto or not, every denial by the trial court of any matter which was a matter of discretion, and the whole charge of the jury, whether a bill of exceptions was signed and sealed thereto or not. Having resorted to this method of review, the defendant is, by the express words of the statute, entitled to a reversal of the judgment against him only when "it appears" that he has "suffered manifest wrong or injury" by some of such rulings on evidence, or denials of matter of discretion, or by something contained in the charge. And this is so even if the defendant, in addition to filing reasons for reversal as provided by the 137th section of the statute, also files common-law assignments of error, as was done in this case. He cannot take advantage of the benefits conferred by the statute by bringing up for review the whole record of the proceedings at the trial, and at the same time escape the result which the statute declares shall follow such a method of review.

[3] The question, therefore, which these causes of reversal present for determination, is not whether the rulings on evidence complained of were erroneous, but whether it appears from an examination of the whole proceedings had at the trial that the defendant suffered manifest wrong or injury thereby. An examination of these proceedings shows that Hannis himself on the witness stand admitted that his rating as a principal was "very poor," and that the defendant testified that the rating of Hannis was "the poorest rating" of any principal in the town. No attempt was made on the part of the prosecution to controvert this statement, and it went to the jury practically an admitted fact. The excluded evidence was, therefore, merely cumulative, and it is not perceived how it can be logically said that the defendant has suffered manifest wrong or injury by the refusal to admit testimony which merely supports the existence of an uncontroverted fact that has been proved by other evidence in the case.

[4] The next ground of reversal challenges the validity of the ruling of the court excluding a question asked of the witness Hannis upon his cross-examination calling for his opinion as to the effect which would have been produced upon the mind of one Von Schaltzke, a member of the alleged "combine" by the communication to him by the witness of the defendant's statement that he (Von Schaltzke) demanded money as a consideration for his vote to reappoint the witness as school principal. Nothing which is worthy of being called an argument is submitted in support of the contention that this ruling was erroneous, and we are unable, without assistance, to discover any reason for so holding. Unless the witness was an expert in mind reading, surely the members of the jury were equally as well qualified to form such an opinion as the witness, and so, even if the matter inquired of, namely, the effect which would have been produced upon

the mind of Von Schaltzke by the communication to him of the defendant's statement, had been material to the issue, the opinion of the witness upon it would have been without probative force.

[5, 6] It is further argued that there was harmful error in refusing to permit counsel for defendant to ask Hannis on his cross-examination whether the supervising principal had not presented to the board of education a report showing that his (Hannis's) discipline was bad. The question was excluded upon the ground that the report itself was the best evidence of its contents. It is now urged that the question should have been permitted, because the witness had just previously stated that the supervising principal had always commended his school and his work, and that counsel had a right to wring from him the admission that he had been reported for bad discipline, and thus force him to contradict his preceding statement; in other words, that the question was competent as a test of the credibility of the witness.

If the witness had no knowledge of the making of such a report, his answer to the question would have thrown no light upon his credibility. If he knew that it had been made, and would have so stated in reply to the question, the injury to the defendant resulting from its exclusion was cured by the subsequent admission in evidence of the report itself. If he had stated in answer to the question that no such report had been made, it does not necessarily follow that he would have been guilty of false swearing, for his reply might have been due to entire lack of knowledge on his part of the fact and a belief in the truth of his statement. The question, we think, was not apt to test the credibility of the witness, and its exclusion was not harmful to the defendant in view of the reception in evidence later of the report itself.

[7] It is further contended that the indictment itself is fatally defective, and that the motion to quash it, made before the impaneling of the jury, should have prevailed. The single defect in the indictment which is assigned before us as a reason for reversal is the failure to aver in it the name of the person from whom the defendant solicited the bribe. Section 44 of the Criminal Procedure Act (Comp. St. p. 1834) provides that: "Every objection to any indictment, for any defect of form or substance apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards." No such objection to the indictment as that now alleged before us was taken on the motion to quash, and the statute is a bar to its consideration for the first time in a court of review. *Mead v. State*, 53 N. J. Law. 601, 23 Atl. 264; *State v. Sharkey*, 73 N. J. Law, 491, 63 Atl. 866.

[8] The only other ground upon which we are asked to reverse the conviction is that

the verdict of the jury is not supported by the preponderance of the evidence. In the case of *State v. Lang*, 75 N. J. Law, 8, 66 Atl. 942, this court in disposing of a similar contention declared that it was no part of the duty of a court of review in a case brought up under the 136th section of the Criminal Procedure Act to examine the evidence for the purpose of determining whether or not it justified the verdict of the jury; and the Court of Errors and Appeals, upon a review of our judgment in that case, "entirely concurred" in the conclusion expressed by us upon that point. S. c. on error, 75 N. J. Law, 513, 68 Atl. 210.

The judgment under review will be affirmed.

SHEEHAN v. HUMPHREYS et al.

(Court of Chancery of New Jersey. April 8, 1912.)

SPECIFIC PERFORMANCE (§ 29*)—NATURE OF CONTRACT—TRANSFER OF STOCK.

Where H. contracted to sell a portion of his shares in a corporation, but refused to sell all of his interest, because he did not desire to sever his connection with the corporation, the contract was not susceptible of specific performance; the subject-matter being indeterminate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 69-82; Dec. Dig. § 29.*]

Suit for specific performance by William M. Sheehan against Frank L. Humphreys and others. Bill dismissed.

Charlton A. Reed and Elmer King, both of Morristown, for complainant. Willard W. Cutler, of Morristown, and Richard V. Lindabury, of Newark, for defendants.

HOWELL, V. C. The controversy in this case arises out of an alleged agreement between the complainant and Humphreys for the sale and transfer of certain shares of the capital stock of the Morris & Somerset Electric Company. At the time the alleged bargain was made, Humphreys owned 80 shares of the stock, 30 of which stood in his name on the books of the company; the other 50 stood in the name of the defendant Gillespie, and had not been transferred on the books. Humphreys, however, held the certificate, properly indorsed, and was the real owner. In January of 1911, the complainant and Humphreys had some conversation respecting the sale of Humphreys' stock; but at that time there was no definite number of shares spoken of. It was, however, distinctly mentioned by Humphreys that he would not care to dispose of all his stock, and that he would like to remain a member of the board of directors, for the reason that he had been connected with the company since its organization. Plainly this early conversation contemplated that Humphreys should retain some portion of his stock.

The next step in the transaction was a letter, written by the complainant to Humphreys

under date of February 11, 1911, in which the complainant asks the defendant Humphreys to procure options on the stock of his friends, without letting them know who was seeking the option, and inclosing copies of forms of option and proxy to be executed by the voting stockholders. He says: "We would ask you in this case also to sign a copy of this [form of option] covering your own holdings, and we feel sure that several of your friends [naming them] would sign them if you requested them to do so. We leave the matter in your hands and trust that you can aid us in bringing the necessary conditions about to secure for us control of the maximum amount of stock among your friends. * * * You must realize of course that we would like to secure options upon the stock at 85, as you have offered yours for, but leave that entirely in your hands to say if you see fit to take this matter up for us then whether it shall be 85 or some other figure."

At the time this letter was written, Humphreys was in Florida, and he did not receive it until he arrived home on February 21st. On that day, he wrote a letter in reply to W. M. Sheehan & Co., the complainant's firm, in which, among other things, he said: "I shall go ahead and see what I can do for you. While I am willing to sell my stock at the figure I gave you, I can give no positive assurance that any one else will do so. I can hardly go to friends to whom I sold stock at par and ask them to sell at any figure much under par, but I will see what I can do and let you know."

There is very grave doubt in my mind about the meaning and effect of this correspondence. When the motion for an injunction was made, I was of the opinion that it did not constitute an option which could be made a binding agreement by any acceptance thereof. Now, having heard all the evidence and examined all the exhibits, the same doubt remains in my mind that I expressed on that occasion. It is very evident that the complainant, either individually or on behalf of a firm of brokers in New York, desired to secure the control of the company by the purchase of a majority of its stock. Neither he nor they cared particularly about the stock of Humphreys, unless they could secure enough shares to give them control. Reading the correspondence with this in mind, it is quite apparent that what the complainant was bargaining for was the control of the company, and this is what Humphreys was endeavoring to aid him in procuring. Again, there is doubt about the number of shares which the defendant Humphreys intended to contribute to the complainant's scheme of control.

The correspondence does not mention the number of shares. It refers to a previous conversation, in which it was specifically stated that Humphreys should retain an interest and remain in the directorate. How

can the court determine how many shares were in the contemplation of the parties at the time of the correspondence? The only statement on the subject appears in the January conversation, and that left it entirely indeterminate. This court is debarred from granting relief in specific performance cases in cases where there is doubt, either concerning the facts or the law. This has been determined by the court of last resort in a long line of cases. *McKibbin v. Brown*, 14 N. J. Eq. 13, affirmed 15 N. J. Eq. 498; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 204, affirmed 46 N. J. Eq. 609, 22 Atl. 56; *Myers v. Metzger*, 63 N. J. Eq. 779, 52 Atl. 274; *Doutney v. Lambie*, 78 N. J. Eq. 277, 78 Atl. 746; *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25, Ann. Cas. 1912A, 319.

Again, it is not clear that the parties intended that the correspondence in question should operate either as an option or as a contract. The letter of February 11th inclosed several forms of option and proxy, one of which the complainant asked Humphreys to sign. This points to the conclusion that the complainant did not think that Humphreys would be bound, unless he signed one of those documents; besides, from a careful examination of the form of so-called option, it is not entirely clear that it is not an agreement for the sale of shares in present, with payment and delivery postponed. There is so much doubt about the matter that I am constrained to deny relief to the complainant.

The bill must therefore be dismissed.

ADAMS v. ADAMS.

(Court of Errors and Appeals of New Jersey.
April 19, 1912.)

1. CONTEMPT (§ 66*)—ORDER TO SHOW CAUSE—APPEAL.

Since an order to show cause why defendant should not be attached for contempt adjudicates nothing against him, it is not appealable.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. § 66.*]

2. HUSBAND AND WIFE (§ 299*)—SUPPORT—ALIMONY—DEFAULT—CONTEMPT PROCEEDINGS.

Where defendant was in default in the payment of alimony adjudged to his wife, and she obtained from the Chancellor an order requiring him to show cause why he should not be adjudged guilty of contempt, and why a commitment should not be issued, the hearing of such order was properly referred to the Vice Chancellor, with instructions to submit a report of the proceedings had before him, and to advise the order which should be entered thereon.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

3. HUSBAND AND WIFE (§ 299*)—SEPARATE MAINTENANCE—ALIMONY—DECREE.

Where a decree for separate maintenance adjudged that complainant was entitled to alimony to be paid to her by defendant, he having agreed in open court as to the amount

which he should pay, and induced the court to make the decree on the basis of the agreement, he was estopped to claim that the decree was a nullity, because it did not adjudicate that the parties were husband and wife, and that defendant had separated himself from complainant without justifiable cause and neglected and refused to maintain and support her, or that the amount was suitable for such maintenance and support.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

4. CONSTITUTIONAL LAW (§ 83*)—HUSBAND AND WIFE (§ 299*)—SEPARATE MAINTENANCE—ALIMONY—ENFORCEMENT BY CONTEMPT—"DEBT."

An allowance of alimony is not a "debt," within the constitutional provisions forbidding imprisonment for debt, and may be enforced by attachment for contempt, and not alone by fieri facias and process of sequestration.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.* Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

5. HUSBAND AND WIFE (§ 299*)—ALIMONY—DECREE—ENFORCEMENT.

That the amount of alimony specified in a decree requiring defendant to provide separate maintenance for his wife was agreed on in open court did not render the decree one for the payment of money due under a contract between the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

6. HUSBAND AND WIFE (§ 299*)—PROCEEDINGS—COMMITMENT.

Where a decree was rendered against defendant for alimony for the separate maintenance of his wife, and contempt proceedings were thereafter instituted, because of arrears of alimony unpaid, by an order requiring him to show cause why he should not be punished for contempt for failing to pay all the installments of alimony, due, payable, and unpaid, but neither in any of the proceedings nor in the commitment was there any adjudication as to the amount due, or the amount he was required to pay in order to purge the contempt, the commitment was void.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1094-1097; Dec. Dig. § 299.*]

Appeals from Court of Chancery.

Action by Mary C. Adams against Alfred Adams, Jr. From an order to show cause why defendant should not be attached for contempt in failing to comply with an order requiring payment of alimony, and from an order committing defendant to jail until he had complied with such orders, he appeals. Appeal from the order to show cause dismissed, and the order of commitment reversed.

See, also, 77 N. J. Eq. 123, 79 Atl. 683.

U. G. Styron, of Atlantic City, and E. A. Armstrong, of Camden, for appellant. Gaskill & Gaskill, of Camden, for respondent.

GUMMERE, C. J. The complainant, Mary O. Adams, filed a bill against her husband, the defendant, for alimony under the stat-

ute. He answered the bill, admitting the marriage, and on the hearing agreed, through his counsel, to have a decree made against him, requiring him to pay to the complainant alimony at the rate of \$2,500 per year in quarterly installments. A decree was thereupon made, dated the 19th day of September, 1905, reciting this agreement, and adjudging that, in pursuance thereof, the complainant was entitled to alimony to be paid by the defendant, and that the defendant should pay to the complainant alimony at the rate of \$2,500 per year, the same to be paid in quarterly installments in advance; the first payment to be made on the 1st day of October, 1905. Having fallen in arrears in the payments to be made under the decree, the defendant, on the 31st of March, 1909, filed a petition, praying to have the amount of alimony adjudged against him reduced. The court refused to consider the application, so long as the arrears of alimony remained unpaid, and made an order, under date of February 14, 1910, "that, unless payment of any and all installments of alimony now due and payable, but unpaid, be paid and satisfied by the defendant to the complainant at once, that the necessary proceedings for contempt may be taken out forthwith." On the 5th day of July, 1910, the complainant applied to the Chancellor for an attachment against the defendant, upon the ground that he had failed to pay the arrears of alimony in compliance with the order last referred to. This application was supported by affidavits, and the Chancellor thereupon made an order requiring the defendant to show cause why he should not be adjudged guilty of a contempt of court, and why an order should not be made directing a warrant to issue for his commitment, because of his refusal "to obey the order of the court, ordering and directing him to pay all alimony then in arrears to the complainant, pursuant to the order or decree made in the cause on the 19th day of September, 1905," and referred the hearing on the order to Vice Chancellor Leaming, with instructions to the Vice Chancellor to submit to him a report of the proceedings had before him (the Vice Chancellor), and to advise him what order should be made thereon. This order to show cause was immediately appealed from by the defendant. Notwithstanding the appeal, the order was prosecuted to a conclusion before the Vice Chancellor, who then reported the proceedings to the Chancellor for his consideration, and advised him that an order should be made adjudging the defendant to be guilty of misconduct in failing to pay the arrears of alimony in compliance with the mandate of the order of February 14, 1910, and directing that he "stand committed to the common jail or the county of Atlantic, there to remain charged upon this commitment until he shall have fully complied with the orders of this court touching the payment of said

alimony, and shall have paid a fine of \$50 for the use of the state, unless the court shall see fit sooner to discharge him; and that a warrant issue against the said Alfred Adams for that purpose." The Chancellor, having received from the Vice Chancellor the report of the proceedings before him and his advice as to what action should be taken thereon, made an order in strict accordance with that advice and in the language above quoted. From this order, also, the defendant has appealed.

[1] The appeal from the order to show cause why the defendant should not be attached for contempt was improvidently taken. No appeal will lie from an order of the Court of Chancery, the purpose of which is to bring a party into court to answer for an alleged contempt. The reason is that it adjudicates nothing against him, and he therefore cannot be said to be aggrieved by it; and, unless he be aggrieved, he is not entitled to an appeal. Such is the rule declared by this court in *Coryell v. Holcombe*, 9 N. J. Eq. 650, and adopted as the basis of decision by this court in *Doland's Case*, 69 N. J. Eq. 802, 64 Atl. 1091. The appeal from the order to show cause must therefore be dismissed.

[2] The first ground upon which the order adjudging the defendant to be in contempt, and directing his commitment to the common jail of the county of Atlantic, is attacked is that the reference to the Vice Chancellor of the matter for hearing was without warrant of law, for the reason that this officer had no power to hear and adjudicate upon the matter. It is enough, in disposing of this contention, to say that the course pursued was substantially that adopted by the Chancellor and approved by this court in the case of *Seastream v. N. J. Exhibition Co.*, 72 N. J. Eq. 377, 65 Atl. 982.

[3] It is further contended that the order is null and void, because the decree of September 22, 1905, is itself a nullity, because it contains no adjudication that the defendant and complainant were husband and wife, or that the defendant had separated himself from the complainant without justifiable cause and refused and neglected to maintain and support her, or that the amount which he was decreed to pay was suitable for such support and maintenance. We find this contention, also, to be without merit. The adjudication that the complainant is entitled to alimony to be paid to her by the defendant is, by necessary implication, a finding that the parties are husband and wife, and that the statutory conditions which authorize the Court of Chancery to award alimony exist. It does not lie in the mouth of the defendant, after having agreed in open court as to the amount which he should be decreed to pay as alimony to his wife, and induced the court to make a decree on the basis of that agreement, to now assert that the amount was excessive. Much less can he be heard

to say that it was insufficient to suitably maintain and provide for his wife.

[4] It is further argued that, even if the validity of the decree for alimony be affirmed, it is not enforceable by an attachment for contempt for failure to perform its mandate, but only by fieri facias and process of sequestration. *Aspinwall v. Aspinwall*, 53 N. J. Eq. 684, 33 Atl. 470, is relied upon as authority for this contention. That decision, however, does not support it, in our judgment. The question there before us was whether a decree for the payment of money, *due under a contract between the parties*, was enforceable by process of contempt; and we held that such a method of enforcement of decrees, resting upon such a basis, had been done away with by the constitutional provision abolishing imprisonment for debt on any judgment founded upon contract, and that this was recognized by the legislative enactments for the enforcement of such decrees, which were referred to in the opinion. That the decision was not intended to have the scope attributed to it by defendant's counsel would seem to have been assumed by this court in its opinion in *Jernee v. Jernee*, 54 N. J. Eq. 657, 35 Atl. 458, decided only two terms later, in which a commitment by the Court of Chancery for contempt in failing to comply with a decree directing the payment of alimony was set aside, not for lack of power in the court to make the order of commitment, but because of the failure to specify in the commitment the amount of money which the defendant was required to pay, in order to entitle him to a discharge from imprisonment. Such a disposition of the case, so soon after the decision in *Aspinwall v. Aspinwall*, can only be accounted for upon the theory that the commitment of a defendant for contempt for disobedience of a decree commanding him to pay alimony was not considered by the court to be a violation of the constitutional provision prohibiting imprisonment for debt.

The question whether the enforcement of decrees for the payment of alimony, by attachment for contempt, is prohibited by statutory or constitutional provisions forbidding imprisonment for debt has frequently received consideration in the courts of our sister states; and the great weight of authority is that an allowance of alimony is not a debt, within the meaning of such provisions, and that an order for the enforcement of its payment by attachment for contempt does not violate them. *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Ex parte Perkins*, 18 Cal. 60; *Lyon v. Lyon*, 21 Conn. 185; *Carlton v. Carlton*, 44 Ga. 216; *Wightman v. Wightman*, 45 Ill. 167; *Chase v. Ingalls*, 97 Mass. 524; *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *Pain v. Pain*, 80 N. C. 322; *Sheafe v. Sheafe*, 36 N. H. 155; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817. We concur in this view, and hold that the order now under consideration

cannot be reversed upon the ground just discussed.

[5] It is suggested that the present decree is for the payment of money due under a contract between the parties, and so is within the very letter of the decision in the *Aspinwall Case*. But this is clearly not so. In the *Aspinwall Case*, the complainant sought to compel the performance of a contract previously entered into by herself and her husband, one of the provisions of which required the payment of a certain sum of money by him to her at stated intervals. In the present case, the bill was filed to compel the performance by the defendant of the marital duty which he owed his wife of providing for her support. The contract between them, made upon the hearing, did not create the obligation, but merely liquidated the amount of money which he should pay her from time to time in discharge thereof.

[6] Lastly, it is argued that this order is invalid, because it fails to specify the amount which the defendant is required to pay, in order to purge his contempt. It will be perceived from the recital of the various orders which followed the making of a final decree, in September, 1905, that at no time was there any ascertainment or adjudication by the Court of Chancery of the amount of alimony which was in arrears. The order of February 14, 1910, which is the foundation of the contempt proceedings, provides that, "unless payment of any and all installments of alimony now due and payable, but unpaid, be paid and satisfied by the defendant to the complainant at once," contempt proceedings may be instituted, but contains no ascertainment and determination as to what installments are due, or how much money the defendant shall pay, in order to avoid being proceeded against for contempt. The order to show cause is likewise silent upon this point, merely directing that the defendant should show cause why he should not be adjudged guilty of a contempt of court, and why an order should not be made directing a warrant to issue for his commitment, "because he has refused to obey the order of the court, made on the 14th day of February, then last past, ordering and directing him to pay all alimony then in arrears to the complainant." What has been said with relation to these two orders is also true with relation to the order adjudging the defendant to be in contempt, and directing his commitment to the common jail of Atlantic county. That order recites that the defendant has not complied with the order or decree of February 14th, then last past, and has not paid to the complainant any of the alimony then in arrear and ordered to be paid, and then directs that the defendant stand committed to the common jail of the county of Atlantic, there to remain until he shall have fully complied with the orders of the Court of Chancery touching the payment of the

alimony, and shall have paid a fine of \$50 for the use of the state.

In the case of *Jernee v. Jernee*, supra, the defendant had been committed to the county jail of Middlesex county for contempt on account of his failure to pay alimony. The warrant, after the usual recitals, contained the following order: "Therefore we command you that you take the body of the said William R. Jernee, and him safely and closely keep in your custody in the common jail of the county of Middlesex until he shall have paid to the said complainant the alimony now due her, and the costs of such contempt to be taxed; and also a fine (\$5) for the use of the state, together with the costs of this writ, or until our said court shall make order to the contrary." Application was made to the Court of Chancery for the discharge of the defendant, upon the ground that this commitment was fatally defective, inasmuch as neither it nor the order that authorized it specified the amount of the alimony to be paid. The application was refused, upon the ground that it was the proper practice in such cases for the defendant to secure his discharge by an application to the court, upon satisfying the court that he had purged his contempt.

Upon an appeal to this court from the order refusing his discharge, it was held that the defendant's right to be released from imprisonment was complete upon his complying with the order, i. e., upon payment of the alimony in arrears. We there said: "The punishment for the contempt has already been determined and announced, and the method of purgation has also been made known. Why should the contemner be again set before the court? The only result would be a reiteration of the existing mandate to pay the fine, the alimony, and the costs, and then go free. Besides, this recurrence to the court is inconsistent with the command of the writ, which did not direct the bringing in the appellant for further judgment, but simply his imprisonment until he had paid certain moneys. There was no order that he should be confined until he should be again placed before the Chancellor, and his imprisonment for such a purpose would therefore have been obviously illegal. * * * The sole purpose of the process was to enforce the right that had been adjudged in favor of the respondent in this appeal, and such a writ is, in substance, not to be distinguished from a *capias ad satisfaciendum* founded on a judgment at law. There seems to be no good reason why the moneys to be levied by them, respectively, should not be definitely stated, as well in the one case as in the other. Our conclusion is that the appellant was entitled to a discharge from imprisonment upon the payment by him of the alimony, fine, and costs, and that to effectuate that right it was necessary that the amounts so to be paid should have been specified in the warrant of

commitment. There being a defect in this particular, the decree before us must be reversed."

Although the matter presented for decision in the case cited related to the contents of the warrant of commitment, the reasoning of it would seem to apply equally to the order directing the commitment to issue; for that order is final in its character, and reserves nothing for future hearing and determination. Its mandate is that the warrant of commitment shall issue; and it practically declares the terms which must be complied with by the defendant, in order to be discharged from imprisonment under the warrant. In the *Jernee Case*, we held that the defendant was not obliged to present himself to the court and satisfy it that he had complied with the order which he had been charged with contemning, but that he was entitled to be released from custody by the sheriff upon payment to that officer of the sum of money mentioned in the warrant of commitment. It would seem to be equally his right to avoid incarceration by paying to the complainant, or into court, the amount of money which the order for commitment required him to pay as a prerequisite to his release. As the matter now stands, the defendant is subject to be confined in the county jail of Atlantic county for an indefinite period, without ability to purge himself of his contempt, until the Court of Chancery shall see fit, at some subsequent time, to ascertain the exact amount of alimony in arrears at the time of the making of the order of February 14, 1910, and shall advise him of the amount so ascertained.

We conclude, therefore, that so much of the order of July 11, 1910, as directs that the defendant stand committed to the common jail of the county of Atlantic until he shall have fully complied with the orders of the Court of Chancery touching the payment of alimony is invalid, and must be reversed.

SYNNOTT v. KOBBE et al.

(Court of Chancery of New Jersey. Feb. 29, 1912.)

1. EQUITY (§ 264*)—ANSWER—MOTION TO STRIKE—"INSUFFICIENCY."

A motion to strike an answer, authorized by rule No. 213, takes the place of exceptions, and may be based on scandal, impertinence, or insufficiency; "insufficiency" meaning that a portion of the bill had not been answered, and not that an equitable defense had not been presented.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 536; Dec. Dig. § 264.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 8668, 8669.]

2. EQUITY (§ 264*)—ANSWER—MOTION TO STRIKE—GROUNDS.

In a suit to foreclose a mortgage, an answer, alleging in one part that defendants were not in default and in another admitting default, but pleading a waiver, was not subject

to a motion to strike for scandal, impertinence, or insufficiency.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 536; Dec. Dig. § 264.*]

3. EQUITY (§ 264*)—ANSWER—MOTION TO STRIKE.

Where a bill to foreclose merely alleged that the premises were conveyed subsequent to the mortgage, and with full knowledge thereof, and that the interest so granted was subject to the lien of the mortgage, an answer, admitting that the conveyance to defendant was subject to a mortgage of \$24,100, and denying that it was subject to an indebtedness of \$26,600, was not subject to a motion to strike, but raised an issue for trial as to the amount of the indebtedness.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 536; Dec. Dig. § 264.*]

4. EQUITY (§ 264*)—PLEADING—MOTION TO STRIKE.

An objection that the facts stated in an answer do not make out a defense to the bill cannot be taken advantage of on motion to strike.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 536; Dec. Dig. § 264.*]

Action by Mary D. Synnott against George L. Kobbe and others. On motion to strike answer. Denied.

John F. Reger, of Somerville, for complainant. Frederick A. Pope, of Somerville, for defendants.

GARRISON, V. C. [1] This is a motion based upon rule No. 213, and, as it respects an answer, it takes the place of exceptions to the answer. Exceptions to an answer could have been filed for scandal, impertinence, or insufficiency. Insufficiency, in this sense, means that a portion of the bill has not been answered; it does not mean insufficient in the sense that no equitable defense is presented. The above statements of law will be found in *Steepley v. Public Service Corporation*, 65 N. J. Eq. 529, 56 Atl. 127 (Reed, V. C., 1903).

[2] First. The complainant moves to strike out the answer in this suit, upon the ground that the answer alleges that the defendants were not in default in the payment of interest at the time of the commencement of the suit, and are not now in default in the payment of said interest, although it is therein (that is, in said answer) admitted that the defendants are in default in the payment of interest, and were in default when this action was begun, and that the allegations of said answer do not show that such default has been waived by the complainant. Second. Because, in the ninth and tenth paragraphs of the said answer, the defenses set up therein are not available to the defendant Kobbe, as he was not a party to the bond and mortgage, and took title to the premises subject to the provisions of the said mortgage. Third. Because the defense just alluded to is not available to any of the defendants, as the time for answering has heretofore expired, and the said defend-

ants are thereby precluded from setting up this inequitable defense. Fourth. Because the said defense cannot be set up as against the complainant, who is the assignee of the said bond and mortgage. Fifth. Because the facts alleged in support thereof do not constitute such a defense to the said action, and cannot vary the terms and provisions of the complainant's said bond and mortgage.

I will take these up in their order and briefly deal with each:

First. I do not perceive how it can be said that the part of the answer complained of is either scandalous, impertinent, or insufficient in the proper use of the latter term. It may be that the defendants, by whatever they have alleged in this respect, have not made out a defense; but, as has been pointed out above, this is not to be taken advantage of by the complainants upon a motion to strike out. If a defendant, by his answer, does not make out a defense, a complainant can have no more desirable remedy than to set the case down for a hearing on bill and answer, or to go to hearing upon the answer as it is, in which event the defendant will not be permitted to prove anything more than is in his answer; and, if that does not constitute a defense, the complainant will, upon proving his case, secure the decree.

[3] Second. With respect to the second objection, conceding, for the purpose of the disposition of this case, that one who takes a property subject to a mortgage of a certain amount cannot set up such defenses as the defendant Kobbe seeks to set up, the difficulty is with the facts, and not with the law. The bill charges simply that the premises were conveyed subsequent to the execution and delivery of the mortgage, and with full knowledge thereof, and that the interest of Kobbe is subject to the lien of the mortgage. The answer admits that Shaw conveyed the mortgaged premises to Kobbe, and they admit that the conveyance was subject to a mortgage indebtedness of \$24,100, and deny that it was subject to a mortgage indebtedness of \$26,600. Under these circumstances, on a motion to strike out, the court could not possibly determine that Kobbe took it expressly subject to the mortgage for the greater amount. He distinctly in his answer denies that he did; and, if he can prove it, it is a good defense as to that point.

Third. With respect to the third objection, a somewhat similar situation is present. There is nothing before me to show that the time for the answering defendant to answer had expired; and that therefore they are precluded from setting up the defense they now seek to set up.

Fourth. As to the fourth objection, I know of no reason why the defenses that are made against the mortgagee are not equally good

against an assignee of the mortgage, unless they are purely personal defenses; and that does not seem to be the case here.

[4] Fifth. The subject-matter of this objection is that the facts do not make out a defense; and that cannot be taken advantage of, as previously pointed out, upon such a motion as this.

For these reasons, I shall deny the motion to strike out, and refuse the motion to refer the cause to a master over the answer.

STATE v. VAN NESS.

(Supreme Court of New Jersey. April 10, 1912.)

1. CRIMINAL LAW (§ 182*)—FORMER JEOPARDY—DISCHARGE OF JURY.

The discharge of a jury before a verdict has been rendered, although over the objection of accused, does not constitute former jeopardy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 330-332; Dec. Dig. § 182.*]

2. CRIMINAL LAW (§ 185*)—FORMER JEOPARDY—DISCHARGE OF JURY.

Act March 22, 1899 (2 Comp. St. 1910, p. 1844) § 74a, permits the court in any criminal case to direct the verdict to be taken by the clerk of the court, and Act April 3, 1902 (2 Comp. St. 1910, p. 1523) § 29, empowers the deputy clerk, in the absence of his superior, to exercise all of the powers of the latter, including the reception of verdict. In a criminal prosecution, the court directed the clerk to receive the verdict in his absence, and the deputy clerk on receiving word from the jury that they could not agree discharged them. *Held*, that while this act was clearly beyond his powers, and did not relieve the jury from further consideration of the case, the jury having wrongfully disbanded without finding a verdict, accused cannot set up that trial as a former jeopardy; the essence of former jeopardy being either a former acquittal or conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 344; Dec. Dig. § 185.*]

3. CRIMINAL LAW (§ 1153*)—TRIAL—DISCRETION OF TRIAL COURT—LEADING QUESTIONS.

The trial court has discretionary power to allow leading questions, and its rulings do not constitute grounds for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. § 1153.*]

Error to Court of Quarter Sessions, Essex County.

Marcus Van Ness was convicted of a violation of primary election law, and he brings error. *Affirmed*.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

James R. Nugent, of Newark, for plaintiff in error. Frederick A. Lehlbach, Asst. Prosecutor, of Newark, for the State.

GUMMERE, C. J. The defendant in this case was indicted for a violation of the primary election law. Having pleaded not

guilty, the cause came on to be tried on the 23d of February, 1911. At the close of the case, the jury having been charged and having retired to consider its verdict, the trial judge adjourned for the day, directing that the court remain open for the purpose of taking the verdict and that the clerk receive it. Some eight hours after retiring, the jury returned into the courtroom, in the absence of the trial judge, and stated to the deputy clerk who was present to receive their verdict that they were unable to agree. Thereupon the deputy clerk, without the consent of the defendant, discharged the jury from further service in the case. Subsequently, and on the 15th day of June, 1911, the prosecutor of the pleas moved the trial of the cause a second time. Thereupon the defendant asked for and obtained leave to withdraw his plea of not guilty, and substitute a plea of former jeopardy—setting out the facts just recited as a bar to his further prosecution. On demurrer to this plea it was held bad. The defendant was then permitted to renew the plea of not guilty, went to trial upon it, and was found guilty by the jury. The principal assignment of error argued before us is directed at the action of the trial court in sustaining the demurrer to the plea of former jeopardy.

[1, 2] That the discharge of a jury by the court in a criminal case, before a verdict has been rendered, where good cause for such judicial action exists, presents no bar to the defendant's retrial upon the same indictment, even though the discharge of the jury has been without his consent, is the prevalent view of the courts of this country, and has been the settled law of this state ever since the decision in *State v. Hall*, 9 N. J. Law, 256. This is not controverted by the counsel for the defendant, but he contends that the rule applies only where the court itself, in the exercise of its judicial function, directs such discharges, and not where it is ordered by a person to whom no such power has been intrusted; and that such was the situation exhibited in the special plea of the defendant.

It must be conceded, we think, that in discharging the jury in the present case the deputy clerk acted without authority of law. The statute of March 22, 1899 (Comp. St. p. 1844, § 74a), permits the court in any criminal case, except a capital one, to direct the verdict of the jury to be taken by the clerk; and the act of April 3, 1902 (Comp. St. p. 1523, § 29), empowers the deputy clerk, in the absence of his superior, to exercise all the powers of the latter, including the reception of a verdict. *Manners v. Ribsam*, 61 N. J. Law, 207, 41 Atl. 676. But neither by force of the first of these statutes, nor by the common law, is the clerk of the court (or his deputy) authorized to exercise the function of determining when a proper cause appears for discharging a jury from further

consideration of the case submitted to them. This function, in the language of the older decisions, is a delicate and highly important one, only to be exercised in case of necessity, and is intrusted solely to the courts. To determine when and under what conditions it shall be exercised is a matter of judicial discretion, and, in the absence of legislative authority, can no more be performed by the clerk, or other nonjudicial officer connected with the administration of justice, than any other judicial duty which has been committed by the sovereign to the judges.

But the fact that the discharge of the jury was without authority of law affords no ground for holding that the defendant cannot be retried upon the indictment found against him. The deputy clerk having without warrant discharged the jury, his action was entirely inefficient to relieve them from further consideration of the case; just as much so as would have been the unauthorized act of the constable who had them in charge in releasing them from confinement, and permitting them to return to their respective homes. The jury having illegally, although in good faith, terminated their service without reaching a verdict, a mistrial resulted; and a second trial is not interdicted when the first has proved abortive by reason of the mistake or misconduct of the jury. *Smith & Bennett v. State*, 41 N. J. Law, 598, 616. In fact, it would seem, from the reasoning of *Beasley, C. J.*, in the opinion in the case cited, that nothing but an existing judgment either of conviction or acquittal, so that a plea of *autre fois* convict, or *autre fois* acquit can be pleaded, will be a bar to a retrial on the same indictment. We conclude therefore that the assignment of error which we have been discussing is unsubstantial.

[3] The only other assignments of error referred to in the brief of counsel for defendant (the case was submitted without oral argument) are directed at questions asked by the prosecutor of the pleas of one Morehouse, a witness called by the state, and at a specified portion of the charge to the jury. No argument is made by counsel in support of either of these assignments. He contents himself with saying that the questions referred to were leading, and that the instruction complained of "confused the jury." We consider neither of the assignments meritorious. The right of the trial court in its discretion to allow leading questions is universally admitted. *Luckenbach v. Sciple*, 72 N. J. Law, 478, 63 Atl. 244, and the rulings of trial courts upon matters that are committed to their discretion do not constitute grounds for reversal upon error. *Donnelly v. State*, 28 N. J. Law, 601; *Hasse v. State*, 53 N. J. Law, 34, 20 Atl. 751. The present case having been brought before us on strict bills of

exception, the common-law rule referred to controls. As to the assertion that the portion of the charge which is made the subject of criticism confused the jury, it is enough to say that it is refuted by the verdict; and, further, that if it were true, it affords no ground for reversal.

The judgment under review will be affirmed.

BLICK et al. v. COCKINS et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. TRUSTS (§ 109*)—TESTAMENTARY TRUSTS—ESTABLISHMENT—PAROL EVIDENCE.

Where a testator has been induced to make a devise by the promise of the devisee that it shall be applied to the benefit of another, a trust is thereby created that may be established by parol evidence, the element of fraud giving the court jurisdiction to inquire into it, not with a view of enforcing a parol trust, but to relieve against the fraud by raising a constructive trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 159; Dec. Dig. § 109.*]

2. TRUSTS (§ 110*)—CONSTRUCTIVE TRUSTS—EVIDENCE—SUFFICIENCY.

A bill alleged that defendant had procured his wife to execute a will by his verbal assurance that he would hold the property only for life, and, at his death, would divide it between the brother and sister of testatrix, the complainants in the bill, that he had repudiated the promise, and proposed to hold the property as his own. Complainants testified to admissions by defendant that the will was executed on the strength of his promise, and that the will was so written that he might pass the property to complainants at his death, and a reputable lawyer testified that at the probate of the will defendant stated that he held the estate in trust for complainants, and it was also shown that he executed what purported to be a last will written by complainant's husband, at defendant's request, giving the estate left him to the complainants, which will he afterwards destroyed. Held error to refuse to decree a trust in favor of complainants.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 160; Dec. Dig. § 110.*]

3. TRUSTS (§ 110*)—SUIT TO ENFORCE—EVIDENCE—SUFFICIENCY.

A bill to have a trust *ex maleficio* declared in the defendant with respect to property bequeathed to him by his wife on an allegation that he had procured the execution of the will on the promise at his death to divide the property between the brother and sister of decedent is not a suit to reform a written instrument on the unsupported testimony of a single witness, but to prove fraud on the part of the defendant, and for this purpose the testimony of the one witness is sufficient, if believed.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 160; Dec. Dig. § 110.*]

Moscizisker, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Bill by Adelaide Miller Blick and Horace J. Miller against James M. Cockins and others. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John S. Ferguson and Joseph N. Ulman, for appellants. Samuel S. Mehard and Harvey A. Miller, for appellees.

STEWART, J. This was a proceeding by bill in equity to have a trust ex maleficio declared in the defendant James M. Cockins with respect to property bequeathed and devised to him by the last will of his wife, Mariana M. Cockins, the averment being that the testatrix yielding to the persecution and studied insistence of her husband made her will devising her entire estate to her husband, only, however, upon his promise that he would hold the property so given him for and during his life, and would see to it that at his death the property should be divided between the complainants, brother and sister of his wife of the half blood. A decree was asked requiring the defendant to perform the terms of the trust, and enjoining him from incumbering or alienating the property. The answer specifically denied any effort on the part of the defendant to influence his wife with respect to the disposition of her estate, and denied specifically that the will giving him the property absolutely had been made on any assurance or promise from him that he would hold it only for life, and provide that upon his death it should go to appellants. Much besides what we have stated was alleged in the bill and denied in the answer, but the evidence in the case related solely to the one question of alleged inducement and promise on the part of the respondent. When the case came before us in *Miller v. Cockins*, 231 Pa. 449, 80 Atl. 1055, we remanded it for fuller and more specific findings. These have now been furnished, and the case is here for final determination. If the supplemental report leaves obscure some things which called for explanation, it is doubtless due to the fact that we did not clearly enough indicate the matters upon which we desired the mind of the chancellor. What these are will later on appear. The circumstances and relation of the parties to the controversy have but little bearing on the case. It is enough to state that the testatrix was a second wife of the appellee, Rev. James M. Cockins; that she was possessed of a very considerable estate, said to be of the value of \$300,000, derived largely from her father, who was likewise father of the appellants by an earlier wife; that she died childless after a married life of about seven years, leaving as her closest kin the appellants. While her home was in Baltimore, she died in California while there on a visit. Her husband accompanied her remains to Pittsburgh for interment there.

The appellants' whole case rests upon admissions and declarations alleged to have been made by the defendant with respect to

his wife's will during the course of the funeral in Pittsburgh, on the evening of the same day, and on a day later in Baltimore where the will had been deposited and where it was to be probated. The witnesses who testified to the declarations made in Pittsburgh were the appellants Horace J. Miller, Mrs. Adelaide Miller Blick, and Carrol B. Blick, husband of the latter. The witness who testified to admissions made in Baltimore was Samuel J. Harman, Esq., a reputable member of the bar. The material inquiry must be as to the sufficiency of the declarations and admissions made by the defendant to establish in him a trust with respect to the property given him by the will. The chancellor fully accredits the witnesses who testify to the declarations and admissions; and, notwithstanding the explicit, unqualified, and repeated denial of each and every one by the defendant, he finds that the admissions were made in entire accordance with their testimony. He resolves it into a simple question of sufficiency of the proof.

[1] The doctrine is too well established to call for citation of authority that, where a testator has been induced to make a devise by the promise of the devisee that it should be applied to the benefit of another, a trust is thereby created that may be established by parol evidence, and that this is not contrary to the statute of wills nor within the statute of frauds and perjuries. It is the element of fraud appearing in the case that gives the court jurisdiction to inquire into it, not with a view of enforcing a parol trust, but to relieve against the fraud by raising a constructive trust. Now, the fraud alleged here and which was the one issue to which all the testimony was directed was that the defendant had procured his wife to execute the probated will by giving her verbal assurance that he would hold the property devised to him absolutely only during his life, and would see to it that the property so obtained by him should be divided between complainants equally upon his death, and that now, having by reason of such promise obtained the property, he repudiates the obligation of his promise, and proposes to hold the property as his own absolutely. How far do the admissions go towards sustaining this charge?

[2] Since the credibility of witnesses is a matter exclusively for the chancellor, and since in this instance the chancellor has expressly indicated the witnesses whose testimony he has accepted, our present inquiry must be confined to the testimony of these. They are Mrs. Adelaide Blick, Horace J. Miller, and Samuel J. Harman. With respect to these witnesses the learned chancellor in his supplemental opinion says: "We are sorry to have been thus misapprehended, and desire to say that instead of disbelieving the testimony of Mr. Harman, who is an entirely disinterested witness, we were and are

convinced that his account of the conversation testified to by him is correct. In like manner we have relied upon and treated as correct the testimony of Mrs. Blick, and especially that of Horace J. Miller, as to the statements made by the defendant to them in regard to his wife's will, and, notwithstanding the somewhat general denial of the defendant, we have no doubt that his declarations were substantially as related by these witnesses." We have quoted this so that sufficient reason may appear for our limiting our present inquiry in the manner above indicated. We now give so much of the testimony of each of these witnesses as bears directly upon the point at issue.

Mrs. Blick, accompanied by her husband, came from her home in Baltimore to attend the funeral of her sister, the testatrix in Pittsburgh. She and her husband, with her brother Horace, accompanied the defendant to the funeral, occupying the same carriage. This is Mrs. Blick's testimony in chief as to the conversation that there occurred. "Well, we were coming I believe out of the cemetery gate when the conversation came up, and he, defendant, spoke of the will being made and the money being left to him, and the next reference was, he followed that right up by saying it would be all right, it was a sacred trust that Mariana had imposed upon him, and it was a beautiful trust, that she had trusted him, and that he meant by Almighty God to carry it out, and he would see we children got the money at his death, and he said this two or three times in different ways, but all meaning the same thing." Speaking of a later conversation that occurred during the evening of the same day at the hotel where they were stopping, she says defendant put his arms about her, and said, "Now, Adelaide, Mariana trusted me and you can trust me, and I will see not a penny of this money goes to my brothers. It will go to you and your brother Horace, and you can depend on it, and I will carry it out." On cross-examination, referring to this later conversation, she says: "Mr. Cockins said to me that I need have no worry over the estate, that it was left to him apparently in the will absolutely, but upon his promise to my sister that at his death it would go to us. It was not only a promise he made to my sister, but it was a sacred—a sacred contract he had made before God Almighty. He meant to carry it out, and he would see in the end that the money would be ours."

Horace J. Miller's testimony as to the conversation when returning from the funeral was as follows: "As we were returning from the interment, and I believe just as we were coming out of the cemetery gateway, Mr. Cockins suddenly mentioned the fact that his wife had left a will and had left all the property to him, but he said: 'I expect to do what is right. This is a sacred trust.' And then he immediately followed that up by saying: 'It was beautiful how

my wife trusted me, and I will carry this out. I will carry out her intentions.' He added some words to the effect that it was his duty so to do, and he would see that they were carried out to the letter. My sister Adelaide made some sort of remark, 'Oh, Mr. Cockins, we don't want to hear about these things just now,' something like that, but he went on and told us about how his wife trusted him." Further on he says: "Well, he said that this property had been left to him absolutely apparently, but that it was left for him so that he might pass it to us at his death, that this would be better—I think he used the words that we would some day feel the advantage of this provision made in this way."

The conversation testified to by Samuel J. Harman occurred in Baltimore on the occasion of the probate of the will. Horace J. Miller had accompanied the others from Pittsburgh to Baltimore with a view to inquiring further as to the will. After reading the will, Horace proposed to go and consult counsel. This Mr. Harman communicated to the defendant, whom he found in his office on his return, "and it was then," Mr. Harman testifies, that Mr. Cockins made the remark "that it was very foolish for Horace to employ counsel, or to give him any trouble in this matter, that he held Mariana's estate—meaning his wife's—in trust, a sacred trust, for Adelaide and Horace, Adelaide being Mrs. Blick, and Horace Miller, that he intended to give it to them, but, if Horace gave any trouble, he was going to give Mrs. Blick her share, but Horace's share he would give to charity. He didn't intend his brothers should have any part of it, that they had enough, but that his share if he gave any trouble would be given to charity."

The testimony of these witnesses having been fully accepted by the chancellor as true, it is unnecessary to indicate here how amply it was supported by the general facts of the case, especially by the circumstance that the same night that the conversation occurred in Pittsburgh defendant in the presence of Mrs. Blick and her husband executed what purported to be a last will, written by Mr. Blick at defendant's request, giving the entire estate left him by his wife to Mrs. Blick and Horace J. Miller absolutely. Here we have two of the only three accredited witnesses in the case testifying to explicit admissions by the defendant, one that the will was executed giving to defendant absolutely the entire estate on the strength of the promise made by him to his wife that he would see that the estate would at his death go to her brother and sister, and the other that the absoluteness of the gift to him was only apparent, that it was only so written that he might pass it to appellants at his death, and this supplemented by the testimony of Mr. Harman strongly corroborative in that the defendant there not only admitted a

trust, but speaks of the sharees of Mrs. Blick and Horace in the estate. Notwithstanding this accredited testimony we have this supplemental finding by the chancellor: "Ninth. The defendant did not constrain or compel his wife to execute the will in question leaving her property to him upon his verbal assurance that he would hold it only for life and see to it at his death that it should go to the plaintiffs; nor did his wife at or before the time of making her will require the defendant to make the promise alleged, nor did he obtain or procure the will to be made by making any such promise."

We remark here that it is not a question as to defendant's active interference in connection with the making of the will, whether he compelled or constrained his wife to make the will as written, or whether the wife required the defendant to make the promise alleged; for, while such matters were alleged against defendant in the bill, the entire evidence was directed to the one point, which was also averred in the bill, that the will had been made on the strength of defendant's alleged promise. The sole question is, therefore, Did the defendant promise his wife that, if she gave him by her will an absolute estate in her property, he would claim only a life estate therein and see that her brother and sister upon his death succeeded to the estate? This is just what he did according to the testimony of these witnesses, with no one contradicting except the defendant whose denials are rejected by the chancellor. It is difficult to see how the evidence, particularly that given by Mrs. Blick, could have been more direct and positive to the point that the will was made on the promise alleged. The other testimony was strictly corroborative and in no particular conflicting.

In the leading case of *Hoge v. Hoge*, 1 Watts, 163, 28 Am. Dec. 52, a trust maleficio was declared entirely upon proof of admissions by the devisee not a particle stronger, more direct or explicit than those we have here. Defendant told Mrs. Blick that "the will left the estate to him absolutely, but upon his promise that at his death it was to go to us." He told Horace, "the property had been left to him absolutely apparently, but that it was left to him so that he might pass it to us at his death." These conversations occurred in Pittsburgh before any one saw the will or had any knowledge of its contents except the defendant, who had the will in his safety box in the Fidelity Safe Deposit Company in Baltimore, where it had lain for three years. He told Mr. Harman that "he held the estate in trust, a sacred trust for Adelaide and Horace," and spoke of their shares. The circumstances in connection with these admissions are in our judgment the full equivalent of another witness, the denial by the defendant, not general as stated by the chancellor, but specific and un-

qualified as to each admission, his eagerness the night his admissions were made in Pittsburgh to execute his trust by making a will there, in presence of Mrs. Blick and her husband, giving the estate at his death to the brother and sister, because as he said he could not sleep until he had done so, his assurance to Horace in Baltimore that he had by this will—afterwards destroyed—secured to him and his sister the estate. In a similar case (*Jones v. McKee*, 3 Pa. 496, 45 Am. Dec. 661) Mr. Justice Burnside finds occasion to say that "the circumstances attending the case often afford the most violent presumption of its object and truth." As much may be said in this connection. Whether we regard this finding by the chancellor as a finding of fact or conclusion of law, we feel, in view of what we have said, and in view of another finding to which we shall refer, that it is without support in so far as it finds that the defendant did not obtain or procure the will to be written by making the alleged promise.

Our attention is directed to the seventh original finding which is as follows: "We have thus stated the substance of the testimony for the reason that the nature and character of the evidence in a case of this kind appears to be a substantive fact. We are somewhat at a loss to determine from the evidence thus given precisely what did happen as to declarations and writing relied upon by the plaintiff. We have no difficulty, however, in finding as a fact, and we do find, that Mr. Cockins, when he told the plaintiffs of his wife making a will of all her property in his favor, said to them substantially that his wife had reposed great confidence in him, that she had expressed to him the wish that her next of kin got the property after his death, and that he told her that he would see to it that they got it, but he did not say or mean to say that the will was made by her upon any promise or condition, but merely that after the will was made and she had told him of it the request and promise had been made as stated." This finding contains the obscurity which we had hoped would be removed by the supplemental findings. Instead, it is rather increased. The obscurity is not in the finding—that is too explicit and direct to be misunderstood—but in the considerations which led to its adoption. In his discussion the chancellor made no attempt to vindicate the finding, and our examination of the evidence discloses nothing upon which it could rest. It was with a view of becoming better informed as to the mind of the chancellor with respect to it that we directed a return of the record. The only result is the additional finding, No. 9, which we have just discussed, and which throws no light on the earlier finding. The latter was direct and explicit in finding (1) that the defendant did make admission that his wife had expressed to him the wish that

he would see that her next of kin got the property after his death; (2) then he told her that he would see to it that they got it; and (3) that the request and promise were not made before, but after the will had been executed. We have nothing to do with what the defendant meant to say. He does not pretend that his language was misunderstood, but denies unequivocally that he ever admitted that he had ever made any promise whatever. That he did say exactly what the chancellor finds he did not say or mean to say is the testimony of Mrs. Blick, a witness accredited by the chancellor, and the testimony of Horace J. Miller almost as direct. The finding is that the wife had expressed to the defendant "the wish that he would see that her next of kin got the property after his death, and that he had told her that he would see to it that they got it." Had it been found that this admission related to a time antecedent to the execution of the will, can it be questioned that, if believed, it would have been entirely sufficient to establish the trust? But the finding is that the request and promise was made after the will had been executed. Upon what testimony could this rest? We examined the evidence when the case was here before, and we have again examined it with greatest care without finding anywhere any suggestion that request and promise followed the making of the will. The defendant does not say that they did, but denies that they were made at any time. And it is absolutely impossible to derive the conclusion of the chancellor from the testimony of the opposing witnesses each of whom testified to admissions of facts which necessarily must have preceded the actual execution of the will. It might well be argued, in view of some of our decisions, notably *Hoffner's Est. Anderson's Appeal*, 161 Pa. 331, 29 Atl. 33, that it is immaterial whether the property has been obtained by promise made before or after the execution of the will. The chancellor took a different view. We decide nothing with respect to the question here suggested, since we find nothing in the case to support the conclusion reached by the chancellor in regard to this feature of it. While some of the admissions testified to would perhaps not be inconsistent with the view that the reference was to request and promise subsequent to the execution of the will, yet all are equally consistent with the view that they preceded the execution of the will, and the testimony of Mrs. Blick as to what defendant said is too explicit and direct to receive any other interpretation than that which its language clearly expresses. If it be that she is the only witness who tes-

tified to an admission covering in explicit terms every requirement of the law as to the time when the promise was made, what matters it if her testimony be true?

[3] This is not a case of attempting to reform a written instrument on the unsupported testimony of a single witness. The will operates as written, and all dispute as to it is closed. What plaintiffs here attempted was to prove fraud on the part of the defendant, and for this one witness is sufficient if believed.

The point in the case is not the number of the witnesses who testify to the defendant's admission, nor their credibility, for that is established, but whether defendant did admit that he had promised his wife that, if by her will she gave him her estate absolutely, he would hold it for life, and see that at his death it passed to her next of kin. We have sufficiently discussed the evidence on this subject. To our mind the affirmative of this proposition was so clearly established by admittedly credible witnesses that nothing was left the chancellor but to decree a trust as prayed for. The material findings are Nos. 7 and 9, and these have been assigned for error. They need not again be here recited. For the reasons stated we think clear error has been shown in each, and that upon the evidence the plaintiffs in the bill were entitled to the relief prayed for.

We accordingly reverse the decree dismissing the bill, and direct that the bill be reinstated, the case to be proceeded with to final decree in accordance with the views here expressed. The costs on the appeal to be paid by the appellee.

MOSCHZISKER, J. (dissenting). I would affirm upon the findings of the court below to the effect that the promise was not contemporaneous with, or did not precede or procure the making of the will. The burden was upon the appellants to establish these facts to the satisfaction of the chancellor, as an essential part of their case. *McCloskey v. McCloskey*, 205 Pa. 491, 55 Atl. 180. This they failed to do. None of the declarations of the defendant suggests that the promise induced the will; in fact, only one at all indicates a promise, and that gives no particulars as to the making of the alleged bargain concerning the final disposition of the estate. It seems to me that it would be a most dangerous precedent to permit a solemn testament to be set aside upon such incoherent emotional declarations as are testified to in this case. To my mind the law as laid down in *McCloskey v. McCloskey*, supra, governs here, and thereunder no error was committed in dismissing the bill.

In re YOUNG'S ESTATE.

Appeal of VINCENT.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. BILLS AND NOTES (§ 366*)—BONA FIDE HOLDERS—STATUTORY PROVISIONS.

Where a bank discounts a note by a wife to her husband's order, which is indorsed by him, the bank having knowledge that she is a surety, and on the luncacy of the husband the bank takes from the wife a new note made by her, indorsed by her sister, and after several renewals thereof the sister dies, her administrator cannot resist payment on the ground of the invalidity of the original note as against the wife, under Act May 16, 1901 (P. L. 202) § 57, providing that a holder in due course holds the instrument free from any defect of title of prior parties, and from defenses available to private parties among themselves, and section 66, providing that every unqualified indorsement shall be held to warrant that the instrument is genuine; that the indorser has good title; and that all prior parties had capacity to contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 945, 946; Dec. Dig. § 366.*]

2. NOVATION (§ 3*)—SUBSTITUTION OF PARTIES—CONSIDERATION.

Where, by way of novation, a new party is substituted for a former debtor, the new party's note is supported by a sufficient consideration as for his own debt.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. BILLS AND NOTES (§ 340*)—INDORSEMENT—NATURE OF CONTRACT.

The indorsement of a note implies a guaranty by the indorser that the makers were competent to contract in the character in which, by the terms of the paper, they purported to contract; and knowledge by one who became a holder before maturity, for a valuable consideration, that the makers were married women does not deprive him of the right to rely upon the implied guaranty.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 825-828, 842-848; Dec. Dig. 340.*]

Appeal from Orphans' Court, Allegheny County.

Exceptions to adjudication in the estate of Parthenia Young, deceased. From a decree dismissing the exceptions, Mary Emma Vincent, administratrix, appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

George H. Rankin, for appellant. W. T. Tredway, for appellee.

STEWART, J. [1] The note which gives rise to this controversy was the last of series of renewals, all of like tenor, with the same maker and indorser on each. The maker was a married woman; the indorser, a single woman, who has since died. It is against the estate of the latter, now in process of distribution, that demand is made for payment of the note. The transaction had its origin back in October, 1903, when the East End Savings & Trust Company, appellee, dis-

counted a note drawn by Emma Vincent, payable to the order of Reed M. Vincent, and by the latter indorsed, for \$2,000, with full knowledge of the fact that maker and indorser of the note were husband and wife; and that, while the wife appeared as maker of the note, she was in point of fact surety. The proceeds of the note were passed to the credit of the husband on the books of the bank. This note was renewed from time to time; the last renewal on which the husband appeared bearing date 16th January, 1907. Before maturity of this last renewal, Reed M. Vincent was adjudged a lunatic. Upon its maturity, the bank required of Mrs. Vincent that she either deposit collateral, or furnish a satisfactory indorser. To meet this demand, she gave a new note, in which she was maker and her sister, Parthenia Young, indorser. This note, so indorsed, was regularly renewed; the last renewal bearing date 11th January, 1909. Before its maturity, Parthenia Young died. The note having been protested, it is now presented for payment out of the latter's estate. That the bank is a holder in due course, for value, cannot be disputed. When it accepted the first note drawn by Mrs. Vincent with Parthenia Young as indorser, it surrendered the obligation on which Reed M. Vincent was bound, thereby parting with a security it had; and by accepting the new note it extended the time of payment for Mrs. Vincent.

[2] It is well settled that when a new debtor is substituted by way of novation for the original debtor, there is a sufficient consideration for the new debtor's note as for his own debt. 7 Cyc. 702. The fact that originally the debt was that of the husband of Mrs. Vincent, and not enforceable at law against her, puts no different aspect on the case. A moral obligation rested on Mrs. Vincent to pay the debt, as she had contracted to do. Her legal exemption from liability was a personal privilege of which she might or might not choose to avail herself. Leonard v. Duffin, 94 Pa. 218; Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790. It follows that when the first note was given with Parthenia Young as indorser a consideration moved directly to Mrs. Vincent in the extension allowed her to redeem her moral obligation. The bank then being the holder in due course, for value, is entitled to the protection which our act of May 16, 1901 (P. L. 194), relating to negotiable instruments, gives. By the fifty-seventh section of that act, it is provided that "a holder in due course holds the instrument free from any defect of title of prior parties, and free from defense available to private parties among themselves, and may enforce payment of the instrument for the full amount against all parties liable thereon." And by the sixty-sixth section it is provided that every unqualified indorsement shall be held to warrant (1) that the

instrument is genuine and in all respects what it purports to be; (2) that the indorser has a good title to it; and (3) that all prior parties had capacity to contract. The effect of the statute is to shut off all such defense as is here set up. In so deciding, we are in accord with the decisions in other states where like statutory provision governs.

[3] In *Erwin v. Downs*, 15 N. Y. 575, it is held that "the indorsement of a promissory note implies a guaranty by the indorser, that the makers were competent to contract in the character in which, by the terms of the paper, they purported to contract; and knowledge by one who became the holder of such a note before maturity and for a valuable consideration that the makers were married women does not deprive him of the right to rely upon the implied guaranty of the indorser that the makers were competent to contract as parties, nor of the character of a bona fide holder." In *Binney v. Globe National Bank*, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379, it is held that, "while a promissory note between husband and wife is void between the original parties, an indorser, when sued on the contract between him and his indorsee, is not at liberty to deny the validity of the original note, or the capacity of the maker, for the purpose of defeating his or her liability." The views expressed in these cases as to the purpose and effect of the statute rest upon the plain language of the act itself, which admits of no other construction. Their application to the case in hand is too obvious to call for discussion.

The order and decree of the orphans' court, awarding payment of the note out of the estate of Parthenia Young, is affirmed, and the appeal is accordingly dismissed.

In re BARR et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

TRUSTS (§ 282*)—TRUST FUNDS—INTEREST.

A father assigned to a trustee with certain other property notes made by two of his sons, with directions to pay the net income of said properties to the grantor and his wife and the survivor during their lives, and, upon their death, after charging the two sons who had made the notes the sums due from them or so much as should not be paid, to divide the properties held in trust among the grantor's six children. Held, that the notes carried interest until the death of the surviving parent, and, on final distribution, the shares of the sons who had made the notes were chargeable with all the unpaid interest thereon.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 402; Dec. Dig. § 282.*]

Appeal from Court of Common Pleas, Allegheny County.

Petition of Charles W. Smith for appointment of an auditor and distribution of a trust estate. From a decree awarding dis-

tribution, Ella F. Barr and others appeal. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

M. W. Acheson, Jr., for appellants. John D. Meyer, for appellees.

BROWN, J. On September 5, 1893, Joseph Smith, Jr., assigned to Hugh D. Smith, in trust, certain personal property included in which were the following items: A note of Smith, Bartlett & Co., dated November 3, 1892, for \$13,000, payable one day after date to the order of Joseph Smith, Jr., with interest at 8 per cent. per annum, upon which there was paid about the sum of \$5,974.28; two notes of Charles W. Smith to the order of Joseph Smith, Jr., payable one day after date, one for \$400, bearing date March 4, 1885, and the other for \$90, dated August 2, 1885; a note of Alex. B. Smith, dated January 6, 1893, payable to the order of Joseph Smith, Jr., on demand, for \$3,150; sundry small notes and accounts due by Alex. B. Smith to Joseph Smith, Jr., amounting to about \$350. Charles W. Smith and Alex. B. Smith were sons of Joseph Smith, Jr., and the former was the only responsible member of the firm of Smith, Bartlett & Co. After a direction to the trustee to sell any of the securities or obligations for the purpose of discharging certain specified indebtedness of Joseph Smith, Jr., there are the following provisions: "After the payment of said debts, said trustee shall pay to Joseph Smith, Jr., or to Elizabeth S. Smith, his wife, as he, in his discretion, shall deem best, the net income of said properties during the natural lives of said Joseph and Elizabeth Smith; and upon the death of either, the income shall be paid to the survivor during his or her natural life. Upon the death of both, said Joseph Smith, Jr., and Elizabeth S. Smith, said trustee, after charging to Charles W. Smith and Alex. B. Smith, as in the case of advancements, the sums due from them specified above, or so much thereof as shall not have been paid, shall divide the properties held by him in trust, into six equal parts." There then follow the names of the parties who are to receive these distributive shares. Joseph Smith, Jr., died July 8, 1902, and Elizabeth, his wife, on January 12, 1907. An auditor was appointed in the court below to distribute the assets remaining in the hands of the present trustee, the Union Trust Company of Pittsburgh, which succeeded to the trust upon the death of Hugh D. Smith on April 3, 1906, and from the decree of distribution which relieved the sons, Charles W. and Alex. B. Smith, from paying any interest on their obligations prior to the death of their mother, these appeals were taken.

The manifest purpose of Joseph Smith, Jr., in executing the deed of trust, was the preservation of his estate and the creation of income for himself and wife during life. The only income that could have been derived from the promissory notes of the two sons above enumerated was interest upon them. They were part of what their father in his deed of trust called "property," and his directions were that "the net income of said properties" should be paid to him and his wife during their joint lives and to the survivor upon the death of the other. The obligations of the sons were thus expressly charged with the creation of income when they passed to the trustee, and income from them could be nothing but interest upon them. As still further illustrating the intention of the father that the sons should pay interest to the trustee upon their obligations is the provision that, upon the final distribution of the estate, there should be charged against the sons so much upon their specified obligations as should not have been paid. If the father did not intend that these obligations should bear interest for the purpose of furnishing income to him and his wife, he certainly would not have contemplated that the sons would pay anything on them; for, upon whatever they might so pay, they would lose interest during the continuance of the trust. If the intention of Joseph Smith, Jr., as gathered from the entire declaration of trust, and not from a particular phrase in it, without reference to the context, is clear that his sons shall pay interest, they must be charged with the same on the distribution of the assets in the hands of the trustee, for they are mere volunteers and must take the bounty of their father upon the terms in which he bestowed it. *Reichelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014.

To avoid the payment of the interest which the father clearly intended his sons should pay, they point to the clause in the declaration of trust which provides that, upon the death of himself and wife, the trustee shall charge the sons, as in the case of advancements, with the sums due by them upon their obligations. It is to be noted in passing that advancements may be charged with interest, and will be so charged if the intention of the testator is clearly so expressed. *Miller's Appeal*, 81 Pa. 337; *Porter's Appeal*, 94 Pa. 332; *Farnum's Estate*, 176 Pa. 366, 35 Atl. 282. But upon this we need not dwell in the case before us, for the father did not declare that what he had lent to his sons should be deemed and treated as advancements by him to them.

In *Porter's Appeal*, *supra*, relied upon to sustain the view of the court below, the words of the testator relating to the notes of his son and two daughters were, they "are deemed by me as advancements to the respective drawers thereof." The will was artistically drawn, evincing an accurate knowledge of technical terms, and it was, therefore, held that the testator was conclusively presumed to have employed the term "advancements" in its strict legal sense and had turned the notes of his children in unmistakable phrase into gifts to them, to be valued as of their respective dates. In the present case Joseph Smith did not declare that he deemed the amounts due on the obligations of his sons as advancements to them, nor did he direct that they should be so treated on the final distribution of the trust estate. As already shown, he regarded them as debts from which he was to derive income for himself and wife. Such declaration on his part would not, of course, have made the obligations debts of the sons, if barred by the statute of limitations or they were incollectible for any other reason; but in creating the trust he had the right to treat them as debts, and the sons claiming under that trust must, therefore, regard them as valid obligations. All that the father provided in the clause upon which the sons now rely for immunity from paying interest was that upon the final distribution of what might remain of the trust estate the sons should be charged "as in the case of advancements" with the sums due from them, as specified in the declaration of trust. This means nothing more nor less than that what they owed upon the death of their mother, as specified in the declaration of trust, principal and unpaid interest, should be counted as part of the corpus of the estate, and the amount due by each son deducted from his share. On the obligations of Alexander, payable on demand, interest is chargeable from the day the father declared them to be part of the property from which income was to be derived, and the son, now claiming a distributive share under the declaration of trust, must take it cum onere. If he refuses to so take it, he can get nothing, for he is a mere volunteer. He must take it as his father gave it to him in the declaration of trust, or not at all.

The decree of the court below is reversed and the record remitted, that distribution may be made in accordance with the views herein expressed, the costs on these appeals to be paid out of the fund in the hands of the trustee.

DUFF v. HEPPENSTALL FORGE & KNIFE CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MUNICIPAL CORPORATIONS (§ 661*) — STREETS—POWERS OF CITY.

Under Act June 16, 1836 (P. L. 749), providing that all streets, lanes, and alleys in the city of Pittsburgh, if not less than 20 feet wide, which have been laid out, appropriated, and opened by private persons for public use shall be public highways as fully as other public streets in the city, such streets, etc., are part of the public works of the city; and the city has complete jurisdiction over them for all purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434-1436; Dec. Dig. § 661.*]

2. MUNICIPAL CORPORATIONS (§ 665*) — STREETS—OBSTRUCTIONS—INJUNCTION.

Where it appeared in an equity proceeding that plaintiff was the owner of lots abutting on streets originally dedicated by a private owner of the plan of lots, which lots were subsequently incorporated in the city of Pittsburgh, and portions of these streets were vacated by ordinances duly passed, a bill by plaintiff to restrain an abutting owner from encroaching on the bed of a street so vacated was properly dismissed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1441; Dec. Dig. § 665.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Levi Bird Duff against the Heppenstall Forge & Knife Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The plaintiff alleged in his bill that he is the owner of four lots in the plan of the executors of the will of Anna H. Irwin, deceased, by title derived from said executors; that at the time said plan was recorded all of the streets and alleys in said plan were opened for use to the lot holders and to the public, and the lots were conveyed to purchasers by numbers, bounding them by the streets and alleys of said plan, and since that time the lot holders and the public have had free and uninterrupted use of said street and alleys of said plan, and hold their lots subject to such use; that the defendant is the owner of lots 33 to 50, inclusive, and also lots 51 to 69, inclusive, in said plan, and holds said lots subject to the free use of said streets; that the defendant has encroached upon Home street by extending its buildings five to ten feet on the east side thereof over the building line, and threatens to permanently obstruct and close said street from Hatfield to Valley streets, and it has occupied with buildings a part of Valley street, and threatens to permanently close Valley street from Holly alley to Forty-Seventh street; and that the obstructions to and closing of said streets will greatly injure the plaintiff's property. The plaintiff prayed that the defendant be required to remove the

obstructions from said Home and Valley streets; and that it be enjoined from further obstructing and closing the same.

It appeared by the defendant's answer and upon the trial that the city of Pittsburgh, by an ordinance enacted June 24, 1907, had ordained that Home street from Hatfield street to Valley street, in said plan of the executors of Anna H. Irwin, deceased, be vacated; also that said city, by another ordinance approved June 16, 1910, enacted that said Home street from Hatfield street to Valley street be vacated, upon condition, however, that the ordinance should not be effective, unless the owners of the abutting property should pay \$3,000 into the city treasury within 30 days after its passage, which sum was paid into the city treasury of Pittsburgh on July 16, 1910. Home street and Valley street were each 50 feet wide.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Leonard K. Guller, Levi Bird Duff, and L. B. D. Reese, for appellant. W. S. Dalzell, for appellee.

ELKIN, J. [1, 2] The learned court below has given this case such full and intelligent consideration that but little need be said in reviewing it. Appellant is the owner of certain lots abutting on streets originally dedicated to public use by a private owner of the plan of lots. Subsequent to the dedication, the plan of lots was incorporated in the city of Pittsburgh, and the streets thus dedicated became part of the system of public highways. Portions of these streets, after they were taken over by the city, were vacated by ordinances duly passed. Appellant contends that the vacating ordinances are invalid, because the streets in question never were public highways, and the city therefore had no power to vacate them. The learned court below did not agree with this contention, and we concur in the conclusion of the lower court upon this branch of the case. But, assuming that the vacating ordinances are valid, appellant further contends that the vacation of portions of the streets as public highways cannot affect his right as an abutting owner of lots on the streets originally dedicated to have the same kept open for the use and benefit of the lot owners. It is not necessary in the disposition of this case to discuss what the general rule is or should be in such cases. In the case at bar, we have to do only with streets in the city of Pittsburgh and the declared statutory policy of the law relating to the same. The act of June 16, 1836 (P. L. 749), provides as follows: "All streets, lanes and alleys within the city of Pittsburgh, if not less than twenty feet in width, which have been laid out, appropriated and opened by private persons for public use or for

the use of owners of lots fronting thereon, or which shall be, being of not less than twenty feet in width, hereafter laid out, appropriated and opened as aforesaid, shall for every purpose be deemed, taken and be public highways, as fully as the other public streets within the said city."

In passing upon this question, the learned court below said: "As before stated, the act of 1836 is explicit that streets, in plans of private persons, which are of a certain width and have been opened, shall be public highways. This is not simply a declaration that such streets should be public highways; the statute goes much further. It enacts that such streets shall be public highways 'as fully as other public streets within the said city,' and, not merely for some purposes, but 'for every purpose.'" What is the meaning of these expressions? They must have been added for some reason. Their use was not necessary to effectuate the purpose of making such streets public highways. That had already been done by appropriate language. To our mind, the plain intent of this statute was to abolish all distinctions between streets in Pittsburgh, between those of the city itself and those in private plans, which were above 20 feet in width, and were opened to the public use. This was a declaration by the sovereign that thereafter the opened streets of a private plan were to be part of the public works of Pittsburgh, as much so as if the city itself had located and opened them to public use. Such streets were therefore public highways, and the city of Pittsburgh had complete jurisdiction over them for all purposes which the Legislature might commit to it.

We think the learned court below properly interpreted the statute, and that it was the intention of the Legislature, in passing the act in question, to abolish distinctions as to streets in the city of Pittsburgh. In other words, it was thus declared as a policy of the law that streets of the designated width, dedicated to public use by a private owner, should be treated upon the same basis as other streets opened, improved, and maintained by the city itself. This means that all streets in said city, those dedicated by a private owner as well as those opened by ordinance, are subject to the control and supervision of city councils. They may be widened, improved, or vacated in the manner provided by law, when the necessities of the city so require. All subsequent purchasers of lots included in the original plan took title with notice of the declared statutory policy of the law relating to the public highways of the city of Pittsburgh after the passage of the act of 1836. The Legislature, representing the sovereign authority of the state, had the power to declare what streets shall be deemed public highways, and what control and supervision shall be exercised over them. It exercised the power by pass-

ing the act of 1836, and this is binding upon the public, the municipal authorities, and the private lot owners. We agree with all the conclusions reached by the learned court below, and think the bill was properly dismissed.

Decree affirmed, at cost of appellant.

ERNY v. SAUER.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MORTGAGES (§ 309*)—AGREEMENT TO SURRENDER POSSESSION—CONSIDERATION.

An agreement by a mortgagor in default to surrender possession of the mortgaged property and convey the same under release from further liability is void; and that the mortgagor went to expense of removing his family to another residence is not a sufficient consideration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 870, 899, 900, 902-905, 907-912; Dec. Dig. § 309.*]

2. CONTRACTS (§ 75*)—CONSIDERATION.

A promise cannot be conditioned on a promise to do a thing to which a party is already bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 278-285; Dec. Dig. § 75.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Joseph F. Erny, for use of Joseph F. Erny, Trustee of German National Bank, and others, against W. N. Sauer. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

U. G. Vogan, for appellant. John E. Winner and John D. Brown, for appellee.

MESTREZAT, J. This is an appeal by the defendant from a judgment entered by the court below for want of a sufficient affidavit of defense. The learned court has not favored us with an opinion, and we are therefore not advised as to its reasons for entering the judgment. It has frequently been pointed out by this court that an opinion should be filed setting forth briefly at least the reasons of the court for holding the affidavit insufficient and depriving the defendant of a jury trial. In the present condition of this record, we become a court of first instance, and deal with the question involved as though it had not been considered or determined by the trial court. This, as we have often said, is not the intention of the law. The court of common pleas is the court of first instance, and the parties have the right to have their cause heard and decided according to law and the established practice of the state. This court, in adjudicating the question for decision, is entitled to have the assistance which the opinion of the trial court would give.

W. N. Sauer, the defendant, and one L. H. Smith became indorsers on several promissory notes for E. T. and C. L. Walther. These notes were discounted by the banks for whose use the scire facias on the mortgage was issued. Smith and Walther became insolvent, the former's estate paying a very small part of the indebtedness secured by the notes. The banks looked to Sauer for payment of the balance due, and he, being unable to raise the money, entered into an agreement with Joseph F. Erny, the plaintiff, on April 1, 1909, agreeing to execute and deliver to Erny a bond and mortgage conditioned for the payment of \$32,700, being the aggregate amount of the notes. The debt was to be paid in two years and nine months, with interest from January 1, 1910, payable semiannually. The mortgage was executed and delivered contemporaneously with the agreement. The mortgage contained a clause providing that, in case of default in the payment of the principal or any semiannual installment of interest for 30 days after the same should become due and payable, the whole of the principal debt and interest then unpaid should thereupon become due and payable, and a writ of scire facias might issue forthwith on the mortgage.

The defendant having made default in the payment of the two semiannual installments of interest due on July 1, 1910, and January 1, 1911, the plaintiff on May 23, 1911, issued a scire facias on the mortgage. To the plaintiff's statement of claim the defendant filed an affidavit of defense, denying that he was in default in the payment of the principal sum or interest, and averring substantially that about March 1, 1911, Erny, the plaintiff, and Sauer, the defendant, entered into an oral agreement by which the defendant was to surrender possession of the mortgaged property, make a deed of conveyance for the same to the plaintiff, and, in consideration therefor, the defendant was to be released from further obligation on account of the mortgage; that, in pursuance of the agreement, the defendant rented a house and removed from the premises, and gave possession to the plaintiff, who at the time of bringing the suit was in possession under the oral agreement. The affidavit of defense further avers that the defendant, in pursuance of the agreement and at plaintiff's request, gave his title deeds to the plaintiff for the purpose of having a deed prepared for the defendant to execute and that he is ready and willing to execute a deed at any time he receives it.

[1] The defendant contends that the mortgage was released by the parol agreement entered into between the parties, and that, therefore, the plaintiff has no right to proceed by scire facias to obtain judgment and sell the premises. The difficulty with the defendant's contention is that conceding, as he maintains, that the mortgage could be re-

leased by an oral agreement, there is no consideration to support the agreement entered into between him and the plaintiff. Our cases hold, as is conceded, that a new consideration is necessary to support the oral agreement. The defendant contends, however, that the surrender of the possession and the other acts performed by him are a sufficient consideration. The other acts referred to are the trouble and expense of procuring another residence and removing his family thereto. It is true, as he claims, that the practice in this state is for the mortgagor to retain possession and receive the rents and profits of the premises until he is dispossessed by foreclosure proceedings. He therefore contends that it was an advantage to the plaintiff to be given immediate possession without the delay and expense incident to a sale and purchase of the premises by the plaintiff. These advantages to the plaintiff, together with the alleged disadvantages to the defendant, it is claimed, are sufficient consideration to support the agreement.

But we are not impressed with the defendant's contention that the matter and acts he refers to constitute a consideration which will support the agreement. At the time the writ was issued in this case, the defendant had made default in payment of the semiannual installment of interest due on July 1, 1910, and January 1, 1911. The plaintiff therefore, on March 1, 1911, the date of the alleged oral agreement, could have proceeded by scire facias, obtained judgment, sold the premises, and collected the indebtedness due him, secured by the bond and mortgage; or he could have entered at pleasure, take actual possession, used the land and reaped its profits. *Tryon v. Munson*, 77 Pa. 250. If the defendant refused to give possession, he could have been ousted by an action of ejectment. Assuming that he gave possession in pursuance of the alleged parol agreement, he did nothing more than it was his duty to do, or what he could have been compelled by legal process to do. No consideration therefore passed to the plaintiff when the defendant voluntarily surrendered possession of the premises to him in pursuance of the agreement. *Wimer v. Worth Township Poor Overseers*, 104 Pa. 317; *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750; *Dunn v. Washington Building & Loan Association*, 2 Penny. 109.

[2] In the *Fink* Case it is said (at page 128 of 170 Pa., at page 566 of 32 Atl. [50 Am. St. Rep. 750]): "A promise made by the owner to obtain possession of his goods, which at the time are wrongfully withheld from him, is without consideration." Mr. Justice Trunkley, delivering the opinion in the *Wimer* Case, says (at page 320 of 104 Pa.): "Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. * * * A promise cannot be conditioned on a promise to do a

thing to which a party is already legally bound." We are of the opinion that the affidavit sets up no legal defense to the plaintiff's claim, and that therefore the rule for judgment was properly made absolute.

The judgment is affirmed.

FLYNN v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

STREET RAILROADS (§ 100*)—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Where a woman on a clear day approaches a street railway track where there is a view of the track for more than a mile in the direction of an approaching car, and is struck the instant she goes on the track, she is guilty of contributory negligence, and is not relieved from that charge because she was nearsighted.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 217; Dec. Dig. § 100.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Elizabeth Flynn against the Pittsburgh Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

William A. Challener and Clarence Burleigh, for appellant. Rody P. Marshall and Thomas M. Marshall, for appellee.

BROWN, J. The contributory negligence of the plaintiff below was so clear that the defendant's motion for a nonsuit should have prevailed, or, at the close of the testimony, a verdict ought to have been directed in its favor. After leaving a street car on California avenue, in the city of Allegheny, the appellee, with several others, walked down an alley to Beaver avenue, for the purpose of boarding a car on the south side of that avenue. There were two tracks of the defendant company upon it, and to reach the one on the south side it was necessary to cross over the one on the north. The testimony of the appellee is that, after she had passed out of the alley, she stepped down from the curb of the pavement, and looked and listened for an approaching car, and, having neither seen nor heard one, passed over the space between the curb and first track—less than eight feet in width—continuing to look and listen for a car. The day was clear and bright, and there was nothing to obstruct a view of the track for more than a mile in the direction from which the car came that struck her, for it was straight and level for that distance. She was struck just as her feet were upon the track, though the coming of the car could have been seen for the distance stated. That she was struck the instant she got upon the track is not to be questioned. William

Hines, a witness to the accident, who was called by the plaintiff, testified as follows:

"Q. Where was the car when she stepped on the track? A. The car was very near on top of her when she stepped on the track.

* * * Q. And the car was on top of her when she stepped on the first rail, wasn't it? A. Yes, sir. Q. And she practically stepped in front of that moving car, didn't she? A. Yes, sir." Her own daughter, Mrs. Lillian Mulroy, who witnessed the collision, stated that as soon as her mother stepped across the first rail the car struck her about the center of the track. In *Crooks v. Pittsburgh Railways Company*, 216 Pa. 590, 66 Atl. 142, we said: "Where a foot passenger walks or steps directly in front of an approaching car, and is struck at the instant he sets his foot between the rails, there is but one inference which can reasonably be drawn from that fact, and that is the inference of contributory negligence. * * * The testimony is undisputed as to the manner in which this most unfortunate accident occurred. As we have seen, one step, or at the most two, carried the deceased from a point outside the line of the track into collision with the car. It must have occurred in less than a second of time. The facts speak for themselves. The action of the deceased can only be characterized as contributory negligence." And so here the act of the appellee in stepping on the track when the car which struck her was but a few feet from her, and which she must have seen and heard if she had been looking and listening, must be regarded as contributory negligence, barring her right to recover, even if the defendant company was negligent.

But it is urged that the appellee ought not to be adjudged guilty of contributory negligence as a matter of law, for two reasons: First, she was nearsighted; and, second, as there was a safety stop a few feet from the alley, in the direction from which the car came, she had a right to presume it would stop there. These two circumstances were not sufficient to send to the jury the question of her contributory negligence. Though nearsighted, she admitted that she could see, for she says she looked to see whether a car was coming, and, even when protesting her nearsightedness, she again admitted that she could see a moving object across the street from her. If she had looked when she was about to put her foot on the track, she would have seen the car, which was then nearer to her than the width of the street. If she was nearsighted, there was the greater reason for caution on her part in crossing the street. Her nearsightedness, instead of relieving her from the duty of ordinary care, imposed upon her the duty of greater precaution to avoid injury. *Central Railroad Company of New Jersey v. Feller*, 84 Pa. 226; *Mark's Administrator v. Petersburg Railroad Co.*, 88

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Va. 1, 13 S. E. 299; McKinney v. Chicago & Northwestern Railway Co., 87 Wis. 282, 58 N. W. 386. "Those who are deficient in any one of their senses must all the more diligently use the others. Thus a deaf man should look up and down the track even more closely than might be necessary if he could hear well; and one whose eyesight is defective ought to listen all the more carefully for trains." Shearman & Redfield on the Law of Negligence (5th Ed.) § 481. If the appellee had looked before she stepped upon the track, she would have known that the car had not stopped at the safety stop. The learned trial judge correctly instructed the jury that she could not escape the charge of contributory negligence by reason of being nearsighted nor relieve herself of that charge under a belief that the car would stop at the safety stop; but he should have gone further, and, in view of her clear contributory negligence, to which we have referred, affirmed defendant's point.

The first assignment is sustained, and the judgment reversed.

OIL WELL SUPPLY CO. v. ULRICH STEWART MFG. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

APPEAL AND ERROR (§ 1022*)—REVIEW— QUESTIONS OF FACT—FINDINGS BY AUDI- TOR.

Where findings of fact by an auditor of the account of a receiver have been approved by the trial court and are without manifest error, they will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the Oil Well Supply Company against the Ulrich Stewart Manufacturing Company. From an order dismissing exceptions to an auditor's report, Henry Ulrich appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. K. Jennings, C. D. Jennings, and Stonecipher & Ralston, for appellant. Ward Bon-sall and Charles A. Poth, for appellee.

PER CURIAM. The assignments of error are to the confirmation of the report of an auditor of the account of a receiver of an insolvent corporation. The main complaint is that a personal claim by the receiver for the value of property alleged by him to have been delivered to the corporation at the time of its organization was disallowed. A discussion of the details of the controversy between the receiver and the creditors of the corporation would serve no useful purpose. The question before the auditor was one of fact purely. We have repeatedly said that the findings of fact by an auditor, approved by the court, will not be disturbed, unless it is clearly shown that they are erroneous. Ordinarily the limit of our inquiry, in reviewing findings of fact, is to ascertain whether there was testimony which, if believed, would sustain the findings. Steinnmeyer v. Siebert, 190 Pa. 471, 42 Atl. 880, 70 Am. St. Rep. 641; Rorabaugh's Estate, 229 Pa. 377, 78 Atl. 849. There was ample testimony to sustain the findings made.

The order is affirmed, at the cost of the appellant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LANDER v. PERSKY et al.

(Supreme Court of Errors of Connecticut.
May 16, 1912.)

1. MORTGAGES (§ 497*)—FORECLOSURES—EFFECT OF DECREE.

P. and A., taking note and mortgage therefor, agreed to loan D. \$6,000, payable to him in installments; each payment being conditioned on D. being furnished a waiver by contractors of mechanics' liens. Waiver was not furnished, and the last payment of \$800 was not paid or demanded; but D. gave to L. an assignment of \$600, payable therefrom, of which P. and A. were notified. For nonpayment of interest, P. and A. brought action of foreclosure; and L., claiming an interest in the premises, procured himself to be made a party plaintiff. Held that, L. having no interest in the property or in the loan, the assignment never having become effective, and so not being a necessary or proper party plaintiff, the foreclosure decree, finding the interest due at an amount which included the interest on said \$800, and ordering, in default of redemption, that possession of the premises be delivered to P. S. and L., could vest in L. no interest in the premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469-1471, 1473; Dec. Dig. § 497.*]

2. MORTGAGES (§ 497*)—FORECLOSURE—EFFECT.

Where a mortgage was given to secure a loan, payable to the mortgagor in installments, and the last installment of \$800 was not paid to him, the condition on which it was payable, the furnishing of waivers of mechanics' liens, not being complied with, the inclusion of interest on said \$800 in the foreclosure judgment, while subject for complaint, was not a waiver of the condition on which the \$800 was payable, or an unconditional acceptance by the mortgagee of the mortgagor's assignment to a third person of part of the \$800.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469-1471, 1473; Dec. Dig. § 497.*]

3. TRUSTS (§ 72*)—RESULTING TRUST.

That there may be a resulting trust in favor of one from the acquisition of title to property by others, part of the consideration by which they secured title must have come from him.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 102, 103; Dec. Dig. § 72.*]

4. EVIDENCE (§ 114*)—RELEVANCY AND MATERIALITY.

It has no tendency to prove validity of plaintiff's claim against defendants that a third person, as part consideration of defendants' transfer of property, agreed to pay the claim, if it should be established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125-132; Dec. Dig. § 114.*]

Appeal from Court of Common Pleas, New Haven County; Simpson, Judge.

Action by Abraham Lander against Simon Persky and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Ward Church, of New Haven, for appellant. Benjamin Slade, of New Haven, for appellees.

WHEELER, J. [1] The defendants Persky and Asher, on December 22, 1909, loaned one Danzig \$2,800 on note, secured by first

mortgage on certain premises, and also agreed to loan him \$6,000, payable in 11 payments at different stages of construction of a building by Danzig on said premises, and took a note for said \$6,000, secured by second mortgage on said premises. Each payment was conditioned upon Danzig furnishing Persky a waiver of lien, signed by all the contractors engaged on the building and by the materialmen who furnished the material for the construction of the building.

Danzig proceeded with the erection of the building, and Persky and Asher paid to him all of the \$6,000 loan, except the last payment of \$800. Danzig never furnished said waiver, nor demanded payment of said \$800.

While the building was uncompleted, there being then no mechanics' liens on said building, Danzig, on June 8, 1910, borrowed of Lander, the plaintiff, \$600 for use in finishing the building, and gave the plaintiff an assignment of \$600, payable out of said final payment of \$800, notice of which was duly given the defendants. After June 8, 1910, mechanics' liens were filed against said premises and remained thereon, when, on September 21, 1910, Persky and Asher brought an action of foreclosure of said mortgages against Danzig for nonpayment of interest due.

The plaintiff, claiming an interest in said mortgage premises by virtue of his assignment, procured himself to be made a party plaintiff in the foreclosure action. A decree therein was entered, finding the amount of interest due \$528, being the interest to date on the entire loans, including the final payment of \$800 never made, and limiting the time for redemption of the several defendants, and ordering possession delivered to the said mortgagees, Persky and Asher, and the present plaintiff.

None of the defendants redeemed, and immediately Persky and Asher filed a certificate of foreclosure of title to said property in the town clerk's office of New Haven, under General Statutes, § 4125, and on said day conveyed the same to Cohen, one of the defendants in the foreclosure proceedings, and received in consideration a note, secured by mortgage, on said premises, being for the face of the judgment and costs and interest thereon from its date.

The plaintiff seeks in this action to recover the \$600 advanced by him to Danzig, together with interest thereon. In his brief, he thus states his claim: "When Persky and Asher caused judgment to be entered for interest on the full face of the loans, they thereby adopted and made a part of their own claim the \$600 advanced by Lander, and the interest thereon. When they recorded a certificate of foreclosure in their names as full owners, and gave a deed in the same way, they thereby caused to exist a resulting trust in Lander's favor."

Upon what legal theory Lander was made a party plaintiff in the foreclosure action brought by Persky and Asher against Danzig, we are unable to conceive. Lander had no interest in the property as lienor or otherwise, and no interest, legal or equitable, in these loans. The assignment to him of \$600 of the amount due under the last payment never became effective, since its payment was contingent upon the securing of waivers of the mechanics' liens, and these were never obtained. The judgment of foreclosure found \$528 due the plaintiff on the debts named in the complaint, and these were debts in which Lander had no interest. It necessarily follows that Lander took absolutely nothing by the judgment of foreclosure. He was neither a necessary nor a proper party plaintiff. The decree of the court could not vest in him an interest in these premises, any more than it could in any other stranger to the premises.

[2] The inclusion of the interest due on the last payment in the foreclosure judgment was a matter of which the defendants therein might complain, but which in no way concerned Lander. It was not a waiver of the condition upon which the last payment was to become due, nor was it an unconditional acceptance of the \$600 assignment.

[3] Since Lander had no interest in the loans, there was no foundation upon which to rest a claim of a resulting trust in his favor in the property foreclosed. No part of the consideration by which Persky and Asher secured title to the property came from Lander, and this would be a prerequisite to a resulting trust in his favor. *Ward v. Ward*, 59 Conn. 195, 22 Atl. 149.

[4] The plaintiff called the defendant Asher as a witness, and he, having testified as to the consideration of the transfer to Cohen, was asked if Cohen, as a further consideration, agreed that if Lander's claim was established he would pay it and save Persky and Asher harmless. This question was properly excluded. It was immaterial to the issue; it did not tend to establish the defendants' legal liability to the plaintiff.

There is no error. The other Judges concurred.

HUMPHREY et al. v. GERARD et al.
(Supreme Court of Errors of Connecticut.
May 16, 1912.)

1. DOWER (§ 55*)—WIDOW—NATURE OF INTEREST.

A widow owning an unassigned dower interest in certain real property of her husband is a tenant in common to the extent of such interest with the husband's heirs, their grantees, and the other owners of the property, and as such is entitled to possession and to her proper share of the income of the property in like manner as her cotenants.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 176; Dec. Dig. § 55.*]

2. QUIETING TITLE (§ 50*)—RECEIVERS—INCOME—DISTRIBUTION.

Where in a suit to quiet title a receiver was appointed to conserve the income of the property pendente lite, the superior court after having determined the title had jurisdiction to distribute the funds in the hands of the receiver, and for that purpose to ascertain the persons entitled thereto, and therefore was authorized to decree that a widow had a dower interest in one of the shares of the property and to award to her, though such dower was unassigned, her distributive share of such income.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 100; Dec. Dig. § 50.*]

3. DOWER (§ 55*)—NATURE OF ESTATE—VESTING—ASSIGNMENT.

A widow's dower vests immediately on the death of her husband, without assignment or setting out, and remains unchanged except as an assignment or her own act may operate to do so.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 176; Dec. Dig. § 55.*]

4. INTERPLEADER (§ 4*)—SCOPE OF REMEDY—FUNDS IN THE HANDS OF RECEIVER.

Where in a suit to quiet title the court appointed a receiver who took charge of the rents and profits pendente lite, it was proper for the court after determining the title to order the parties interested in the fund so collected to file statements of claim as in an interpleader.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 5; Dec. Dig. § 4.*]

Appeal from Superior Court, New Haven County; Howard J. Curtis, Judge.

Action by Marie E. Ives Humphrey and others against George L. Gerard and others. From that portion of a judgment of the superior court distributing certain moneys in the hands of a receiver collected as the income of the property pending the action, Gerard appeals. Affirmed.

Charles S. Hamilton and Robert C. Stoddard, for appellant. Harrison T. Sheldon, for appellee Emmons.

PRENTICE, J. This litigation has been before us in some of its aspects upon several former occasions, the last as reported in 84 Conn. 216, 79 Atl. 57. The action was brought to quiet and settle the title to certain real estate. Pending it the court appointed a receiver to collect the income from the property. All the issues involving the title have been finally determined. The present appeal grows out of the order of the court contained in the final judgment, which divides and distributes the net income in the hands of the receiver. There is no dispute as to the disposition made of seven-eighths of this amount, or as to that of two-thirds of the remaining one-eighth. The sole contention arises from the claim of Frankie S. Garfield Emmons, as the widow of James H. Garfield, to one-third of one-eighth, while the defendant Gerard claims that he is entitled to this portion as the adjudged fee owner during the period of litigation through a deed from one of the two children of

James H. Garfield of the one-eighth interest in the property, in which interest Mrs. Emmons claims her disputed dower right. There is no question as to Gerard's full title to the one undivided one-eighth property interest about which the controversy centers, or to the correctness of his claim to the entire income appropriate to that one-eighth except such as arises from the widow's claim of dower. The controversy thus becomes resolved into one as to the validity of the latter claim.

Upon this question there is left no room for doubt upon the facts found. It is found that all the conditions existed which were necessary to entitle Mrs. Emmons, upon the decease of her husband, to dower in all the real estate in this state of which he died possessed, and that her dower has never been assigned or set out pursuant to our statute.

[1] Under the well-established principles of our law, she was therefore, during the period when the income in question was collected, a tenant in common to the extent of her dower interest, with the heirs of her husband, their grantees, and the other owners of the property, and as such entitled to possession and to her proper share of its income in like manner as her cotenants. *Calder v. Bull*, 2 Root, 50, 52; *Stedman v. Fortune*, 5 Conn. 462, 465; *Wooster v. Hunts Lyman Iron Co.*, 38 Conn. 256, 257; 1 *Swift's Digest*, s. p. 85. The court so held, and correctly awarded to her such share and no more.

[2] The appellant's objections to the action of the court appear to rest upon the theory that the award to Mrs. Emmons involved an assignment of dower to her—a proceeding which is not within the province of the superior court. Such was by no means the case. The court had funds in its hands for distribution to those rightfully entitled to them. It was competent for it to inquire who these persons were, and the share belonging to each of them. That inquiry necessarily involved one as to the owners of the property which had produced the income during the period of its production, and their several interests in it. Such inquiry the court made as a preliminary to its distribution of the funds, and it did nothing more touching the title to the property. In so doing it was simply seeking to learn the state of the title as it was during the operations of the receiver as furnishing the necessary basis for its order of distribution. It neither undertook to create a new interest nor to change or make permanent an existing one. The contention that it either directly attempted to do or in effect did what we said in our former opinion (84 Conn. 216, 221, 79 Atl. 57) the superior court is incompetent to do, to wit, to assign dower, and that the advice of this court in that case was

ignored in the present proceeding, is wholly without foundation. Equally so is the claim that the court could not ascertain the amount to be paid to Mrs. Emmons until her dower had been assigned.

[3] Mrs. Emmons, as a widow entitled to dower immediately upon her husband's death, became endowed for her life with one-third part of all the real estate of which her husband died possessed. We have already had occasion to observe that under our law she, as such doweress, became a tenant in common with the other heirs of her husband in all of his real estate. This estate vested in her immediately. It did not await upon an assignment or setting out. It was complete and perfect from the moment of the husband's death, and would remain unchanged except as an assignment or her own act might operate to do so. 1 *Swift's Digest*, s. p. 85; *Stedman v. Fortune*, 5 Conn. 462; *Wooster v. Hunts Lyman Iron Co.*, 38 Conn. 256, 258; *Greathead's Appeal*, 42 Conn. 374, 375; *Humphrey v. Gerard*, 84 Conn. 216, 221, 79 Atl. 57. When, therefore, the court ascertained that Mrs. Emmons had the estate of a doweress with dower unassigned, it had all the information requisite to establish her right to share in the income of the property of which she was a tenant in common, and it was not necessary to create in her any new right or estate or to give to her any new status whatsoever.

[4] Complaint is made of the procedure adopted by the court for the determination of the rights of the parties in respect to the distribution in that they were ordered to file statements of claim as in an interpleader. There can be no legal objection to the course pursued if the court deemed it wise to direct it. It was entitled to get at the pertinent facts, and the method adopted was one to which it could resort in the proper exercise of its discretion. No hard and fast rule prescribed any precise mode of procedure, or forbade the one chosen.

There is no error. The other Judges concurred.

ATWOOD v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
May 16, 1912.)

NEGLIGENCE (§ 136*)—ACTION—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where the evidence so clearly showed that plaintiff's negligence contributed to produce the injuries complained of that the jury could not reasonably find otherwise, the court was justified in directing a verdict for defendant.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Action by Paul Atwood against the Connecticut Company to recover damages for

personal injuries, alleged to have been sustained through defendant's negligence. There was a judgment for defendant, rendered on a directed verdict, and plaintiff appeals. Affirmed.

Ulysses G. Church, of Waterbury, for appellant. Joseph F. Berry, of New Haven, for appellee.

PER CURIAM. The evidence so clearly indicates that the plaintiff's negligence contributed to produce his injuries that the jury could not reasonably have found otherwise. The court was therefore justified in directing a verdict for the defendant.

This conclusion renders the rulings upon the admission of testimony complained of entirely unimportant.

There is no error.

GRANT v. NEW DEPARTURE MFG. CO. (Supreme Court of Errors of Connecticut. May 16, 1912.)

1. FRAUDS, STATUTE OF (§ 118*)—SUFFICIENCY OF WRITING.

Plaintiff wrote defendant accepting an offer by defendant to take charge of a department of its business "for \$2,500 per annum for the first year," and asked that a contract for the first year be sent. Defendant, in reply, expressed satisfaction at his acceptance, stated that the salary for the first year would be \$2,500, and that no one in its employ had a contract, and they thought it better not to depart from this custom. *Held*, that the letters constituted a sufficient memorandum to satisfy the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

2. FRAUDS, STATUTE OF (§ 53*)—AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

An oral agreement of employment for one year commencing February 1st, made before that date, would be void under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 69, 80, 92; Dec. Dig. § 53.*]

3. EVIDENCE (§ 458*)—PAROL—TO EXPLAIN WRITING.

Oral negotiations between parties before letters constituting a contract were written are competent to show the circumstances under which they were written as an aid to their interpretation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2083; Dec. Dig. § 458.*]

4. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR.

Where the court properly held that there was a sufficient written memorandum of a contract for one year's employment to satisfy the statute of frauds, a finding, unsupported by the evidence, that the oral agreement made before the employment commenced was orally renewed the day it commenced, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

5. MASTER AND SERVANT (§ 40*)—ACTION FOR WRONGFUL DISCHARGE—OTHER EMPLOYMENT.

An employé discharged before the expiration of the time for which he was employed is prima facie entitled to the balance of the stipulated salary, and is not bound to show that he could not or did not obtain other employment; the burden being on the defendant to show that he did or could.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 47-49; Dec. Dig. § 40.*]

6. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

In an action by an employé for wrongful discharge, the burden being on defendant to show in mitigation of damages that plaintiff did or could have obtained other employment, a finding that defendant was not able to obtain other employment, though not supported by any evidence offered by either party, was harmless error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

Wheeler, J., dissenting in part.

Appeal from Court of Common Pleas, Hartford County; John Coats, Judge.

Action by Robert H. Grant against the New Departure Manufacturing Company. From a judgment for plaintiff, defendant appeals, alleging errors in rulings and findings of the court. Affirmed.

The defendant, desiring a superintendent for its ball-bearing department, made the plaintiff a proposition to serve it in that capacity. The plaintiff asked time to consider the proposition, and a few days later, on January 25th, wrote them a letter which read: "I have carefully considered your proposition to take charge of your ball department and any other branch of the business you may see fit to give me, for \$2,500 per annum for the first year and advances as fast as the departments show that they are profitable to the company. If you will kindly send me a contract for the first year as above, I will be with you on the first of the month ready to start in and give you the benefit of my knowledge in the lines mentioned above." To this the defendant on January 27th replied as follows: "Yours of the 25th instant to hand and we are pleased to note that you will be with us on the 1st of February, upon the terms and under conditions as gone into verbally when you were here last. The salary for the first year will be \$2,500. The more valuable you make yourself to us, the better it will please us, and your salary will be governed accordingly. Regarding contracts, would say that there isn't a person in our employ, including the three officers, who has a contract of any kind with this company, and in taking this up with our Mr. Rockwell he stated that he thought inasmuch as this had not been the custom heretofore, we had better not depart from what has been an old-established rule. At the same time you need not anticipate

any trouble as to the treatment you will receive from the hands of this company. Our Mr. Rockwell is most broad in his treatment of these matters and I am sure your new connection will prove most profitable for all concerned. Unless we hear from you to the contrary we will expect you here on the 1st proximo." These letters were in evidence, and also oral testimony tending to show what occurred at the interview between the parties. The plaintiff entered upon the employment on February 1, 1909, and continued in it until October 1, 1909, when, against his will, he was discharged by the defendant.

Josiah H. Peck, of Hartford, and Newell Jennings, of Bristol, for appellant. Clifford H. Bell and John W. Joy, both of Hartford, for appellee.

THAYER, J. (after stating the facts as above). If the plaintiff was employed for a year at a salary of \$2,500, as he claims, then his discharge by the defendant before the end of the year was a breach of its contract.

[1-3] It appears that, prior to the writing of the letters which passed between the parties, the latter had met and talked over the defendant's requirements and the plaintiff's experience and qualifications. The defendant then offered the plaintiff employment as mechanic and supervisor of its ball department at a salary of \$2,500 for the first year. The plaintiff requested time to consider the proposition. The letters then passed between the parties, and pursuant thereto the plaintiff came on from his home in Pennsylvania and entered upon the employment on February 1, 1909. The defendant correctly says that any parol contract made prior to February 1st for a year's employment to begin on that date would be within the statute of frauds and that proof of such contract would be insufficient to establish the contract alleged. But what occurred before the letters were written is competent to show the circumstances under which they were written as an aid to their interpretation.

The plaintiff's letter states the terms of the original proposition and manifestly was intended as an acceptance of it. That the defendant so understood it appears from its reply. It says therein that it is pleased to note that the plaintiff will be with it on the 1st of February upon the terms and conditions which had been gone into verbally at the time of the interview and that his salary will be \$2,500 for the first year. Had the letter ended here, it would have been, in view of the circumstances under which it was written, a sufficient memorandum of a contract for a year to justify the court in its finding of such a contract. *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 6, 85 N. E. 877. The defendant does not seriously contend that it would not, but says that it appears by the letters that the plaintiff

asked for a contract for a year and that the defendant refused to make such a contract. Is this the proper construction of the language of these letters? The plaintiff's request was that "a contract for the first year as above" be sent him, showing that it was the written evidence of the contract which his acceptance of the defendant's proposition had created which he requested. The terms were agreed upon. He asked for a written contract as evidence of those terms. Apparently the defendant so understood it. It declined to send such a contract, not because there was no agreement for a year's service, but because it did not give contracts to its employes, and chose not to depart in this case from an old-established rule. It said, "There isn't a person in our employ, including three officers, who has a contract of any kind with the company." It cannot be considered that this statement was correct unless the reference was to written contracts. Undoubtedly the writer meant that none of its employes, including the officers, had written contracts of employment. The language is that of a person excusing himself for refusing to send a writing embodying an agreement already made for a year's services, rather than that of one refusing to enter into such an agreement. There was no error in the court's holding that there was a contract for a year of which the defendant's letter was a sufficient memorandum to satisfy the statute.

[4] The foregoing renders it unnecessary to consider the defendant's request that paragraphs 11 and 12 of the finding be stricken out as having been found without evidence to support them. The plaintiff having produced a sufficient memorandum in writing of the contract, the finding that the contract was renewed orally on the morning of February 1st has no significance, and the defendant is not harmed by the finding.

[5, 6] Nor is the defendant harmed by the finding (also complained of as having been found without evidence), that from the time of his discharge until the end of the year the plaintiff was not able to obtain employment. The plaintiff had been paid in full to the time of his discharge. The defendant having broken the contract, the plaintiff, *prima facie*, was entitled to the balance of the salary stipulated to be paid. For this he could have brought suit at once. He waited until the year had expired. Had he brought suit at once, the defendant would have been permitted to show in mitigation of damages that the plaintiff by the use of due diligence could find other employment. In the present case, in like manner it was permissible for the defendant to show, either that the plaintiff had between his discharge and the end of the year found and accepted other employment, or that by proper diligence he could have found other employment. 3 *Sedgwick on Damages* (3d Ed.) § 693; 3 *Joyce on Damages*, § 2026; 2 *Green. Ev.* §

261a; *Howard v. Daly*, 61 N. Y. 362, 371, 19 Am. Rep. 285; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877. The plaintiff was not bound to offer any evidence upon that question until it was opened by the defendant. The latter having offered no evidence upon that question, he was not harmed by the finding complained of, because without such finding the plaintiff was entitled to the balance of his salary for the year.

There is no error.

WHEELER, J. (concurring). I concur in the decision and in the opinion, except in the following statement of law: "The defendant having broken the contract, the plaintiff, *prima facie*, was entitled to the balance of the salary stipulated to be paid. For this he could have brought suit at once. He waited until the year had expired. Had he brought suit at once, the defendant would have been permitted to show in mitigation of damages that the plaintiff by the use of due diligence could find other employment. In the present case, in like manner it was permissible for the defendant to show, either that the plaintiff had between his discharge and the end of the year found and accepted other employment, or that by proper diligence he could have found other employment. The plaintiff was not bound to offer any evidence upon that question until it was opened by the defendant."

This is in conflict with the doctrine of *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520, 539, a case of assumpsit for breach of a contract by the defendant, employers of the plaintiff. We then said in relation to the question of damages: "We are clearly of the opinion that the plaintiff is not, necessarily, and as matter of law, entitled to recover the full price for the full term of the contract. The defendants violated their contract, and the plaintiff suffered damage. The injury sustained is the measure of damages. That is ascertained by considering how much he could have earned at the contract price during the balance of the term, taking into consideration the sum payable weekly, and also the value of the stock stipulated for in the contract. From this should be deducted the value of the plaintiff's time to himself. * * * Of course, the plaintiff would not be justified in remaining idle for the whole time. He will not be permitted to increase the damage to himself unnecessarily, at the expense of the defendants. He is bound to use ordinary diligence. The defendants are only liable for proximate damages. Such damages as result from his own negligence, or want of proper diligence, are too remote, and not chargeable to the defendants. Upon the same principle he has no right to insist upon employment in the same business or at the same price. If that is not

to be had, he is bound to engage in other business, and, if need be, at a less price."

We thus held that it is the duty of the discharged employé to lessen his damage by seeking other employment. And yet the opinion holds that it is the duty of the employer to negative by proof the employé's failure of duty to seek employment. If the rule be as stated in *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520, it is difficult to resist the thought that such a conclusion is opposed to sound logic.

It also appears from *Perry v. Simpson Waterproof Mfg. Co.* that the measure of damages is the contract price, less what the employé should have earned by the exercise of reasonable diligence. When it is said in the opinion that *prima facie* the measure of damage is the balance of the contract price, we in effect overturn a rule of law long established and well understood. This means that in the first instance the burden of proving that the employé could by the exercise of reasonable diligence have found employment, and thus lessened his damage, is placed upon the defendant; and thus we place upon the defendant the burden of proving an essential part of the plaintiff's cause of action. The authorities cited in the opinion, i. e., *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877, hold that the burden of proving this *in the case* is on the defendant.

That many courts have been led into this illogical and unsound position is no reason why we should follow in their error. While the immediate question has not been before the court, it is necessarily involved in and logically controlled by the decision in *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520. Moreover, the doctrine that the employé, rather than the employer, should prove the inability of the employé to get work is sound in principle. The facts relating to the ability of the employé to get work are easily within his control. He knows, or may know, if he has done his duty. The employer may not know, though he be ever so diligent. After the employé leaves his service, he may go to some place quite unknown to his former employer. The employer cannot keep track of the whereabouts of his discharged employés and officials. Consider the burden this would place upon the employer of say 20,000. In practice it would result in most cases in the inability of the employer making such proof. He could not support the burden of proof. Hence the discharged employé would recover the face of his contract, and the rule of law limiting his recovery to his actual damage and compelling him to deduct from what his contract would have given him what he could have earned would be rendered nugatory. Such a result would be unjust to the employer and leave our law on this subject contradictory and illogical. It would violate two rules of

law. The burden is on the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. Wigmore on Evidence, § 2486; Greenleaf on Evidence, § 74. The burden is on the party who presumably has peculiar knowledge of a fact. Wigmore on Evidence, § 2486.

DE CECCO v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
May 16, 1912.)

CARRIERS (§ 292*)—INJURIES TO PASSENGERS—LIABILITY.

Where injuries to a passenger, caused by the breaking of a brake rod, were due to the carrier's failure to properly inspect and maintain the brakes of the car, it was liable for the injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168-1170, 1175-1178; Dec. Dig. § 292.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Action by Rosina De Cecco against the Connecticut Company to recover damages for personal injuries, alleged to have been received by plaintiff, while a passenger on a car of defendant, through its negligence. There was a judgment for plaintiff, rendered on a verdict for her, and defendant appeals. Affirmed.

Joseph F. Berry, of New Haven, for appellant. Frank P. McEvoy, of Waterbury, for appellee.

PER CURIAM. The immediate cause of the plaintiff's injury was the breaking of a brake rod. It was competent for the jury to find upon the evidence that the defendant had failed in its duty, as a common carrier of passengers, to the plaintiff, as its passenger, in the matter of the inspection and maintenance of the brakes of the car in question, and that the plaintiff's injury was due to such failure.

There is no error.

CADWELL v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
May 16, 1912.)

1. HIGHWAYS (§ 87*)—EMINENT DOMAIN (§ 119*)—RIGHTS OF ABUTTING OWNERS—TRESPASS—NUISANCE.

Acts done within the limits of a highway may work an actionable injury to the property rights of an abutting owner, either by virtue of his ownership of the fee or his ownership and possession of the abutting property, in the first case the acts, when they impose an unauthorized additional servitude on the land covered by the highway, constituting a trespass, while in the latter case the owner has his remedy as for a nuisance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 297, 300; Dec. Dig. § 87.* Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

2. EMINENT DOMAIN (§ 293*)—ADDITIONAL SERVITUDE—ACTION FOR DAMAGES.

Where a complaint in trespass by an abutting owner against a street railway for imposing an additional servitude on the fee of the highway in front of plaintiff's premises, by transporting things besides passengers, failed to allege any statutory right in the street railway to occupy the highway, and its charter did not show any right to occupy the highway at that particular place, a demurrer was improperly sustained, despite Gen. St. 1902, § 3840, allowing street railways to carry hand baggage for its passengers; the complaint not showing that entire use of the highway was not a trespass.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 737-802; Dec. Dig. § 293.*]

3. EMINENT DOMAIN (§ 119*)—USER OF HIGHWAY—ADDITIONAL BURDEN.

While an additional servitude on the land covered by a highway may be imposed by the manner of the construction and operation of a street railway, the mere fact that the street railway is constructed with T-rails and poles and wires are used to transmit the power is insufficient to show any additional servitude on the fee of the highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

4. EMINENT DOMAIN (§ 293*)—ADDITIONAL SERVITUDE—ACTION FOR DAMAGES.

Where a street railway was chartered to carry passengers and at most only authorized to carry their hand baggage, a complaint in trespass against the road for imposing an additional servitude on the fee of the highway, which alleged that the road is operated as a carrier of property by means of cars designed for and carrying property exclusively, and which run from terminus to terminus without stopping to receive or discharge contents, and receiving and discharging such freight at the two termini only, is not defective on demurrer in failing to charge an additional servitude.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 797-802; Dec. Dig. § 293.*]

Appeal from Superior Court, Hartford County; Gardiner Greene, Judge.

Action by William H. Cadwell against the Connecticut Company. From a pro forma judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

The action was to recover damages by reason of the defendant's operation of its electric street railway over the plaintiff's land within the highway and in front of his premises. The complaint alleges the plaintiff's ownership and possession of a tract of land in New Britain bounded on one side by West Main street. The remaining allegations are the following: "(2) Running between the town of Plainville and the town of New Britain there has been constructed an electric railway, the track of which is built with T-rails, and the cars of which are operated by the use of said track and certain poles and wires. (3) A part of said track built with T-rails, one of said poles and certain of said wires are located upon and over a part of said land, above described, which is

covered by a public highway called West Main street. (4) On or about June 1, 1907, the defendant, for the purposes of maintaining said electric railway as described upon said land, and for the further purpose of operating said electric railway upon said land as a common carrier of persons and property by means of street cars, and for the further purpose of operating said electric railway upon said land as a common carrier of property by means of cars which are solely designed for and which carry property exclusively and which do not stop as they run, to take on and discharge said property, and have a station in the town of Plainville, and the town of New Britain at which they stop to take on and discharge said property, unlawfully entered upon that part of said land, above described, which is covered by said public highway called West Main street, and ever since its entry, day by day, has maintained said electric railway as described upon said land; and ever since its entry, day by day, has operated said electric railway upon said land as a common carrier of persons and property by means of street cars, and ever since its entry, day by day, has operated said electric railway upon said land as a common carrier of property by means which are solely designed for and which carry property exclusively and which do not stop as they run, to take on and discharge said property and have a station in the town of Plainville and the town of New Britain at which they stop to take on and discharge said property."

Charles H. Mitchell, of New Britain, for appellant. Lucius F. Robinson and Francis W. Cole, both of Hartford, for appellee.

PRENTICE, J. (after stating the facts as above). [1] Acts done within the limits of a highway may work an actionable injury to the property rights of an abutting proprietor and occupant by virtue of either his ownership of the fee of the land covered by the highway, or his ownership and possession of the abutting property. *Cadwell v. Connecticut Ry. & Ltg. Co.*, 84 Conn. 450, 452, 80 Atl. 285. In the former case the acts may constitute a trespass. This is the case whenever the acts, being without authority, or in excess of authority, are such as impose an additional servitude upon the land covered by the highway. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 161, 36 Atl. 1107; *Norwich City Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Munson v. Mallory*, 36 Conn. 165, 172, 4 Am. Rep. 52. In the latter case the injured party has his remedy as for a nuisance. *Cadwell v. Connecticut Ry. & Ltg. Co.*, 84 Conn. 450, 454, 80 Atl. 285.

This action, unlike that last cited, which was also brought by this plaintiff against this defendant, and dealt with the same gen-

eral situation, is one which belongs to the former class. It seeks redress, as the former did not, for an alleged invasion of the plaintiff's rights as owner of the soil of the highway through certain conduct of the defendant therein which is set out, and claimed to have been without right. The two cases thus have little in common. In the former we were dealing with an alleged nuisance affecting injuriously the rights of the plaintiff as an abutting owner; in the present, with a claimed trespass done to the land within the highway limits.

This complaint is not drafted with precision, in that it does not directly aver either the plaintiff's ownership and possession of the land over which the highway is laid out, or the defendant's invasion of the plaintiff's rights therein by its acts set up. There are, however, allegations from which these averments may well be inferred, and in which it was evidently intended that they should be included, so that the purpose of the pleader to charge a trespass upon the land within the highway through the operation of the recited acts of the defendant in imposing an additional servitude thereon is apparent. Counsel for the plaintiff so interprets his pleadings, and counsel for the defendant accept it as sufficiently alleging a cause of action of that character.

The latter suggests that a cause of action for a nuisance may also be within the purview of the allegations. Plaintiff's counsel makes no such claim, and there appears to be no substantial basis for it. It is quite evident that the averments respecting rails and structures, which the plaintiff makes, and which alone give color to the suggestion that the complaint may be regarded as comprehending a cause of action for a nuisance, were made for no other purpose than as pertinent to the charge that a servitude was being imposed upon the land of the highway in excess of that resulting from the existing highway easement.

[2] We have, then, before us for determination the single question whether or not the allegations of the complaint show the imposition upon the soil of the highway of an additional servitude. In answering this question it is first of all important to know what legislative authority, if any, the defendant had to construct and operate an electric street railway in front of the plaintiff's premises. The complaint is silent upon this subject, and unless we can gather adequate information upon it through the exercise of that judicial knowledge which we have of its charter rights, the defendant will be left in the position of one who invades a highway with a street railway without legislative authority. If that is the position which the defendant occupies before the court under its demurrer, it is clear that it was improperly sustained. It is not easy to discover how it can escape from this po-

sition with its inevitable result, since the charter informs us only that it has legislative authority to construct and operate for the carriage of both persons and property its tracks through a portion of West Main street. Where that portion is in relation to the plaintiff's property we are not told, and neither legal presumptions, nor section 3840 of the General Statutes, suffice to supply the deficiency.

If, however, it be assumed that the defendant has constructed and operated its road in front of the plaintiff's property under such conditions as to entitle it to the full benefit of the charter and statute authority to utilize it for the transportation of passengers and property, as doubtless is the fact, we are under the necessity of examining the allegations to learn whether they set up any conduct on the defendant's part outside of the limits of the authority thus attempted to be conferred, or within those limits, but without the power of the General Assembly to confer in the absence of compensation to landowners.

[3] The allegation that it has constructed its tracks with T-rails, and that its cars are operated upon such tracks and by the use of certain wires and poles, in the absence of further information may be dismissed from present consideration. It is true that an additional servitude may result from methods of construction and operation, but the bald facts here stated are altogether insufficient to establish such a condition as that principle contemplates. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 159, 36 Atl. 1107; *Nieman v. Detroit Suburban Co.*, 103 Mich. 256, 260, 61 N. W. 519; *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; *Mordhurst v. Ft. Wayne, etc., Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222, 2 Ann. Cas. 967.

The other conduct complained of is the unlawful entry upon the land of the highway for the purpose of maintaining its electric railway, of operating this railway upon said land as a common carrier of persons and property by means of street cars, and of operating said railway upon said land as a common carrier of property by means of cars designed solely for and carrying property exclusively, and which run without stopping between termini located in different towns, which termini are the only points where what is carried is either taken on or discharged, and the continued doing in fact of these things for the period of several years prior to the commencement of the action.

Here are three distinct grounds of complaint. The first, that the defendant is maintaining in the street an electric street railway using poles and wires in its operation and T-rails for its tracks, calls for no extended consideration. The *Canastota Knife Company Case*, *supra*, effectually disposes of

any contention that the construction and operation according to customary methods, and without especial features creating exceptional conditions, of an electric street railway having its rails laid on a level with the surface of the highway, and designed and used for the accommodation of passenger travel, imposes an additional servitude upon the soil of the highway. There is no suggestion in this portion of the complaint that the service performed by the defendant's railway is other than the customary passenger service, that the manner of its construction, operation, or use differs in any respect from the ordinary, or is marked by special features which would tend to give to it a different character from that of the regulation electric street railway, except perhaps the fact that T-rails are used. The inadequacy of this isolated fact we have already had occasion to notice.

[4] The two remaining grounds of complaint import another factor into the situation, and one which takes it outside of the direct application of the decision in the *Canastota Knife Company Case*, and of all other Connecticut decisions. It calls for a consideration of the rights of an electric street railway in the matter of property transportation, directly for hire, and not as an incident of passenger service. The complaint contains certain charges involving this subject. If in the doing of any of the things so charged, the defendant is going further in its use of the highway than it can properly do within the limits of the highway easement, a good cause of action is stated.

The subject of the ability of an electric street railway company, having the customary construction and operation in a highway, to become a carrier of things, without imposing an additional servitude, has been much discussed in the cases and by text-writers, and with widely varying results. In at least one jurisdiction it has been broadly held that highways are as open to use in the transportation of property by street railways as in that of persons, and that such carriage of property generally is not a new and independent use. *Montgomery v. Railway Co.*, 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89.

This broad conclusion has not met with general acceptance, and we are unable to appreciate the force of the reasoning by which it has been supported. To say that because highways ever have been and are established and maintained for purposes of public travel, and in their conception and purpose are, and from the earliest times have been, set apart for transportation thereon of things as well as persons, and for the convenience and service of the public by providing means for such transportation, it follows that any and all use of the highway for the transportation of things, no matter what they are, or how, or for what purpose or end, or for whose

benefit or convenience they are carried, or what effect their carriage, or the method of it (physical features of the system apart), may have upon the enjoyment of the highway by the public generally or by the abutting property owner, is, we think, to ignore possible factors in a situation which might possess large, if not controlling, importance.

The highway conception involves the idea of an agency for the common use and accommodation of all the public—of a use from the enjoyment of which no one shall be unreasonably excluded by the operations of others, and in the enjoyment of which no one shall be unreasonably hindered or annoyed. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 148, 158, 38 Atl. 1107. In that conception the highway becomes a place set apart for the convenience and benefit of members of the local community and of the adjacent landowner among others. It contemplates that its use and enjoyment by those who have occasion to use it shall not be of such character as to unreasonably interfere with its free and beneficial enjoyment by these persons, or to be "the proximate cause of special damage of a new description to the owner of the soil." *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 148, 159, 38 Atl. 1107, 1111; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.*, 70 Conn. 610, 615, 40 Atl. 607, 41 Atl. 169. We are therefore unprepared to say that any change in highway use which might attend the carriage of property over public ways, whatever its character, and however conducted, construction of the road and structures in the highway aside, would be one of degree only and not of kind, and that the highway would remain in all essential particulars unchanged in character, purpose, and use under all conditions of property transportation over it. It is easy to conceive of conditions, and by no means remote ones, under which it could not be said fairly that the use was in aid of the identical use for which way was created, and not a new and independent use; and this is a test which must be met and satisfied. This view is one which was plainly foreshadowed in the *Canastota Knife Company Case* and the earlier case of *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392. In fact, the opinion in the former case went so far as to suggest certain conditions of passenger traffic, independent of construction, which would destroy the identity of use between it and highway use. 69 Conn. 154, 38 Atl. 1107.

Other cases have gone to the other extreme, and held that, where there is carriage of property, there an additional servitude is necessarily imposed. *Wilder v. Aurora, etc., Co.*, 216 Ill. 493, 75 N. E. 194; *Birmingham Belt R. Co. v. Lockwood*, 150 Ala. 610, 43 South. 819; *Rische v. Texas Transportation Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324. The argument upon which this conclusion is based is one to the general effect that, where such

conditions exist, the carrier becomes closely assimilated to the ordinary railroad, and should therefore be classed with them in their relation to the highway easement. Some authorities, including text-writers, elaborate this argument by dividing carriers using tracks as a medium of transportation into two classes, to wit: (1) the street railway, which is defined to be one laid in highways, and designed and used for passenger transportation only; and (2) the commercial railroad, which term is employed in the classification to embrace the ordinary steam road and all others, whatever the kind of power utilized, and wherever laid, which are carriers of things. This classification having been established, it is said that those of the former class impose no additional servitude, while those of the latter do. *Lewis on Eminent Domain*, § 150; *Nellis on Street Railways*, § 83; *Linden Land Co. v. Milwaukee, etc., Co.*, 107 Wis. 511, 83 N. W. 851; *Wilder v. Aurora, etc., Co.*, 216 Ill. 493, 75 N. E. 194; *Rische v. Texas Transportation Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324; *Schaaf v. Cleveland, etc., Co.*, 66 Ohio St. 218, 64 N. E. 145.

The logic of the general proposition enunciated in this class of cases and of this classification is not apparent to us. The purposes for which highways always have been, and now are, laid out, and the right of way therefor acquired, include their use for the transportation thereon of property as well as that of persons. Their intended ministration to the public convenience and advantage is one which comprehends a public service in both capacities. What basis in reason there is for a distinction between conditions which result from the application of like improved methods when made to the carriage of persons and when made to the carriage of things, unless reason for that distinction be found in something besides the bare fact that in the one case it is persons and in the other property which is concerned, we are unable to discover. It well may be that the application of the new methods to property carrying in given cases, or conceivably in all cases, may take such shape and involve such incidents as to create reasons for a recognition of the fact that in those cases an additional servitude will thereby be created. But that is a very different thing from saying that there can be no property carrying without destroying the identity of the highway use for the simple reason that the subject of the carriage is property.

It is easy to conceive how the denial of the right to utilize new methods in the carriage of things over a highway without transgressing the right of way involved in the highway easement might result in serious inconvenience and disadvantage to the public whose interest the highway was designed to serve, and to the local public most directly concerned, and a material diminution of the highway privilege which they

are entitled to enjoy. *Mordhurst v. Ft. Wayne Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222, 2 Ann. Cas. 967. Inability to carry property includes inability to carry mails, or packages for local delivery, or to accommodate the strictly local public in any manner of transportation of things. Can it be fairly said that in no service of this character can conditions be found which, by reason of the inherent nature of the service, will not be in excess of the highway privilege. We think not, and, furthermore, that the incidents of such service are not necessarily such that it must be said of them that they are incompatible with highway use.

There are other cases which have drawn a distinction between urban and interurban service, and attempted to find in that distinction a feature of significance, if not controlling significance, in the determination of the question before the court. *Zehren v. Milwaukee, etc., Co.*, 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; *Younkin v. Milwaukee, etc., Co.*, 112 Wis. 15, 87 N. W. 861; *Harvey v. Aurora, etc., Co.*, 174 Ill. 295, 51 N. E. 163. See *Dillon on Municipal Corporations* (5th Ed.) § 1258. We can discover no good reason for this distinction, at least under our system where the public easement is for the benefit of all the public alike without regard for territorial subdivisions, and where the character of a highway and of the highway easement is the same wherever it is located and however great or small the extent of its service. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 154, 36 Atl. 1107; *Dillon on Municipal Corporations* (5th Ed.) § 1258.

We are satisfied that the question for solution is one which cannot by reason of its nature be resolved in any of the ways indicated. It is one which may present itself under too many widely differing aspects to be resolved in respect to all which may arise by any such artificial process as the application of a simple test which regards a single fact or incident only, and ignores all others. The several tests indicated possess the merit of simplicity, but no one of them is founded in a sound logic, avoids practical difficulties, or escapes what may be harsh results to the public, and results defeating the very purpose of a public way. The practical difficulties attending their application are apparent. We are satisfied that there can be no short cut to a reasonable and just conclusion under the varying conditions which may arise, and one which shall serve the best interests of the public, including abutting owners themselves. Such a conclusion is one which can be reached only by a study of the conditions which are present in a given case, or in given classes of cases, and by bringing to bear upon these conditions those pertinent considerations which are best calculated to

disclose whether the new use is in aid of the highway use, or an essentially different and independent use.

We have no occasion here to attempt an exhaustive recital of those considerations. We have already had occasion to notice a number of them, and sufficiently for present purposes called attention to the objective point of inquiry, the general direction of it, and the salient suggestive facts to be looked at.

The fact that this is the only method by which satisfactory results can be arrived at is emphasized by a study of the cases which have sought to adopt more direct methods. *Dillon* and other writers, realizing the difficulties which must beset an attempt to adopt shorter and simpler processes, have asserted, and we think correctly, that after all each situation must be dealt with upon its own merits. *Dillon on Municipal Corporations* (5th Ed.) § 2032n; *Nichols on Eminent Domain*, § 100. This is substantially the attitude which certain courts have taken. *White v. Blanchard Bros. Granite Co.*, 178 Mass. 363, 366, et seq., 59 N. E. 1025, *Mordhurst v. Ft. Wayne Co.*, 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222, 2 Ann. Cas. 967; *Schaaf v. Railway Co.*, 66 Ohio St. 215, 64 N. E. 145.

Turning now to the allegations of the complaint, we find that it is there charged that the defendant in the operation of its road has been and is transporting property as well as persons. This charge, standing as it does, by itself and without amplification, is under our conclusion insufficient to establish conduct which is outside of highway rights. It is, however, further averred that its road is operated as a carrier of property by means of cars designed for and carrying property exclusively, and which run from terminus to terminus, presumably some miles distant from each other, without stopping to receive or discharge contents, and receiving and discharging such contents at the two termini only.

In the *Canastota Knife Company Case* it was suggested that a passenger traffic road running under similar conditions, and not serving and accommodating the public as it ran, might not be rightfully operated in a highway without creating an additional servitude. Here is set up a situation where all local accommodation is *prima facie* excluded. The company in the operation of its property carrying cars does not serve and accommodate as they run, and the highway is apparently put to a use in which there is no purpose to facilitate its most natural and normal use. Under the allegations the transportation might well be for the general purposes of commerce rather than as an adjunct of ordinary street travel, and the service rendered thus brought into close affiliation with that rendered by

ordinary freight carrying roads of the steam variety. Dillon on Municipal Corporations (5th Ed.) § 259; Kinsey v. Union Traction Co., 169 Ind. 563, 584, 81 N. E. 922. The allegations are not as full and as informing concerning the situation as they should have been made; but they are sufficient to enable the plaintiff to establish under them an invasion of his rights as fee owner, and they ought not to have been dismissed upon demurrer, but should have been allowed to stand to be dealt with after the pertinent facts of the situation had been more fully developed by the pleadings or upon a hearing.

There is error. The judgment is reversed, and the cause remanded to be proceeded with according to law.

BLANCHARD et al. v. PRUDENTIAL INS. CO. OF AMERICA et al.

(Court of Errors and Appeals of New Jersey. April 26, 1912.)

1. INSURANCE (§ 38*) — LIFE INSURANCE COMPANIES — RATES — REDUCTION — STATUTES.

P. L. 1907, p. 140, § 12, required domestic insurance companies to elect whether they would conduct a participating or nonparticipating policy business. A domestic insurance company, which was issuing ordinary policies entitling the holder to participation in profits, and which had put nearly all of its industrial nonparticipating policies on a basis of participation in profits by means of cash dividends and surrender values, elected to carry on a nonparticipating business and to discontinue the issuance of participating policies, and thereafter its directors in good faith made a concession to all holders of industrial policies, including policies issued after the statute, by adding about 10 per cent. to the amount of insurance the same premium would pay, claiming that such concession was only a return of excessive premiums, or a cost or expense necessarily incurred in preserving its business. *Held*, that the sole intention of the Legislature was to separate the two forms of insurance without reference to the methods adopted by companies in the conduct of their business, and that the concession did not constitute the doing of a participating policy business in violation of the statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 47; Dec. Dig. § 38.*]

2. INSURANCE (§ 38*)—STOCK COMPANIES—DIVIDENDS—STATUTORY PROVISIONS.

P. L. 1907, p. 132, § 1, required insurance companies conducted on the mutual plan, or in which the policy holders were entitled to share in the profits or surplus, to annually ascertain the amount of surplus to which participating policies were entitled, and to apportion to such policies as a class the surplus so ascertained, and carry such amount as a distinct liability to such class of policies on and for which it was accumulated. Directors of a domestic insurance company, in compliance with the statute, in February, 1908, ascertained the earnings on participating policies prior to December 31, 1907, and apportioned a profit of about \$2,500,000 to the stockholders, and by resolution not affected with fraud or bad faith placed that amount to its contingent surplus, and deferred its payment until future action

by the directors. *Held*, in view of the contingencies and liabilities of the company, that their refusal to make a present distribution of such stockholders' dividends was a matter of business discretion, and that equity would not interfere by injunction to compel a present distribution.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 47; Dec. Dig. § 38.*]

3. CORPORATIONS (§ 152*)—CAPITAL STOCK—DIVIDENDS—RIGHTS OF STOCKHOLDERS.

In cases where the power of the directors of a corporation is without limitation and free from restraint, they may reserve such profits as may be necessary or judicious for repairs or improvements and to meet contingencies both present and prospective, and thereby defer the distribution of dividends, and their determination to do so, if made in good faith, is final and not subject to judicial revision.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

Appeal from Court of Chancery; Howell, Vice Chancellor.

Bill by Leon F. Blanchard and others against the Prudential Insurance Company of America and others. From a decree of the Chancery Court (78 N. J. Eq. 471, 79 Atl. 533), directing a mandatory injunction against the directors of the company to declare a dividend to complainants, and denying complainants all other relief, both parties appeal. That part of the decree denying relief to complainants affirmed, and that part of the decree directing the distribution of dividends reversed.

John R. Hardin and Robert H. McCarter, both of Newark, for complainants. Edward D. Duffield and Richard V. Lindabury, both of Newark, for defendants.

KALISCH, J. A bill of complaint was filed in the Court of Chancery against the Prudential Insurance Company by Leon F. Blanchard in behalf of himself and other stockholders of said company who might come in, to compel a distribution to them, by way of dividend, of an equitable portion of the surplus from accumulated profits amounting to \$2,500,000, which had been alleged to be available for the purpose by the directors of said company and arbitrarily and illegally "in a way fraudulent in law and subversive of the rights of the stockholders not assenting thereto," withheld by them from the stockholders entitled thereto. As incidental to this relief, the bill prayed the aid of the court to prevent the company from making any payments and granting any benefits out of the surplus profits to policy holders in excess of their contractual rights. The decree of the Court of Chancery directed a mandatory injunction to the directors of said company to declare a dividend to the complainants, and all other stockholders of that company, pro rata to their several stockholdings, of \$2,500,000 from the surplus of the company. It denied to the complainants all other relief, and di-

rected the payment of complainants' costs and counsel fee by the defendant company. From that part of the decree directing the declaring of the dividend and to distribute the same to stockholders and the payment of complainants' counsel fees and costs by the defendant company, the defendants appealed to this court, upon the ground that the Court of Chancery should have dismissed the complainants' bill, with costs.

From that part of the decree denying all other relief to the complainants, the complainants appealed to this court, on the ground that the court should also have decreed that additional benefits applied to the policies issued by the defendant insurance company after the beginning of the year 1907, and before July 1, 1909, made the policy holders holding said policies on the last-mentioned date participate, to the extent of such additional benefits, in the profits of the company's business contrary to the provisions of the act of the Legislature of New Jersey (supplemental to the general law for the regulation and incorporation of insurance companies) approved April 15, 1907; and that in determining the surplus of the company as a stock corporation the amount of such additional benefits should have been included in the profits of the company's business and added to said surplus as part thereof; and that an injunction should have been directed restraining and enjoining the defendant company from further payments to any policy holder holding a policy issued after the beginning of the year 1907, and before July 1, 1909, in force on July 1, 1907, to which said policy holder may not be entitled by the terms of the policy contract; and from in any way enlarging or changing the policy contracts issued within the period aforesaid, or at any time, in such way as to authorize or require the payment to a policy holder of any sum of money to which such policy holder would not be entitled under the terms of the policy contract, and from thereafter diverting further sums from the profits of said corporation by the payment of any sum or sums to which policy holders holding policies issued within the period aforesaid may not be entitled by the terms of their contract, and from further payment to policy holders of any sum or sums on policies issued prior to the beginning of 1907 by way of additional benefits to which the policy holders may not be entitled by the terms of the policy contracts beyond additional benefits announced to such policies prior to the 1st day of July, 1909.

It developed upon the hearing that the company from the time of its inception until 1886, a period of nine years, issued what is generally known in the life insurance business as nonparticipating industrial policies only. These were plain ordinary policies of a fixed amount which required the

payment of a fixed premium, and the holders thereof under their contracts with the company were not entitled to any rebates or dividends by reason of any profits the company might make in the transaction of the business, or to any participation in such profits.

In 1886 the company inaugurated a change in its business respecting the issuance of policies of insurance and began issuing what is termed ordinary policies, the greater number of which by their terms entitled the holders thereof to such dividends or participation in the company's profits as the directors might determine upon. This course of business was pursued until January, 1897, when the company adopted a scheme by which it granted concessions to the holders of industrial policies by giving to them a post mortem dividend after 5 years, a cash dividend after 15 years, and establishing a surrender value after 20 years. This in effect made all the industrial policies outstanding at that time participants in the profits of the business, and thus nearly all the policies outstanding at that time, both ordinary and industrial, on a participating basis.

This situation remained unchanged until by virtue of section 12 of an act of the Legislature of 1907 (page 133) the company was put to its election of conducting its business either as participating or nonparticipating. And in pursuance of this section the company passed a resolution July 8, 1907, electing to carry on the nonparticipating business and to discontinue the issuing of participating policies August 1, 1907. On June 14, 1909, the board of directors by resolution made a concession to the holders of all industrial policies issued on and after July 5, 1909, not by reducing the premium, but by adding about 10 per cent. to the amount of insurance that the same premium would thereafter purchase. A similar concession was likewise extended to the holders of all industrial policies which were issued after January 1, 1907, and in force on July 1, 1909. Such concessions appeared to have been made by the company in 1880, 1885, 1891, 1897, and 1906.

[1] Complainants insisted in the court below, and now urge, that the action of the board of directors, by extending these increased benefits to all industrial policies issued since the beginning of the year 1907 and in force on July 1, 1909, was and is in contravention of the act of 1907 under which the company had elected to do a nonparticipating business, and violative of the contractual rights of policy holders, who by their policies are entitled to participate in the profits of the company, as well as of the rights of the stockholders, in that it diverts large sums of money from the profits of the company by making the concessions to its policy holders not entitled thereto,

and the effect of which is to reduce the profits of the company, in which the participating policy holders and the stockholders are entitled to share. And it is further claimed that these concessions on the part of the company are tantamount to the doing of a participating business, and therefore are wholly unauthorized.

The defendant company meets this charge with the claim that it had been its practice to make such concessions as are now for the first time being objected to, at irregular intervals (the years in which they have been made has been before stated), and they justify it upon an apparently sound and substantial basis, the main reason for such action, on the part of the company, being that in fixing the premiums to be paid for insurance such fixed premiums had to be in their very nature experimental in order to guard against any possible loss and to protect the fund accumulated for the benefit of the policy holders in that, in case of an emergency, it would be able to meet the demands which should be made upon it, i. e., policies becoming payable, to meet the expenses and costs not only of conducting but also extending the business. The premiums were therefore fixed high enough to insure against any possible loss.

As a result, the company necessarily from a business point of view and intentionally charged the industrial policy holder more for his insurance than it was worth; that is, more than it cost to carry it. The main cause for this was that it was impossible to foresee how much it would cost. Business caution rendered it necessary to take into account the fluctuation in the rates of interest which was likely to occur, the uncertainty as to the number of policies which would lapse from one cause or another, and above all the uncertainty of the extent of mortality among its policy holders. An estimate of what a fair premium should be based upon such contingencies, is, in its very nature, largely speculative. Besides, another important element which entered into the fixing of the premium was the cost of obtaining the business and preserving it. The business, as it developed, demonstrated that the premiums charged and paid were excessive. Now it is this excess of premium, this ascertained overcharge, which the company claims it returns to the policy holders by the methods which have already been adverted to. It is further claimed by the defendant company that this excess of premiums is not to be regarded in any sense as profits, because unless policy holders were relieved from paying the excessive premiums and were put upon the same basis with other policy holders who had been carrying and were carrying like sums of insurance, for a lower rate they would allow their policies to lapse and seek other companies for insurance, and that therefore these conces-

sions were to be considered rather in the nature of cost and expense necessarily incurred in preserving its business and meeting competition, than a participation by policy holders in the profits of the business. In effect, it is contended that it is a business method adopted by the company as conducive to the well-being and prosperity of the company and its policy holders, and that in making these concessions the directors were acting in good faith.

It becomes of vital importance, in order to ascertain the true meaning of the act, to keep in view the real nature of the business conducted by domestic life insurance companies doing business in this state prior to its passage. For it may be safely assumed that the Legislature intended to differentiate between what are termed participating and nonparticipating business. As has already been observed, the defendant company had issued policies by which its policy holders paying a fixed premium were entitled to participate in the profits and were what is known as dividend-paying policies, and straight out or ordinary policies, by which its policy holders paid a fixed and stated premium without any regard to the profits made by the company. To this latter class of policy holders, however, as has been already stated, the company had prior to the act of 1907 made concessions at irregular intervals as the business conducted by it warranted and to meet competition with other companies which the future stability and prosperity of the company demanded.

In order to ascertain the true meaning and spirit of the act of 1907, we must have recourse to what the business conditions and methods of doing business by domestic life insurance companies doing business in this state actually were up to the time of the passage of said act. This information is sufficiently gleaned from the history of the defendant company, of its life and progress, from its inception to the present time. The salient features of its business were the issuing of two classes of policies, participating and nonparticipating. Both classes of policies were the creatures of express contracts made between the company and the policy holders. Those policy holders, who by their policies were entitled to participate in the profits, were not dependent upon any bounty or gracious act of the company, but were solely entitled to do so by virtue of the contractual relation which existed between them and the company. The right to share in the profits of the company by the participating policy holders was not affected by any fluctuation of the profits, for, if there was any profit, they were entitled to share in it. It appears that the concessions were infrequently made. From the time of the company's organization up to 1907, five such concessions, as are complained of, were

made by the company to the policy holders. The first four concessions were made at intervals of five and six years, and it appears that none was made from 1897 until 1906.

It is therefore extremely unlikely that this feature of the company's method of conducting its business was within the contemplation of the Legislature when the act was passed. The twelfth section of the act requires the board of directors by resolution "to elect whether it will carry on its business in the form of participating business or nonparticipating business," and then concludes: "And it shall not be lawful for such company to thereafter conduct both the participating and nonparticipating forms of life insurance."

What the Legislature manifestly had in view was the character of the business conducted by domestic insurance companies, and not the business methods adopted by them in the conduct of such business.

It was the business of participating and nonparticipating forms of life insurance with which the Legislature dealt. Both forms of life insurance constituted the business which the company conducted, and both kinds of insurance were subjects of contractual relations between the company and the takers of policies. Nothing can be clearer than that it was the sole design of the Legislature to separate the two forms of life insurance business and to compel such life insurance companies to elect to conduct either form, but not to conduct both.

The defendant company concedes that, it having elected to do a nonparticipating business, it is therefore not authorized to conduct a participating form of insurance business. The complainants maintain that the concessions made by the company to its policy holders, though made at irregular intervals, is practically the doing of a participating business. We cannot accede to this for the reasons already pointed out. It was not in any sense a participation in the profits. Participation in the profits by the contractual relation imports a right to and a certainty of participation in the profits, if there are any, and in no wise is made dependent upon an act of grace. The concessions made appear to have been a necessary outlay from the earnings of the company which must be considered as entering into the cost of conducting the business, and though, as a result, the profits are diminished and policy holders receive the benefit of such concessions, it is not tantamount to a participation in the profits. Net profit is the gain which remains after all the costs and expenses of the business have been paid. Whether the company should have made or make these concessions involves a purely business proposition. Upon what business basis the company has made these concessions has already been amply shown. While these transactions may be the subject of legislative con-

trol, they are clearly not amenable to judicial supervision. Judicial interference can only be invoked when it appears that some clear statutory policy or some legal rule has been violated. No claim has been made that the directors in making these concessions acted fraudulently or in bad faith. It seems to us that the making of these concessions was purely a business matter which called for the exercise of the sound discretion of the directors of the company. They have exercised it, and there is nothing before us to show that they have not fairly exercised such discretion. It seems to us that it would have been unconscionable on the part of the directors when, from statistics and from actual experience, they had ascertained that the premiums which had been fixed and paid by policy holders of straight out policies were unreasonably excessive, for the insurance which they carried, for them to have converted such excess of premiums into profits and continued to exact the same, instead of returning such excess of premiums, in some shape or other, to the policy holders who had paid them. It seems rather more consonant with business probity, equitable principles, fairness, and justness that those who have overpaid and who are overpaying for the insurance which they are carrying, should be made whole, than that such excess of premium should be retained by the company to swell its profits for the benefit of the stockholders and for policy holders because contractual relations with the company entitle them to participate in the profits.

It is not in violation of the contractual rights of policy holders holding dividend-paying policies, because their contracts are subject to the fair business methods adopted by the company to maintain its business, to expand it, and to use all other legitimate business means adopted by it to increase its stability and prosperity.

For the reasons given, the decree denying the relief prayed for by the complainants is affirmed.

[2] We now turn to a consideration of the appeal of the defendant company from that part of the decree directing it to distribute \$2,500,000, by way of dividend. The fact has already been adverted to that, prior to 1907, the company issued both participating and nonparticipating policies, and up to that period no apportionment was required by law; the surplus earnings of the company being carried in its general surplus until the dividend period of the participating policy arrived. It has also been commented upon how, in the course of the conduct of its business, the defendant designedly charged a high rate of premium for insurance, in order to meet every possible emergency that may arise, and how it had become the custom of the company at irregular intervals to return the excess of premium charg-

ed by it, to the policy holders. It is self-evident that, in order to determine the cost of insurance, it was necessary in the case of a stock company to determine how much should be paid to the stockholders for their investment, and very large profits were paid, until the \$93,000, originally contributed, had increased to \$2,000,000. The company subsequently adopted the policy of taking only 10 per cent. of \$2,000,000, each year, as representing the share of the stockholders. By section 1 of the Laws of 1907 (P. L. p. 132), it required that domestic insurance companies doing business in this state, conducted on the mutual plan, or in which policy holders are by the terms of their policies entitled to share in the profits or surplus to annually ascertain the amount of surplus to which all such policies (participating policies), as a separate class, are entitled, and to "annually apportion to such policies as a class the amount of surplus so ascertained and carry the amount of such apportioned surplus, plus the actual interest earnings of such fund, as a distinct and separate liability to such class of policies on and for which the same was accumulated."

It appears that in compliance with the provision of the act the defendant company on February 10, 1908, made apportionment of the surplus earnings which had accrued upon the participating policies prior to December 31, 1907; and it further appears that the total earnings on such policies to the end of the year 1909 amounted to \$40,765,214. The division made of this sum by the company was to set aside about \$22,000,000 to meet what were called deferred dividends on participating policies, nearly \$5,000,000, to policy holders in the form of dividends and concessions; \$10,000,000, was set aside for a contingency surplus; and over \$3,000,000 went for the benefit of the stockholders. It appears that the exact total amount of the earnings which was assigned to the stockholders during the three years out of the earnings of the deferred dividend policies, as their portion, was \$2,429,655.95, which with interest on the investment amounted at the time of the decree to \$2,536,722.69. It is in regard to this sum set aside for the stockholders and the refusal to distribute the same among them by way of dividend that has given rise to this controversy. The directors, it further appears, in setting aside these earnings for the benefit of the stockholders, accompanied it with a resolution that the same be added to the contingency surplus, and not to be paid to the stockholder except by future action of the board. The complainants hold about 20 per cent. of the stock and insist that their share of \$2,500,000 should now be distributed to them in the form of dividends. Since the capital stock of the company is only \$2,000,000, this would amount to a dividend of over 125 per cent.

The defendant company claims that it is necessary to retain this fund in order that the solvency of the company may be amply secured. This at once gives rise to a question which appertains to the wisdom of business management and foresight, and does not call for the interference of the court. The complainants are practically seeking to have the business management of a life insurance company put into the hands of the court. Upon what basic legal principle the court is asked to substitute its judicial sense for the business sense and discretion which must rest with the directors of the company has not been made clear. The complainants do not claim that the directors, in their action, were actuated by a fraudulent or improper purpose. They do not seriously attack the good faith of the directors in passing the resolutions adding the earnings assigned to the stockholders, to the surplus contingency fund. The burden of their complaint is that the directors are unnecessarily overcautious, because they say there is ample safety in the amount reserved and in the contingency surplus to guarantee the future solvency of the company. In the judgment of the directors, it is not deemed sufficient. Out of more than \$200,000,000, more than \$150,000,000, called the "reserve," is held by the company in trust for the policy holders and is money held by it for the purpose of meeting the contracts it has made as they mature by death. This fund is a sacred one for the benefit of its policy holders, and is not subject to be diverted from the purpose for which it was established without a breach of trust on the part of the company. These large sums, being represented in the shape of securities for the moneys received by the company, must be invested, and it is a matter derived from everyday observation that there are and will be fluctuations in value of securities and property in the market. And therefore the company, for the protection of its policy holders, and to insure the meeting of its contractual obligations, retains more than this actual reserve, for securities may go down, property may decrease in value, and consequently how much this contingency surplus should be is a matter for the good judgment of the directors of the company.

The directors in this case seem to have thought, and we cannot say unjustifiably so, that the nature of the company's business subjected it to additional hazards from earthquake, plague, war, and other similar disasters. But it is claimed that the directors have exercised their judgment when they have set apart \$2,500,000 for the stockholders. We think not. The resolutions assigning the several sums to the stockholders, which aggregate the sum of \$2,500,000, are conditional. The resolution must be read as a whole. Each resolution, where the assignment to the stockholders was

made, reads thus: "Resolved, further, that the amount so apportioned to the stockholders be held and added to the contingency surplus of the company and be not paid out to the stockholders in the form of dividends, or otherwise, except by the further action of the board." Reading the resolution as a whole, the meaning is unequivocal to the effect that the amount set apart will eventually, if everything goes well, belong to the stockholders; but, in view of possible contingencies, it should not be paid out to the stockholders now, but should be retained for the purpose of making more secure the payment of the company's contracts with its policy holders, which may run from 50 to 75 years yet. And the reason that the directors may do this with propriety is that the company is handling for profit the money of the policy holders, and they are bound to see that the policy holders are protected. This sum of \$2,500,000 belongs to the stockholders, only provisionally, in that it is subject to the risk of the business. The complainant's proposition contemplated the actual withdrawal from the company and from future possibility of its being reached for the protection of the policy holders, this whole sum of \$2,500,000. It became, therefore, a matter of pure business policy, and the conservation of the sacred trust reposed in the directors, which called for the exercise of their highest and wisest discretion, in dealing with the matter. The directors having exercised their discretion in the matter, their judgment is not open to a successful attack, unless it appears that it was the result of fraud or bad faith on their part. It was not seriously contended, on the part of the complainants, that the directors were actuated by fraud or bad faith. The Vice Chancellor did not find that there was any fraudulent conduct or bad faith on the part of these directors. From the evidence before us, we do not find any fraud or bad faith on the part of the directors in refusing to distribute now the \$2,500,000 among the stockholders. On the contrary, it seems to us that the directors, in order to protect the policy holders, have exercised no more than that degree of wisdom, caution, and foresight which was incumbent upon them in dealing with a fund in which thousands of poor persons and of limited means are vitally interested.

[3] As to when and under what circumstances the court of this state will interfere with the exercise of the discretion of a board of directors in the conduct or managing of a business is not an open question.

The rule of law is well stated by Vice Chancellor Van Fleet in *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162, affirmed on opinion, by this court, in 45 N. J. Eq. 244, 19 Atl. 621, as follows: "In cases where the power of the directors of a corporation is without limitation, and free

from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of their honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs or improvements, and to meet contingencies, both present and prospective. And their determination in respect to these matters, if made in good faith and for honest ends, though the result may show that it was injudicious, is final, and not subject to judicial revision." The same subject received consideration in *Laurel Springs Land Co. v. Fongeray*, 50 N. J. Eq. 756, 26 Atl. 886, by this court, by Mr. Justice Garrison, where he clearly states the legal rule to be "that the authority of the directors is absolute so long as they act in the exercise of an honest judgment." This rule was followed with approval, by this court, in *Murray et al. v. Beattie Mfg. Co.*, 82 Atl. 1038, at the last term, in an opinion, by Mr. Justice Swayze.

We do not find that the conduct of the directors was not in the exercise of an honest judgment, and therefore that part of the decree, directing and declaring of the dividend of \$2,500,000 and to distribute the same to the complainants and other stockholders of the defendant company and to pay to the said complainants their costs and a counsel fee of \$5,000 each, should be reversed, with costs.

SANFORD v. KEER.

(Court of Errors and Appeals of New Jersey.
April 26, 1912.)

(Syllabus by the Court.)

1. COVENANTS (§ 78*) — ACTIONS — JURISDICTION OF EQUITY.

A restrictive covenant in a conveyance of a part of a tract of land, beneficial to the value or use of the remainder of the tract, will be enforced in equity in favor of the covenantee owning such remainder against the covenantor's grantee, with notice of the covenant, of the restricted part.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 77; Dec. Dig. § 78.*]

2. COVENANTS (§ 78*) — MODIFICATION — EFFECT.

The right of such covenantee to enforce the unmodified portion of the covenant is not defeated by the fact that it, with other like covenants imposed upon neighboring lots, forms a general or neighborhood scheme, which has been modified by the elimination of some of the prohibitive provisions thereof by general consent or acquiescence, in a manner, however, not destroying the essential mutual benefit enjoyed by the lot owners from the general scheme, nor the benefit to the covenantee's remaining property to be derived from performance of the covenants of the general scheme as so modified.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 77; Dec. Dig. § 78.*]

3. COVENANTS (§ 79*)—CONSTRUCTION—GENERAL OR NEIGHBORHOOD SCHEME.

Where a tract of land is divided into building lots and a plan exhibited, showing the prospective purchasers the streets and lots thereof, and such purchasers are induced to buy the lots by and in reliance upon representations either public or private, that all conveyances would contain protective restrictions of a designated character and purpose, the restrictive covenants inserted in the conveyances of the lots in accordance with these representations constitute a general or neighborhood scheme, and may be enforced between the lot purchasers *inter sese*.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 78-82; Dec. Dig. § 79.*]

4. COVENANTS (§ 103*)—MODIFICATION.

In a general or neighborhood scheme, the burden follows the benefit; and where, by reason of abandonment, acquiesced-in violation, change of character of the neighborhood, or other sufficient cause, the benefit to the property owners affected by the scheme is totally or partially destroyed or impaired, the accompanying burden undergoes a corresponding modification.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 169; Dec. Dig. § 103.*]

5. INJUNCTION (§ 62*)—SUBJECTS OF RELIEF—BREACH OF COVENANT.

Where, by reason of a change of the character of a neighborhood, the enforcement of a restrictive covenant would be a burden upon the restricted property, without conferring any benefit upon the property of the covenantee, equity will refuse relief; but, where the change does not conflict with the essential purpose of the covenant, and the benefit therefrom remains unimpaired, a violation will be enjoined.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

Appeal from Court of Chancery.

Bill in equity by Margaret J. Sanford against Ernest F. Keer. From a decree for defendant, complainant appeals. Reversed and remanded.

See, also, 74 Atl. 291.

The complainant and her husband (who is now deceased, and whose share has passed to her) were the owners, by the entirety, of a tract of land on the north side of Clinton avenue, in the city of Newark, which they laid out into building lots, opening up streets (Shanley, formerly Sanford, avenue, South Tenth street, and South Eleventh street, running north and south, and Madison avenue, running east and west) through it, and of which they prepared a plan, showing the streets and the building lots thereon. They sold a very large portion of these lots, and conveyed them to the respective purchasers under and subject to express restrictive covenants against their use for other than residential purposes, and providing for improvements of a character indicated by the terms of the covenants, which terms varied somewhat in the different sections of the tract, apparently in accordance with the class of improvements intended to be promoted in each section. All the lots sold, however, were restricted for residential purposes and dwelling house improvements of one class or another. The original

mansion house portion of the tract, where complainant and her husband lived when the sales took place, and where she still resides, and which she now owns, occupies nearly the entire block on the west side of South Tenth street from Clinton avenue to Madison avenue, and the lots, nine in number, on the opposite, or easterly, side of South Tenth street in this block, including the lot in question now owned by defendant, have all been sold, except one, which complainant still owns, and conveyed, subject to the express restrictive covenants that the grantee, his heirs and assigns, will not erect, suffer or permit to be erected, thereon, within a period of 50 years, any building whatsoever other than a private dwelling house, such private dwelling house to be used only as and for a private residence and for one family only; that it should set back from the street line 30 feet to the piazza line, or 39 feet to the main building (except the one on the corner of Madison avenue, which had to set back 42 feet), and that it should cost at least \$5,000, in all cases except two, one of which, that of the first lot sold, specified \$4,500 as the minimum cost, and the other, the corner, \$12,000 as the minimum cost of such dwelling house. In addition to these provisions, which were contained in the deeds for each of the eight lots sold in this block, and, in the same or a modified form, somewhat varying, seemingly, to suit different sections, were common throughout the entire tract, there appeared in the deed for four of the lots, including that of defendant, in the block in question, an additional restriction against stables or outbuildings of any description; whereas, in the deeds for three other of these lots, there is coupled with the restriction for the dwelling house permission for necessary or appropriate outbuildings, and, in the case of the corner lot, a private garage is expressly permitted upon the rear end of the lot furthest from South Tenth street. The evidence shows that private garages have also been constructed upon the rear end of two of the other lots in this block upon which dwelling houses, in accordance with the restrictive covenants, had been constructed; and in one of these instances there is evidence that complainant consented to the insertion of the clause, "together with necessary outbuildings," to enable the purchaser to erect a private garage in the rear of his lot for use in connection with his dwelling house thereon, because he refused to buy, unless this were permitted.

The defendant owns a lot fronting on South Tenth street and directly opposite the mansion house owned and occupied by complainant, as aforesaid, and about the middle of the block in question, which lot he bought from one Weston, a grantee from complainant and her husband by a conveyance containing the following restrictive covenant:

"That the said party of the second part, his heirs and assigns, shall and will not at any time prior to the first day of April, 1955, erect, suffer or permit to be erected on the lands above described and hereby conveyed or on any part thereof any building whatever other than a private dwelling house, which said dwelling house shall be used only as and for a private residence and for one family only and for no other purpose whatsoever; that no part of said dwelling house, except the piazza, shall be erected or placed within 39 feet to the curb line of the street in front of said premises above described and hereby conveyed, and that the said party of the second part, his heirs and assigns, will not erect or permit to be erected on the premises hereby conveyed, prior to April 1, 1955, any dwelling house costing less than \$5,000, which said dwelling house shall be erected and completed in a good workmanlike manner. It is also hereby further stipulated and expressly agreed by and between the parties hereto, their heirs and assigns, that no stable or outbuilding at any time hereafter, shall be erected or placed on the premises above described and hereby conveyed, and that the grade of said lot shall be made to correspond to the grade of the lots adjoining the lot hereby conveyed on which dwellings are now erected, and that the above restrictions and each of them shall run with the land hereby conveyed the same having been computed as a part of the consideration of this conveyance."

Defendant has constructed a garage, not upon the rear of his lot, but in substantially the exact location (40 feet from the curb line) thereon specified by the restrictive covenant for a dwelling house. He has not constructed any dwelling house on this lot, but resides in a dwelling house on another lot which he owns, fronting on Shanley avenue and abutting up to the lot in question in the rear; and he uses the garage in connection with his dwelling house on said other lot.

The bill was filed promptly upon the commencement of the building of the garage, a restraining order was applied for and refused, and the defendant proceeded with and completed the garage at his peril. Upon final hearing, a decree was entered, refusing the injunction prayed for and dismissing the bill, and the present appeal is from that decree.

Frank E. Bradner, of Newark, for appellant. Raymond, Mountain, Van Blarcom & Marsh, of Newark, for respondent.

WHITE, J. (after stating the facts as above). [1] The complainant in her bill expressly repudiates any general or neighborhood scheme of restrictive covenants, and bases her prayer for relief upon the individual and particular covenant (above recited in full) entered into with her by defendant's

vendor and appearing in his chain of title. It is beyond question, and is admitted, that what defendant has done is a clear violation of the terms of this covenant, and that he purchased with complete notice of these terms. Under these circumstances, standing alone, it is too well settled to require discussion that complainant, whose remaining property, still owned by her, is clearly injured by the breach, is entitled in equity to enforce performance of the covenant against the defendant. *Tulk v. Moxhay*, 2 Phil. 744; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190; *Hayes v. Waverly & Passaic R. R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648; and other cases too numerous to mention. The defendant, on the other hand, invokes in defense two principles, which, if substantiated by the facts, are almost, if not quite, equally well settled.

[4] The first is that the covenant in question formed part of a general or neighborhood scheme, and that this scheme, in so far as it is involved in this violation, has been abandoned by mutual consent and acquiescence of all parties in interest, including the complainant, not only by permitted violations of its requirement in several cases where it did appear in the covenants, but by its entire omission from the covenants upon some of the lots, and the substitution in place of it of express consent to such violation. This point, if applicable to the facts, is fatal to the relief asked by complainant. In a neighborhood scheme, the burden follows the benefit. It is the mutual benefit accruing to all and to each which makes it inequitable for any one so benefited to repudiate the burden to the injury of the others. If, therefore, the parties in interest, by express act or passive acquiescence, permit such violations of the plan or scheme as destroy, wholly or partially, the benefit therefrom, they have to a corresponding extent absolved each other from its burdens. Thus, in *Roper v. Williams*, 1 Turn. & R. 18, Lord Chancellor Eldon said: "Having lived in Gower street, I have often been in the habit of illustrating my view of such cases by reference to the stipulations contained in the Duke of Bedford's lease. In the lease of the houses on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating, not only for his own benefit, but for the benefit of all the tenants in that neighborhood. If, therefore, the landlord in some particular instance, lets loose some of his tenants, he cannot come into equity to restrain others to whom he has not given such license, from infringing the covenant. He may have a good case for damages at law; but, if he thinks it is right for him to take away the benefit of his general plan from some of his tenants, he cannot, with any justice, come into equity for an injunction against those

tenants. It is not question of mere acquiescence; but, in every instance in which the grantor suffers grantees to deviate from the general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all." In *Peek v. Matthews*, L. R. 3 Eq. Cas. 515, it was said: "The vendor in such cases, stipulating for the benefit of himself and others, as a quasi trustee for them, is bound to enforce the covenant as much against one as against the other." See, also, *Ocean City Ass'n v. Headley*, 62 N. J. Eq. 322, 50 Atl. 78, and *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153.

[3] Turning, now, to the present case, the Vice Chancellor found as a fact that the restrictive covenants contained in the deeds from complainant and her husband for the various lots of this tract which were sold constituted a general or neighborhood scheme; and an examination of the evidence completely confirms this view. There was a plan of the lots, with the streets and avenues laid out thereon, exhibited to the purchasers, who were induced to buy by representations that the value of their proposed improvements would be protected by the fact that restrictions were placed on all lots as sold; and the nature and provisions of these restrictions were explained to them according to the particular section in which they proposed to purchase. It is difficult to see how these representations could be made for the purpose of inducing the proposed purchasers to pay higher prices for the lots because of their protected condition, unless it was intended that this protection should inure to the benefit of the purchasers of the lots so protected; and that is the exact test which decides in favor of a general or neighborhood scheme. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329-338, 24 Atl. 388.

It is true that these restrictions varied in different sections in accordance with the designs of the promoters for the character of such sections, respectively; but this does not interfere with the integrity of a neighborhood scheme. Under such circumstances, the covenants applicable to each section become, to a certain extent, a separate scheme for that section; the various covenants on the different sections forming a general scheme for the whole only in so far as all contain features common and beneficial to all. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369.

[2] What, then, was the essential and beneficial neighborhood scheme for the lots on the east side of South Tenth street, between Clinton and Madison avenues, which the purchasers of those lots became protected in their right, to enjoy, and the destruction of which would deprive them of the benefit, in return for which they submit to the reciprocal burdens? We think it was to have those lots used

and improved, during the time limited by the restriction, for residential purposes, with one dwelling house, for occupation by one family only, on one lot, such dwelling house to set back from the street in accordance with the line established by the restrictions, and to cost at least about \$5,000 to build; that, as incidental to this general purpose, there was also a start made to restrict against outbuildings of any character, but that this part of the restriction, where it was imposed, has been modified by mutual acquiescence by the insertion, in place of it, in some of the conveyances, in connection with the dwelling house covenants, of the phrase, "with necessary or desirable outbuildings," and by its violation, in one or more instances, by the erection of a garage on the rear of a lot upon which a dwelling house was constructed in conformity with the dwelling house restriction. We do not think, however, that this modification of this incidental feature is of such a nature as to destroy or impair the mutual benefit to the lot owners of the essential general dwelling house scheme upon the protection of which they relied. So far as the modification of what may be called the incidental "no outhouse scheme" is concerned, of course, defendant's covenant is likewise modified, so that his burden will correspond with his benefit; but, as to the main essential purpose of the neighborhood dwelling house scheme, we think defendant's lot continues to participate in its benefit, and consequently remains subject to its burden.

This being the case, the question arises: Does the construction of the defendant's garage, not on the rear of his lot behind a dwelling house constructed thereon in conformity with the covenant, but, instead of that, constructed without any dwelling house on the lot at all, and in the very place fixed by the covenant for the dwelling house to go, fall within the modification of the incidental outhouse covenant, so as to be protected by such modification? We not only think that it does not, but, on the contrary, that it is a violation of the essential and beneficial purpose and effect of the neighborhood dwelling house scheme. This scheme gave each lot owner, who paid a higher price for his lot with that in view and constructed his dwelling house in accordance with the covenant, the right to expect that the improvement upon his neighbor's lot, in close proximity to his own dwelling house and fronting upon an uniform building line, would be a similar dwelling, or one at least of the designated cost. The advantages to him of such an arrangement are too obvious to require discussion. Instead of this, he finds as the neighboring improvement a sheet iron garage building of probably comparatively trifling expense as compared with the cost of the improvement which he had a right to expect, and doubtless of such displeasing appearance as to quite justify the taste of the

owner in placing it beside some one else's dwelling house, instead of beside his own.

While we entirely agree, therefore, with the view of the Vice Chancellor that there was in this instance a neighborhood scheme, we think he erred in his conclusion that it had been abandoned in such essential features as to justify its violation in the manner in which defendant has violated it.

(6) The other principle invoked by the defendant to justify his violation of this covenant is that, by reason of other similar constructions (garages) in alleged similar locations with reference to complainant's remaining property, the violated covenant, in so far as it is violated, has ceased to have any beneficial value to complainant's property, and consequently can form no ground for equitable relief. This principle, if applicable, would also be decisive. The foundation for equitable relief in these cases is that, the first vendor having arranged by the covenant to accept a part of the consideration for his grant *in a benefit* to accrue to his remaining property by the performance of the covenant, it would be unconscionable to permit the covenantor-vendee's assignee, with notice, to cheat the vendor out of this portion of his consideration by *depriving him of the benefit* which he would receive by the performance of the covenant. If, however, there was no benefit, or the benefit has ceased to exist, there is no basis for equitable intervention. Thus, in *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, it was held that a covenant not to dig marl on one tract of land was not a benefit to the use of the adjoining tract (the probable purpose, to prevent competition, being unlawful, because in restraint of trade), and consequently would not be enforced in equity; and in *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365, followed in *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11, and in numerous other cases, it was held that "equity would refuse to enforce a covenant not to devote certain property to business purposes, where there had been such a change in the character of the neighborhood by the building of an elevated railroad and the increase of business houses as to *defeat the object and purpose of the agreement* and render it inequitable to deprive such owner of the privilege of using his property as its surroundings required." Pomeroy states this principle as follows: "Specific performance, not being an absolute right, the fact that enforcement would be of little or no benefit to the complainant, and a burden upon the defendant, is sufficient to constitute performance oppressive, and it will not be given." 6 Pomeroy, Eq. 1316.

The facts in this case, however, fall very far short of bringing it within the operation of this doctrine. It is quite true that complainant, whose interest (aside from what

should be her natural desire to protect the purchasers of her ground in a general scheme of improvements upon which she had induced them to rely) is in the value of the mansion house property directly opposite the lot in question, and in which she lives, and in the value of her other unsold lots, has permitted the erection of garages upon the rear of the lots and back of the dwelling houses which front toward her property on South Tenth street; and, having done so, it would be difficult to see what possible benefit she could have in preventing the defendant from constructing his garage on the rear of his lot and behind a dwelling house built thereon in conformity with the dwelling house restrictions. But this, so far as her property is concerned, situate as it is, is a very different proposition from substituting the probably unsightly outhouse garage instead of and in the exact location of a dwelling house to cost at least \$5,000, for which she stipulated. Her benefit, which is invaded by what defendant has done, not only equals, but is even greater than, that of the neighboring lot owners, because, if defendant may lawfully do what he has done, it can only be because both the dwelling house general scheme and the dwelling house individual covenants have become inoperative; and in that case all the other dwellings constructed on the east side of South Tenth street may be turned into factories, or built out to the street line in the shape of stores, and the entire residential character of the neighborhood, which, by reason of her larger remaining interests, is obviously more valuable to complainant than to any one else, may be completely destroyed.

The suggestion has also been made that, because complainant is using as a garage a stable which existed on the mansion house property before any of the lots in the entire tract were laid out and sold, she is not in a position to ask relief in a court of equity against the construction of defendant's garage. We cannot see the relevancy of this suggestion. This building was in existence at the time complainant sold defendant's lot, and consequently at the time the covenant in question was entered into. There was no reciprocal covenant, either for the removal of this building, or to regulate its use; and its use as a garage does not seem in any way to affect either the beneficial result to the complainant of the performance of the covenant in question in particular, or the integrity and beneficial effect of the neighborhood scheme as established by the covenants in general.

For the reasons above stated, the decree of the Court of Chancery is reversed, and the case is remanded to that court, in order that a decree may be entered in accordance with the opinion herein expressed.

SEIBERT v. SEIBERT.

(Court of Chancery of New Jersey. April 26, 1912.)

1. DIVORCE (§ 129*)—ADULTERY—SUFFICIENCY OF EVIDENCE.

Evidence in a suit by a wife for maintenance, in which defendant filed a cross-bill for divorce, *held* to show that the wife had committed adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441, 454; Dec. Dig. § 129.*]

2. DIVORCE (§ 129*)—ADULTERY—SUFFICIENCY OF EVIDENCE.

Evidence in a suit by a wife for maintenance, in which defendant filed a cross-bill for divorce, *held* not to show that the defendant had committed adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441, 454; Dec. Dig. § 129.*]

3. DIVORCE (§ 54*)—RECRIMINATION.

Bad conduct by a husband other than cruelty and infidelity cannot be set up as a bar to his suit for divorce for adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 190-196; Dec. Dig. § 54.*]

Suit by Catharine L. Seibert against Henry F. Seibert for maintenance, in which defendant filed a cross-petition for divorce. Judgment for defendant in the principal suit and on the cross-petition.

Ralph E. Lum, of Newark, for complainant. Geo. H. Lambert, of Newark, for defendant.

STEVENS, V. C. This is primarily a bill for maintenance. The defendant defends on the ground of adultery, alleged to have been committed by his wife, and by cross-petition asks for a divorce. The complainant replies by alleging adultery committed by her husband. It may be remarked, at the outset, that I have never tried a case in which so much moral depravity has been exhibited. The case is the more difficult on that account; the evidence of the principal witnesses being open to so much suspicion.

The parties, who were married on October 4, 1898, appeared to have lived together in Newark harmoniously until about three years ago. Up to that time their income had been small. On his father's death, in 1908, defendant came into possession of an income exceeding \$40,000 a year, which he, not knowing what otherwise to do with, began, with his wife, to waste in riotous living. Mrs. Seibert has since then been three times treated for alcoholism.

[1] I regret that the evidence convinces me that Mrs. Seibert committed adultery with John E. Woelfie on the day charged in the cross-petition, viz., March 8, 1910. Woelfie was a saloon keeper and a boon companion of defendant in his debauches. He is shown by the evidence to be a man utterly devoid of moral sense. He was, until July, 1910, when Woelfie and defendant quarreled, a constant visitor at Seibert's house, at Seibert's invitation; after that time

he went there clandestinely. He and Mrs. Seibert went out driving together, visited saloons together, and some of the witnesses saw them kissing. On March 7, 1910, Mrs. Seibert ordered from Harth's livery stable a coupé which was driven by a man named Sears. According to this driver, she started from her home shortly after 2 o'clock in the afternoon, took up Woelfie near South Orange avenue, and went, first to Lauchenhauer's saloon, and then to the Old Red Mill. In the evening they ordered Sears to drive to the Continental Hotel in Newark. On their way thither they changed their minds. Mrs. Seibert asked Sears whether he had a room anywhere. He replied that he had, at 246 South Orange avenue. She asked him whether they could go and stay there for the night. He told her they could. On their way they stopped at Hauffer's saloon. Sears procured whisky which he took out to the carriage, and they drove to his room on the opposite side of the street. He showed them up and then, at their request, brought, from the same saloon, more whisky and a bottle of ginger ale. They remained in this room during the night. Sears came for them in the morning and took them for breakfast to the Old Homestead Brewery. Such is Sears' story. If true, it proves the charge made in defendant's answer. It is much too strongly corroborated to dismiss it as the perjured evidence of a man bribed to give false testimony. Sears is a witness of some intelligence. He was, at the time of the occurrence narrated, in the regular employ of Harth. He is now a motorman on a trolley in Schenectady. He is corroborated, first, by an entry on Harth's books as follows: "March 7, 1910, Henry F. Seibert—coupé; black mare Harry; Sears 1:15 p. m. to 5 a. m.—\$12.50." Second, by Merz, the bartender at Hauffer's saloon, who testified to the drinks taken to the carriage and to the whisky afterwards bought by Sears and taken across the street. He did not see the persons in the carriage. Third, by Mrs. Whipperman, the keeper of the lodging house, who testifies to the condition of the room and bed, and to having seen a woman in furs leave the house in the morning. She says that she tried to see Sears afterwards and tell him that he could not have the room any longer but he did not come back. Fourth, by Dolan, who held the horse while Woelfie and Mrs. Seibert got out of the carriage and who recognized her because he had driven for Harth, whose carriages the Seiberts were in the habit of using. Fifth, by Mrs. Schmidt, who, from a saloon across the street kept by her husband, saw a man and a woman come out of the house in the morning. She identified Woelfie as the man but did not know Mrs. Seibert. She says, however, that Sears came over to her husband's saloon and told the men there that he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

waiting for them and that the men were all watching for Mrs. Seibert to come out. Sixth, by Winter, who says that on the only morning Woelfie, whom he knows, was ever in the Old Homestead during the period of his employment, he was accompanied by a lady to whom he served something to eat and drink. He does not identify Mrs. Seibert as the woman, and his evidence, standing by itself, would be of little value.

Mrs. Seibert seeks to meet this body of evidence with an alibi. She and her niece, Mrs. Finn, say that on the afternoon and evening in question they were shopping and attending the theater. They do not remember the play, and, as to the shopping, all that they testify to could as well have happened on any other day. While some weight is to be given to the testimony of Mrs. Finn, who appears to be an intelligent and conscientious witness, I do not think it throws any real doubt over the narration of Sears, fortified as it is by so many independent witnesses, and, I am sorry to say, so probable in itself. The same remark applies to Mrs. Woelfie's testimony. The subsequent conduct of Woelfie and Mrs. Seibert supports the story and proves, as it seems to me, an illicit connection. The cross-petition does not charge adultery committed at the Hotel Rudolph in the following November, but the inference of it is hard to avoid. Woelfie there went under an assumed name, and both he and Mrs. Seibert admit that for two successive nights they occupied the same bedroom; the trained nurse who accompanied her being in the adjoining room. Mrs. Seibert was then in full possession of her senses; she did not, through excessive drinking, become unconscious till a day or two afterwards. One would have supposed that the proper place for the nurse would have been in Mrs. Seibert's room, and that Woelfie, if merely a friend and assistant, would have been in the room occupied by the nurse.

[2] A more difficult problem is presented when we come to deal with the charge against Mr. Seibert. That charge is that on March 17, 1910, and on other days of said month, he committed adultery with one Myrtle Miller at the Hotel Denville, No. 207 West Fortieth street, New York City; and "at other places unknown to complainant and at divers other times subsequently thereto." This charge was an afterthought, not having been made in the original answer to the cross-petition filed on June 29, 1911. The supplemental answer making the charge was not filed until November 22, 1911, the first day of the hearing. The charge that adultery was committed on March 17th is disproved. Indeed, Woelfie, from whom the information upon which it was based must have been derived, does not pretend that it was committed on that day. He vaguely says, in his testimony, that it was committed with a stout woman, whose name he does not know, in the latter part of March, and that it was in

April that the adultery was committed with Myrtle Miller. These discrepancies, ordinarily of slight importance, are deserving, in this particular case, of some attention. Proof of the adultery committed in March rests exclusively upon the testimony of Woelfie; proof of that committed in April, upon the evidence of Woelfie and a girl named Margaret Lee.

Woelfie's testimony as to the alleged occurrence in March is that in the latter part of that month he (Seibert) and the chauffeur, a man named Cisco, drove to New York, in Seibert's car, and proceeded to the German Village, a drinking place and resort of prostitutes, but not a bedhouse; that, after getting drinks and selecting three girls, they proceeded to the Hotel Denver (not Denville as charged in the answer) and there obtained rooms which they occupied for about three-quarters of an hour, and then returned to Newark. He cannot identify the girl with whom he says Seibert roomed except by describing her as a stout girl. This is the only evidence of the occurrence. It is given by a man without morals, without character, and entirely unworthy of belief. If the case rested here, there would be no difficulty in dismissing it, denied as it is by Seibert and Cisco, on the ground that judgment of guilt could not be safely rested upon such testimony.

The other occurrence is testified to, not only by Woelfie, but also by Margaret Lee. Woelfie's account is as follows: "About the 10th of April we (Seibert, Cisco, and Woelfie) went over to the German Village, met this Miss Miller (the girl that he says Cisco had had on the previous occasion) and a new girl who was introduced to Cisco. I think," he says, "her name was Alice. I had a girl by the name of Elsie Brown. Mr. Seibert took Miss Miller, the girl that Cisco had the week before, and we all went to the rooms together again. We were there about half an hour, the same as before. * * * I had to register for Mr. Seibert. * * * He says, 'put me down Lowenstein.' * * * I made my name Einstein. I can't recollect what I made for Cisco." He reiterates this account on cross-examination and gives no further particulars.

Margaret Lee's account is as follows: "We met the party in April (about the 10th I should judge) in Delawanna (a village between Nutley and Passaic) at a roadhouse kept by one Foley. * * * We went out for a ride. There was Mr. Cisco, Mr. Seibert, Mr. Woelfie, Mr. Foley, and some other gentleman, and myself. [She had never seen the other gentleman before and did not remember his name.] From Delawanna we went to Boonton. * * * We had a drink. From Boonton we went to some other roadhouse, I couldn't just tell where it is, called Jack Garabrandt's. From there we went to Paterson to the French restaurant and had dinner, then back to Delawanna, and from

Delawanna to New York. We arrived at New York between half past nine and ten at night, and went to the German Village. Were there about half an hour or three-quarters of an hour. We went in—our party—we had a few drinks; well I won't say a few, we had two drinks. There was three young girls going out and the gentlemen spoke to them, and the young ladies told them they could not sit down at the table unless they got up and walked to the door with them and came back, which they did, all excepting Mr. Seibert and Mr. Foley and I. We sat there. The young ladies came back. There was some fellow going through selling flowers and Mr. Seibert asked us if we would have some, so we said, 'Yes.' He bought the young ladies violets, and I said I would like to have a bunch of violets, and he wouldn't allow me to take them. He said if they had violets, I should have better, and he bought me a bunch of roses. After that they suggested going to the hotel, so we got up and went out, Mr. Seibert and the girl he was with, Mr. Foley, and I. We went to the hotel together—the Denver on Fortleth street, right off Seventh avenue, I believe it is. We went down there, and we all went in through the hotel into the parlor on the right hand side, going in the door. So we had one drink there, and Mr. Seibert, Mr. Cisco, and Mr. Woelfie, and the other gentleman left Mr. Foley and I sitting in the ladies' room, the ladies' parlor, and we went back to the German Village and had a drink. We had one drink there and came back, and the parties were not downstairs yet, so we sat in the machine and waited * * * about three-quarters of an hour. They came down. I didn't see the girls after that. The gentlemen got in the car and we drove off; drove back to Delawanna."

On cross-examination she says that she had had "perhaps as many as 20 drinks" that day; that she did not remember who, besides herself and Foley, walked from the German Village to the hotel Denver, thought it was Woelfie (on her direct examination she said Seibert); that she did not see the girls come out of the hotel, and was uncertain whether there were three or four; that on their way home they stopped at a roadhouse on the boulevard and reached Foley's at Delawanna "around one or half past one o'clock in the morning," where she stayed all night.

The account of the trip, given by Margaret Lee, has at least verisimilitude because of its circumstantiality. It is denied by Seibert and Cisco, but, if believed, Seibert must be held to be guilty. Is this girl, then, a credible witness? There is no presumption of innocence arising from Seibert's manner of life. While he denies that he made the trip in question, he admits that he has "once or twice" visited the German Village. He is a frequenter of saloons and races; and has no employ-

ment. He is, notwithstanding, not to be adjudged guilty against his own and Cisco's denial, unless the crime be proved by credible witnesses. I was at first inclined to give weight to the account of Margaret Lee, but her story is attended with several peculiarities. In the first place, she was not called until after the complainant's case, on the issue in question, had been put in, and until it must have been seen that it could not prevail on Woelfie's evidence alone. How did she happen to be at Foley's, a roadhouse distant from her residence, on the Sunday in question? And why was she, an entire stranger, invited to go on the ride? This is not explained. Taking Margaret's account of herself, she leads, if not an immoral, at least a questionable, life. She admits that she frequents saloons and has, on three occasions, visited the German Village. In her direct evidence she said she was employed in a silkmill in Paterson, but on cross-examination she testified that she had not been working for two weeks. She does not appear to have any visible means of livelihood outside of her work. The mode in which her attendance was procured is a little suspicious. She says she received a subpoena in an envelope that contained no witness fee; that she came to Newark from Paterson and was met at the street door of the Prudential Building by Woelfie. On her cross-examination she first said that Woelfie was waiting for her, but further on she said he was not. She said that he asked her to come up and testify "about that ride at the time we were out; that they were denying it," and she further said that she had never at any time talked to any one about the occurrence except the woman she boarded with. How her address was discovered does not appear. As the evidence stands, we must infer that it was Woelfie who communicated to counsel the fact that she knew about the matter. But Woelfie does not seem to have given any information about her in connection with this particular occurrence or about the occurrence itself, even at the time when the supplemental answer to the cross-petition was filed, for no mention is therein made of any act of adultery committed on April 10th, although it was later in time and more noteworthy and more likely to be remembered than that actually mentioned in the pleading as occurring on March 17th. It is a singular fact that, although Woelfie must have known from the beginning that Margaret was one of the party and would have strongly corroborated him, he does not mention her name in his evidence when he testifies to the ride of April 10th. They agree upon the day (April 10th, which the almanac shows to be Sunday), but Woelfie, in his evidence, fails to state any one of the circumstances which make the Lee account appear probable. He does not mention the trip to Delawanna, or Margaret's or Foley's name, or the subsequent ride to Paterson, or

the fact that still another man went with them, or what occurred about the flowers; and he was not recalled either to corroborate Margaret on these details or to explain why he himself had so completely forgotten them. Woelfie showed great interest in the result all through the trial, and, naturally, for he was himself a party charged with guilt.

It is moreover proved that on Tuesday, November 21, 1911, while the hearing was progressing, he went to the German Village and told Rose Simpson, one of the girls there, that there was \$200 in it for any one who would take Elsie Brown's place; he not finding her there at the time, and she being one of the girls that he had mentioned as going, on April 10, 1910, to the Hotel Denver. The girls addressed declined the offer. These girls gave their testimony on November 29th, eight days after they had been thus approached. On November 19th, Woelfie says he saw Myrtle Miller at the same garden. He does not say that he asked her to come over, and he does not pretend that she refused to do so. The inference is strong that he did not secure her attendance because she would not corroborate him. Now it was after this failure to get either Myrtle Miller or Elsie Brown, or some one who would personate Elsie Brown, that, for the first time in the progress of the cause, Margaret Lee comes upon the scene—a girl of doubtful antecedents, out of employment, and who, because of the somewhat extraordinary circumstances attending the ride, was a prominent and a not to be forgotten figure in it. I confess that it seems to me to be inexplicable that, if she and Foley (now dead) and another unknown man were members of the party, Woelfie should have forgotten to mention it. While it cannot be affirmed that Woelfie's colorless account contradicts Margaret's, no one reading the two would imagine that they referred to the same occurrence.

Dismissing Woelfie as unworthy of belief, there is nothing left but Margaret's narration. She is flatly contradicted by Selbert and by Cisco, the chauffeur. I do not think that her evidence is so convincing and reliable that it should be allowed to prevail against the explicit denials of the parties charged. The verdict must be not proven.

There is another consideration not ordinarily present in cases of this kind—the pecuniary stake involved. Selbert's income exceeds \$40,000 a year. If the testimony that Selbert produced had been of a purchasable kind, it would have been as open to suspicion as is that of complainant's, but the difference is marked. Sears' evidence does not stand alone; it is corroborated by such a number of independent witnesses, each testifying to an important detail—just such a detail as would naturally be testified to if the story were true—that it is impossible to resist their cumulative force, and it is made

all the more probable by the behavior and admissions of the parties themselves—behavior and admissions that tend strongly to show guilt. The testimony of Margaret Lee stands on a different footing. It is not corroborated even on points on which, in a charge of this sort, corroboration is often, or usually, obtainable. No outsider saw any of the party enter the German Garden or the hotel, or saw them on their trip; the hotel register is not produced; the girl with whom the act is alleged to have been committed is not called, although it does not appear that she refused to come, and although she was seen by Woelfie shortly before the day on which her associates came to testify to Woelfie's offer.

[3] If bad conduct other than cruelty and infidelity could be set up as a bar, there would be ground for arguing that Selbert should be denied relief; but the law is otherwise.

As to condonation, the evidence falls considerably short of proving that the husband condoned his wife's guilt, after knowledge of the facts. Of connivance, there is no proof whatever. I have not adverted to the alleged visit to the Hotel Bryant, because no reliance is placed upon what Woelfie says about it.

PATTERSON v. CLOSE.

(Supreme Court of New Jersey. April 25, 1912.)

1. STATUTES (§ 125*)—SUBJECTS AND TITLES.

Act March 26, 1902 (P. L. p. 65), is entitled "An act to reduce the number of members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards;" and section 6 provides that the terms of office of all officers then holding under appointment by the board of chosen freeholders in any county at the organization of the board under the act shall expire with the termination of office of the members of such previous board, as aforesaid, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointments by such previous board shall then become vacant; and the boards constituted or elected under this act shall fill the offices hereby vacated for the term of one year only. *Held*, that the provision changing the length of the terms of county offices which are filled by appointment of the board was not authorized by the title, so that the statute was repugnant to Const. art. 4, § 7, par. 4, providing that the subject of every law shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 134, 187-191; Dec. Dig. § 125.*]

2. STATUTES (§ 109*)—SUBJECTS AND TITLES —AMENDMENT OF INVALID ACT.

Under Const. art. 4, § 7, par. 4, requiring that the subject of every law shall be expressed in its title, the title must be broad enough to express the general object sought to be accomplished, being a restriction upon the enacting part of the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139, 196; Dec. Dig. § 109.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. STATUTES (§ 109*)—SUBJECTS AND TITLES. The amendment of the title of a statute, which was invalid, because its title did not express certain subjects included in the body of the statute, so as to include such subjects therein, would not render the amended statute constitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139, 196; Dec. Dig. § 109.*]

Quo warranto by the State, George W. Patterson, Jr., relator, against Charles E. Close. On demurrer to the plea. Judgment for relator.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Alan H. Strong, of New Brunswick, for relator. Rulif V. Lawrence, of Freehold, for defendant.

GUMMERE, C. J. The information in this case avers that at the annual stated meeting of the board of chosen freeholders of the county of Monmouth, on January 1, 1910, the office of clerk of the board was vacant, and that the board thereupon appointed the relator to fill it for the term prescribed by law; that he took the oath and gave the bond required by the statute, and entered upon the duties of his office and continued to discharge the same until May, 1911, at which time, and during the continuance of the term of the relator, the defendant took possession of the office, and since then has excluded the relator and usurped, intruded into, and unlawfully held, used, and exercised said office.

The defense set up by the plea is that the term of office of the relator had expired prior to May, 1911; that the defendant was duly appointed by the board of freeholders of Monmouth county to the office of clerk of the board at the expiration of the relator's term; and that his entry into the office at the time and in the manner set out in the information was under and by virtue of that appointment. In support of the allegation of the plea that the term of office of the relator had expired prior to the time of the appointment of the defendant to that office, the pleader appeals to the sixth section of the act of March 26, 1902, entitled "An act to reduce the number of members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards" (Pamph. Laws, p. 65), and avers that the provisions of this statute were adopted by the voters of the county of Monmouth at the general election held in 1905.

The statutory provision appealed to by the defendant is as follows: "The terms of office of all officers then holding office under appointment by the board of chosen freeholders existing in any county at the time of the organization of said board under this act in such county shall expire with the termina-

tion of office of the members of such previous board as aforesaid, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointments by such previous boards shall then become vacant; and the boards of chosen freeholders constituted or elected under the provisions of this act shall forthwith, upon their organization, fill the offices hereby vacated for the term of one year only."

[1] The principal ground of demurrer to the plea is that so much of this section as attempts to change the length of the terms of county offices which are filled by the appointment of the board is unconstitutional, for the reason that no such purpose is disclosed in the title of the act. We are told by counsel that it had already been so decided by this court in the unreported case of Attorney General v. Herbert, at November term, 1907; but we find no such adjudication in that case. The determination of the question raised by the demurrer, therefore, cannot be put upon the ground of stare decisis, but requires original consideration at the hands of the court.

The constitutional provision which is invoked declares that "every law shall embrace but one object, and that shall be expressed in its title." Article 4, § 7, par. 4. This provision places no obstacle in the way of legislation which in a single statute creates boards of freeholders, provides for the number of their members, the length of the terms, and the compensation to be paid to such members, the duties to be performed, and the powers to be exercised by such boards, including the power to appoint such officers as may be required to aid them in the performance of those duties and the exercise of those powers, and which fixes the terms and salaries of such appointees; for legislation by one statute looking toward a single general object, although it contains and enacts various and multiform matters, is not prohibited by this constitutional provision, if these matters are properly related to each other and tend to effectuate the general object. *Payne v. Mahon*, 44 N. J. Law, 213; *Newark v. Mount Pleasant Cemetery Co.*, 58 N. J. Law, 168, 33 Atl. 396. But the power of the Legislature to pass a single statute having so general a purpose is not unlimited.

[2] In order to make the legislation valid, the title must be broad enough to express the general object sought to be accomplished; for, under the constitutional provision referred to, the title is not only an indication of the legislative intent, but is also a restriction upon the enacting part of the law. *Hendrickson v. Fries*, 45 N. J. Law, 555; *Dobbins v. Northampton*, 50 N. J. Law, 496, 14 Atl. 587. The title of our general act incorporating chosen freeholders in the several counties of the state is an example of compliance with the constitutional mandate in

a case where the legislation embraces various and diverse matters all tending to the accomplishment of a single general object, such as that which we have indicated. The title of the act of March 28, 1902, however, does not disclose a purpose to legislate generally with relation to the boards of freeholders of the several counties of the state, but specifically with respect to the number of members of which such boards shall be composed, the compensation which they shall receive, and the time and method of their election, and consequently restricts the enacting part of the statute to these three subject-matters, and matters cognate thereto. That the length of the terms of office of appointees of those boards bears no relation to the matters so specified seems to us too plain for argument. As it does not, legislation dealing with that subject is not permitted, by the constitutional provision appealed to by the relator, to be injected into the enacting part of the law; and the provision of section 6 of the statute which is set up by the defendant as a justification of his claim to be entitled to the office which he holds must be declared null and void.

[3] The defendant further contends that, if it be considered that the provision of section 6 of the act of 1902 that has been just adverted to is unconstitutional as originally enacted, its invalidity was cured by the amendment to the act, passed April 20, 1909 (Pamph. Laws, p. 294). The title of the amendment is "An act to amend the title of an act entitled 'An act to reduce the number of members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards,' approved March twenty-sixth, one thousand nine hundred and two." The body of the amendment reads as follows: "The title of the act entitled 'An act to reduce the number of the members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards,' approved March twenty-sixth, one thousand nine hundred and two, is hereby amended so as to read as follows: 'An act to organize the boards of chosen freeholders of the several counties of this state, reducing the membership thereof, fixing the salaries, and providing for the election and terms of office of the members, and also for the appointment and terms of office of officers appointed by such boards.'" That such an enactment is not effectual to render constitutional a statute which was originally invalid in some of its provisions, because those provisions dealt with objects which were not expressed in the title of the statute, has recently been declared by this court in the case of *Sawter v. Shoenthal*, 80 Atl. 101; and the principle of that case is controlling,

unless and until it shall be disapproved by the court of last resort.

It follows from what has been said that the length of the term of office of the clerk of the board of freeholders of Monmouth county was not changed by the act of 1902, or the amendment thereof in 1909, but remained as it was prior to the enactment of those statutes. Monmouth county, as appears by the recital of the plea in this case, is a county of the second class. In such counties, the term of office of the clerk of the board is fixed at two years by the act of April 23, 1888 (P. L. p. 464; Comp. Stat. p. 533, § 205). The appointment of the relator, therefore, on January 1, 1910, "for the term prescribed by law" entitled him to hold the office for a period of two years from and after that date; and the intrusion of the defendant into the office in May, 1911, under color of an appointment by the board of freeholders of the county, was without warrant of law.

The relator is entitled to judgment on the demurrer.

STATE v. EGAN.

(Supreme Court of New Jersey. April 23, 1912.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 125*)— DUPLICITY—EMBEZZLEMENT.

Where an indictment describes the defendant as a county collector, intrusted with the collection, receipt, care, and custody of the money of the county, and charges him with embezzling the money so received for the county, it describes an offense against the provisions of section 168 of the Crimes Act (P. L. 1898, p. 840), notwithstanding it also charges that he converted to his own use the money of the county as its servant and agent, and it is not void for duplicity, although section 184 of the same act makes it a crime for any agent or servant intrusted with the collection of money to convert it to his own use. Section 168 deals with public officers such as the defendant is described to be, and he is the agent or servant of the county when acting as county collector, and when he embezzles he converts the money or property to his own use. The distinction is that in one case the law is aimed at a public officer, and in the other at one who is simply an agent and servant in a private capacity. In either case they are servants or agents, and when either embezzle they convert to their own use.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. CRIMINAL LAW (§ 1166*)—IMPANELING AND ORGANIZATION.

A defendant in an indictment has no legal ground of complaint that a grand jury which might, but did not, consider a complaint against him was discharged by the court. His constitutional right is limited to a grand jury lawfully impaneled not to have a particular set of men constitute the grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. GRAND JURY (§ 9*)—SUMMONING JURORS—AUTHORITY OF ELISORS.

A statute which provides that a grand jury shall be summoned by the coroners or elisors, when the venire is directed to them, gives a preference to neither, and the court, when the sheriff has been disqualified and a venire is required, may direct it to either, and a grand jury selected and summoned by elisors, when the venire is sent to them, which is sworn and recognized by the court as a grand jury, is lawfully constituted as such, and complies with the constitutional requirement relating thereto.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 21-26; Dec. Dig. § 9.*]

(Additional Syllabus by Editorial Staff.)

4. TAXATION (§ 571*)—COLLECTORS—CRIMINAL PROSECUTIONS—INSTRUCTION.

In a prosecution of a county collector for embezzlement, an instruction that, in order that defendant may be found guilty, it is necessary to find that he converted the money to his own use with intent to defraud the county, that the jury may infer that he converted the money to his own use from the fact that he took it and loaned it in his own name, and that they might infer the intent to defraud from the fact that he parted with control of it and put it beyond his power to pay it over at once, was not erroneous.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1180-1181; Dec. Dig. § 571.*]

Error to Court of Quarter Sessions, Hudson County.

Stephen M. Egan was convicted of embezzlement, and brings error. Affirmed.

Argued February term, 1912, before BERGEN and KALISCH, JJ.

Pierre P. Garven, of Jersey City, for the State. Julius Lichtenstein, of Hoboken, and John Franklin Fort, of Newark, for defendant.

BERGEN, J. The grand jury of the county of Hudson, having presented an indictment against the defendant charging him with embezzlement, he moved to quash it, and, the motion being denied, he was tried and convicted, and thereupon the judgment was pronounced, which he seeks by this writ of error to review. The assignments of error challenge the action of the trial court in refusing the motion to quash, the denial of a motion in arrest of judgment, the admission of testimony, the charge of the court, and refusals to charge as requested, which will be considered and disposed of in the order presented by counsel.

That part of the indictment which is pertinent to the questions raised reads as follows: "The said Stephen M. Egan, being then and there the county collector in and for the said county of Hudson, and as such county collector being a receiver of taxes and of moneys, being the proceeds of the collection of taxes, for and on behalf of the board of chosen freeholders of the county of Hudson, and, as such county collector, being then and there the servant and agent of the said board of chosen freeholders of

the county of Hudson, and being, as such servant and agent, intrusted with the collection, receipt, care, and custody of the moneys of the said board of chosen freeholders of the county of Hudson did then and there unlawfully and fraudulently take and embezzle and convert to his own use a certain large sum of money, to wit, the sum of thirty-one thousand five hundred dollars, he, the said Stephen M. Egan, having theretofore, to wit, on the said fourth day of August, A. D. one thousand nine hundred and nine, received the said sum of money as such county collector as aforesaid, for and on behalf of the said board of chosen freeholders of the county of Hudson."

[1] The first point argued by the plaintiff in error is that this indictment should be quashed because it charges two distinct offenses which are subject to different penalties, and the particular objection pressed is that the defendant was tried, convicted, and sentenced for a high misdemeanor under section 168 of "An act for the punishment of crimes (Revision of 1898)" P. L. 1898, p. 794, while it is claimed that part of the offense described in the indictment is made a crime by section 184 of the same act, and therefore the indictment is bad for duplicity. Section 184 declares that "any consignee, factor, bailee, agent or servant * * * intrusted with the collection or care of any moneys who shall fraudulently take or convert the same * * * to his own use or to the use of any other person or persons whatsoever" shall be guilty of a misdemeanor. While section 168 declares that any county collector having taxes to collect, "who shall embezzle, unlawfully loan, or retain in his hands any moneys received or collected by him" for any county, or other designated municipalities, shall be guilty of a high misdemeanor.

The claim of the plaintiff in error is that, while section 168 does not contain either the words "convert to his own use" or "as servant and agent," they do appear in section 184, and also in the indictment, and therefore, as the indictment charges the defendant with receiving the money as county collector under section 168, and with being the servant and agent of the county, and with converting the money of the county to his own use, in the language contained in section 184, it charges different offenses. This claim, in my opinion, has no legal standing, for section 168 deals with public officers and makes it a crime to embezzle public funds received by them in their public capacity, and the addition of the words "and convert to his own use" does not enlarge or modify the statutory crime of embezzlement, which is the fraudulent appropriation to his own use of money or property by one to whom it is intrusted while acting in a fiduciary capacity, nor does the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

statement that a public officer, described in the statute and indictment as county collector, was, as such, the servant and agent of the county detract from the charge that he was one of a class of officers whose embezzlement of public funds, received as such by him, is made a high misdemeanor. It is the character of the agency that is the distinguishing feature between the two sections.

The next point urged is that the grand jury who presented this indictment was not lawfully selected and impaneled, and for this reason it is argued it was error to refuse to quash the indictment or to grant the motion in arrest of judgment.

The facts upon which these motions were based are not disputed in any material point, and stated concisely are as follows: On the opening day of the court of oyer and terminer to be held in and for the county of Hudson, at the September term, 1911, the sheriff of the county caused to come before the court a sufficient number of the citizens of the county selected by him to serve as grand jurors, whereupon, and before they were sworn, the prosecutor of the pleas interposed a challenge to the array, upon the ground that the sheriff had been charged with an offense against the law, of which the grand jury he had selected would be required to inquire, and therefore he was not an impartial person. After considering the propriety of the challenge, the court sustained it and discharged the entire panel, and then made an order disqualifying the sheriff upon the ground that a complaint was to be made to the grand jury against him, and also restraining him from selecting or summoning a grand jury to serve at that term of the court, and in the same order, having determined that it appeared that a grand jury for the September term of the court should be selected and summoned by elisors, appointed two disinterested freeholders, both residents of Hudson county, to select and summon, and cause to come before the court, 24 good and lawful men of the body of the county of Hudson to serve as grand jurors. The elisors so appointed, having qualified, observed the command of the venire and returned a grand jury, which being impaneled and sworn, presented the indictment under which the defendant was convicted.

No express order was made disqualifying the coroners, but testimony was taken on the question of the qualification of the coroners at the time when the qualification of the sheriff was inquired into, and it must be assumed that, if the court had no option in the matter of awarding the venire to the elisors, such order was based upon the finding that the coroners were not so indifferent as to justify the awarding of the writ to them. The testimony disclosed that three coroners had been elected, filed their

oath of office, and had been actually performing the duties of their respective offices until the awarding of the writ to the elisors. It also appeared that there was a defect in the oath of office of one of them (Michael J. Boylan), which, after a particular statement of the statutory requirements relating to what he should refrain from doing, concluded, "That I will, in all things touching the duties of the said office, de^e mean myself honestly, fairly and *partially* according to the best of my knowledge and understanding." The error upon which, apparently, the disqualification of Boylan was rested consists in the use of the word "partially" instead of "impartially." As no other reason for the disqualification of the coroners appears, it must be taken, and was so admitted on the argument by the state, that if disqualification of the coroners was required in order to award the venire to the elisors, the entire body of the coroners of the county were ignored because the oath of one was defective. I cannot agree that the omission of the use of the prefix mentioned was sufficient to disqualify all the coroners of the county and deprive it of the services of every one of its constitutional officers of that class who were elected at different times and whose terms of office are not concurrent. If this be a disqualification of one coroner, he is disqualified for all purposes, and it is as if he had never qualified, in which case it cannot be the law that the other coroners were disqualified to perform any of the duties of their offices because of the failure of one to qualify, and this seems to have been the view of the court in *Rex v. Warrington*, 12 Mod. Rep. 22, and therefore I have considered this case as though the venire could have been directed to those of the coroners who had qualified if the court, in the exercise of its discretion, had seen fit to send it to them.

[2] The plaintiff in error insists that it was error to discharge the panel returned by the sheriff because he had selected its members before the commission of the crime with which he was charged, and that he was therefore impartial at the time of selection. I am of the opinion that the impartial condition must exist at the time when the grand jury is presented to be sworn, for, as no precept is required, the sheriff could change the members of the grand jury at any time prior to the administration of the oath, the six days' notice to the grand juror required by the statute is for his benefit, and, if he appears and is sworn, lack of a summons, six days in advance, would not disqualify him, nor can any one take advantage of the absence of the notice except the juror. But it is not necessary to rest alone upon this proposition, for the defendant cannot justly complain of the discharge of a grand jury which did not pre-

sent an indictment against him; he is only concerned with the legality of the grand jury which presents the indictment, and, if that was impartial, selected as required by law, and sworn and recognized by the court as a grand jury, no constitutional right has been invaded (*People v. Petrea*, 92 N. Y. 128), where it was said "that an indictment found by a jury of good and lawful men, selected and drawn as a grand jury under color of law, and recognized by the court as a grand jury, is a good indictment by a grand jury within the sense of the Constitution, although the law under which the selection was made is void."

The defendant's constitutional right is that he shall not be held to answer for a criminal offense except on the presentment or indictment of a grand jury, and it is not to have a particular set of men constitute a grand jury. All he is entitled to is an impartial one, selected according to law, and no claim is made in this case that, if lawfully impaneled, the members of the grand jury presenting this indictment were not in every other sense duly qualified.

The right of the prosecutor to challenge the array was sustained in the *Somerset* oyer and terminer by the late Chancellor Magie, then justice of the Supreme Court, 3 N. J. Law J. 153, and the power of the court to discharge a grand jury improperly selected or summoned has, in order to further the administration of justice, been exercised for so many years that it has become a fixed part of the judicial procedure in criminal cases, and I do not understand that such power is questioned in this case.

[3] The next point urged is that the court, having disqualified the sheriff upon the ground that he was not such an impartial person as the law requires to select and return a grand jury, was bound to award the venire for the selection and summoning of the grand jury to the coroners of the county, unless they were all disqualified, and that it was error to pass over the coroners and appoint elisors as was done in this case. This is based upon the claim that at common law such a procedure was required.

The Constitution does not define who shall constitute a grand jury nor the method of their selection or summoning, but the character and qualification of grand jurors, the manner of their selection and summoning, has always been subject to statutory regulations. It may be granted that under the English procedure the practice obtained that in case of the disqualification of the sheriff the venire was first directed to the coroners, and, if they were disqualified, to elisors, but the procedure has always been subject to legislative control, and the entire question of selecting and summoning grand jurors in this state has been for many years provided for and regulated by statute.

In 1794 an act was passed entitled, "An

act constituting courts of oyer and terminer and a general jail delivery;" section 5 of which provided that the respective sheriffs of the several counties of this state should cause to come before the said courts, at the time and place specified in the precept for that purpose, 24 good and lawful men to serve as grand jurors, and by section 6 it was enacted that the clerk of the Supreme Court should "issue precepts under the seal of the said Supreme Court, directed to the respective sheriffs of the counties, in which such court or courts shall be held for the purpose expressed in the preceding section," and that the said precepts should be tested in the name of the chief justice, or, if that office be vacant, in the name of the justice of the Supreme Court next in precedence. *Paterson's Laws*, p. 137. And in the same book (page 259) under the title, "An act relative to juries and verdicts," the Legislature provided that the summons of any grand juror should be made by the sheriff or his lawful deputy either personally to, or in writing, left at the dwelling house of such grand juror at least six days before the first day of the court. The effect of these statutes was that a venire should issue out of the Supreme Court, directed to the sheriff requiring him to cause to come before the court of oyer and terminer 24 good and lawful men to serve as grand jurors, who should have given to them the notice prescribed by the statute. The venire committed to the sheriff the power of selecting those whom he should cause to come by giving the statutory notice.

In 1819 (*Rev. Laws* 1821, p. 658), the act constituting the courts of oyer and terminer was so amended as to require the sheriff to cause the grand jurors to come before the court without a precept, and this is now the law; it having been retained in all the statutes relating to this subject from 1819 to the present time, so far as the selection by the sheriff is concerned. The summoning of the grand jurors appears to have been exclusively committed to the sheriff until the revision of March 27, 1874 (*Rev. St.* 1874, p. 372) § 8, which provided that the summons should be made by the sheriff or his deputy or by one of the coroners when the venire should be awarded to the coroners, and this legislative language is a recognition of the power of the court to award a venire to the coroners if the sheriff is disqualified, for it would be futile to authorize the coroners to summon the grand jurors when the venire was awarded to them and yet withhold the power to award a venire, and, while statutes must be strictly construed, they should be so construed, if possible, as to effectuate the legislative intent, and clearly this statute was a recognition of the power of the court to direct a venire to the coroners when that was necessary to procure a grand jury, for a grand jury is

a required constitutional implement necessary to carry out the criminal procedure in courts, and a legislative direction that the coroners shall summon when the venire is directed to them of necessity implies the power of the court to issue a venire, without which the statute would be nugatory, and the venire necessarily confers the power of selection, unless it be otherwise ordained.

The next legislative step in the matter of selecting and summoning grand jurors was taken in 1876 (P. L. p. 380) which provided that grand jurors should be "summoned by the sheriff, or his deputy, or by one of the coroners or elisors, when the venire shall be awarded to the coroners or elisors." There is nothing in this act which limits the awarding of the venire to the coroners in case the sheriff is disqualified, but neither the coroners nor elisors can summon a grand jury without a venire, and, if the court is called upon to issue its venire for that purpose, it must be directed either to the coroners or elisors. The statute does not declare that if the coroners are disqualified the venire shall go to the elisors, nor is there any statute which expressly requires them or either of them to cause the grand jury to come before the court without a venire as in the case of the sheriff, who has the statutory right, but if he is disqualified, and the court is called upon to issue its venire, the statute declares, in the disjunctive, the summons shall be by the coroners or the elisors when the venire shall be awarded to the one or the other.

It is quite important in construing our statute on this subject to bear in mind that it was adopted with full knowledge of the procedure followed by the English courts which it may be assumed required the venire, the sheriff being disqualified, to issue to the coroners in preference to elisors when the coroners were not disqualified. This procedure the plaintiff in error claims was a part of the common law at the time of the adoption of our Constitution, and by virtue thereof became a part of the body of our law which has not been altered by legislation. This position is vital to the case of the plaintiff in error who insists, the power of the court to award a venire being granted, that the act under consideration has no bearing on the question to whom the venire should go, but is limited to conferring the right to summon upon the officer holding the writ. The right to summon is one of the powers granted under section 8 (P. L. 1876, p. 382) to the officer to whom the writ is directed—this clearly implies the power of selection, and, in my opinion authorizes the awarding of the venire to one who is to select and summon by giving the statutory notice, that is, this is a statutory regulation of the method by which a grand jury is to be brought into court in default of a prop-

er sheriff. The plaintiff in error insists that, granting this, nevertheless the statute is merely declaratory of the common-law rule of procedure and must be construed as if it read "summoned by the sheriff or his deputy or by one of the coroners or (if they be disqualified) elisors." Yet, as I have said, with knowledge of the rule followed by the English courts, no such limitation was put by the Legislature upon the awarding of the venire; the evident intent being to confer upon the court the power to provide for the selection of a grand jury when the sheriff was unable to properly perform that duty. If the Legislature intended to give preference to the coroners, it could easily have done so by inserting the words which the plaintiff in error now desires to have read into the statute, when in 1876 it amended the act of 1874 by adding the words "or elisors"; that being the only amendment then made to the section under consideration. If it was the legislative intent not to confer a power which it deemed did not exist, but simply to declare the common law, it failed to accomplish that purpose, and, we must assume, having before it the procedure in the English courts upon which plaintiff in error relies, refused to adopt it, but, by the use of language which in its ordinary sense confers the power in the alternative, established a rule inconsistent with that upon which the argument for reversal on this ground is rested.

I am of opinion that under our statute, if the sheriff is disqualified, the court has the right to direct the venire either to the coroners or to elisors, as it shall determine, and that in this case the defendant has not been deprived of any constitutional right by the manner in which the grand jury was selected, impaneled, and sworn.

The plaintiff in error argues that, if the court has the right under this statute to pass by the coroners and direct the venire to the elisors, it would have the same power in any case and could send the writ to elisors over the sheriff. The difficulty with this proposition is, as has been pointed out, the sheriff is the statutory officer to select and summon the grand jury, if he be a proper person, and if he should complain that he had been deprived of the right conferred upon him by law, without lawful reason, a different question would be presented, but the defendant is not interested in the disqualification of the sheriff; his only concern is, has the court discretionary power, when the sheriff is disqualified, to appoint either coroners or elisors, or must preference be given to the coroners?

The plaintiff in error also insists that the crime of embezzlement was not proven, and, if any offense was shown, it was that of an unlawful loan. This assignment rests, first, upon the refusal of the trial court to charge, as requested, "for the county col-

lector to unlawfully loan the money of the county in his custody as county collector is a distinct crime, so made by statute, and such an unlawful loan does not constitute the crime of embezzlement unless the further fact appears that the collector failed to account for the funds in his custody and so loaned, on demand, or at a time fixed for him to account for the same, or to pay the same over to his qualified successor," and also upon what the court did charge, namely, that, "The defendant, however, is not indicted for loaning the money of the county unlawfully, and, if that is what he did, he could not properly be convicted under this indictment. But, in deciding whether the transaction was an unlawful loan, you must bear in mind not only the fact that no interest was demanded, paid, or received as is ordinarily the case with a loan, but that the note was not the note of the Jersey City Supply Company to which the checks were made payable, or of Robert Davis against whose estate the defendant filed a claim for the money, but was the note of Robert Davis, Jr., who is not claimed to be primarily liable; and you should consider, especially, the facts that the note was payable to S. M. Egan individually, and that he seems to have claimed it individually of the Davis' estate, and to have assumed the right to forego the interest and to assign the balance of his claim against the Davis estate. * * * You can hardly infer that such a transaction was an unlawful loan within the meaning of the statute. Such facts justify, if they do not require, the inference that he converted the money to his own use, and, if he acted with intent to defraud his act is embezzlement."

The part of the charge of the court complained of was a mere comment on the evidence, except so far as it instructed the jury that if what the defendant did was to unlawfully loan the money of the county he could not be convicted under this indictment, and that part of the charge covered the refused request of which complaint is now made. The request was that, if it was an unlawful loan, it was a distinct crime, and not an embezzlement, and the court so charged.

The next point made is that the court allowed the witness Robert Davis to answer this question: "Q. What did you do with the money, this \$31,500, Mr. Davis?" This was objected to as incompetent. The record shows that the court allowed the evidence upon condition that the prosecutor should connect the defendant with the transaction, and that if he did not he would strike it out. The exception is not to the refusal to strike out, but to the admission of the question, but, if we give to the defendant's exception its intended scope, that is an exception to the question as it then stood, unconnected with any act of the defendant,

and accede to his position that it was incompetent, it is very clear that the testimony was not harmful to him. The answer was that he (the witness) paid the money to the trustees of a church, and, as it was immaterial to the defendant's defense what the borrower did with the money after he had passed it over to him, for the conversion was then complete, if there was a conversion, he was not injured by the testimony. The crime, if there was a crime, was complete when defendant converted the money, and the disposition made of it by Davis after the conversion did not constitute an element of the crime charged against the defendant. To whom Davis paid the money after it had gone out of the control of the defendant did not add to or diminish the completed offense. In addition to this, and perhaps because it was harmless, the defendant did not move to have the answer stricken out at the close of the case as he should have done if it was incompetent, because the disposition of the money by Davis was not brought to the knowledge of the defendant.

[4] The next assignment questions the legality of an instruction to the jury in answer to its request for further instructions after it had retired to consider of its verdict. The instruction complained of is: "In order that the defendant may be found guilty of embezzlement it is necessary to find that he converted this money to his own use, with intent to defraud the county. You may infer that he converted the money to his own use from the fact that he took the money and loaned it in his own name, if you find that to be the fact. You may infer the intent to defraud from the fact that he parted with the control of the money and put it beyond his power to pay it over at once; that is, he failed to keep the money in his control and put it in the control of others."

The criticism which the plaintiff in error makes is that this was a direct statement that, if the defendant had loaned the money to Davis, the jury could infer that he converted it to his own use by thus loaning it. I see no error in this instruction. If the defendant took the money of the county and loaned it as his money, he then converted it to his own use; at least such an inference could be drawn. What the statute means by "unlawfully loan" is loaning the money of the county as the county's money in a way not authorized by law, for if a public officer takes the public funds and invests them in his own name with intent to defraud, the moment he makes the investment he fraudulently converts the money to his own use, and that would be embezzlement which the statute makes a crime.

This disposes of all the questions argued, and, finding no error in the record, the judgment below should be affirmed.

BELVIDERE WATER CO. v. TOWN OF BELVIDERE.

(Court of Errors and Appeals of New Jersey.
April 19, 1912.)

1. CORPORATIONS (§ 518*)—ACTIONS—PLEA OF NUL TIEL.

A plea of nul tiel corporation, averring that there is not, nor ever was, nor on the day of the commencement of the action, nor since, in existence any such corporation as plaintiff, is met by proof that the corporation existed at any time; and a reply, averring that there is and was, on the day of the commencement of the suit, and since that day, in existence a corporation by the name of plaintiff, is proper, and the issue joined involves the existence of the corporation at and since the beginning of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2028; Dec. Dig. § 518.*]

2. CORPORATIONS (§ 518*)—ACTIONS—PLEA OF NUL TIEL.

The question raised under a plea of nul tiel corporation is the ability of plaintiff to sue; and the plea is one in bar.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2028; Dec. Dig. § 518.*]

3. CORPORATIONS (§ 29*)—RIGHT TO SUE—DE FACTO CORPORATION.

The question whether an action by a corporation is maintainable depends on whether it had a de facto existence at the time the suit was brought, since its right to exist can only be questioned by the Attorney General, acting for the state, and not by one who has contracted with it as a corporation, provided there is a statute under which such a corporation may exist.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77, 78; Dec. Dig. § 29.*]

4. CORPORATIONS (§ 490*)—DE FACTO CORPORATIONS—STATUTORY AUTHORITY.

Where there could be a de jure corporation at the time an alleged corporation brought suit, the corporation could be a de facto one, and entitled to sue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1910, 1911, 1913-1919; Dec. Dig. § 490.*]

5. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—CONTRACTS WITH MUNICIPALITIES—CONSTRUCTION.

A water company contracted in 1877 to supply hydrants to a town, within specified limits, for a specified sum per annum, and for each specified hydrant outside the limits an additional sum per annum. For more than 30 years the company supplied water for the hydrants and received pay therefor. Since 1880 the company was at least a de facto corporation, and a de jure one since 1909. The town treated the contract as one for the calendar year by paying for the hydrants within the specified limits. *Held*, that the contract was binding on the town for hydrants outside of the specified limits, though at the time of the making of the contract the law authorized water companies only in municipalities of 2,000 population, and the town did not have such population.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

Error to Circuit Court, Warren County.

Action by the Belvidere Water Company against the Town of Belvidere. There was a judgment for plaintiff, and defendant brings error. *Affirmed*.

This is an action by the Belvidere Water Company to recover the rental of 4 hydrants for the last quarter of 1909. The written contract under the seals of both parties was made in September, 1877, and provided that the water company should supply any number of hydrants, not exceeding 15, within specified limits in the town for \$500 per annum, and that for each hydrant outside those limits the town should pay \$25 per annum. The company has been in operation more than 30 years, and has supplied water for the hydrants, and been paid therefor by the town. There were 8 hydrants outside the limits, but for 4 of them the company made no charge, probably because there were only 11 hydrants within the limits. In October, 1909, the town, after notice to the water company, cut off 4 of the 8 hydrants and refused to pay more than the \$500 required for those within the limits. In fact, 3 of the 4 cut off were those for which no charge had been made by the company. The town has paid for the hydrants within the limits since the suit was begun, and only the rental of 4 hydrants outside the limits is involved.

The defenses were that there was no such corporation as the plaintiff, and a general denial of indebtedness.

The trial judge directed a verdict for the plaintiff for \$25, the rental of 4 hydrants for three months.

Gilbert Collins, of Jersey City, and George M. Shipman, of Belvidere, for plaintiff in error. Joseph M. Roseberry, of Belvidere, for defendant in error.

SWAYZE, J. (after stating the facts as above). [1-4] The plea of nul tiel corporation puts in issue only the present existence of the corporation. It avers that there is not, nor ever was, nor on the day of the commencement of this action, nor ever since, in existence any such corporation. Such a plea is obviously met by proof that the corporation existed at any time; and it was therefore proper to reply, as the plaintiff did, that there is and was on the day of the commencement of this suit, and since that day, in existence a corporation called the "Belvidere Water Company." The issue joined was the existence of the corporation at and since the beginning of this suit. This was the proper issue. The question to be raised under the plea of nul tiel corporation is the ability of the plaintiff to sue. 1 Chitty, Pl. (16th Am. Ed.) 464* note "g." It is therefore sometimes regarded only as a plea in abatement. *Conard v. Atlantic Insurance Co.*, 1 Pet. 396, 450, 7 L. Ed. 189, although the better opinion, sustained by the weight of authority, is that it is a plea in bar. 10 Cyc. 1357. The reason for holding it a plea in bar is well stated in a quotation from *Brooke's Abridgement* by the Supreme Court of Massachusetts, in *Christian Society*

v. Macomber, 3 Metc. 235, 238: "In an action by a corporation or a natural body, misnomer of one or the other goes only to the writ; but to say that there is no such person in *rerum natura*, or no such body politic, this is in bar; for, if he be misnamed, he may have a new writ by the right name; but if there be no such body politic, or such person, then he cannot have an action." The question therefore is whether this action is maintainable in the name of the Belvidere Water Company. This depends, not upon the *de jure*, but upon the *de facto*, existence of such a corporation at the time suit was brought. Its right to exist can be questioned by the Attorney General, acting for the state, but not by one who contracts with it as a corporation, provided there is a statute under which such a corporation may exist. *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362; *Vanneman v. Young*, 52 N. J. Law, 403, 20 Atl. 53; *McCarter v. Ketcham*, 72 N. J. Law, 247, 62 Atl. 693. These principles of law are not disputed by the defendant; it contends that there could be no such corporation *de jure*, because the act, under which it purports to be organized (Revision, p. 1365), permitted water companies only in municipalities having at least 2,000 inhabitants; and it is said Belvidere lacked that number. Assuming the fact to be as the defendant contends, the legal result does not follow. At the time the suit was brought, the act had been amended so as to apply to any municipality having a population of not more than 15,000, and not less than 500. P. L. 1880, p. 273. Since the plea challenges only the right to maintain the action, and there could at that time be a corporation *de jure*, and it is not questioned that every other element necessary to make a corporation *de facto* was present, the plea is not sustained by the proofs.

This conclusion, however, does not suffice to dispose of the pending case.

[§] The plaintiff claims under a contract made at a time when the law authorized water companies only in municipalities of 2,000 population; and the defendant's claim is that no rights can arise out of a contract which purports to be made with a corporation that could not at that time have a legal existence.

This case, however, does not present the question whether the parties are bound by the contract of 1877, but the much narrower question whether the facts showed an indebtedness of the town to the water company for the amount for which the verdict was directed. Whatever defects there may have been in the original incorporation, it was validated by the act of 1909 (3 Comp. St. 1910, p. 3636, § 634); for we must assume, in the absence of proof to the contrary, that the necessary copy of the ordinance consenting to the formation of the company was

filed with the certificate of incorporation. "Omnia presumuntur rite acta." Both the town and the water company have acted on that presumption for 30 years; and clear proof is required to overcome it. For all that time the water company has furnished, and the town has paid for, water in accordance with the terms of the contract. The plaintiff has been a *de facto* corporation at least since 1880, and a *de jure* corporation at least since the validating act of 1909. The necessary inference is that the parties adopted the contract as far as they legally might. 1 *Machen on Corporations*, §§ 329 and 332; *Battelle v. Northwestern Cement Co.*, 37 Minn. 89, 33 N. W. 327; *Bond v. Pike*, 101 Minn. 127, 111 N. W. 916; *Hol-yoke Envelope Co. v. U. S. Envelope Co.*, 182 Mass. 171, 65 N. E. 54. No question is made of the right of the town; under its charter, to make a contract for a year at a time; and, by adopting a contract that provided for an annual rental and paying on that basis, both parties became bound at least for the current year. In the absence of proof to the contrary, a contract for a year is a contract for the calendar year; and so the town has treated it by paying for the hydrants within the limits for the last quarter. The contract was an entire one; and the town could not adopt it as to the hydrants within the limits and repudiate it as to the hydrants outside. Four of these were in fact supplied, and, although one of these had theretofore been supplied without charge, that was only as part of the whole contract and dependent upon the other four being paid for. The water company was ready to supply the one hydrant that was cut off; and the town could not escape its contractual liability by merely disconnecting. The direction of a verdict was proper, and the judgment is affirmed.

SCHMIDT et ux. v. SPAETH.

(Court of Errors and Appeals of New Jersey.
April 19, 1912.)

1. DEDICATION (§ 19*)—PLATTING.

Where the owner of land after subdividing it into lots platted part of it as a street, that platting constituted a dedication to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

2. DEDICATION (§ 31*)—ACCEPTANCE—NECESSITY.

Land dedicated for a public highway does not become a public thoroughfare save upon acceptance of the dedication by the public, which may be indicated by a formal action on the part of the proper representatives, or by public user of the dedicated land.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 31.*]

3. DEDICATION (§ 45*)—ACCEPTANCE—QUESTIONS FOR JURY.

In trespass *quare clausum fregit*, where defendant confessed and avowed on the ground

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the locus in quo was a public street, held that, under the evidence, the question of acceptance of a dedication by the public should have been submitted to the jury.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 88; Dec. Dig. § 45.*]

Error to Supreme Court.

Trespass by John Schmidt and wife against Godfrey F. Spaeth. There was a judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Stackhouse & Kramer, of Camden, for plaintiffs in error. Bleakly & Stockwell, of Camden, for defendant in error.

GUMMERE, C. J. This is an action of trespass *quare clausum fregit*. The averment in the declaration is that the defendant with force and arms entered upon the plaintiffs' close, being a parcel of land in the city of Camden 20 feet in width and 40 feet in length, and broke down and destroyed a certain fence then and there being upon the land. The defendant pleaded the general issue, and also, specially, that the locus in quo was a part of a public highway in the city of Camden, and had been such for more than 20 years preceding the alleged trespass.

The land involved in this controversy is located at the inner end of an alley which opens out of Sycamore street in the city of Camden and runs north on a line parallel with Broadway. The alley had been in existence for more than 20 years next preceding the institution of the suit; but whether it had ever been in actual use as a public way during any part of that period, and whether it included the locus in quo prior to the year 1901, were matters concerning which the testimony was contradictory.

On the 19th of July in the year mentioned, the sheriff of Camden county conveyed to one Benjamin T. Archer, trustee, a tract of land located at the northwest corner of Sycamore street and Broadway, having a frontage of 200 feet on the former, and 160 feet on the latter, street. The alley referred to was included within the boundaries of this tract, which also embraced the locus in quo. After the purchase of the tract, Archer had it surveyed and laid out in lots having a frontage of 20 feet on Broadway, a depth of 180 feet, and running back to a 20-foot wide street extending across the rear of all the lots. The old alley, and also the strip of land involved in the controversy between the parties, each lie within the lines of this street. Afterward, and in compliance with instructions from Archer, this 20-foot wide street was placed upon the "City Plan Book" at the city hall. Later, and on January 8, 1902, Archer conveyed one of these lots to Elizabeth Smith, a description which called for a lot with a frontage of 20 feet on Broadway, a depth of 180 feet, and bounding in the rear upon "a 20-foot street opening into Sycamore street." On the 16th of the same month he

conveyed two more of these lots (adjoining one another) to the plaintiffs. The conveyance described these lots as having together a frontage of 40 feet on Broadway and running back 180 feet to "the east side of a 20-foot wide street opening into Sycamore street." The locus in quo lies immediately in the rear of these two lots, and the fee thereof was, some years later, conveyed to the plaintiffs by the heirs of Archer; he then being dead.

The alleged tortious act charged against the defendant in the declaration was not denied by him, but was attempted to be justified upon the ground that the fence which he tore down was an unlawful obstruction in a public highway, and that he had a legal right to remove it.

The case having been closed with the proofs in the condition which has been indicated, with the title of the plaintiffs to the locus in quo shown beyond controversy, and the alleged tortious act of the defendant admitted by him, the only question remaining in dispute was that raised by the defendant's special plea, viz., whether the locus in quo was a part of a public highway. The trial judge considered that the acts of Archer which have been referred to amounted to a dedication of the "20-foot wide street" to public use, and constituted it a public highway, and thereupon instructed the jury to render a verdict in favor of the defendant. The correctness of this judicial action is now challenged by the plaintiffs.

[1] We concur in the view of the trial court that the act of Mr. Archer in causing this "20-foot wide street" to be delineated upon the City Plan Book, and his conveying of lots by descriptions which called for this street as their rear boundary, constituted a dedication of it by him to public use. Such acts, by a grantor, make the rule laid down by this court in *McAndrews & Forbes Co. v. Camden*, 78 N. J. Eq. 244, 78 Atl. 232, and the cases therein cited, applicable.

[2] But the dedication of land for the purpose of a public highway does not, *ipso facto*, create such a highway. There must be not only a dedication by the owner for that purpose, but an acceptance of that dedication by the public, in order to create it. *Holmes v. Jersey City*, 12 N. J. Eq. 309; *Pope v. Town of Union*, 18 N. J. Eq. 283; *Atty. Gen. v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 391; *Booraem v. North Hudson County Ry. Co.*, 39 N. J. Eq. 467; *s. c.*, on appeal, 40 N. J. Eq. 563, 5 Atl. 106; *New York & Long Branch R. R. Co. v. South Amboy*, 57 N. J. Law, 258, 259, 30 Atl. 628. Such acceptance may be indicated by formal action on the part of the representatives of the public having authority over highways, or by public user of the dedicated land. *Booraem v. North Hudson County Ry. Co.*, 40 N. J. Eq. 563, 5 Atl. 106; *Abbott v. Cottage City*, 143 Mass.

525, 10 N. E. 325, 58 Am. Rep. 143; Elliott on Streets and Roads (Ed. 1890) p. 114.

[3] In the present case no formal act by the public authorities of Camden was shown which tended to indicate an acceptance by them of the proffered street. It is true that there was a delineation of it upon the City Plan Book, but there was no proof that this plan book was in the custody or under the control of the municipal board in charge of the city streets, nor that the delineation of the street therein was done under its sanction, or even with its knowledge. Nor was there any conclusive evidence of such a public user of the street as would indicate an acceptance of it by the public. As has already been stated, the character of the user of the alley or street, both before and after the dedication, was a matter concerning which the testimony was contradictory; that offered on behalf of the plaintiffs tending to show that the user was confined to the owners of the property which abutted upon the alley or street, and persons having business with such owners, while that submitted by the defendant showed a more general and extensive use thereof. The trial court, therefore, should have left the question whether an acceptance of this dedicated street by the public was indicated by the character of the user to which it had been submitted after the dedication to be resolved by the jury, and it was error to take it from them.

The judgment under review will be reversed, and a venire de novo awarded.

HYSON v. GENERAL FIREPROOFING CO.

(Court of Appeals of Maryland. Jan. 14, 1912.)

COURTS (§ 189*)—MUNICIPAL COURTS—RULE DAY ACT—PLEA IN ABATEMENT.

Rule Day Act of Baltimore City provides that plaintiff, on compliance with the act, shall be entitled to judgment on motion at any time after 15 days from the return day to which defendant shall have been summoned, although defendant may have pleaded, unless the plea contains a good defense, and is certified as true, and further states the amount of plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed, and that affiant believes defendant will be able to produce evidence to support the plea, and that he is advised by counsel to file the plea, which shall be accompanied by the certificate of counsel that he so advised the affiant. *Held*, that the filing of a dilatory plea did not suspend plaintiff's remedy under the act, and hence where such a plea denying that plaintiff was properly sued, but the affidavit did not state the amount of plaintiff's demand, if anything, admitted to be due or owing and the amount disputed, the plea was insufficient to prevent plaintiff from taking judgment by default.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. § 189.*]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by the General Fireproofing Com-

pany against T. A. Hyson, trading as the Capital Fireproofing Supply Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Daniel S. Sullivan, for appellant. E. McClure Rouzer, for appellee.

BOYD, C. J. The General Fireproofing Company, a body corporate, sued "T. A. Hyson," trading as the Capital Fireproofing Supply Company," under the Rule Day Act of Baltimore city. The action was commenced on the 27th day of February, 1911; and, although the record does not show the return day, we suppose it was the second Monday, being the 13th day of March, as that was the next return day after the suit was brought. On March 24th the defendant made a motion for a rule security for costs, and it was ordered that the rule be laid, unless cause to the contrary be shown on or before the 20th of April. On the 24th of March the time for filing pleas was extended until five days after the rule security for costs was complied with, and on the 31st of that month the plaintiff gave the security. On the 5th of April the defendant filed two pleas, the first of which is "that the defendant is sued by the name of T. A. Hyson, whereas his true name is Thomas A. Hyson," and the second, "that he is not now trading as the Capital Fireproofing Supply Company, and that he never did trade as the Capital Fireproofing Supply Company, but that together with one Herbert R. Eastwood, of Washington, D. C., he traded in the city of Washington, District of Columbia, as the Capital Fireproofing Supply Company." An affidavit of Thomas A. Hyson was filed, stating "that the pleas above pleaded are true in substance and in fact; and further that he, the affiant, verily believes that he will be able to produce sufficient evidence to support the said pleas, and that he is advised by counsel to file the said pleas under oath." There is also a certificate of counsel that he advised the defendant to make the above oath and file the said pleas. On April 21st the defendant made a motion for a non pros. on the ground that the plaintiff had not filed its replication within fifteen days, and the plaintiff, having been required to show cause why the suit should not be non prosed, filed an answer to the petition, and moved for judgment by default against the defendant for want of sufficient pleas and affidavit of defense, as provided by the statute. That resulted in a judgment by default being ordered by the court, and from that order the defendant appealed.

The important question in the case is whether the filing of the pleas in abatement and the above affidavit prevented a judgment by default under the Rule Day Act; no other

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pleas or affidavit having been filed than those above mentioned. We need not discuss the sufficiency of either of the pleas in abatement, as such, but will for the purpose of the discussion assume them to be sufficient. This precise question has not been passed on by this court, although we have had many cases before us presenting different questions which have arisen under the Rule Day Act of Baltimore city and similar acts in some of the counties, but it seems to us that the language of the act, taken in connection with its objects, furnishes a plain and decisive answer. If the plaintiff does what is required of him under the act, as to which the record in this case raises no question, he is by the statute entitled to judgment "on motion, in writing, at any time after fifteen days from the return day to which the defendant shall have been summoned, although the defendant may have pleaded, unless such plea contains a good defense, and unless the defendant or some one in his behalf shall, under oath or affirmation, state that every plea so pleaded by the defendant is true, and shall further state the amount of plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed, and further that the affiant verily believes the defendant will be able at the trial of the cause to produce sufficient evidence to support the plea as to the portion disputed, and that he is advised by counsel to file the said plea, and such plea shall be accompanied by a certificate of counsel that he so advised the party making such oath or affirmation." Then other provisions follow which we need not quote. Chief Judge Alvey said in *Gemmell v. Davis*, 71 Md. 458, 18 Atl. 955: "The obvious purpose of the act is not only to furnish a short and expeditious method of recovery in the class of actions mentioned, but, by requiring disclosure under oath as to the real amount or matter in dispute or actual contest between the parties, to avoid unnecessary trouble and expense in the trial; and, while the construction of the statute should be such as to afford to every defendant a full and fair opportunity to make all his defenses to the action against him, no such restrictive construction as against the rights of the plaintiff should be adopted as would, to any extent, defeat or frustrate the beneficial objects contemplated by the Legislature." Or as was said by Judge Stone in *Adler v. Crook*, 68 Md. 494, 13 Atl. 153: "The object of the act was, in cases to which it applied, to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and defense (if any), so that the parties might know exactly wherein they differed and shape their action accordingly."

Although we will not say that the Rule Day Act intended to prevent dilatory pleas from being filed, such pleas are not held in favor even in ordinary actions, and they should not be permitted to "defeat or frustrate the beneficial objects contemplated by the Legis-

lature," when it passed the Rule Day Act. It ought not to receive such a construction as will furnish a defendant the means of preventing a speedy judgment against him, if he has no meritorious defense, excepting in so far as such construction be necessary for his protection or be required by the language used. In short, while the Rule Day Act did not abolish dilatory pleas in actions brought under it, dilatory pleas cannot have the effect of abolishing or suspending that act. There is no necessary inconsistency between a dilatory plea and what the act requires to be in the affidavit, for it is well settled that the affidavit is no part of the pleadings (*Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888; *Councilman v. Towson Bank*, 103 Md. 469, 64 Atl. 358); and hence such reference to the merits as is required by the act to be stated in the affidavit cannot have the effect of waiving a dilatory plea, as the filing of a plea in bar would have. The appellant cited the notes to 1 Poe, §§ 383, 594, and article 75, § 24, subsec. 84, Code 1904, as tending to show that the affidavit filed by him was sufficient. Mr. Poe in his note to section 383, in speaking of the affidavit to a plea in abatement, said: "The affidavit should be that the plea is true in substance and in fact, and if the suit be in the city of Baltimore, under the Rule Day Act of 1886 (chapter 184, Code P. L. L. article 4, § 167), it should contain the further averment that the affiant believes that at the trial the defendant will be able to produce sufficient evidence to support the same." And in the note to section 594 what the affidavit should aver is repeated in substance, and there is added: "And that he is advised by counsel to file the said plea, and the plea must be accompanied by a certificate of counsel that he did so advise the filing thereof." The footnote in the Code referred to says: "The affidavit should also contain the averment in the form prescribed by any special law. Such, e. g., as 'that the affiant verily believes that the defendant will be able to produce sufficient evidence to support the same, and that he is advised by counsel to file said plea under oath.'" It is manifest that Mr. Poe did not mean that what he stated in either of those notes was all that would be required, as he mentioned some requirements in the note to section 594 which were not mentioned in the one to section 383, but he was only giving examples of what should be stated, as his note to the section in the Code referred to plainly shows.

It would be difficult to understand why a defendant should be required to file, in addition to the affidavit to pleas in abatement prescribed by the Code, an affidavit including some of the requirements under the Rule Day Act, and not others. It was doubtless intended by the Legislature either that the whole of the act should be applicable to pleas in abatement, or that none of it should be—not that a part of it should, and the rest not.

There is nothing in the act which admits of any other construction, and it certainly does not contemplate allowing a defendant who does not dispute any part of the plaintiff's claim more time than one who does. It has been decided in a number of cases that an affidavit which does not state "the amount of plaintiff's demand, if anything, admitted to be due or owing, and the amount disputed," is defective. See *Adler v. Crook*, 68 Md. 494, 13 Atl. 153, where the general issue pleas were filed, *Hutton & Co. v. Marx Bros.*, 69 Md. 252, 14 Atl. 684, where there was a plea of the statute of limitations in addition to the general issue pleas, *Baltimore Publishing Co. v. Hooper*, 76 Md. 115, 24 Atl. 452, where the affidavit "that the defendant does not admit any of the plaintiff's claim to be due and owing" was held not sufficient, and other cases which might be cited. The affidavit in this case did not comply with that requirement, and hence was defective.

No reason occurs to us why that and other requirements of the statute cannot be complied with, when pleas in abatement are filed. If, in point of fact, the defendant does not dispute any part of a plaintiff's claim, he can ordinarily accomplish nothing by filing dilatory pleas, unless it be delay, and that should not be encouraged. If, however, there be any reason why a defendant cannot make the required affidavit until his pleas in abatement are disposed of, or if justice demands that he be not required to file the affidavit until after that time, the statute furnishes ample protection by providing "that the court for good cause shown, may, by its order in writing, passed at any time before judgment, extend the time for filing such pleas and affidavits, which extension shall suspend until the expiration thereof, the plaintiff's right to enter judgment under this section."

So, without further prolonging this opinion, we will affirm the judgment appealed from, as we are satisfied the appellant was in default for not filing such an affidavit as the Rule Day Act requires.

Judgment affirmed, the appellant to pay the costs.

SNYDER v. SNYDER.

(Court of Appeals of Maryland. Nov. 16, 1910.)

1. WILLS (§ 693*)—CONSTRUCTION—ESTATE TAKEN—DEVISES OR BEQUESTS WITH POWER OF DISPOSITION.

Where an estate is given to a person generally with power of disposition, the devisee or legatee takes the property absolutely, and not merely a power, but, where the property is expressly given for life and a power of disposition annexed, the first taker has but a life estate with a superadded power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

2. WILLS (§ 693*)—CONSTRUCTION—DEVISE WITH POWER OF DISPOSITION—"OR."

A testator devised his whole estate to his wife to manage and control in every particular, "that is to say, to sell a part or any part, or the whole, should it be necessary or advisable in her best judgment." Held, that she took the property absolutely, and that her title was not cut down by the subsequent provision "or I further wish and desire my said wife to make a last will and testament wherein such division of our estate shall be made among our children as in her best judgment will be just, reasonable and proper"; "or" apparently meaning in the event of her not selling the property, and, even if read as "and," merely expressing a wish as to the disposition she should make of the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5002-5015; vol. 8, p. 7739.]

3. WILLS (§ 693*)—POWER OF DISPOSITION—SALES AND CONVEYANCES BY LIFE TENANT.

Even if such will only gave the wife a life estate, it gave her ample power to sell and convey, and hence a purchaser of the property could not refuse to carry out his contract on the ground that she could not give a good title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

Appeal from Circuit Court, Howard County, In Equity; Wm. Henry Forsythe, Jr., Judge.

"Not to be officially reported."

Action for specific performance by Mary S. Snyder against William E. Snyder. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, THOMAS, PATTISON, and URNER, JJ.

Joseph L. Donovan, for appellant. James Clark, for appellee.

BOYD, C. J. The appellant purchased from the appellee a farm in Howard county for which he paid \$200 in cash, and agreed to pay the balance of the purchase money on March 15, 1910. Upon refusal to pay the balance (\$10,000), this bill for specific performance was filed by the appellee and there was a decree in her favor. The appellant contends that the appellee is unable to give him a good title in fee simple to the property, and relies on the provisions of the will of George W. Snyder, under which the appellee claims. Those relied on are as follows: "Item. I give and bequeath to my beloved wife, Mary S. Snyder, who has labored faithfully for our common good and the well being of our children, the whole of my estate, real, personal and mixed, to control and manage in every particular; that is to say, to sell a part or any part, or the whole, should it become necessary or advisable in her best judgment, with the aid of the best advice to be obtained from discreet and trusted friends; or I further wish and desire my said beloved wife to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

make a last will and testament, wherein such a division of our estate shall be made among our children, as in her best judgment will be just, reasonable and proper."

[1] The rule of law announced in *Benesch v. Clark*, 49 Md. 497, has been so often followed by this court that we would hesitate to repeat it but for the fact that there is an expression in this will which might be said to distinguish it somewhat from other cases in which the doctrine has been considered, and hence it may be well to recall it. It was thus stated by Chief Judge McSherry in *Welsh v. Gist*, 101 Md. 606, 61 Atl. 635: "It is no less a well-settled doctrine of the law, sustained by all the authorities, that where an estate is given to a person generally or indefinitely, with power of disposition, such gift carries the entire estate; and the devisee or legatee takes, not a simple power, but the property absolutely. But where the property is given expressly for life, and a power of disposition of the reversion is annexed, the rule is different, and the first taker has but an estate for life with the superadded power."

[2] In this instance the testator left the whole of his estate to his wife "to control and manage in every particular." He nowhere said, or even intimated, that he intended it to be only for her life, and he did not make any disposition of a remainder. It would therefore seem clearly to be within the first part of the rule above stated, unless it can be said that there is something in the subsequent language of the item which would take the devise out of that general rule. The language "to control and manage in every particular" is as broad as the term "full control" used in the will before the court in *Welsh v. Gist*, and it was there held that the addition of the words "full control" to the expression "all the rest of my estate I give her" did not have the effect of reducing what would otherwise be an absolute interest to a life estate. But in this case the testator saw fit to explain what he meant by the above expression and added: "That is to say, to sell a part or any part, or the whole, should it become necessary or advisable in her best judgment with the aid of the best advice to be obtained from discreet and trusted friends." If he had stopped there, no one would suggest any doubt as to her power to sell the property, and, if she had the power to sell it, she had the power to convey it. It would seem to be equally beyond controversy that the power to sell and convey was not limited to a life estate, for, if he had left her only a life estate, she could have sold and conveyed that without any power from the testator. Therefore, up to that point he had given her the whole of his

estate to control and manage in every particular, and with the power to sell a part, any part, or the whole of it, either if it became necessary or if in her judgment it was advisable. He made no provision that in case she did sell any part, or the whole, of the property, that the proceeds should be invested, but on the contrary, so far as disclosed by the will, he intended that she could do as she pleased with them, if she thought it necessary or advisable to make the sale.

Does the remaining clause limit the estate given by the first part of the will? It is: "Or I further wish and desire my said beloved wife to make a last will and testament, wherein such a division of our estate shall be made among our children, as in her best judgment will be just, reasonable and proper." He had in the beginning of the item spoken of her as one "who has labored faithfully for our common good and the well being of our children," and he referred to the "division of our estate." The "or" was apparently intended simply to mean in the event of her not selling the property, but, if we read it as "and," the clause is merely the expression of a wish on the part of the testator that she execute a will and make a division of the estate among their children as in her best judgment would be just, reasonable, and proper. He evidently felt confident that she would leave whatever was left to their children or some of them, and was desirous of having her exercise her judgment in the division of such estate—thus again showing that he did not intend to die intestate as to any part of his estate and have it go to his descendants under the laws of descent or distribution, as the case might be. Nor did he leave a life estate to his wife and the remainder to such of his children and in such proportions as she might designate by her last will and testament, but he simply expressed his wish and desire that she make the division of what he left her, as she deemed just, reasonable, and proper, and not necessarily let it descend to the children equally. So without further prolonging this opinion, our conclusion is that the testator intended to, and did, leave to the appellee an absolute interest in all of his property, and that as such devisee she is authorized to convey the farm in fee simple.

[3] We might add that, if we had reached a contrary conclusion as to that, the will of Mr. Snyder gave her ample power to sell and convey the property, and, as that is all the appellant is interested in in this case, the decree below would have been affirmed.

Decree affirmed, the appellant to pay the costs, above and below.

BALTIMORE & O. R. CO. v. WILSON.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. APPEAL AND ERROR (§ 1005*)—CONCLUSIVENESS OF VERDICT—AMOUNT OF RECOVERY.

In a case properly submitted to a jury under suitable instructions, and approved by the trial court, upon motion for a new trial, the verdict is conclusive as to the amount of recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.*]

2. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—SAFE PLACE TO WORK.

A master is bound to provide a reasonably safe place for the servant to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLECT OF MASTER—PLACE FOR WORK.

In an action by a watchman employed by a railroad for personal injuries received in the collapse of a bridge, *held*, on the evidence, that the question of defendant's negligence in failing to provide a reasonably safe place for work was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. TRIAL (§ 253*)—INSTRUCTION—IGNORING ISSUES AND DEFENSES.

In an action against a railroad company for personal injuries to a watchman, resulting from the collapse of a bridge in the course of construction, a requested instruction, requiring the jury to find, either that the railroad did not use due care in planning the construction of the bridge, or in inspecting the work during its progress, was properly refused, since it ignored the question of its liability, if it did not use due care in selecting the contractor to build the bridge, or it was not constructed in accordance with the plans.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. APPEAL AND ERROR (§ 1078*)—BRIEFS AND ARGUMENT—WAIVER OF EXCEPTIONS.

An exception to the direction of a verdict, not questioned on appeal, will be regarded as having been waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

6. MASTER AND SERVANT (§§ 101, 102*)—MASTER'S LIABILITY—DUTY OF MASTER.

A master is not an insurer of the servant's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178, 179, 180-184, 192; Dec. Dig. §§ 101, 102.*]

7. MASTER AND SERVANT (§ 103*)—MASTER'S LIABILITY—DELEGATION OF DUTY—PLACE FOR WORK.

A master's duty in respect to providing the servant a safe place to work cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

8. MASTER AND SERVANT (§ 185*)—INJURY TO SERVANT—SAFE PLACE TO WORK—INSPECTION—DELEGATION OF DUTY.

A railroad employing a contractor in the construction of a bridge cannot escape liability

for injuries to a servant, caused by the collapse of the bridge, on the ground that it relied upon a fellow servant to see that the place in which plaintiff was required to work was reasonably safe, since this was a duty owed to plaintiff, for negligence in the performance of which the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

9. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—ACTION FOR INJURIES—RES IPSA LOQUITUR.

In an action against a railroad by an employé for injuries resulting from the collapse of a bridge in the course of construction, where the evidence showed a construction of falsework for a large and heavy railroad bridge, specially designed to bear great weight and resist the vibration necessarily incident to the passage of trains over it, constructed by the direction of eminent engineers, and in actual use for about two months, suddenly collapsed, and in which defendant offered no adequate explanation for its collapse, the doctrine of *res ipsa loquitur* did not apply, so as to make the falling of the bridge *prima facie* evidence of negligence on the part of the defendant; but plaintiff could not recover without showing that the defendant was guilty of actual negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

Appeal from Circuit Court, Queen Anne County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by William H. Wilson against the Baltimore & Ohio Railroad Company and another. There was judgment for plaintiff against the defendant named alone, and it appeals. Reversed, and remanded for new trial.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

John E. Semmes, Jr., and John E. Semmes, for appellant. John S. Young, for appellee.

STOCKBRIDGE, J. [1] The present case derives its chief importance from the fact that the jury before which it was tried rendered a verdict in favor of the plaintiff for \$20,000, one of the largest verdicts in an action for damages for personal injuries rendered in this state. But with the amount of the verdict this court has nothing to do. That was a question for the jury, if the case made out was one which it was proper to submit to a jury, under suitable instructions, and for the court in which it was tried, upon the motion for a new trial.

The questions of law upon which the case is brought before this court are few in number; but one of them at least is of considerable importance.

[2, 3] The fourth bill of exceptions was taken to the action of the trial court in its rulings upon the defendant's prayers, the first of which was to the effect that there was no legally sufficient evidence to entitle the plaintiff to recover. As this went to the

entire case of the plaintiff, a succinct statement of the facts as testified to by the witnesses becomes germane to the consideration. The Baltimore & Ohio Railroad had a single-track bridge over the Susquehanna river, which was being reconstructed and converted into a double-track steel bridge. This involved the taking down of the previously existing structure. For this purpose, and the further purpose of continuing the operations of the railroad, there was erected falsework to support the track while the work was proceeding, and which falsework was designed to bear the weight of the new bridge during the progress of the work, together with the machinery necessarily employed in the construction. The plan was that the bridge, when completed, should rest upon piers built of concrete; the spans between the several piers being of various lengths. The main span between the Cecil county end of the bridge and Watson's Island was to be 377 feet in length. To support the construction of this span and the track of the railroad during the time of construction, two towers were erected. The manner of erecting these towers was: First, double rows of piles were driven in the bed of the river 30 feet apart; each row containing 28 piles. The rows of piles were parallel with the general direction of the river, and at apparently a right angle with the general direction of the bridge and railroad to be constructed above. These piles were then capped with heavy timber, and upon this capping were erected uprights of 12 by 12 timbers, the outer of which, or possibly all, were battered; that is, inclined, so as to resist and distribute the strain from above. The upper ends of these uprights were in turn capped, and the same method of construction continued until the desired height was reached, so that the railroad tracks were elevated about 90 feet above mean tide. In addition to the battering, the uprights were braced by longitudinal and X braces.

After the construction of these towers, the trains of the defendant company were run upon and over this falsework without accident from about the middle of July, 1906, until the 23d of September. Shortly after 6 o'clock on that morning, a passenger train, west bound, passed over the bridge. This train passed the plaintiff, who was a day watchman on the bridge, employed by the defendant company, not far from the west end of the bridge. The plaintiff, after this train had passed, continued on across the bridge to the east end, and then started to return across the bridge. He had proceeded but a short distance, when he met an east-bound freight. The locomotive and two or three cars of this train passed him, when the structure collapsed, carrying down the falsework and cars, together with the plaintiff, 90 feet. By this fall, the plaintiff was severely injured; and it is to recover

for the injuries so sustained that this suit is brought.

The plaintiff called as witnesses Joseph Brandt, who had worked at bridge building for about 10 years, Murray Wood, who had been similarly employed between 5 and 6 years, Christopher Burns, also a bridge worker for 5½ years, George Horner, similarly employed for some time, and Carroll Boyd, also a bridge worker for about 6 years. After testifying to the method of constructing the falsework, they gave evidence which may be epitomized as follows, without quoting the precise questions and answers of each witness: On the afternoon of September 22d, for the purpose of driving a bolt home in the new steelwork, a portion of a rail, weighing in the neighborhood of 1,200 pounds, was used as a rammer. While being so used, the rail or rammer broke, and a piece of it fell, striking and cutting off an end or corner of one of the caps below. This, it was subsequently testified by the witness Reynolds, who was a foreman on that part of the work, and who was called by the defendant, had no effect upon the strength of the tower. But it was further testified to by the witnesses for the plaintiff that the timbers on one of the towers were out of plumb, by some that they had buckled, and that this condition became worse as time progressed, and that it had increased to such a degree that it was the occasion of conversation among the men employed on the work as they were returning home the evening before the accident, and the attention of the foreman, Reynolds, was called to it. Most of the witnesses place the point of what they describe as "buckling" at the cap where the piles and the first set of the 12 by 12 timber uprights came together. That these workmen were correct is corroborated by the witness Reynolds, who testified that the piles did lean out, though he denies that there had been a technical buckle; and he also testifies that they had been in this condition from the time they were first capped, but insists that the safety of the structure was not affected thereby.

For the purpose of the prayer now being considered, the evidence of the witness of the defendant, Reynolds, is immaterial, and is referred to only to show that the conditions testified to by the plaintiff's witnesses, who were practical men, rather than experts, is amply supported. The rule is too well settled to require any citation of authorities that a master is bound to provide a reasonably safe place for the servant to work in. The plaintiff's evidence tended to show that the place provided was upon a temporary structure of high elevation, required to sustain heavy weights and vibration, where one of the supports had buckled, or was out of plumb, or had sprung; and that this condition had been increasingly manifest up to the time of the happening of the accident. This evidence, if believed by the jury,

would clearly have warranted an inference that the accident was due to the negligence of the defendant in failing to provide a reasonably safe place for the plaintiff to perform his duties; and the refusal of the trial court to grant the first prayer of the defendant was entirely correct.

[4] The defendant's third prayer was likewise properly refused. It required the jury to find, either that the railroad company did not use due care in planning the reconstruction of the bridge, or in inspecting the work during its progress, entirely ignoring the element that the bridge was or should have been constructed in accordance with the plans, or that the railroad company did not use due care in selecting the American Bridge Company to reconstruct the bridge. The railroad company could not in any such manner relieve itself of its legal obligation to provide its own servant, whom it placed on the work, with a reasonably safe place in which to do his work.

Nor is it perceived how the defendant was in any way injured by the granting of its second prayer in connection with the eighth prayer of the plaintiff. This prayer of the plaintiff has been repeatedly passed on and approved by this court; and the effect of the joining to it of the defendant's second prayer was to instruct the jury more precisely as to the burden of proof in respect thereto.

The plaintiff's third prayer was upon the measure of damages, in the event that the jury found a verdict for the plaintiff, and his seventh prayer defined the measure of care or duty owed by the master to the servant, and were both in the form sanctioned by long usage.

[5] The correctness of the granting of the prayer in favor of the American Bridge Company, by which a verdict was directed in favor of that corporation, has not been questioned in this court; and that exception is to be regarded as having been waived.

There remain for consideration plaintiff's prayer, numbered 2½, and defendant's prayer A, both of which raise the same question, namely, whether, in a case like the present, the doctrine of *res ipsa loquitur* is applicable. That it can be invoked on behalf of the plaintiff is the theory of his prayer, and that it cannot be is the theory of the defendant's prayer. In the argument before this court, the appellant sought to justify its position by three propositions: First, that, in the relation of master and servant, the master is never an insurer of the servant's safety, and that he has performed his whole duty when he has exercised reasonable care in providing a safe place for the servant to work in and exercised proper inspection with regard to the place; and, secondly, that if there was negligence in the present case it was the negligence of a fellow servant, for which the master cannot be held to respond in damages; and, thirdly, that the doctrine

of *res ipsa loquitur* can never apply in a case arising between master and servant.

[6, 7] In regard to the first of these contentions, it is sufficient to say that, while it is perfectly true that the master is not an insurer of the servant's safety, his duty as regards the servant is nondelegable; and the question whether there was or was not adequate inspection, under the circumstances testified to in this case, was rather a question for the jury than a question of law for the court.

[8] The second proposition of the appellant assumes that there was negligence shown in the case; but claims it to have been the negligence of a fellow servant. But whether the negligence was the original negligence in the construction of the tower by one properly to be classed as a fellow servant, or whether it was the negligence of the defendant in inadequate inspection, was also a question of fact for the jury to determine from the evidence. The rule applicable with regard to the negligence of the fellow servant in a case between master and servant, where there is an intervening contractor, has been so recently fully stated in the able opinion by Judge Thomas, in *Penn Steel Co. v. Nace*, 113 Md. 460, 77 Atl. 1121, that it is not now necessary to repeat it; and it will be sufficient to ascertain whether the court below was correct in instructing the jury, as was done by prayer No. 2½, that "the falling of said bridge, or a part thereof, if the jury find the same, is prima facie evidence of negligence on the part of said defendant the said Baltimore & Ohio Railroad Company."

[9] By the plaintiff's prayer No. 8, joined with the defendant's second prayer, the jury were told that the plaintiff was not entitled to recover, unless the jury found that the said company was guilty of negligence, either in the construction, inspection, or maintenance of the falsework, the collapsing of which is claimed to have caused the accident. We thus have the jury told in one instruction that the mere falling of the falsework was prima facie evidence of negligence, and in another that the plaintiff's right to recover could not be maintained, unless the jury found the company guilty of negligence. It is, of course, evident that if the jury found positive acts of negligence, either in the construction, inspection, or maintenance of the falsework, no harm was done to the defendant by the granting of the plaintiff's prayer No. 2½; while, on the other hand, if the jury found no evidence of negligence, except the accident itself, then serious injury resulted to the defendant from the two instructions.

The evidence in this case shows the construction of falsework for a large and very heavy railroad bridge, specially designed to bear great weight and resist the vibration necessarily incident to the passage of the trains over it, constructed under the direction of eminent engineers and in actual use

for about two months, suddenly collapsing, failing to accomplish the very end for which it was planned and built, and for which collapse no adequate explanation has been offered by the defense, though one is suggested in the evidence of the plaintiff, in that the supports of one of the towers were out of plumb, or had sprung or buckled. In the case of *Howser v. C. & P. R. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, what would constitute a proper case for the application of the doctrine of *res ipsa loquitur* was thus stated by Judge Roberts: "Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the proper management use proper care, it affords reasonable evidence, *in the absence of explanation by the defendant*, that the accident arose from want of care." This was said in a case, not between master and servant, but where some cross-ties fell from a passing train upon the plaintiff, who was not on the right of way of the railroad company, and severely injured him, and in which case no evidence whatever was attempted to be introduced by the defendant to show care, either in the loading of the ties, or inspection of them after being loaded; and among the authorities relied on in that case was *Kearney v. London, Brighton & South Coast R.*, W. L. R. 5 Q. B. 411, which case was decided by a divided court.

In a number of states, and especially in the Western states, there has been a marked disposition to extend the idea that negligence was deducible from the fact of an accident, without any positive evidence of negligence on the part of the defendant. This has been in part due to the adoption of what are known as "workmen's compensation acts"; and in some states, without the intervention of the Legislature, courts have shown an inclination by their decisions to ingraft such a doctrine into their law. That has not, however, been the policy of this state; and decision after decision of this court might be cited to illustrate this fact. It has always been the policy of the courts of Maryland to interpret and administer the law, rather than to make it; and, if a change is to be made in our settled policy, it should be by the law-making branch of the state, not by a usurpation by the judicial branch of legislative functions.

Two cases were cited and relied upon by the appellee as tending to support the theory that the mere happening of the accident constituted a *prima facie* case of negligence; yet each of them, when closely examined, disclose acts of negligence testified to, sufficient to have carried those cases to the jury. The class of cases in which the doctrine of *res ipsa loquitur* is applicable is, under our decisions, very much restricted; but it is not meant by this opinion to say that cases may

not arise where it can be properly invoked as between master and servant, but a reference to some of our cases will show that this does not come within that class. Thus, in the case of the *Winkelmann & Brown Drug Co. v. Colladay*, 88 Md. 78, 40 Atl. 1078, the doctrine was invoked, and the defendant offered no evidence whatever; but in passing upon that case this court expressly said that, "apart from the presumption of negligence, there was evidence, if the jury believed it, tending to prove negligence on the part of the company."

And in the *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 53 Atl. 665, 94 Am. St. Rep. 560, this court refused the right of the plaintiff to recover, where the sole evidence of negligence was the fact that a sharp knife on a rapidly revolving cylinder broke and flew off, injuring the plaintiff; and in *Stewart & Co. v. Harman*, 108 Md. 466, 70 Atl. 333, 20 L. R. A. (N. S.) 228, the application of the doctrine was denied, where the sole evidence of negligence was that a large pane of plate glass fell upon and injured the plaintiff; and, also, in *Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. 338, in a very able opinion by the late Chief Justice Alvey, it was said that "the jury should not have been allowed to infer from the simple fact of the happening of the accident that there was negligence or unskillfulness."

In view of these repeated decisions, it appears to this court that there was error, both in granting plaintiff's prayer No. 2½ and in refusing defendant's prayer A, and that the judgment must therefore be reversed; but, inasmuch as there was evidence from which the jury might properly have found negligence in construction, or neglect, or inadequate inspection, the case will be remanded for a new trial.

Judgment reversed, and case remanded for a new trial, with costs to the appellant.

RATKE v. RINKER.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. PARTNERSHIP (§ 54*)—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY.

Evidence held not to show the existence of a partnership between plaintiff suing for balance due from defendant for erection of a building and a third person in the construction of said building.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 77; Dec. Dig. § 54.*]

2. PARTNERSHIP (§ 36*)—EXISTENCE OF RELATION—HOLDING OUT AS PARTNER.

Where plaintiff, contracting alone to construct a building, did not hold out a third person as a partner in the transaction, and the owner of the building knew that the third person had the exclusive superintendence of the work during the sickness of the contractor, a payment by the owner to the third person on the contract, made under the belief that the third person could collect the money as the architect of the building, was not binding on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the plaintiff on the theory that he held out the third person as a partner; the owner never having heard that the third person had been so held out.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 51; Dec. Dig. § 36.*]

Appeal from Circuit Court, Allegany County, in Equity; Robert R. Henderson, Judge.

Suit by James R. Rinker against Stephen Ratke. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

F. Brooke Whiting, for appellant. Charles R. Morris and Harry R. Donnelly, for appellee.

PATTISON, J. In this case the appellee filed his bill in the circuit court for Allegany county, in equity, alleging therein that he, in August, 1910, contracted with the appellant to build for him a dwelling house on a lot of ground owned by the appellant in the city of Cumberland. By the contract the appellee was to do the work and furnish the materials to be used in the erection of said building. The bill further alleged that the plaintiff performed his part of the contract in accordance with the terms thereof, but alleges that the defendant has failed to pay unto him the whole of the amount owing unto him for the work done and materials furnished in the erection of said building as agreed upon by and between the plaintiff and defendant, and, because of the defendant's failure to pay the whole amount thereof, the plaintiff filed in the office of the clerk of the circuit court for Allegany county a mechanic's lien for the amount so unpaid against said building and the ground upon which it is erected, as well as the ground immediately adjacent thereto, claiming therein that the amount of balance still owing him by the defendant is \$573.59. The bill then alleges that the above amount is still unpaid, and in the prayer thereto the court was asked to pass a decree for the sale of said property, or so much thereof as was necessary for the payment of said mechanic's lien claim.

The defendant in his answer to the bill not only admitted the execution of the contract, as the bill alleged, but also admitted that the "defendant fulfilled his contract as alleged in the bill," but averred "that said contract was fulfilled and completed, not by the plaintiff alone, but in conjunction with one George A. Coleman, his partner in said contract." The answer then admits the filing of said mechanic's lien, but charges that the claim thereunder "is wholly erroneous and unfounded," and alleges that the defendant owed no part of the amount claimed to be owing by him to the plaintiff, but alleges that the sum so claimed to be owing was duly paid by the defendant to "Coleman and

Rinker, partners aforesaid" upon the completion of the work.

The learned court below, after considering the evidence taken in the case, passed a decree for the sale of the property as prayed, and it is from that decree that this appeal is taken.

It is not claimed by the defendant that he has paid to the plaintiff the entire amount that was to be paid under the contract for the erection of the building therein named, for of this sum he alleges that he has paid the amount so claimed by the defendant to Coleman for the alleged firm of Coleman and Rinker, although the record discloses that the amount paid to Coleman was only \$546.59. The defendant's contention is that a copartnership existed between Rinker and Coleman in the erection of said building, and that the payment to Coleman, one of the partners, was a payment to the copartnership or firm, and that such payment, together with the amounts previously paid, was in full payment of the amount to be paid under the contract with the plaintiff for the work done and materials furnished thereunder.

The plaintiff, however, denies the existence of the alleged copartnership, and contends that the amount paid to Coleman without authority from him was not a payment upon the amount to be received by him under his contract with Ratke, the defendant, and that it cannot be so considered. Therefore, as he contends, the above-stated amount is still owing to him by the defendant.

[1] It will thus be seen that the defendant makes his defense in this case upon the existence of the alleged copartnership. Coleman testified that prior to the execution of the contract mentioned he had formed a copartnership with Rinker "on some work in South Cumberland," and while at this work he was told by Rinker that he had been asked by Ratke, who was thinking of building a dwelling, to prepare for him plans therefor. This Rinker undertook to do and submitted several plans to Ratke, but none of them were accepted, and that it was then that he (Coleman), with Rinker, went to see Ratke and talked with him about the kind of house he wanted, and upon their way home Rinker suggested to him that they do the work together. Coleman then prepared the plans, which, when carried by Rinker to Ratke, were accepted by the latter, and a contract was then executed by Rinker and Ratke, but Rinker told him, when he returned after the execution of the contract, that they would draw a contract between them in regard to the work, "but we never did." Nothing more seems to have been said between Rinker and Coleman as to the partnership except that Coleman later on in his testimony stated that it was understood "when we were done that we were to split even on the profits." The work was started,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

but before it was completed the plaintiff was taken sick with typhoid fever, and was for six or more weeks confined at his home and hospital. Coleman worked upon the building both before and after Rinker was taken sick, and during the illness of the plaintiff, and until the building was completed, the work was superintended by him exclusively. It was while Rinker was sick that Coleman called upon the defendant for the money that was paid to him. The money so paid to him, as he testifies, is still in the hands of his attorney, Mr. Cochrane.

Mr. Ratke testified that Rinker submitted to him the plans for the house. He did not know that Coleman or any one else had anything to do with the plans, although he heard Coleman say to Rinker on the visit to his house, when the plans submitted to him were not accepted, "We will have to draw a new plan." He further testified that after the house was finished Coleman called upon him saying he needed money, to which he replied "All right," that he had the money in Mr. Cochrane's office, and directed Coleman to meet him there the following morning, at which time he received a check for the amount of \$556.59. Ratke, when asked if he thought Coleman had the right to receive the money, said Mr. Rinker told him when he made the plans that Coleman was the architect, and he thought as Mr. Rinker was sick that Mr. Coleman, as architect, had the right to collect the money. Neither by the testimony of Ratke nor Coleman is it shown that, when Coleman called upon Ratke for the money, any representations were made to him by Coleman as to his being a partner of Rinker. On the contrary, Ratke thought it was proper to pay Coleman because he was told by Rinker that he was his architect in the erection of the building. In addition to this, there is some slight testimony in the record of the holding out by Rinker of Coleman as a partner. Keys, a witness called by the defendant, testified that in a conversation with Coleman, at which the plaintiff was present, Coleman said to him that they (Rinker and himself) were partners, to which Rinker made no reply. Rinker, however, denies this conversation, or at least said that if it was said he did not so understand it. Also one of the subcontractors testified that his bid as subcontractor was made out to Coleman & Co., although he was not told by either of them that a partnership existed between them; he assumed from what was said and done that they were partners. The money, however, when paid to the subcontractor, was paid by the check of Rinker. The record also discloses that one of the witnesses testified that he overheard Rinker on one occasion, when in a dispute or altercation with Coleman, say "such business would not do," and said "there would be a split if there was not a change made." This was construed to be a threat to dissolve the

copartnership. To this, however, we cannot subscribe, for it would be equally applicable to an intention on his part to sever his relations if Coleman was only a foreman, as claimed by the plaintiff. Nowhere in the record does it appear that Coleman was ever held out to Ratke as a partner of Rinker in the erection of said building, or that he was induced to pay to him the money because of such copartnership, for in his testimony, as we have stated, he said he paid him because he thought he had the right as architect to collect it; and moreover, as Coleman testifies, Rinker told Ratke that he (Coleman) would be the architect on the job.

The plaintiff Rinker, testified that he was called upon by Ratke to make him plans for a house, which he did; that he finally adopted one of those made by him. A contract was then executed by and between him and Ratke, by which he should do the work and furnish the material in the erection of the building at and for the sum named therein. That before completing the building he was taken sick and remained sick for six weeks or more at his home and in the hospital. While sick, Coleman acted as foreman in the erection of the building. That he made payments to him several times upon account of the services so rendered by him. Upon recovering from his illness, he called on Ratke for the payment of the money, and was told by him that he had paid Coleman. He notified Ratke that he would hold him for the money; that there was no agreement of partnership between them, nor had Coleman any interest in the job. It was then that he sent for Coleman to come to his house. After repeated requests he came, and when asked why he got the money, and how he managed to get it, he said he just told Ratke that he wanted it and needed it and Ratke let him have it. He then promised that he would turn it over to him when plaintiff was able to attend to business. That he had every cent of the money and would account for that which he had spent and would turn the balance over to the plaintiff. Later he refused to settle, and the money has never been paid to him.

From this evidence we cannot find that a copartnership actually existed between Rinker, the plaintiff, and Coleman for the erection of the building mentioned herein, and we think it is shown from the testimony that, if any copartnership theretofore existed as to the erection of other buildings, it was for such buildings only, and was concluded at the completion of such work. It is shown by the testimony of Coleman who testified that, after the visit of him and Rinker to the home of Ratke, the plaintiff suggested that they do the work together. If a general copartnership was at the time existing between them, there would have been no necessity for this suggestion on the part of Rinker.

[2] It is contended, however, that the defendant was protected in the payment to Coleman of the amount so paid to him by reason of Coleman's being held out as a partner of Rinker in this transaction. There is but little evidence as to this fact, and in our opinion it is entirely insufficient to protect the defendant in the payment of this money. If it were a fact that Rinker, the plaintiff, had held out Coleman as his partner in this transaction, although he was not an actual partner, and had thereby induced the defendant, Ratke, to pay to him the money mentioned, believing him to be a partner, the defendant would, no doubt, have been protected thereby in the payment of said money. 30 Cyc. 391. Here, however, the contract was made with Rinker alone; it was not made with Rinker and Coleman as partners, and this fact was known to the defendant. He knew full well with whom he was contracting. Coleman was not held out to him by Rinker or by any one else as a partner with Rinker in this transaction, and his work as foreman upon the building and the exclusive superintendency thereof during the sickness of the plaintiff, which was known to the defendant, is altogether consistent with the claim of the plaintiff that Coleman was only a foreman in said work.

It is not claimed by the defendant that he was induced to make the payment to Coleman because he believed him to be a partner, for he particularly states in his testimony that he paid it to him believing that he had a right to collect it as an architect employed in the erection of the building. In fact, he had never heard that he was a partner or that he was ever held out as such partner. Therefore the payment to him could not have been induced by any alleged fact of which he had no knowledge.

From what we have said, the learned court below committed no error in passing decree appealed from, and the decree will therefore be affirmed.

Decree affirmed, with costs to the appellee.

CECIL PAPER CO., Inc., v. NESBITT.

(Court of Appeals of Maryland. Jan. 9, 1912.)

1. HIGHWAYS (§ 184*)—INJURIES TO TRAVELER—ACTION—PLEADING.

A count of a declaration which alleged that the defendant, while engaged in hauling bales of paper stock to its mill, negligently loaded the same upon its wagon, and in consequence of the negligence the bales fell therefrom upon the public highway, and, lying there, frightened plaintiff's mules, causing them to run away to his injury, sufficiently charged the negligence of the defendant.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. HIGHWAYS (§ 184*)—INJURIES TO TRAVELER—ACTION—PLEADING.

A count of a declaration which averred that bales of paper stock fell from defendant's

wagon to the public road, and that the defendant, knowing the same had fallen from the wagon, negligently allowed them to remain thereon, and in consequence the plaintiff was injured, was sufficient as charging actionable negligence of the defendant.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

3. HIGHWAYS (§ 184*)—INJURIES TO TRAVELER—ACTION—PLEADING.

A count in a declaration averring that the defendant's servant, acting within the reasonable line of his employment in hauling bales of paper stock over a public highway, discovered that a portion of the bales would not carry to the defendant's mills, but negligently proceeded with the load, and that before reaching the mills some of the bales fell from the wagon to the side of the highway, and in consequence the plaintiff's mules were frightened and ran away to the plaintiff's damage, sufficiently charged actionable negligence of the defendant.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

4. NEGLIGENCE (§ 108*)—ACTIONS—CAUSE OF ACTION—PLEADING.

To constitute a cause of action for negligence there should be stated a right in the plaintiff, a duty of the defendant in respect thereto, and a breach of that duty by the defendant whereby the plaintiff has suffered.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 175, 179, 180; Dec. Dig. § 108.*]

5. PLEADING (§ 18*)—ALLEGATIONS OF FACTS.

While only the facts constituting a cause of action need be stated, they must be averred or set forth with sufficient certainty to render them understandable by the party who is to answer, the jury, and the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 39; Dec. Dig. § 18.*]

6. TRIAL (§ 258*)—INSTRUCTIONS—CONTENTS—SAME MATTER IN DIFFERENT PRAYERS.

While the practice of presenting the same legal proposition in different prayers is not to be commended because of its tendency to confuse and mislead the jury, it was not objectionable where the different prayers referred in terms to separate counts of the declaration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646, 647; Dec. Dig. § 258.*]

7. TRIAL (§ 253*)—INSTRUCTIONS—SUPPORT IN EVIDENCE.

In an action for injuries caused by a runaway, an instruction that if plaintiff's mules were roadworthy and easily controllable, the driver skillful and careful, and the vehicle and harness sufficient and in good condition, the plaintiff nevertheless could not recover if he might have prevented the injury by the exercise of reasonable care and caution, was properly refused as excluding consideration of the negligence vel non of the defendant shown.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

8. TRIAL (§ 260*)—INSTRUCTIONS—INCLUSION IN OTHERS GIVEN.

A defendant in an action for negligence causing injury to the plaintiff from a runaway cannot complain of the rejection of an instruction requested where its substance was included in others given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

9. APPEAL AND ERROR (§ 730*)—RESERVATION OF GROUNDS OF REVIEW—BRIEFS.

Though exceptions are taken to the rejection of prayers, they will not be considered

on appeal where no reasons are stated in the court on appeal or in the appellant's brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

10. EVIDENCE (§ 122*) — ADMISSIONS BY AGENTS—RES GESTÆ.

In an action for negligence causing the fright and running away of the plaintiff's mules, and his injury, the declaration of the driver of the wagon from which bales of paper, which caused the fright, had fallen, made near where the bales fell off and just before they did so, were admissible where there was evidence that the driver was the agent of the defendant, as declarations in the course of his employment, as part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 389-350; Dec. Dig. § 122.*]

11. EVIDENCE (§ 474½*)—OPINION—EXPERTS—SUBJECT-MATTER.

In an action for negligence causing the fright and running away of plaintiff's mules, evidence as to how mules will act when approaching an object calculated to frighten them, whether the witness had ever observed a mule to frighten at an object, and as to what was their conduct under the circumstances, was properly refused as evidence of matters occurring in the common business of life concerning which the jury was competent to draw inferences from the facts without hearing opinions of witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.*]

12. EVIDENCE (§ 535*) — OPINION—FOUNDATION.

In an action for negligence causing the running away of the plaintiff's mules and his consequent injury, expert evidence as to the characteristics of mules was properly refused in the absence of any foundation establishing the witness' claim to expert knowledge.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 535.*]

13. HIGHWAYS (§ 184*)—INJURIES TO TRAVELERS—ACTION—EVIDENCE.

Where in an action for negligence causing the fright and running away of the plaintiff's mules there was evidence that bales of paper stock caused to lie on the highway by defendant were responsible for the fright of the mules, evidence of a witness for the defendant as to the conduct of mules generally when frightened would not reflect on or tend to contradict the evidence that they were frightened, and was properly refused.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

14. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—NECESSITY OF PREJUDICE.

In an action for negligence causing the running away of plaintiff's mules and his consequent injury, cross-examination of the driver of the defendant's wagon, from which the bales of paper which caused the fright fell onto the public highway, as to his duty in regard to such bales, and his reply that he went after them if his employer sent him, would not prejudice the cause of the defendant, and was harmless though not touched on in chief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

Appeal from Circuit Court, Cecil County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by William H. Nesbitt against the Cecil Paper Company, Incorporated. From a

judgment for plaintiff, defendant appeals. Affirmed.

The testimony of Calvin Reynolds referred to in the opinion was to the effect that, on the day the bales fell off the load, the driver of the team asked the witness to help tighten the rope around the load, which the witness did, and stated to the witness that he was afraid the load would not carry to the mill.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Frank B. Evans and William S. Evans, for appellant. Henry A. Warburton and William T. Warburton, for appellee.

BRISCOE, J. The appellant is a corporation known as the Cecil Paper Company, Incorporated, and owns and operates a paper mill near Rising Sun, a station on the Philadelphia & Baltimore Central Railroad in Cecil county. The appellee is a resident of Cecil county, and on the 16th day of December, 1910, brought this suit against the appellant to recover damages for personal injuries sustained by him while driving over one of the public roads of the county by reason of the alleged negligence of the appellant. The declaration contains three counts, and the defendant in the court below interposed a demurrer to each count, and the overruling of these demurrers presents the first question for our consideration on this appeal.

[1] The first count of the declaration alleges "that the defendant in the operation of the mill uses what is known as paper stock, which is shipped to the defendant in bales; that the defendant hauls the bales of paper stock from the railroad station at Rising Sun to its mills in wagons; that the defendant, while engaged in hauling the bales of paper stock, negligently loaded the same upon its wagons; that, in consequence of the negligence while the wagons of the defendant were passing over and upon the public road from the railroad station to its mills, some of the bales fell from the wagon upon the public road; that in consequence of the negligence of the defendant the plaintiff on the 12th day of August, 1910, while driving with due care his team of two mules and wagon along and over the public road, the mules, frightened at the bales of paper lying in the public road, became unmanageable, and ran away, whereby the plaintiff was thrown out and seriously and permanently injured."

[2] The second count avers that the defendant, while engaged in hauling the bales of paper stock, some of the bales fell from the wagon upon the public road, and the defendant, knowing that the same had fallen from its wagon, negligently allowed the bales to remain upon the public road where they had fallen, and that, in consequence of the

negligence of the defendant, the plaintiff was seriously and permanently injured, etc.

[3] The third count avers that the defendant's servant, acting within the line of his employment and within its scope while engaged in hauling the bales of paper stock on the 10th day of August, 1910, over the public highway, and when about one mile from Rising Sun discovered that the bales or a portion of them would not carry to the mills, negligently proceeded with the load, and before reaching the mills some of the bales fell from the wagon and upon and on the side of the highway, where they remained for several days; that, in consequence of the negligence of defendant's servants, the plaintiff on the 12th day of August, 1910, while driving with due care his team of two mules and wagon, along and over the public road, his mules, frightened at the bales of paper stock lying in the public road, became unmanageable, and ran away, whereby the plaintiff was thrown out and permanently injured.

It is contended upon the part of the appellant that the demurrer to the first, second, and third counts of the declaration should have been sustained because neither of those counts state a good cause of action, and for the further reason that the second count fails to allege that the defendant did not remove the bales within a reasonable time. The averments of the declaration in this case, we think, state with sufficient clearness the tort for which redress is here sought to constitute a good cause of action in a suit for negligence.

[4] In *Maenner v. Carroll*, 46 Md. 212, the rule is held to be this: To constitute a good cause of action, in a case of negligence, there should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered.

[5] In *Phil. B. & W. R. Co. v. Allen*, 102 Md. 113, 62 Atl. 245, it was held that the dry allegation of the fact, without detailing a variety of minute circumstances which constituted the evidence of it, was sufficient. As only the facts constituting the cause of action need be stated, it is a cardinal rule that they must be averred or set forth with certainty, by which term is signified a clear and distinct statement of them so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. 1 Chitty's Pleading (8th Am. Ed.) pp. 225 and 233; *Gent v. Cole*, 38 Md. 110; *Havre de Grace v. Fletcher*, 112 Md. 569, 77 Atl. 114. Tested by the rules announced by these cases, the declaration in the case at bar is free from the objections urged against it, and the demurrers, therefore, were properly overruled by the court below.

At the trial of the case, the defendant reserved seven bills of exceptions, one to the ruling of the court upon the prayers—that is, to the granting of the plaintiff's first, second, third, fourth, and fifth prayers, and to the rejection of the defendant's second, fourth, seventh, and eighth prayers. The defendant's first, third, fifth, and sixth prayers were granted. The remaining bills of exception were taken in the course of the trial to the ruling of the court and relate to the admissibility of the evidence.

[6] The plaintiff's first, second, third, and fourth prayers announce substantially the same legal proposition. The first prayer, as offered, applied to the whole declaration, and the second, third, and fourth prayers had reference, in terms, to the several counts of the declaration, and were simply an unnecessary separation of the correct proposition of law applicable to the case, as contained in the first prayer. While the presentation of the same legal proposition in different prayers is a practice not to be commended or to be sanctioned because tending to confuse and to mislead the jury, but in this case the second, third, and fourth prayers respectively referred in terms to separate counts of the declaration, and are not open to the objection in this respect. It is difficult to see how they could have misled or confused the jury upon the proposition of law stated by them. The fifth instruction granted at the instance of the plaintiff correctly stated the rule as to the measure of damages, and has been approved by this court in the form as granted. The plaintiff's prayers and the defendant's granted prayers fairly submitted the law of the case, and have been repeatedly sustained in this court.

[7] The defendant's second prayer presented an erroneous proposition of law upon contributory negligence upon the facts of the case and was properly refused by the court. It not only disregarded material facts of the case, but excluded altogether from the consideration of the jury the negligence vel non of the defendant. It told the jury, in effect, that if the mules driven by the plaintiff were roadworthy and easily controllable, that the driver was skillful and careful, that the vehicle and harness were sufficient and in good repair, that nevertheless the plaintiff in this case cannot recover if they shall further find that the said plaintiff might have prevented the injury by the exercise of reasonable care and caution.

[8] The law, however, upon this subject was fully and correctly stated and was covered by the defendant's fifth and sixth instructions, and the defendant was not injured by the rejection of this prayer.

[9] The rejection of the defendant's fourth, seventh, and eighth prayers, although excepted to, no reasons are stated against the rulings of the court thereon in

this court or in the appellant's brief. They will not therefore be considered further by us than to say they were properly refused and could not have been granted by the court as presented. There were six bills of exception upon the admissibility of testimony taken at the trial on the part of the appellant.

[10] The question raised by the first bill of exception relates to the admissibility of the declaration of Leroy Reynolds, the driver of the team of the loaded wagon testified to by the witness Calvin Reynolds. There was evidence that the driver was the agent and employé of the defendant, and that the admission and declaration were made to the witness as to the loading of the wagon and while on the public road near where the accident occurred and on the day of the accident and just prior thereto.

It is a well-settled principle that declarations, statements, and admissions of an agent made in the course of his employment and within the scope of his authority are binding on the principal, and, where the agency is sufficiently established, they may be given in evidence against the principal as part of the *res gestæ*. 1 Greenleaf, Evidence, § 113; Story on Agency, § 135; Farmers' Packing Co. v. Brown, 87 Md. 12, 39 Atl. 625; Thomas v. Sternheimer, 29 Md. 268; Bank v. Steam Nav. Co., 11 G. & J. 29, 33 Am. Dec. 687; Rowland v. Long, 45 Md. 439. The declaration of the employé, as the driver of the wagon and the servant of the appellant, was made at the time of the transaction, and prior to the accident, and constituted a part of the *res gestæ*, and the court committed no error in holding that the declaration and admission of the employé, under the facts of the case, were admissible in evidence to establish the liability of the master for the tort of the servant. Consolidated R. R. Co. v. Pierce, 89 Md. 495, 43 Atl. 940; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400.

[11, 12] In the second and third exceptions the defendant proposed to prove by the witness Amos Ailes how mules would act under certain conditions, and asked the witness the following questions: "(1) Have you ever observed the conduct of mules when approaching some object that is calculated to frighten them? (2) In your 20 years' experience with mules, did you ever observe a mule or mules frighten at an object; if yea, did the mules shy, or what was their conduct under the circumstances?" The court below refused to permit these questions to be put and answered. This is not a case for the admission of expert testimony, even if the proper foundation had been laid for the introduction of such evi-

dence, which does not appear to have been done here.

In *Balto. v. Leonhardt*, 66 Md. 70, 5 Atl. 346, it is said: "Where the question can be decided by such experience and knowledge as are ordinarily found in the common business of life, the jury are competent to draw the proper inferences from the facts without hearing the opinions of witnesses. In such case the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury." *Anne Arundel v. Stansbury*, 107 Md. 216, 68 Atl. 602, 14 L. R. A. (N. S.) 452; *Stumore v. Shaw*, 68 Md. 11, 11 Atl. 360, 6 Am. St. Rep. 412; *Balto. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; *Bank v. Manion*, 87 Md. 80, 39 Atl. 90; *Balto. v. Neal*, 65 Md. 457, 5 Atl. 338.

[13] The opinion of the witness as to the conduct of mules generally when frightened would not reflect upon or tend to contradict the testimony of the plaintiff's witnesses that the mules driven by the plaintiff were frightened by the bales of paper lying upon the highway in this case. There was no error in the rulings of the court upon these exceptions. The appellant's fourth, fifth, and sixth exceptions present substantially the same question and will be considered together. A consideration of one will dispose also of the others.

[14] The witness Leroy Reynolds had been called by the plaintiff as a witness, examined, and dismissed. He was subsequently in the course of the trial called by the defendant and examined as defendant's witness, and upon cross-examination by the plaintiff's attorney he was asked the following question: "Q. But I ask you what is your duty in regards to the bales of paper that fall off? A. I get them if the boss sends me after them." It is objected that this was not a proper cross-examination, as the witness had not testified in chief as to the matter here inquired into, and the court committed an error in overruling the objection and permitting the question to be asked and answered. Conceding that the appellant is right in this contention, it is difficult to perceive in what way his case was prejudiced by the testimony. It could only be regarded as harmless error, and, being such, could not avail him on this appeal. There must be both error and injury to justify a reversal.

It follows from what we have said that the appellant was in no way prejudiced by the rulings of the court below, and, finding no reversible error on any of the rulings, the judgment will be affirmed.

Judgment affirmed, with costs.

BARRON et al. v. ZIMMERMAN et al.
(Court of Appeals of Maryland. Jan. 11, 1912.)

1. BASTARDS (§ 102*)—INHERITANCE—MOTHER'S DECEASED SISTER—STATUTES—"CHILD."

Code Pub. Gen. Laws 1904, art. 93, § 133, provides that the illegitimate child or children of any female may take real or personal estate from their mother as if born in lawful wedlock. Article 46, § 30, declares that where an illegitimate child shall die, leaving no descendants or brothers or sisters, or the descendants of such brothers and sisters, then the mother shall inherit, and, if she be dead, the mother's heirs at law shall inherit the estate of such child as if such child had been born in lawful wedlock. Article 46, § 27, provides that, if any father or mother entitled to take by inheritance shall be dead, the child or children of such father or mother shall take by representation. *Held*, that an illegitimate child was the "child" of its mother within section 27, and hence, where the mother of an illegitimate child was dead, he was entitled to inherit as an heir of the mother's deceased sister.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 254, 255; Dec. Dig. § 102.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

2. PARTITION (§ 39*)—HEIRSHIP—ESTABLISHMENT—EQUITY.

Where plaintiff filed a bill alleging an interest in land as an heir of his mother's deceased sister and prayed the establishment of his interest and the sale of the property in accordance with Code Pub. Gen. Laws 1904, art. 16, § 129, authorizing a suit in equity for partition, the bill was not demurrable nor was equity ousted of jurisdiction by a denial that plaintiff was entitled to inherit because of illegitimacy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 93-96; Dec. Dig. § 39.*]

3. PARTITION (§ 39*)—EQUITY JURISDICTION—DEMURRER.

The test of equity jurisdiction in a suit for partition is whether a demurrer will lie to the bill.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 93-96; Dec. Dig. § 39.*]

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Bill by James A. Barron and another against Monroe Zimmerman and others to establish plaintiff's heirship to an interest in the estate of Mary Zimmerman, deceased. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Albert J. Long, for appellants. H. F. Wingert, for appellees.

URNER, J. The principal inquiry upon this appeal is whether, under the laws of this state, an illegitimate child is capable of inheriting from his deceased mother's sister. This question arises in a proceeding for the sale of real estate for the purposes of partition under section 129 of article 16 of the Code. The property was owned by Elizabeth R. Bitner in her lifetime, and after her death intestate and without issue the

appellant filed the present bill alleging that he is one of her heirs at law as the son of her deceased sister, Mary Zimmerman, and that the land sought to be sold descended to himself and the defendant heirs as tenants in common. It does not appear affirmatively upon the face of the bill that the plaintiff is illegitimate, but this fact is averred in the answer and is shown by the evidence without dispute.

[1] It is clear that the plaintiff's right as an heir at law in this case could not exist independently of statute, as at common law an illegitimate child is devoid of any capacity for inheritance. *Miller v. Stewart*, 8 Gill, 130; *Southgate v. Annan*, 31 Md. 116.

The existing statutory provisions dealing specifically with the subject of inheritance by and from illegitimates are found in section 30 of article 46 of the Code, title "Inheritance," subtitle "Descents," and in section 133 of article 93, title "Testamentary Law," subtitle "Distribution." The latter section is a reproduction of chapter 156 of the Acts of 1825 and provides that: "The illegitimate child or children of any female, and the issue of any such illegitimate child or children, shall be capable to take real or personal estate from their mother, or from each other, or from the descendants of each other, in like manner as if born in lawful wedlock."

The section first mentioned is a codification of the act of 1825 as amended by chapter 199 of the Acts of 1868 and includes the provision just quoted with additional clauses, as follows: "And where such illegitimate child or children shall die, leaving no descendants, or brothers or sisters, or the descendants of such brothers and sisters, then and in that case, the mother of such illegitimate child or children, if living, shall inherit both real and personal estate from such illegitimate child or children; and if the mother be dead, then and in that case, the heirs at law of the mother shall inherit the real and personal estate of such illegitimate child or children in like manner as if such illegitimate child or children had been born in lawful wedlock."

By virtue of these statutes the plaintiff was as fully capable of inheriting from his mother as if he were legitimate; and his mother's sister, if she had survived, would have had an undoubted right to inherit from him upon his decease. There is no provision, however, among those we have thus far quoted, which expressly enables an illegitimate to take by descent or distribution the property of a brother or sister of his deceased mother. But, with respect to the descent of real estate, it is provided by section 27 of article 46 of the Code, under the same subtitle as section 30, previously mentioned, that: "If in the descending or collateral line, any father or mother shall

be dead, the child or children of such father or mother shall by representation be considered in the same degree as the father or mother would have been if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled to, and no more." In reference to the distribution of personal property it is provided by section 127 of article 93 that "the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister."

The appellant contends that, notwithstanding his illegitimacy, he is entitled to a place in the line of inheritance as the representative and child of his deceased mother within the spirit and intent of section 27, just quoted, when interpreted in the light of the other provisions of the Code which accord him the right to inherit from his mother as if he had been born in lawful wedlock.

The decisive question thus presented is not whether the appellant would be so entitled merely by force of the section making him capable of inheriting direct from his mother, or whether the term "child" as ordinarily used in a statute would include an illegitimate, but whether, under a codified system of laws by which such a person is invested with the full qualifications of legitimacy with reference to the inheritance of his mother's estate, he is within the purview of a constituent provision that the estate which the deceased mother would have inherited shall pass to her "child or children." In our judgment this question should be answered in the affirmative. It would certainly seem to be a reasonable construction of statutory provisions which are codified together as parts of the same general plan of descent and distribution to hold that one who is placed in the position of a lawfully begotten child for the purpose of inheriting from his mother should be regarded as a "child" of the mother within the intent of the law for the purpose of succeeding to the estate which she would have inherited if she had survived.

It has been decided that so far as the inheritance of the mother's estate is concerned her children all stand upon an equal footing without regard to their legitimacy. *Earle v. Dawes*, 3 Md. Ch. 231. In the case just cited, the chancellor observed that by the statute illegitimates are placed, as regards their mother's estate, "in the condition of legitimate children in all respects and to every intent." But, if we were to deny the right here asserted by the appellant, it would have to be upon the ground that, although he is treated by the "inheritance" article of the Code as if he were a legitimate child of his mother for the purpose of being her heir at law, he is to be refused recognition as her "child" under the same article for the purpose of representing her in the course of descent.

If the several sections to which we have

referred had been included in the same original enactment, it would probably not be seriously contended that an illegitimate child who was made capable by the statute of inheriting from his mother should not be regarded as her "child," under that unqualified description in the act, with a view to participation in the estate which she would have inherited had she lived. But section 27 of article 46 formed part of the Acts of 1820, c. 191, and, at the time of the passage of that statute, the only existing provision in reference to illegitimates was one enacted in 1786, and incorporated in the act of 1820, to the effect that if any man should have a child or children by any woman whom he afterwards married, such child or children, if acknowledged by the man, should, by virtue of the marriage and acknowledgment, be legitimated and capable in law to inherit and transmit inheritance as if born in wedlock. Code, art. 46, § 29. When the act of 1820 first became effective, it obviously did not intend that illegitimates generally should be included in the category of "children" capable of inheriting in the place of the deceased mother because this class of persons at that time still remained under their common-law disability as to inheritance except upon the single contingency stated; and, if that act had never been codified with those of 1825 and 1868 as co-ordinate provisions of the same system of descents, the contention of the appellees might have greater force. The Code of 1888, however, in which these statutes were all incorporated, was adopted in lieu of all public general laws of the state then in effect, and its provisions dealing with the same subject-matter must be construed together in order to ascertain the legislative intent. *Reese v. Starner*, 106 Md. 53, 66 Atl. 443; *State v. Popp*, 45 Md. 433; *McCracken v. State*, 71 Md. 150, 17 Atl. 932; *Trustees of College v. McKinsty*, 75 Md. 188, 23 Atl. 471.

In *Reese v. Starner*, supra, the widow of an illegitimate, who died intestate without issue and without leaving brothers or sisters or the descendants of brothers or sisters, was claiming the whole of her husband's estate as against the claim of his mother to one-half. The widow based her contention upon what she regarded as the proper construction of section 119 of article 93 of the Code, which provides that: "If the intestate leave a surviving husband or widow, as the case may be, and no child, parent, grandchild, brother or sister, or the child of a brother or sister of the said intestate, the said surviving husband or widow, as the case may be, shall be entitled to the whole." The argument was that the mother of an illegitimate child could not be considered a "parent" within the meaning of this section because at the time of its original enactment in 1798 the mother of an illegitimate could not inherit his property. But it was held that the subsequent codifi-

cation of the statute with the act of 1868, which enabled the mother to inherit from her illegitimate offspring, superseded the pre-existing law on the subject, and that, as both the provisions referred to are concerned with the devolution of title to the estates of decedents, they should be construed together even though they are contained in separate articles. The conclusion was accordingly reached that a mother, qualified under section 30 of article 46 to inherit from her illegitimate child, was to be regarded as his "parent" under section 119 of article 93. Upon the same principle we must hold that one who, being a child in fact, is made a child in law with respect to inheritance from his mother cannot be denied recognition as her "child" under section 27 for the purpose of inheriting property to which she, if she had survived, would have been entitled. This interpretation of the law does not disregard, but is consistent with the rule applied by this court in an early case, that legislation modifying the common-law disqualifications of illegitimate children should be strictly construed. *Miller v. Stewart*, supra.

Numerous decisions in other jurisdictions have been cited, but the only one which appears to deal with statutory conditions analogous to the present is that of *Dennis v. Dennis*, 105 Tenn. 86, 58 S. W. 284. There were two separate Code provisions considered in that case, one of which was that if an intestate die without issue his land shall be inherited by his brothers and sisters, and, if any such brother or sister die in the intestate's lifetime "leaving issue," such issue shall represent their deceased parent, and the other of which was that, where a woman dies intestate leaving a natural born child, he shall take her estate by the general rules of descent and distribution equally with her other children. These provisions were construed together, and it was held that an illegitimate child of a mother who predeceased her sister, who died intestate without issue, takes the share of the estate of his mother's sister which his mother would have taken had she survived.

[2] The appellee questions the jurisdiction of a court of equity to entertain the present proceeding upon the ground that a court of law is the proper tribunal in which to have a question of title determined. This objection is based upon certain language used in the opinion of this court in the case of *Savary v. Da Camara*, 60 Md. 139. It was there said: "A bill for partition cannot be made to serve as an action of ejectment, and is not designed to settle adverse rights, but only to subserve the convenience of those whose interests in the subject-matter are concerned. * * * The object of the bill is to secure a sale for the benefit of those assumed to be the owners of the property; and the defendants who are, or ought to be, those conceded to have a common or con-

current interest are really summoned, not to litigate a denial of their title, but, as jointly interested, to be heard upon the prayer of the bill to sell, instead of divide, the property, as being the most advantageous to all concerned." These expressions were employed in the course of an opinion disposing of a demurrer to a bill of review. The decree which the bill sought to have reviewed had been passed in a proceeding instituted for the sale of the real estate of a decedent by persons claiming to be his heirs at law on the maternal side and alleging that he left no known heirs on the part of his father. An order of publication, however, was prayed for and issued against the "unknown heirs" on the paternal side. The property was subsequently decreed to be sold, and, while the proceeds were awaiting distribution, the bill of review referred to was filed by parties who claimed to be heirs of the decedent on the part of his father and who alleged their previous ignorance of the partition proceeding and of their interest in the estate. They prayed that the proceedings be reopened and that an opportunity be given them to prove their relationship. In this state of the case the sole question considered upon the demurrer to the bill of review was whether the plaintiffs in that bill, conceding them to be heirs of the decedent in the paternal line and hence entitled in the first instance to his property, were not concluded by the decree of sale, the order of publication, and the evidence adduced in the partition suit. It was held that they were not so concluded because the maternal heirs, having no interest where there were paternal heirs in existence, as the demurrer admitted, had no more right to maintain a suit for the sale of the property than absolute strangers, and because the order of publication, having been directed against a class of persons who would have a title paramount to, and not concurrent with that claimed by the plaintiff in the proceeding, could not support the jurisdiction of the court for the purpose contemplated. The effect of the decision was that the court was not authorized to entertain a bill for partition filed by those claiming as heirs in the maternal line against those who would be entitled, if at all, as heirs on the part of the father, because upon the face of such a bill the want of jurisdiction is apparent.

In the case before us no such difficulty exists. The allegations of the bill disclose no ground upon which the jurisdiction of the court can be questioned. The interest which the plaintiff claims is not superior to but is in common with the interests which he concedes to the defendants. He has filed his bill in strict conformity to the Code provision that the court may decree a partition or sale of lands upon the bill or petition of any concurrent owner. Article 16, § 129.

[3] In such suits as the present, the test of the court's jurisdiction is whether a de-

murrer would lie to the bill. *Scarlett v. Robinson*, 112 Md. 207, 76 Atl. 181; *Hamilton v. Traber*, 78 Md. 28, 27 Atl. 229, 44 Am. St. Rep. 258; *Johnson v. Hoover*, 75 Md. 486, 23 Atl. 903; *Slingluff v. Stanley*, 66 Md. 225, 7 Atl. 261. It is evident here that the bill is not demurrable, and we see no reason to hold that the court should be divested of the jurisdiction it has acquired merely because the answer and the proof deny the plaintiff's legitimacy. If such a denial were sufficient to oust the court of the jurisdiction which the bill has conferred, the same result would be produced whether the objection were well founded or fictitious, and a court of equity could proceed in no case of this character where the plaintiff's rights are disputed by any of the defendants. As the present bill contains all the essential jurisdictional averments, and as the issue raised in the answer as to the plaintiff's legitimacy was relevant to the subject-matter to which the jurisdiction of the court below had attached, we think the court was fully authorized to hear and determine the question. Its conclusions, however, differ from those we have stated, and the decree will therefore be reversed and the cause remanded for further proceedings.

Decree reversed with costs, and cause remanded.

DUCKWORTH v. FERLAND.

(Supreme Court of Rhode Island. May 27, 1912.)

PLEADING (§ 250*)—AMENDMENT—AD DAMNUM—EFFECT.

Where by agreement of counsel an amended declaration was filed in which the damages were laid at \$500, while the ad damnum in the writ was laid at \$300, an exception that the decision was for an amount greater than the ad damnum in the writ was not sustainable, for the amendment was as effective as a raising of the ad damnum on motion would have been.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 730-733; *Dec. Dig.* § 250.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by Riley Duckworth against Joseph Ferland. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and cause remitted, with directions to enter judgment for plaintiff. The ad damnum laid in the writ was \$300.

James E. Brennan, of Pawtucket, for plaintiff. Noe L. Nadeau and Claude J. Farnsworth, both of Pawtucket, for defendant.

PER CURIAM. From an examination of the transcript of testimony we are not able to say that the decision was contrary to the evidence or that the damages are excessive.

As to the exception that the decision was for an amount greater than the ad damnum

in the writ, it appears that, by agreement of counsel, an amended declaration was filed in the district court in which the damages were laid at \$500. We think this was as effective as a raising of the ad damnum upon motion would have been.

There is nothing to indicate that the justice did not decide the case upon the rule of damages argued as proper by the defendant.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment for the plaintiff upon the decision.

BLAKE v. ATLANTIC NAT. BANK.

(Supreme Court of Rhode Island. May 27, 1912.)

COSTS (§ 245*)—ON APPEAL—PARTIES LIABLE—AMOUNT OF JUDGMENT.

Where, on a hearing to show cause why a case should not be transmitted to the superior court with directions to enter judgment for defendant for costs, defendant admitted that it had in its hands a balance of \$225.94, and raised no objection to the entry of judgment against it for that amount, the Supreme Court will order that the case be remitted to the superior court, with direction to enter judgment for plaintiff for the amount without costs; the recovery being insufficient in amount to carry costs.

[Ed. Note.—For other cases, see *Costs*, Dec. Dig. § 245.*]

Hearing on order to show cause why the case should not be transmitted to the superior court, with directions to enter judgment for defendant for costs. Case remitted, with direction to enter judgment without costs. For former opinion, see 82 Atl. 225.

PER CURIAM. After the opinion of this court in the above-entitled case, filed March 4, 1912, the plaintiff appeared, and has been heard to show cause why the case should not be transmitted to the superior court, with direction to enter judgment for the defendant for costs. Upon the question whether the indebtedness to the defendant of \$1,700 on the underwriting agreement was originally an obligation of the firm or of N. Curtis Fletcher individually, the plaintiff has presented nothing which has not already been considered by us before filing said opinion. The plaintiff, however, has called to our attention a letter written by the assistant cashier of the defendant to the plaintiff. In this letter said officer states that, after deducting from the net proceeds of the sale of collateral security, the indebtedness of the copartnership of N. Curtis Fletcher & Co. to the defendant, including the indebtedness of seventeen hundred dollars upon said underwriting agreement, the defendant was "holding for an adjustment 225.94." This letter, filed with the papers in the case, was overlooked by the parties, and was not called to the notice of the court until this hearing. The defendant

now admits that it has this balance in its hands, and raises no objection to the entry of judgment against it for that amount. If a judgment for that amount should be entered in favor of the plaintiff, in accordance with the provision of the statute, he should not have costs, as the recovery of that amount would not carry costs. It is therefore ordered that the case be remitted to the superior court, with direction to enter judgment for the plaintiff for \$225.94, without costs.

BARBER v. ADAMS, Town Treasurer.

(Supreme Court of Rhode Island. March 8, 1912. On Rehearing, May 27, 1912.)

TAXATION (§ 549*)—COLLECTION—COMPENSATION—OFFICERS.

Gen. Laws 1909, c. 62, § 4, provides that town tax collectors shall be paid for collecting at the rate of 5 per cent., unless they shall have agreed with the town for a less sum. *Held* that, where plaintiff was elected tax collector at a town meeting, and after the election, but before plaintiff had qualified, the town passed a resolution fixing the collector's salary at \$600, it was a condition of plaintiff's right to qualify that he accepted the office at the salary voted, and could not by declining to accept the sum so voted as compensation for his services recover an amount equal to 5 per cent. of the taxes collected.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1043-1050; Dec. Dig. § 549.*]

Case Certified from Superior Court, Kent County.

Action by Herbert W. Barber against Dwight R. Adams, as town treasurer of Warwick. Case certified from Supreme Court on agreed statement of facts. Judgment for plaintiff on amended declaration.

Mumford, Huddy & Emerson, of Providence (Charles C. Mumford, of Providence, of counsel), for plaintiff. Lester T. Murphy, of Providence, for defendant.

SWEETLAND, J. This is an action of debt to recover compensation for the plaintiff's services as collector of taxes of the town of Warwick. The case, at issue on its merits in the superior court, has been certified to this court upon an agreed statement of facts. The essential facts are as follows: The plaintiff was elected collector of taxes by the town council of said town at its session on November 8, 1909. At said meeting after said election, and after the transaction of other business, the said town council voted to fix the salary of the collector of taxes at the sum of \$600. On the 16th day of November the electors of said town at a financial town meeting appropriated the sum of \$600 for the salary of collector of taxes, and also voted to fix the salary of collector of taxes at \$600. At a session of said town council on November 22, 1909, the plaintiff in

a written communication to said council declined "to accept the sum specified by the vote of the financial town meeting of said town as compensation for his services as collector of taxes for the ensuing year and refuses to agree with said town upon the sum so specified in said vote." The town council thereupon voted to receive and record said written communication, but took no further action upon the same. The plaintiff afterward qualified as collector of taxes by taking the oath and presenting the bond required by law, which bond was approved by said town council on January 24, 1910. The plaintiff proceeded to execute the duties of collector of taxes, and collected and paid over to the town treasurer the sum of \$165,748.46. The plaintiff has presented to the town council his claim for compensation amounting to \$8,287.42, the same being 5 per centum of the amount of taxes so collected. No satisfaction has been made to the plaintiff on this claim, and he has brought this suit to recover said sum.

The plaintiff bases his claim upon the provision of chapter 62, § 4, Gen. Laws 1909. This section, referring to collectors of taxes, in part is as follows: "And collectors shall be paid for collecting at the rate of five per centum, unless they shall have agreed with the town for a less sum." It is the plaintiff's contention that the statement of facts shows no agreement on his part with the town for a less sum; and that his election was wholly unconditional, vesting him with the right to execute the office and receive the compensation attached to it by the statute, namely, 5 per centum of the amount of taxes collected by him during the year following his qualification in January, 1910. In the larger towns of the state the rate of compensation for tax collectors provided by statute is out of proportion to the services rendered by them; and the statute contemplates that such towns will make agreements with their tax collectors for compensation which shall be reasonable in the circumstances of each case. Tax collectors are not hired as agents or employes of the towns, but are elected either at the annual town meeting or by the town council. Hence, before election, it is uncertain who will be tax collector for the following year; and, before election, it is not practicable for a town to enter into negotiation with its possible future tax collector for the purpose of making an agreement with him as to the amount of his compensation. A town may, however, fix the compensation which it will pay to its tax collector by ordinance or by resolution passed before or at the town meeting or the session of the town council at which the collector is elected. Then, if the person who is elected qualifies as such collector, he will be held to have accepted the compensation fixed, and to have agreed with the town

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for that sum. *Wood v. School District*, 28 R. I. 299, 67 Atl. 85.

The plaintiff lays stress upon the fact that in the case at bar the vote of the town council, fixing the compensation of the tax collector, was passed after the plaintiff's election. It was, however, passed at the same meeting, was clearly intended by the council as a condition of the election, and was known by the plaintiff before he qualified and gave bond. We are of the opinion that the vote in question attached itself to the election of the plaintiff as a condition thereof; and that the plaintiff, by qualifying under that election, must be held to have accepted the condition and agreed with the town. The fact that the plaintiff notified the town council that he refused to agree with the town upon the sum specified in the vote of the financial town meeting does not affect the case. The town did not change its position or modify the condition attached to the plaintiff's election.

The plaintiff is not entitled to the statutory compensation, for the recovery of which he has brought this action of debt. Decision for the defendant for costs. Papers in the cause with the decision of this court certified thereon sent back to the superior court for Kent county, with direction to enter final judgment for defendant for costs upon said decision.

On Rehearing.

PER CURIAM. At the time of the certification of the above-entitled case to this court upon an agreed statement of facts, the declaration, the same being in debt, contained but one count, wherein the plaintiff alleged an indebtedness of the defendant to him of \$8,287.42 by force of the statute. This court by its opinion filed March 8, 1912, found that the defendant was not so indebted to the plaintiff, and ordered judgment to be entered in the superior court for the defendant for costs. Since the filing of said opinion the plaintiff, by agreement with the defendant, has moved to amend his declaration by adding thereto a count, in the nature of assumption, alleging that the said defendant promised and assumed to pay the plaintiff the sum of \$600 as compensation for his services as tax collector of the town of Warwick. And the plaintiff and defendant have further agreed that judgment be ordered in favor of the defendant for \$600 without costs.

The decision heretofore rendered by us in said case and the order directing the cause, with the decision of this court certified thereon, to be sent back to the superior court for Kent county, with direction to enter final judgment for the defendant for costs, are hereby vacated. The declaration may be amended as agreed upon by the parties. Under the declaration, as thus amended, upon the agreed statement of facts, the

plaintiff is entitled to recover the sum of \$600. Decision for the plaintiff for \$600 without costs.

It is ordered that the papers in the cause with the later decision of this court certified thereon be sent back to the superior court for Kent county, with direction to enter final judgment for the plaintiff for \$600 without costs.

BARAN v. SILVERMAN.

(Supreme Court of Rhode Island. May 27, 1912.)

1. TRIAL (§ 252*)—CIVIL ACTION—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for assault and battery, where plaintiff claimed that the act of the defendant was willful and intentional, growing out of an altercation, and defendant denied this and claimed that he unconsciously dropped the pail which struck plaintiff, an instruction as to defendant's liability in case of negligence was without support in the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

2. ASSAULT AND BATTERY (§ 3*)—CIVIL LIABILITY—WILLFUL OR INTENTIONAL ACT.

An action for assault and battery is based upon willful and intentional acts and not upon negligence.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 2; Dec. Dig. § 3.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by Abram Baran against Max Silverman. Judgment for plaintiff, and defendant excepts. Exceptions sustained, and case remitted to the Superior Court, with direction to grant a new trial.

George W. Bennett, Jr., of Providence, for plaintiff. Harold S. James and James J. McGovern, both of Providence, for defendant.

PARKHURST, J. This case was tried before a justice of the superior court, sitting in the county of Providence, with a jury, on March 21 and 22, 1911, and a verdict was returned in favor of the plaintiff in the sum of \$193. The action is in trespass for assault and battery, and the circumstances as shown by the evidence were as follows: Upon January 30, 1910, the plaintiff with his minor son visited a building upon Hilton street, in the city of Providence, customarily visited by Jewish people of the neighborhood for the purpose of taking baths. While there and engaged in the act of bathing his son, the plaintiff was suddenly struck in the ear by a pail, such as was commonly used by all the bathers, which pail came from the direction of the defendant. The defendant admitted that he had been using it. The plaintiff and defendant were strangers. They differ materially in their account of the occurrence. The plaintiff claims that the defendant, who was seated behind and above him at a dis-

tance of about three feet, while in the act of pouring cold water upon his head from the pail, which he held aloft, spilled some of the water upon the plaintiff's son; the plaintiff says that he thereupon remonstrated with the defendant, who became angered, insulted him, and finally threw the pail, striking the plaintiff in the ear, nearly severing the same. The plaintiff does not claim to have seen the pail thrown by the defendant, but did see it coming towards him, and the defendant's hand uplifted, and maintains that the conditions warranted him in concluding that the defendant did throw it. The defendant, although admitting that the pail which he was using was the one which caused the injury, maintains that he was not responsible, because, owing to the heat due to the presence of steam in the room, he was overcome, so that at the moment he raised the pail of cold water, intending to pour it upon his head for the purpose of relieving his condition, it slipped from his hands, through weakness, and that he was unaware that it fell upon the plaintiff, until after the injury had occurred.

[1] The case now comes before this court upon exception to certain parts of the charge of the superior court wherein the jury was charged as follows: "If, however, he raised this pail above his head and unconsciously—I wouldn't say unconsciously, but unintentionally—but carelessly allowed it to drop out of his hands and strike the plaintiff, he would be liable in that case, but he would only be liable for such damages as would fairly compensate the plaintiff for the damages sustained. * * * But if the injury occurred simply by a careless act on the part of the defendant, and he dropped the pail and struck the plaintiff when he had no intention of doing so, in that case it would not be proper to award any punitive damages, but simply such damages as would fairly compensate the plaintiff for the injury done. * * *" We are constrained to hold that these instructions were erroneous. The action was trespass for assault and battery. The plaintiff claimed that the act of the defendant was willful and intentional growing out of bad temper arising from an altercation; the defendant denied this and claimed that he dropped the pail unconsciously because he was faint from the heat of the steam; so that there was no evidence of negligence on the part of the defendant. This portion of the charge was therefore gratuitous and had no support in the evidence.

[2] Furthermore, the declaration, being in trespass for assault and battery, is based upon willful and intentional acts, and not upon negligence, and evidence of negligence upon the part of the defendant would have been inadmissible. If the plaintiff had intended to rely upon the negligence of the defendant as a cause of action, his proper form of action would have been trespass on

the case for negligence. *Fallon v. O'Brien*, 12 R. I. 518, 521, 34 Am. Rep. 713.

In *Krall v. Lull*, 49 Wis. 403, 5 N. W. 874, which was a civil action for assault and battery alleged to have been made by defendant by the discharge of a loaded pistol at the plaintiff, the court charged that if defendant did not assault the plaintiff, but the pistol, being in his hand for a lawful purpose, was discharged by careless handling or by accident, there could be no recovery in this action. The charge was held correct.

In *Razor v. Kinsey*, 55 Ill. App. 605, 614, it is said: "Willfulness, or intention on the part of the defendant to do the injury to the person of the party injured, is held to be essential to the establishment of liability of the defendant in an action of trespass for an assault and battery, and malice or wantonness besides, to an allowance for vindictive damages. There may be trespass to the person and liability for the actual damage, without intention to commit it, but not an assault and battery. For aught that this record discloses, the jury may have believed the testimony of the defendant and Curtis Razor, rather than that of the plaintiff, and found that all of the injuries to plaintiff were due solely to the collision of the carts, and that this was unintentional on the part of defendant; but, under the instructions given, that having put in motion and been in charge of the force that caused it, it was his misfortune that he was unable to control it, which he must bear, and pay the damage resulting to plaintiff, that the amount found was only a fair compensation for his injuries, and that, had they been instructed that there could be no rightful recovery in this action for such unintentional injury, they would have found for the defendant."

It would seem that the jury must have been governed in their finding by this improper instruction. They returned a verdict for the plaintiff for \$193. The testimony undisputed shows expenses for surgeon's and doctor's bills of about \$150, and loss of business due to enforced absence therefrom of about \$150. It would not be likely that the jury would award less than the actual damages proved, if they believed the plaintiff's story that he was willfully assaulted, and they might have awarded punitive damages in addition. On the other hand, it would appear that they must have taken the unauthorized view permitted by the court, in these instructions, that the injury was due to carelessness or negligence on the part of the defendant, and awarded much less than would have been proper if they acted upon the plaintiff's theory of the case, and much more than would have been proper, if they had believed the defendant's story.

Inasmuch as the jury were thus improperly instructed, we are unable to determine what weight they gave to the testimony which

was properly before them; but we are satisfied that their verdict is not properly responsive to the evidence and should be set aside.

The exceptions to the charge of the court as above set forth are therefore sustained, and the case is remitted to the superior court, with direction to grant a new trial.

OLDHAM v. OLDHAM.

(Supreme Court of Rhode Island. May 27, 1912.)

1. EVIDENCE (§ 353*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—SIGNATURE.

In an action involving the execution and effect of a certain document in terms assigning to defendant plaintiff's claim or right to the proceeds of a claim against a railroad and purporting to have been signed by plaintiff, the document was admissible, after plaintiff's refusal to admit his signature, as evidence tending to show such signature.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1404-1428, 1430, 1431; Dec. Dig. § 353.*]

2. APPEAL AND ERROR (§ 1015*)—VERDICT—DISAPPROVAL BY TRIAL JUDGE—CONCLUSIVENESS.

The action of the trial judge, in granting a new trial on the ground that the verdict was against the evidence, where it does not clearly appear to be erroneous, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

3. APPEAL AND ERROR (§ 209*)—NECESSITY OF OBJECTION—REQUEST FOR INSTRUCTION.

An exception urging an objection to the grant of a new trial, relating solely to the weight of the evidence, and not made the subject of any request to charge or in any way called to the attention of the court, cannot be considered on exceptions to the court's action in granting a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1300, 1302½, 1303; Dec. Dig. § 209.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by John A. Oldham against Edgar C. Oldham. Judgment for plaintiff, and defendant's motion for new trial granted, and plaintiff excepts. Exceptions overruled, and case remitted to the Superior Court for new trial in accordance with the decision of the trial justice.

John W. Hogan and Phillip S. Knauer, both of Providence, for plaintiff. James L. Jenks and Roscoe M. Dexter, both of Pawtucket, for defendant.

PER CURIAM. After verdict for the plaintiff, the justice of the superior court granted the defendant's motion for a new trial on the ground that the verdict is against the evidence and the weight thereof. Thereupon the plaintiff duly excepted and has brought his bill of exceptions duly allowed before this court, setting forth the several

exceptions to the rulings of the justice of the superior court, admitting certain testimony, and striking out certain testimony, and to the decision of the said justice in granting a new trial.

[1] The plaintiff now urges before this court only one exception as to the admission of evidence (No. 2), relating to the admission in evidence (see Tr. p. 43) of a certain document, dated August 2, 1905, being an assignment by the plaintiff to the defendant of the plaintiff's claim or right to the proceeds of a claim against the New York, New Haven & Hartford Railroad Company for damages caused by the death of his son Joseph A. Oldham, son of the plaintiff and brother of the defendant. The paper purported to be signed by the plaintiff, John A. Oldham, on the 2d day of August, 1905, and to be acknowledged by him before a notary public on the same day. It was presented to him when he was on the stand, and he refused to admit his signature and execution thereof. It was perfectly proper that the paper should be offered and admitted in evidence, not only to show his signature, but for what it purported to be on its face, and as a preliminary to other testimony from other witnesses as to its execution and delivery. We find no error in the admission of the document in evidence, and the exception thereto is overruled.

[2] The only other exceptions urged by the plaintiff's counsel (Nos. 4, 5) relate to the weight of the evidence, as it was to be considered by the justice of the superior court, on the motion for a new trial. We have carefully examined the testimony and the briefs and arguments of counsel, upon the question thus raised, as to whether the justice who tried the case with the jury and heard all the witnesses committed any error in granting a new trial. We think the case falls within the rule stated in *Noland v. Rhode Island Co.*, 30 R. I. 246, 74 Atl. 914. We do not find that it "clearly appears that such conclusion of the trial judge is erroneous." The testimony in the case at bar was of such a character that we cannot say that the trial judge erred in granting a new trial.

[3] As to the plaintiff's exception 5, urging the plaintiff's objection to the granting of a new trial on the ground that the defendant's claim of a gift from the plaintiff was, upon the evidence, inequitable and void in equity, and that the plaintiff can urge such equitable objection although not specifically pleaded, we do not find that this is so much an exception, based upon any ground of objection or exception taken at the trial to any ruling of the court, or to any charge to the jury, as it is an argument which was doubtless addressed to the jury and to the court below and has been urged before this court; but it relates solely to

the weight of the defendant's testimony as to his claim of a gift, in view of the relations by way of consanguinity, trust, etc., between the parties. As this question was not made the subject of any request to charge the jury, and was not called to their attention by the court, we cannot further consider it here.

Plaintiff's exceptions overruled, and case remitted to the superior court for a new trial in accordance with the decision of the justice who tried the case.

ZIEGLER v. THAYER.

(Supreme Court of Rhode Island. May 27, 1912.)

1. BANKRUPTCY (§ 57*)—"INSOLVENCY"—DETERMINATION OF INSOLVENCY—MARKET VALUE OF PROPERTY.

Under Bankruptcy Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3419), providing that a person shall be deemed "insolvent" when the aggregate of his property, exclusive of property conveyed with intent to defraud his creditors, shall not at a fair valuation be sufficient to pay his debts, the question whether a mortgage and assignment of book accounts by one to his wife were invalid on account of insolvency must be determined by a valuation of his property at its fair market value, rather than by any personal value to the bankrupt which he might place on it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69-71; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

2. BANKRUPTCY (§ 184*)—AGREEMENT TO SECURE—CONVEYANCES AFTER INSOLVENCY.

As under Gen. Laws 1909, c. 258, § 10, which provides that a mortgage of personalty shall not be valid as to the assignee in insolvency of the mortgagor until possession of the mortgaged property be delivered to and retained by the mortgagee, or the mortgage be duly recorded, a mortgage given at the time of a loan to a person who afterwards became bankrupt would not be valid against creditors without a compliance with the statute, and a mortgage and transfer of book accounts made after insolvency to secure a claim for money advanced theretofore under an agreement to secure could have no greater effect than an unrecorded mortgage, and could be avoided at the instance of the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Judge.

Petition by Edward H. Ziegler, trustee in bankruptcy, against Rachel A. Thayer. From a judgment for petitioner, respondent appeals. Affirmed and remanded for further proceedings.

Mendell W. Crane, of Providence, for appellant. Washington R. Prescott, of Providence, for appellee.

JOHNSON, J. This cause is before this court on appeal from a decree of the superior court in a cause in equity wherein the

complainant, as trustee in bankruptcy of the estate of Chester A. Thayer, prayed that a certain chattel mortgage and a deed of assignment of certain book accounts from the said Chester A. Thayer to the respondent, his wife, be set aside and the respondent ordered to deliver to the complainant all books, papers, and ledger cards and all other evidences of existence of said rights and credits and choses in action assigned to her as aforesaid, now in her hands and possession. The answer of the respondent admits that she is the wife of said Chester A. Thayer; that on the 18th day of November, 1910, the said Chester A. Thayer was duly adjudged a bankrupt by the District Court of the United States for the state of Rhode Island on an involuntary petition by his creditors, dated October 3, 1910, and duly filed in said court; that the complainant was duly elected trustee of the said bankrupt estate of said Chester A. Thayer by his creditors on the 18th day of January, 1911; that he has duly qualified as such trustee and has entered upon the execution of the duties of said trust; that on the 17th day of September, 1910, said Chester A. Thayer conveyed by chattel mortgage to said respondent certain goods and chattels described in said mortgage as of the value of \$1,000; that said conveyance was made to secure the payment of the sum of \$900 and was duly recorded as required by law; that on said 17th day of September the said Chester A. Thayer by deed of assignment assigned to said respondent certain rights and credits and choses in action due to him from various parties fully listed and described in said deed of assignment of the face value of \$3,000 to further secure said respondent for moneys which the respondent alleges and claims that her husband, said Chester A. Thayer, was owing to her at the date of said assignment and of said chattel mortgage. Said respondent admits that she has in her possession the books, papers, and ledger cards containing the accounts of persons, firms and corporations indebted to said Chester A. Thayer at the date of the assignment of said accounts to the respondent. Said respondent denies the following allegations in the bill of complaint: "Sixth. That there was no consideration for said mortgage and deed of assignment moving and passing at the time of the delivery of said papers by the said Chester A. Thayer to the respondent, from said respondent to said Chester A. Thayer; and the only consideration for said transaction was an alleged pre-existing debt due and owing to the respondent by said Chester A. Thayer. Seventh. That by said chattel mortgage and deed of assignment said Chester A. Thayer conveyed and mortgaged to the respondent the whole of his estate of which he was then seised and possessed, except certain household effects which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

were exempt from attachment. Eighth. That at the date of the delivery of said mortgage and assignment to the respondent by said Chester A. Thayer, the said Chester A. Thayer was involved in debt to a large amount, to wit, to the amount of several thousand dollars, besides the alleged indebtedness to the respondent; he was then insolvent and unable to pay his creditors; and said conveyances are inequitable and a fraud upon his other creditors and were made to defraud his general creditors, and to prefer his said wife as an alleged creditor over his other and general creditors." And said respondent, further answering, denies the allegations made in said bill that said Thayer did convey, as alleged, the whole of his estate, and denies that said Thayer was insolvent at the time of the alleged transfer. Said cause was heard in the superior court April 10, 1911, upon bill, answer, and proof, and on April 12, 1911, a decree was entered "that said chattel mortgage dated the 17th day of September, A. D. 1910, and said deed of assignment of the same date, given by said Chester A. Thayer to Rachel A. Thayer, be, and the same hereby are, set aside; and that the respondent be and she is hereby ordered to deliver to the petitioner all books, papers, and ledger cards, and evidences of said choses in action, assigned by said Chester A. Thayer to her the said Rachel A. Thayer as aforesaid; and that the respondent be and she is hereby ordered to account to the petitioner for all moneys collected by her or by her agent or attorney on account of any of said rights and credits." From this decree the respondent appealed, assigning as reasons therefor: "First, because said decree is wrong and erroneous in law and ought to be reversed and rendered in favor of the respondent. Second, because said decree is wrong in fact. Third, because said decree is against the law. Fourth, because said decree is against the evidence and the weight thereof. Fifth, because said superior court erred in not admitting certain evidence going to show the solvency of Chester A. Thayer. Sixth, because said superior court erred in not finding that there was present and adequate consideration for the transfer of property and assignment of accounts to said Rachel A. Thayer."

Upon the evidence allowed by the justice of the superior court, Chester A. Thayer was clearly insolvent upon September 17, 1910, the date of the mortgage and assignment to his wife. Respondent's counsel admits this, but claims that the justice erred in ruling out evidence, which he says would have proved Thayer to have been solvent upon said date.

[1] After testifying that on the date of the mortgage and assignment he owed less money than his schedules show as liabilities, Mr. Thayer was asked certain questions by counsel for respondent. On page 36 the record reads:

"Q. 3. Was the value of your tangible property on the date of the transfer to your wife, the value to you— The Court: The value to him. Q. 4. Was the value of his tangible property, was, the value to him not to others, was the value to him larger or smaller than your schedule value of the same property? The Court: Why do you put the question in that way? Mr. Crane: The purpose is this: The value of property to Mr. Thayer might be much more than it would be to me, or at the auction value, or to others. In arriving at a fair value of his property, the decisions are that he can put such value as is fair under the circumstances, not having in view an auction sale or a forced sale. The Court: That might be the rule as to market price rather than the value to him. He might have some very exaggerated opinion. It might be a very peculiar value to him. You cannot fix values that way." Questions followed asking the value to *him* to use in his business of his automobile, of the plans and specifications spoken of in the mortgage, of the accounts receivable, of his household furniture, and of his wearing apparel. Question 14 was as follows: "Did some of your property have a working value to you which would give you an income from the use of it, a larger income, larger than the average man, or the average purchaser of such property would get from the use of the same property after the same manner?" All the above questions were ruled out. Their exclusion was proper. The value of the property to Thayer was not the proper test of fair valuation. "Insolvency" is defined in section 1, subd. 15, of the Bankruptcy Act as follows: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Insolvency, under the definition contained in this section, turns on what is a fair valuation of the property. In *re Gilbert* (D. C.) 112 Fed. 951. "Fair valuation" has been held to be the present market value, and not the amount which might be realized from a forced sale of the property. *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666. It has been held that the valuation, for the test of solvency or insolvency upon an issue as to whether a chattel mortgage was preferential, must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy has intervened. *Butler Paper Co. v. Goembel*, 143 Fed. 295, 74 C. C. A. 433. In the case of *In re Hines* (D. C.) 144 Fed. 142, the court, in considering what constitutes a fair valuation, said: "As it respects property considered in a com-

mercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market valuation; that is, what the property will probably bring, or is worth, in the general market to-day, where everybody buys. It could not be what it is worth to one person or to another under special circumstances, or having special use for a particular article, but what it is worth as a marketable commodity at a given time with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale."

[2] The mortgage and transfer were given to secure the claim of Rachel A. Thayer for money advanced to Chester A. Thayer at various times from May to August, 1910, amounting in all to \$1,400.

Rachel A. Thayer testified: "Q. 5. What was the entire, the agreement between you and him as to these loans and security? A. It was agreed that I should give him money from time to time up to a certain amount, and that he would give me security for the same." She testified that he did not give her any notes for any of these loans, and that she kept account of them on a piece of paper; that each time she gave him any she would add that to the other.

It is not claimed that any consideration passed on the date of the execution of the mortgage and transfer. Chester A. Thayer testified: "Q. 62. Your wife loaned you certain money? A. Yes, sir. Q. 63. According to the testimony here of the preceding witness? A. Yes, sir. Q. 64. Was there or was there not an agreement with her, with regard to giving security? A. There was. * * * Q. 66. What was that agreement? A. That I was to give her security for money that she loaned me. Q. 67. Give the details of your entire agreement with her? A. She advanced me money at different times, and I was to give her security for the amount of money that she had advanced me. Q. 68. Were there any notes given, up to the time of the giving of the security? A. No, sir. Q. 69. Was your agreement as to giving security carried out on the 17th of September? A. It was."

We cannot believe that, while transfers of the bankrupt's property made within the period of four months before the bankruptcy may be avoided, such transfers can be rendered valid by reason of a parol agreement made prior to the commencement of said period. As the court said in *Re Dismal Swamp Contracting Co.* (D. C.) 135 Fed. 415, 417: "Once let it be understood that conveyances made within four months of bankruptcy can be successfully attacked, while those made in pursuance of a pre-existing bona fide agreement will be upheld, and the entire policy of the bankrupt law, in so far as it undertakes to specify the time within which preferences can and cannot be assailed, will be frustrated and destroyed. The door for fraud would be left wide open, and

creditors would never know when they were safe in dealing with the estates of their debtors. A condition, alike destructive of the interests of creditors and bankrupts, would be brought about, and a harvest for dishonest debtors afforded. The debtors knowing the circumstances under which they make the preferences, their general creditors to be affected thereby would be entirely at their mercy."

In the case of *In re Ronk* (D. C.) 111 Fed. 154, the court, at page 156, said: "It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors; and, if it did not create a valid lien, then, by the terms of the bankruptcy act, it cannot be enforced as a lien entitled to priority over other claims. It created no lien—nothing but a secret equity, possibly good as between mother and son, but certainly not valid and enforceable to the prejudice of the claims of creditors. The bankruptcy act embraces payments for the purpose of giving preferences, as well as the giving of securities for such purpose; and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed at the time it was contracted to pay the debt, without defalcation, on a specified day. The doctrine contended for by the mortgagee would necessarily invite and inevitably lead to the defeat of the bankruptcy act. It would be easy in every case, where it was desired to thwart the operation of the law and to give a preference to a relative or a friend, to make an agreement at the time the money was loaned or the credit given for a mortgage to be executed in the future. If the law can be thus evaded, it would be an open invitation to every person loaning money or giving credit to the bankrupt to enter into such a verbal agreement with him. Such agreements, if held valid, would create secret liens upon the bankrupt's property, and would enable him in every case to effect the very objects which it was the purpose of the bankruptcy act to prevent. Such agreements would undoubtedly be made in every case where the debtor wished to secure relatives and friends to the detriment of his other creditors."

The assignment as well as the mortgage is claimed to have been made as security for the prior loans. Gen. Laws R. I. 1909, c. 258, § 10, provides: "No mortgage of personal property hereafter made shall be valid as to the assignee in insolvency of the mortgagor, or any other person except the parties thereto and their executors and administrators, until possession of the mortgaged property be delivered to and retained by the mortgagee, or the said mortgage be recorded in the records of mortgages of personal property in the town or city where the mortgagor shall reside, if in this state; and if not in this state, then in the town where the property is at the time of making said mortgage;

which said recording or taking and retention of possession as aforesaid shall be made or taken within five days from the date of the signing thereof. * * * " A mortgage given at the time of the loan would not have availed against other creditors of Chester A. Thayer unless recorded in accordance with said statute. A parol agreement to give security could certainly have had no greater effect than a mortgage actually given, but not recorded as required by the statute. In *Re Ronk*, supra, the court cited a statute of Indiana, the case having arisen in said state, as follows: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." And said: "If the mortgage had been executed on November 14, 1900, and had not been recorded until March 29, 1901, manifestly it would have been invalid as against creditors. It is difficult to perceive how, in view of this statute, a secret claim or equity can be held to have been created by the verbal agreement, when a mortgage or assignment actually executed by the parties at the time, if unrecorded, would have been invalid as against creditors. It is apparent that it was the purpose of the Legislature to allow no valid claim, lien, or secret equity to be created on goods unless public disclosure was made either by delivery of the goods to the assignee or mortgagee and the retention thereof by him, or by recording the assignment or mortgage within 10 days. To hold otherwise would be to defeat the beneficial effect of the recording statute." Section 67, cl. "a" of the bankruptcy act provides: "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

The superior court did not err in not finding that there was present and adequate consideration for the transfer of property and assignment of accounts to said Rachel A. Thayer.

The appeal is dismissed. The decree below is affirmed, and the cause is remanded to the superior court for further proceedings.

SNOW v. SMITH et al.

(Supreme Court of Vermont. Bennington.
May 20, 1912.)

1. FIXTURES (§ 15*)—LESSOR AND LESSEE—TRADE FIXTURES.

Where a mining lessee erected buildings and placed machinery therein for the purpose of carrying on the mining operations, and the

buildings and machinery were fit for no other purpose, and their removal would not injure the freehold, they were trade fixtures and might be removed.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

2. FIXTURES (§ 15*)—REMOVAL—RIGHT TO COMPLAIN.

Where a mining lease made no provision that at its expiration the shaft should be covered, the lessor cannot complain of the removal of buildings which would leave the shaft uncovered, the buildings being trade fixtures.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

3. FIXTURES (§ 15*)—REMOVAL—RIGHT TO OBJECT.

As no landlord's lien exists, a lessor cannot prevent the removal of trade fixtures on the ground that he will otherwise be unable to collect the rent.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

4. FIXTURES (§ 15*)—REMOVAL—RIGHT TO OBJECT.

A mining lease for a long term of years made no provision that the buildings and machinery erected by the lessee should be subject to a lien in favor of the landlord. Long before the expiration of the term the lessee abandoned mining and attempted to remove the buildings which were trade fixtures. There was no showing of any fraud by the lessee. *Held*, that the lessor could not prevent the removal on the ground that he had an equitable lien thereon for future rent, for equitable liens have their foundations in contracts or in protection against fraud.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 23-29; Dec. Dig. § 15.*]

Appeal in Chancery, Bennington County; Wm. M. Taylor, Chancellor.

Bill by William H. Snow against Webster T. Smith and others. From a decree dismissing the bill, the orator appeals. Affirmed.

Argued before MUNSON, WATSON, HASELTON, and POWERS, JJ.

Charles A. Maurer and James K. Batchelder, for appellant. Bennett & Graves and D. A. Gullitinan, for appellees.

POWERS, J. In the fall of 1904, the orator leased to Harry T. Cushman for a term of 50 years a part of the pasture on his farm in Bennington. The lease was in writing, and, among other things, provided that the lessee might take and remove all ores and minerals lying in or upon the premises, that he might erect such buildings as might be necessary for the proper conduct of the business, that he should pay a certain rent as therein specified, and, after the first year, a certain sum per ton for all ore taken in excess of 150 tons, that he should deliver up the possession at the expiration of the term "without let or hindrance," and that, in case he should for a period of 30 days fail to perform any of his agreements as contained in the lease, the orator might forthwith "re-enter upon and repossess the premises." Cushman took possession under the lease and erected the buildings and in-

stalled the machinery, the removal of which the orator seeks by these proceedings to restrain. A shaft was sunk some 37 feet and from this, at various depths, drifts were extended in different directions. One of the buildings stands over this shaft, and it is in this building that the machinery is installed. The buildings are cheap, wooden structures, and they and the machinery were designed solely for mining purposes and were of little value for other purposes. All the machinery except a dryer can be removed without injury to itself or the building, and the buildings can be removed without material injury either to themselves or to the land.

[1] The defendants have succeeded to Cushman's rights under the lease. The orator says, and his statement is not disputed, though the master's report does not show it, that one installment of rent was due when this suit was begun, but it was not 30 days overdue when it was paid by the solicitor for the defendants, and no re-entry was attempted. When this suit was brought and the temporary injunction issued, the defendants were engaged in the removal of the buildings and machinery, and they admit that they do not intend to continue mining operations on the premises. Since these buildings and the machinery therein were placed upon the rented premises to advance the business for which the premises were leased, they must be held to be trade fixtures, and so removable by the tenant within the term. *Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342; *Conrad v. Saginaw Mining Co.*, 54 Mich. 249, 20 N. W. 39, 52 Am. Rep. 817.

It was said in *Wagner v. C. & T. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770, that the general principle involved in a determination of such questions is the distinction between the business which is carried on in or upon the premises and the premises themselves. That the former is personal in its nature, and articles that are merely accessory to the business and have been put on the premises for this purpose retain the personal character of the principal, to which they are subservient. But articles which have been annexed to the premises as accessory to the land, without regard to the business there carried on, become subservient to the realty and acquire its character. A leading case upon this subject is *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374. It is held therein that the question of the removability of fixtures erected by a tenant depends solely upon whether they were designed for the purposes of trade or not. This being so, the size, quality, and character of a building and the manner in which it is attached to the realty are of little or no consequence except as evidence bearing upon the purpose of its erection. That this property, both buildings and machinery, are

trade fixtures is, in effect, conceded by the orator. He denies, however, that they can be removed by the tenant, and bases his denial on two grounds: First, because he would suffer great and disproportionate damage from the removal of the building over the shaft, since his cattle would be exposed to the dangers incident to the hole thereby left unguarded. Second, because he would be left without any security for the rent as it accrues in the future, and that he therefore ought to be decreed to have an equitable lien on the property.

[2] The orator's first claim takes no note of the finding of the master that the buildings can be removed without material injury to the real estate. And we cannot say that this is not so, for the open shaft and its dangers are only the indirect result of the removal of the building. The removal itself cannot injure the land. The condition thereby exposed can be easily guarded against as shown by the report. These came from a legitimate use of the demised premises, both as to the sinking of the shaft and the removal of its covering erected by the orator's express permission, and, if the orator had wished to avoid this result, he should have stipulated against it in the lease.

[3] The orator's other claim is equally unsustainable. It may or may not be true that he will be unable to collect his rent in the future. The report does not show. It is not quite fair to say, as the orator does, that the defendants have abandoned the premises. They have stopped mining thereon, and that permanently, but there is no finding that they intend to abandon their rights. At any rate, we can establish no lien here, for neither the law nor the contract provides for one. We have no landlord's lien in this state.

[4] Equitable liens are recognized, but these, says Mr. Pomeroy, have their foundation "in contracts, express or implied, which deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels or securities, a certain fund, or the like." 3 Pom. Eq. § 1235. Here the buildings and machinery were not the subject-matter of any contract, express or implied. Again in *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332, it was said that to raise an equitable lien the aid of a court of equity must be requisite to the owner of the property on which an equitable lien is sought, so that he may be compelled to do equity, or there must be some element of fraud in the matter as a ground of equitable relief. Here the owner is not seeking the aid of the court of equity, nor can it be charged that he has been guilty of anything resembling fraud toward the orator.

Affirmed and remanded. All concur.

ROWELL, C. J., did not sit.

DEROSIA v. FERLAND.

(Supreme Court of Vermont. Franklin. May 14, 1912.)

1. PLEADING (§ 34*)—MASTER AND SERVANT (§ 39*)—CONSTRUCTION OF DECLARATION—EMPLOYMENT CONTRACT — ACTION FOR BREACH.

All parts of a pleading will, if the language permits, be so construed as to be consistent with each other; and the count of a declaration which stated that plaintiff was hired by defendant as a clerk and salesman and wrongfully discharged, as the result of which he sustained certain losses, and then stated that the total of the enumerated losses was due the plaintiff "on account of the said contract," made a claim for damages sustained by a breach of the contract, and not for pay for constructive services.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34;* Master and Servant, Cent. Dig. §§ 12, 45, 46; Dec. Dig. § 89.*]

2. ELECTION OF REMEDIES (§ 11*)—MISTAKE AS TO REMEDY.

A judgment against a discharged employé, in his action wherein he mistook his remedy, and sought to recover for constructive services after his discharge, was not a bar to a subsequent action for damages for breach of the employment contract; the pursuit of a remedy which does not exist being no bar in an action for pay for constructive services.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 14; Dec. Dig. § 11.*]

3. JUDGMENT (§ 950*) — RES JUDICATA — PLEADINGS.

A defendant cannot, in aid of his plea of res judicata, invoke former proceedings which he has not set out.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1804, 1805, 1807; Dec. Dig. § 950.*]

4. JUDGMENT (§ 562*)—RES JUDICATA.

A judgment, not purporting to be upon the merits, and merely stating that the plaintiff take nothing in respect to the debt mentioned in his declaration, where the declaration is for wages for constructive services subsequent to the plaintiff's discharge, is not a bar to a subsequent action by him for breach of his employment contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1009; Dec. Dig. § 562.*]

5. JUDGMENT (§ 656*)—DEMURRER—CONCLUSIVENESS.

Where each of defendant's pleas was directed to the whole declaration, the overruling of general and special demurrers to the pleas necessarily disposed of the question of the sufficiency of the declaration as against a general demurrer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1167; Dec. Dig. § 656.*]

Exceptions from Franklin County Court; E. L. Waterman, Judge.

Action by Thomas A. Derosia against Peter Ferland. From a judgment sustaining demurrers to the defendant's pleas, the defendant excepts. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

C. G. Austin & Sons, for plaintiff. D. W. Steele and F. S. Tupper, for defendant.

HASELTON, J. This is an action of special assumpsit in two counts. The defendant filed five pleas. The first three were respectively, the general issue, payment, and accord and satisfaction. No question with reference to these is brought to this court. The fourth plea sets out that the plaintiff cannot maintain this action, because he has elected a different remedy; and the fifth plea relies upon an estoppel by the judgment of this court. To each of the fourth and fifth pleas, the plaintiff demurred generally and specially. The demurrers were sustained, and the pleas adjudged insufficient. The defendant excepted, and the case was passed to this court before further proceedings.

[1] Before considering the pleas, the declaration will be examined. The first count sets up that the plaintiff was hired by the defendant to work as clerk and salesman in the defendant's store; that he was wrongfully discharged by the defendant; and that by reason of "the wrongful act of the defendant in so discharging him" he lost the value of his services and sustained various other losses. Following these allegations the plaintiff says that the total of the losses enumerated is due him "on account of the said contract." The defendant claims that in consequence of this latter phrase the plaintiff is seeking to recover for constructive services, and not damages for breach of contract. But the allegations are to be construed together, and so construed they base the right of recovery, not upon constructive service, which is not recognized in this state, as was held when these parties were formerly here, but upon damages claimed to have resulted from the wrongful discharge of the plaintiff by the defendant.

A pleader, if his language will permit, is supposed to have intended that the parts of a plea be consistent with each other, and they are to be construed with reference to each other; and the meaning of a phrase often depends upon the context. Royce v. Maloney, 58 Vt. 437, 445, 5 Atl. 395; Stevens v. Gibson, 69 Vt. 142, 145, 37 Atl. 244.

Applying this reasonable and approved rule, we think the first count in the declaration goes only for damages claimed to have been sustained by breach of the contract on the part of the defendant.

The second count is, as the defendant concedes, for the recovery of damages for the claimed breach of contract, and so the same cause of action is set out in both counts. Derosia v. Ferland, 83 Vt. 372, 76 Atl. 153, 28 L. R. A. (N. S.) 577, 138 Am. St. Rep. 1092, Ann. Cas. 1912A, 295.

[2] The defendant's fourth plea sets out the proceedings in the litigation, just referred to, between these parties, in which litigation judgment was rendered by this court in favor of the defendant, and relies on the doctrine of the election of remedies to de-

feat this suit. It appears from the plea that the plaintiff, before the bringing of this suit, had proceeded against the defendant on the contract here alleged, and that his declaration in that suit was in the common counts only, and that he sought in that suit to recover as for constructive service his wages subsequent to his discharge. The plea sets out that at the close of the evidence in the former case the defendant moved for a verdict, on the ground that the plaintiff could not recover for unearned wages under the common counts, "and that, if the plaintiff was entitled to recover any sum, it would only be by way of damages for breach of contract and upon a special declaration declaring upon the contract and breach thereof." This motion, as we have seen, was well grounded, and it shows that the plaintiff had not made an election between two available remedies, but that he had mistaken his remedy; and, as this court has recently said, "the pursuit of a remedy which does not exist is no bar." *Holbrook v. Quinlan Co.*, 84 Vt. 411, 80 Atl. 339. The *Holbrook* Case, and the cases therein cited, render discussion of this question superfluous. The plaintiff has here pursued the remedy which the defendant, by his fourth plea, pointed out as a true one, if he is entitled to recover at all.

[3, 4] The defendant, by his fifth plea, says that the plaintiff is precluded from saying that the defendant is liable for a breach of the claimed contract, on the ground that by a former judgment of this court "it was determined that the plaintiff should take nothing by his said writ in respect to the said debt in the plaintiff's declaration mentioned, and that the said defendant recover his costs, as by the record of said court appears." This plea does not, as does the fourth, set out the proceedings in the former suit. Doubtless nothing which is not set out by the defendant in the plea can be invoked by him in aid of it. But he cannot well complain if we look into the fourth plea for the record to which he appeals. Indeed, the fourth and fifth pleas appear to be intended by the pleader to be read together; for, while the other pleas are numerically separated, these are not. By looking into the record as set out in the fourth plea, we see, as has already been stated, that the former case did not raise the question of the right of the plaintiff to recover damages in an action for a breach of the claimed contract, and that so the judgment in that case is no bar to this action. But if it is not permissible, as against the pleader, to look into his fourth plea in considering his fifth, then it must be said that the plea of estoppel by judgment is insufficient, because it does not aver that the judgment was rendered upon the merits of the cause, but only that it was adjudged "that the plaintiff should take nothing

by his said writ in respect of the said debt in the plaintiff's declaration mentioned." *Dunklee v. Goodenough*, 63 Vt. 459, 21 Atl. 494.

The fourth and fifth pleas were both insufficient, and the demurrers thereto were rightfully sustained by the court.

[5] The defendant, however, insists that if the pleas were bad they were good enough to meet the declaration, which, he says, was also bad. Each plea was directed to the whole declaration; and the general and special demurrer to the pleas raised the question of the sufficiency of the declaration as against a general demurrer. But, by way of anticipation, we considered this question at the outset, and determined that the declaration is good.

Judgment affirmed, and cause remanded.

STEINBERG et ux. v. EAGAN.

[Supreme Court of Pennsylvania. Jan. 2, 1912.]

1. APPEAL AND ERROR (§ 722*)—REVIEW—ASSIGNMENTS OF ERROR.

Assignments of error should be limited to the important and controlling questions involved in the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.*]

2. PARTNERSHIP (§ 330*) — DISSOLUTION — ACCOUNTING—PARTNERSHIP DEBTS.

On a bill for partnership accounting, where it appeared that the assets were to go, on dissolution, to plaintiffs, if the defendants canceled the agreement of partnership, in awarding an accounting and referring the matter to an auditor, it was error to decree that the assets belonged to plaintiffs, as such a decree should not be made before payment of the partnership debts and costs of dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 787; Dec. Dig. § 330.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Jacob Steinberg and Katie Steinberg, his wife, against J. H. D. Eagan. Decree for complainants, and defendant appeals. Affirmed.

From the record it appeared that under the partnership articles the assets specified in the decree were to become the property of the plaintiffs if the defendant canceled the agreement. The court found as a fact that Eagan dissolved the partnership. The court entered a decree, the material portions of which were as follows:

"First. That a partnership existed between the said J. H. D. Eagan and the said Jacob Steinberg and Katie Steinberg, as provided in the articles of agreement attached to and made part of plaintiff's bill of complaint.

"Second. That the said partnership was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dissolved by the act of the defendant, J. H. D. Eagan, on the 13th day of July, 1910.

"Fourth. It is further decreed that all of the patents, equipment, unfilled orders on hand, stock of material, finished product, or product in process of completion, which belonged to the said partnership at the time of its dissolution, July 13, 1910, become the property of the plaintiffs, Jacob and Katie Steinberg, in the liquidation of the said partnership.

"Fifth. It is further decreed that C. W. Reamer, Esq., be and he is hereby appointed auditor, to state an accounting between the parties in accordance with the terms and conditions of the articles of agreement attached to plaintiffs' bill of complaint."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZSKER, JJ.

Andrew G. Smith, for appellant. E. E. Fulmer, for appellees.

ELKIN, J. This is a case in which counsel should be reminded that the unnecessary multiplication of assignments of error does not add strength to an appeal. The questions involved are simple and free from legal complications. There are 44 assignments, when 3 or 4 would have answered every legitimate purpose of the case. This practice is not to be encouraged, and we call attention to it now, so that counsel hereafter may exercise greater care in this respect.

[1] The errors assigned should go to the important and controlling questions involved in the controversy. The bill asks for an accounting, and this was decreed. The complaint is that an accounting was not only directed, but that the manner of making it was also decreed. It is true that in the fourth paragraph of the decree all patents, equipment, unfilled orders, materials, and finished product on hand or in process of completion, belonging to the partnership at the time of its dissolution, were adjudged to be the property of appellees. This order must be understood to have reference to property left after the payment of the partnership indebtedness.

[2] All of the partnership assets, without reference to which partner contributed the same, or from whence they may have been derived, are held subject to the payment of the partnership debts. Until the debts are paid, there are no assets for distribution. But, after payment of the indebtedness and the costs of dissolution are provided for, the property will be divided among the partners according to the terms of the partnership agreement. The auditor is to make an accounting in accordance with the terms of the articles of agreement made by the parties at the time the partnership was formed, and whatever property

is left after paying partnership debts and the costs of dissolution belongs to appellees, as stated in the fourth paragraph of the decree. But title to this property does not pass to appellees until all partnership debts and costs are paid and the business is finally wound up. The auditor will so understand his duty in making an accounting.

The decree will be modified to this extent. With the modification indicated, decree is affirmed; costs to be paid out of the partnership funds.

CITY OF PITTSBURGH v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. APPEAL AND ERROR (§ 193*)—PRESENTATION OF QUESTIONS IN LOWER COURT—RULINGS ON PLEADINGS.

In an action by a city against a street railway company for the cost of cleaning streets occupied by the company, insufficiency of the statement to disclose clearly the plaintiff's claim so as to enable defendant to prepare its defense should be raised by a demurrer or a rule for a bill of particulars and cannot be presented for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.*]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by a city against a street railway company for the cost of cleaning streets, where the affidavits of defense admitted that defendant had assumed such expense, imposed by the charters and franchises of the underlying companies, the admission of such charters in evidence did not harm defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

3. EVIDENCE (§ 222*)—ADMISSIONS—PLEADING.

Admissions by a party against interest, whether verbal or written, including admissions in affidavits of defense, are admissible to sustain or defeat the cause of action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 786, 800, 803-808; Dec. Dig. § 222.*]

4. STREET RAILROADS (§ 24*)—MAINTENANCE—OBLIGATION TO CLEAN STREETS—NECESSITY FOR NOTICE OR REQUEST.

Where a street railway company obtains municipal consent to operate a railroad upon the streets, it is chargeable with notice of its duty to keep the streets clean as required by an ordinance granting consent, and assumes this duty without further notice or request from the city.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.*]

5. TRIAL (§ 307*)—DELIBERATIONS OF JURY—TAKING PAPERS TO JURY ROOM.

In assumpsit for moneys due plaintiff, either or both parties may send out with the jury a calculation and statement of claim based on evidence produced, and such statements and calculations are not evidence, but are given to the jury simply to show the various items

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—18

and the manner in which the party arrived at his demand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 732-737; Dec. Dig. § 307.*]

6. APPEAL AND ERROR (§ 231*)—PRESENTING QUESTIONS IN TRIAL COURT—OBJECTIONS TO STATEMENT FOR JURY.

Where a party only files a general objection to a statement filed by his opponent in assumpsit to be sent out with the jury, he cannot on appeal dispute the items therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

7. APPEAL AND ERROR (§ 991*)—REVIEW—QUESTIONS OF FACT.

That the cost of cleaning streets shown by the evidence in an action by a city against a railroad company for such costs was not as large as set forth in exhibit attached to the statement, or that the system adopted by the city in cleaning the streets was alleged to be extravagant, did not require a reversal of the judgment for plaintiff; these being questions of fact for the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3896-3899, 3912, 3913; Dec. Dig. § 991.*]

8. STREET RAILROADS (§ 57*)—MAINTENANCE—CLEANING STREETS—ACTION FOR COST.

In an action against a street railroad for the cost of cleaning streets which should have been cleaned by defendant, where the companies underlying defendant obtained their right to the streets on the condition that they should keep them cleaned, and defendant conceded that on taking possession it assumed the duty and conditions relating to cleaning of streets imposed by the charters and franchises of the underlying companies, a verdict and judgment for plaintiff for the cost of cleaning the streets between the tracks and one foot on either side thereof in accordance with a general ordinance, instead of for the entire street from curb to curb, as required by some of the charters, should be sustained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 136-143; Dec. Dig. § 57.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by the City of Pittsburgh against the Pittsburgh Railways Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Edwin W. Smith and Wm. M. Robinson, for appellant. O. K. Robinson, C. A. O'Brien, and C. Elmer Bown, for appellee.

MESTREZAT, J. It would have been well if this case had been submitted to a referee. The voluminous record discloses the difficulty which a jury would have in dealing with the questions of fact submitted to them. For some reason, not apparent, it was thought best to try the case before a jury and let it consider the almost innumerable items contained in the plaintiff's claim and which had to be dealt with as matters of fact. The case was one peculiarly for a referee, and we are satisfied that counsel for both parties must be of that opinion now, if not prior to

the trial before the jury. The action was assumpsit brought by the city of Pittsburgh on July 22, 1907, to recover the cost of cleaning the streets of the city occupied by the tracks of the street railways operated by the defendant company during the annual periods ending January 31st in the years 1902 to 1907 inclusive. The claim of the city, as appears by the statement, is based upon the assumption by the defendant company of the obligations of the underlying companies owning the lines which it operated. All the underlying companies obtained their rights to use the streets of the city on condition that they should keep them clean, in some instances from curb to curb, and in others between the tracks and one foot outside thereof. On January 1, 1902, the Pittsburgh Railways Company, the defendant, became the successor of the traction companies and has since been operating the street railways in the city of Pittsburgh. It had previously secured control of the street railway lines not included in the two traction companies. The city, on February 25, 1890, enacted a general ordinance relating to the entry upon and use of its streets by street railway companies or by companies operating passenger or street railways and providing regulations pertaining thereto for the public convenience and safety. Prior to this ordinance, the obligations of the railway companies in the use and cleaning of the streets were imposed by special ordinances which granted the right to such companies to enter upon and use the streets. Some of these ordinances required the railway company to clean the streets from curb to curb. By paragraph 3 of section 1 of the ordinance of 1890, the company was required to clean the space within its tracks and one foot outside thereof, and by section 3, railway companies were prohibited from entering upon and using the streets until after they had procured the consent of councils, "by an ordinance other than this one, * * * granting such rights to such companies," and had accepted all the conditions and provisions of the ordinance of 1890. In 1895 the city organized a department for cleaning its streets, and thereafter this department cleaned the streets from curb to curb, including the part of the street between the street railway tracks and one foot outside thereof which, under the general ordinance of 1890, the defendant company was required to keep clean. This action was brought to recover the cost of cleaning the streets on which the defendant operated its street railway; but, under the instructions of the court, the city was permitted to recover only for cleaning that part of the streets lying between the tracks and one foot on either side thereof. The aggregate of the plaintiff's claim was \$704,946.40, alleged to be the cost of cleaning the streets for the five years ending January 31, 1907.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The case was tried before a jury and resulted in a verdict for the plaintiff for \$228,000. A motion was made for a new trial and also for judgment for the defendant non obstante veredicto. Both motions were overruled in elaborate opinions by the learned court below and judgment was entered on the verdict. From this judgment the defendant company has appealed.

There are 30 assignments of error supported by an elaborate argument of the learned counsel for the appellant company. Its contentions may be summarized as follows: (a) The statement of claim is insufficient in that it does not set forth in full the ordinances referred to in Exhibit A, or any contracts, agreements, or leases connecting the defendant with any of the companies named in the exhibit, and hence the ordinances were not admissible in evidence; (b) the ordinances relating to street railways subject to the general ordinance of 1890 were not admissible so far as they were not referred to in the exhibit; (c) the cost of expense of cleaning the streets shown by the evidence had no relation to the figures set forth in Exhibit B; (d) there could be no recovery without a prior demand on defendant to do the work, and it is not alleged that any demand was made; and (e) the system adopted in cleaning the streets was extravagant and the charges are excessive.

The statement avers that the defendant company, by reason of operating and controlling the street railways and traction systems, is responsible for the obligations and conditions attached to and forming a part of the charters and franchises of the underlying companies whose lines it operates. There is attached to the statement a schedule, marked "Exhibit A," which contains a reference to the acts of assembly and the ordinances authorizing the construction and operation of street car lines and relating to the duty of the railway and traction companies to clean the streets. It is averred that those companies neglected and refused to keep clean the streets traversed by the railway tracks, and the city had been obliged to do the work at a large expenditure of money, and that the defendant became liable for the moneys thus expended. There is also attached to the statement of demand a statement, marked "Exhibit B," showing the streets having railway tracks therein, alleging liability on the defendant for cleaning all the streets between the tracks and one foot outside thereof, and liability for cleaning certain specified streets from curb to curb. The statement shows the proportionate cost of the work of cleaning which the defendant should pay and the proportion of money expended by the plaintiff in maintaining the street cleaning department, for which, it is alleged, the defendant was liable. The statement further discloses the number of times the streets had been cleaned and the

total cost thereof, and avers that the cost and expenditure are reasonable and proper and what the services were worth.

[1] We think the statement, while not as definite as it should be, is sufficiently full and clear to advise the defendant of the particulars of the plaintiff's claim, and of what the defendant company would have to meet on the trial of the cause. The exhibits contain a reference to the various acts of assembly and city ordinances authorizing the construction and operation of the street car systems in the city now controlled by the defendant, and also a reference to the clauses in the acts and ordinances imposing the obligation to clean the streets, and setting forth in detail the work required to be done and cost thereof. The statement avers that the defendant was responsible for the obligations of the underlying companies, that those companies had not cleaned the streets, and that the city had to do the work. As suggested by the learned trial judge in his opinion discharging the rule for judgment n. o. v., "its (the defendant's) liability was averred, the streets upon which its tracks were laid were specified, and the responsibility under the general ordinance for all streets was distinctly affirmed." There was no demurrer to the statement nor request for a bill of particulars. The plea was non assumpsit. The court permitted a recovery only upon the obligations imposed by the general ordinance, thus excluding from the consideration of the jury liability alleged in the statement under special ordinances. No recovery was had for sweeping snow or for cleaning streets from curb to curb, or for expenses for maintaining the department. These were claimed in the statement, but were abandoned on the trial by the plaintiff, or the evidence supporting them was excluded.

Had the defendant company demurred in the first instance, it might have been difficult to sustain the statement. If deemed inadequate or insufficient under the practice act, or that it did not disclose clearly the plaintiff's claim so as to enable the company to prepare its defense, the proper way to raise these questions was by a demurrer or a rule for a bill of particulars. Having pleaded the general issue and filed an affidavit of defense to the merits of the plaintiff's claim which avers no defect in the statement, it is now too late to allege that the statement is insufficient in not setting out the claim in greater detail. The statement was sufficient, and the evidence offered was properly admitted.

[2] For the purpose of showing that the responsibilities which attached to various street railway companies under the general ordinance of 1890 and under the special ordinances set forth in Exhibit A had been assumed by the defendant company since 1902, the plaintiff offered in evidence para-

graph 1 of the affidavit of defense as follows: "That while it may not be true that the defendant is responsible for all of the obligations and conditions attached to and forming a part of the charters and franchises of the various companies whose lines defendant operates, the defendant is willing to admit that in so far as such obligations and conditions relate to the cleaning of streets in the city of Pittsburgh it has assumed the responsibility of such companies since the 1st day of January, 1902, at which time its operating contracts with the United Traction Company and the Consolidated Traction Company became effective." The plaintiff also offered in evidence for the purpose of showing an admission of liability on the part of certain traction systems, under the general ordinance of 1890, paragraph 2 of the affidavit of defense, which, in part, is as follows: "That nearly all the street cars are operated over routes in this city covered by certain traction systems, and that rights were granted to the traction companies operating these systems, subject to the general ordinance dated February 25, 1890, which provided that the streets should be kept clean and in repair between the tracks and one foot outside, and the defendant asserts that, in so far as it has any liability for the cleaning and repair of streets, it is under this traction ordinance or the general ordinance of the city of Pittsburgh, passed on the 25th day of February, 1890; that any act of assembly or other ordinance which has imposed any other duties of cleaning the streets or keeping them in repair has been abrogated and rendered of no effect by the passage of these later ordinances." Under the admissions in the affidavit, which are in evidence, the defendant concedes, as will be observed, that since January 1, 1902, it assumed the obligations and conditions which relate to the cleaning of streets within the city imposed by the charters and franchises of the underlying companies. It also appears by these admissions that the street cars are operated over routes in the city covered by traction systems, and that rights were granted to the traction companies operating these systems subject to the general ordinance of 1890, which "abrogated and rendered of no effect" the duty to clean streets imposed by any act of assembly or other ordinance. The plaintiff was therefore not required to show the charters and franchises of the underlying companies nor the contracts, agreements, or leases connecting the defendant with those companies. The affidavit admits that the charters of these underlying companies required them to keep the streets clean, as does also the general ordinance of 1890, and that the defendant assumed this obligation since January 1, 1902. In view of these admissions, it was immaterial, so far as showing the liability of the underlying companies to

clean the streets was concerned, whether the charters of those companies were put in evidence or not, and therefore their admission did the defendant no harm.

[3] The court properly admitted in evidence, on the plaintiff's offer, the two paragraphs of the affidavit of defense. They contained admissions which were adverse to the defense and tended to sustain the plaintiff's claim. A party may prove his claim by showing the voluntary admissions of his opponent, whenever and wherever made, and whether verbal or in writing. Admissions against interest are always admissible in the trial of a case to sustain or defeat a cause of action. At any time or under any circumstances, if the admission is voluntarily made, it may be given in evidence by the opposite party. Admissions in affidavits of defense are not an exception to the general rule. The purpose of an affidavit of defense is primarily to prevent a summary judgment; but it may become evidential by containing admissions or statements adverse to the party who made it. It is the uniform practice in this state for the plaintiff to offer any part or parts of an affidavit of defense which show admissions by his opponent sustaining the plaintiff's claim. He may offer those parts of the affidavit for the specific purpose of showing such admissions, and the offer and the evidence will be confined to the purpose. He is not required to offer the whole affidavit and is not bound by any part of the affidavit which he does not specifically offer, nor can the defendant use the other parts of the affidavit to relieve himself from supporting those averments by proof. Such parts only of the affidavits as are offered for the specific purpose are in evidence and to be considered by the jury.

[4] Paragraph 3 of the general ordinance of 1890 provides that a passenger street railway company "shall keep clean and maintain such pavement in good order, condition and repair so long as its tracks shall be used." The acceptance of this ordinance imposed upon street railway companies an absolute duty to clean that portion of the streets between its tracks and one foot outside thereof. The obligation is definite and mandatory. When a company obtains municipal consent to enter and operate a railway upon the streets of a city, it is charged with notice of its duty to keep the streets clean as required by the ordinance. It assumes the performance of this duty without further notice or request from the city. The ordinance itself is notice to the company that it must keep the streets clean. Notice of the necessity for the observance of the ordinance and of cleaning the streets is brought to its attention every day. It sees the municipality cleaning those parts of the streets which the ordinance requires the company to clean, and therefore there was no necessity for notice to the defendant company to per-

form its duty in this respect. He who assumes the performance of a fixed duty at a definite time voluntarily imposed cannot justify a neglect or failure on the ground of the absence of a subsequent request that he perform the duty. In other words, he need not be told to do what he already knows it is his duty to do. His failure to act under such circumstances imposes liability for the necessary consequences. There is no provision in the general ordinance of any special ordinance which requires the railway company to clean the streets after notice or on demand to do so. Nor is there any provision in the ordinance imposing a conditional duty on the railway company to clean the streets; on the contrary, the duty is unconditional and obligatory that the company "shall keep clean and maintain such pavement in good order, condition and repair so long as its tracks shall be used." The duty therefore was imperative, and the time of its performance was absolutely fixed. There is no merit whatever in the contention that a prior demand upon the defendant to clean the streets was a prerequisite to the right of the plaintiff to maintain this action.

This is not a claim for the cost of paving or repaving a street where a prior duty devolves upon the municipality of determining the character of the pavement and the time when it shall be laid. The municipal discretion in such matters must be first exercised before the party is required to perform the service. In such cases it is necessary that notice to act be given the party whose duty it is to pave the street. The cases cited by the appellant are of this character, and were determined upon facts which required a prior notice to impose responsibility upon the defendant company.

[5] We have held that it is the practice in this state to send out with the jury calculations and statements of a claim in the trial of a *scire facias*, in an action of replevin, and in an action of trespass for mesne profits. There has never been any doubt, and it has been ruled time and again, that in an action of assumpsit to recover moneys alleged to be due the plaintiff, either or both parties may send out with the jury a calculation and statement of claim based on evidence produced at the trial. It is everyday practice. In holding it proper in such cases to send out with the jury a "statement and set-off and calculations made of the same," Mr. Justice Gibson said, in *Frazier v. Funk*, 15 Serg. & R. 23, 27: "With reasonable caution on the part of the court, no unfairness can be practiced in sending out a paper such as this; of its consequences, no test is so good as experience, and that proves not only its fairness, but its great utility. Indeed, where accounts are submitted to a jury, it would be impossible to get along without it. It originated with mutual convenience and the agreement of parties; but it has prevailed so long and so uninter-

ruptedly, as to have grown to be a rule of practice, and as such we are not bound to disturb it." Such statements and calculations are not evidence, and in this case the court distinctly told the jury they must not be considered as such, but are simply given to the jury to show the several items and the manner by which the plaintiff arrived at his demand. Of course, every item in the claim must be proven to the satisfaction of the jury; otherwise it must be stricken from the claim and not allowed to go to the jury. When the plaintiff offers to send out his calculation or statement, if there is any objection, it must be submitted to the court, who will see that it contains no item which is not supported by evidence. It is not the duty of the court, however, to say that the evidence is not sufficient to support any item, but only to see that there is evidence which if believed by the jury will sustain the item.

[6] If the opposite party has any objection to the statement, it is his duty to call the attention of the court to the disputed items and ask that they be stricken out, and, if he fails to do so, and only files a general objection to the statement, we will not reverse. *Kline v. Gundrum*, 11 Pa. 242; *Terry v. Drabenstadt*, 68 Pa. 400. In the case in hand, it was obviously necessary that a statement of the plaintiff's claim, including the several items thereof and the tabulations and calculations, should be sent out with the jury. The defendant company was at liberty to send out a tabulated statement if it desired, and should have done so if it thought the plaintiff's statement erroneous in any particular. The trial occupied more than two weeks of the time of the court, and Exhibit B, showing the items of expenditure and other data, fill 100 pages of the paper-book. Without the statement the jury would have been at sea without compass or rudder. Twelve accountants, sitting as a jury, could not have intelligently considered and arrived at a correct conclusion without a tabulated statement showing the several items and a calculation showing the final result. The tabulations made by the plaintiff and sent out with the jury were all based upon testimony which had been delivered before the jury, and as the several items of the claim were stated, the jury was enabled to consider each item and to apply the evidence to it. The jury was admonished that the statement and tabulations were "merely claims of the plaintiff as to what the evidence shows, and unless you find that the evidence corresponds with them, both with respect to the time that was occupied, the number of men employed, when the work was done, and all those matters, you will disregard them." Under the circumstances, and considering that the verdict was, in the judgment of the trial court, very reasonable, being less than one-third of the claim, we can see no just ground for holding it error to send out the tabulations with the jury. Sending papers

and exhibits out with a jury is in the sound discretion of the court. *Little Schuylkill Nav., R. R. & Coal Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Ott v. Oyer*, 106 Pa. 6; *Person & Biegel v. Lipps*, 219 Pa. 99, 67 Atl. 1081.

[7] The fact that the cost of cleaning the streets as shown by the evidence was not as large as that set forth in Exhibit B, or that the system adopted in cleaning the streets was alleged to be extravagant and the charges excessive, do not require us to reverse the judgment. They are matters of which the trial court is far more able to judge intelligently than we are. It is seldom that a plaintiff proves an unliquidated demand in the exact amount set out in his statement, and he is not required to do so. He avers the amount of his claim, and it is the province of the jury to determine whether he has proved the whole or any part of it. Likewise, whether the system of cleaning the streets was extravagant and the charges excessive, as alleged, were matters for the jury under proper instructions by the court. They were necessarily questions of fact and could not be withdrawn from the jury.

[8] We have dealt with the controlling questions in the case without taking up serially the 30 assignments of error. The court committed no reversible error in the conduct of the trial, and we see no reason for interfering with the judgment. Under the pleadings, evidence, and admissions in the case, there is no doubt of the liability of the defendant company for the cost and expenses incurred by the city in cleaning the parts of the streets between the railway tracks and one foot outside thereof (the obligation imposed by the general ordinance), and the only real question in dispute on the trial was the amount of the expenses legally incurred by the city in doing the work assumed, but not performed, by the defendant company.

The judgment is affirmed.

BLISS v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

STREET RAILROADS (§ 98*)—OPERATION—ACTIONS FOR INJURIES—NONSUIT.

Where plaintiff was injured while walking on a trestle on defendant street railroad's private right of way, when he could easily have gotten to a place of safety before he was struck by stepping on crossbeams at either side of the track, and the motorman, on discovering that plaintiff was making no attempt to avoid a collision, did all he could to stop the car, a nonsuit was properly entered in plaintiff's action for the injuries.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of trespass for personal injuries by George W. Bliss against the Pittsburgh Rail-

ways Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

H. Fred Mercer, for appellant. Craig Smith, Clarence Burleigh, and William A. Challaner, for appellee.

FELL, C. J. The plaintiff was struck by a car of the defendant on a trestle on its private right of way. He sought to recover damages on the ground that he was injured by the wanton act of the motorman in not stopping the car. A nonsuit was entered for the reason, stated by the court, that the plaintiff could have easily got to a place of safety by stepping on crossbeams at either side of the track, and that the motorman did all he could to stop the car when he found the plaintiff was making no attempt to avoid a collision by doing what he would naturally be supposed to do.

There was no dispute at the trial in relation to the proposition, so strenuously and elaborately argued in behalf of the appellant, that there is a duty to a trespasser not to injure him intentionally or wantonly to expose him to danger. This was conceded, but it was denied that the facts proved, or any reasonable inference that could be drawn from them, would sustain a finding by the jury that the motorman acted recklessly or wantonly or failed in any duty owing a person who was unlawfully on the track.

At some distance from the place of the accident, the tracks of the defendant's electric railway are turned from a public road, in a rural district, onto its private right of way, that is fenced on either side and extends through open fields. On this way there was a trestle about 1,000 feet in length. The track was laid on cross-ties that rested on girders that were supported by crossbeams attached to heavy upright posts. The crossbeams were 18 or 20 feet apart and extended on either side $1\frac{1}{2}$ or 2 feet beyond the ends of the ties. The plaintiff and a companion turned from the public road and walked on the ties between the rails for their own convenience. They were willful and deliberate trespassers. When about halfway across the trestle, they heard a car approaching some 600 feet away, and signaled the motorman by raising their hands. He signaled them by waving his hand to get off at the sides, and afterwards slackened the speed of the car. One of the men moved to a place of safety on the end of a crossbeam; the other, the plaintiff, apparently did not attempt to get off the track until the car was near him, and then stepped on the end of a tie, but not down on the crossbeam. The car was stopped within 30 feet of the place of the accident. These facts did not indicate a wanton disregard of the plaintiff's safety by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

motorman. When he saw the men and knew that they saw him, they were 600 feet in front of his car, and not more than 10 feet from a cross-tie on which they could step. He signaled them to get off the track, and slowed the speed to enable them to do so. He saw one step to a place of safety, and he could reasonably assume that the other would do so. The most that could be said in criticism of his conduct is that he erred in assuming that the plaintiff would act with reasonable prudence.

The judgment is affirmed.

SIYUFY v. PENNSYLVANIA CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

CARRIERS (§ 94*) — FAILURE TO DELIVER FREIGHT—QUESTION FOR JURY.

Where plaintiff delivered to an initial carrier 19 cases of rugs, 1 consigned to a point on the line of the initial carrier and 18 to a point on the line of the terminal carrier, and only 17 were delivered at such point, and two employees of the initial carrier testified that 17 cases only were delivered at the point on the terminal line, and that the word "eighteen" in the bill of lading was a mistake, the question is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-396, 456; Dec. Dig. § 94.*]

Elkin, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Action by G. Siyufy against the Pennsylvania Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Gordon Fisher, for appellant. William A. Wilson, for appellee.

MESTREZAT, J. The plaintiff is a dealer in oriental rugs. On July 8, 1908, he delivered at the freight station of the Toledo & Ohio Railway at Findlay, Ohio, certain cases of rugs, 1 to be shipped to New York and the others to Mansfield, Ohio. A bill of lading or receipt for 18 cases of rugs was delivered to the shipper, by which the Railway Company agreed to carry the goods to Mansfield, if on its road, otherwise to deliver them to another carrier on the route to said destination. The rugs were placed in a car which was transferred at Dunkirk, Ohio, to the defendant company, the connecting carrier, which took the car over its own line to Mansfield, the destination of all the cases except the one consigned to New York. That case was taken from the car at Dunkirk and its transportation was continued over the initial carrier's line to New York. The defendant gave notice to the consignee of the arrival of the goods at Mansfield. It appears on the notice that

18 cases of rugs were shipped at Findlay for Mansfield, but the notice directed attention to the fact that the consignment was 1 case short on arrival at Mansfield, there being only 17 cases. The plaintiff alleges that he delivered 19 cases of rugs to the initial carrier at Findlay, and that 1 case was to be shipped to New York and 18 cases to Mansfield. The defendant company having delivered but 17 cases and refusing to account for the other case, the plaintiff brought this action of assumpsit to recover damages for the loss of the case which was not delivered. The defense was that but 18 cases were delivered to the carrier at Findlay, 17 of which were to be shipped to Mansfield and 1 to New York. The learned court below submitted the case to the jury, which returned a verdict for the plaintiff. No motion for a new trial was made, but the defendant moved for judgment non obstante veredicto which was refused. Judgment having been entered on the verdict, the defendant has taken this appeal.

The assignments allege error in the court in not directing a verdict for the defendant company, and subsequently in refusing to enter judgment for the defendant non obstante veredicto. The position of the defendant company, as stated by its counsel, is that, under the circumstances disclosed on the trial, the presumption that the loss occurred on the company's line was so decisively met by its evidence as to shift the burden of proof, and that the plaintiff did not meet the burden thus shifted to him, and therefore the court should have directed a verdict for the defendant. We do not regard this position as tenable. The case, as tried, resolved itself into the single question of fact whether the plaintiff had delivered to the initial carrier at Findlay 17 or 18 cases of rugs to be transported to Mansfield. If 18 cases were received by the initial carrier at Findlay for shipment to Mansfield to be carried over its own line and the defendant's line, the subsequent failure of the defendant to deliver the 18 cases cast the burden upon it to account for the failure to make the delivery of all the cases to the consignee at Mansfield. Under the circumstances, a presumption arose that the loss occurred on the defendant company's line. It is not alleged that all the rugs received by the initial carrier for shipment to Mansfield were not delivered to the defendant at Dunkirk to complete the transportation. The delivery of the rugs to the initial carrier, and the failure of the connecting carrier to deliver them at their destination, raised the presumption of negligence on the part of the defendant company which it was called upon to rebut. It made the attempt to rebut the presumption by showing that only 17 cases of rugs had been delivered to the initial carrier at Findlay for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

transportation to Mansfield. In no other way did the defendant attempt to meet the presumption of negligence arising from the failure to deliver the case of rugs. It is apparent, therefore, that whether the presumption of the defendant's negligence was rebutted or not turned upon the disputed fact whether the rugs were delivered, as alleged by the plaintiff, to the initial carrier at Findlay. Under the evidence offered, it is manifest that the court could not have declared that the presumption was conclusively rebutted, and directed a verdict for the defendant. The plaintiff testified clearly and distinctly that he had delivered 18 cases to be shipped to Mansfield. He was corroborated by the bill of lading or receipt of the defendant company's billing clerk acknowledging the receipt of 18 cases to be shipped to Mansfield. The notice given by the defendant company to the consignee at Mansfield while noting a case short stated that 18 cases had been delivered to the initial carrier at Findlay for shipment. This evidence clearly made out a case which the learned court was required to submit to the jury. The facts as thus proven raised a presumption of negligence on the part of the defendant company.

The billing clerk and the checking clerk of the initial carrier testified for the defendant. These witnesses denied that 18 cases of rugs had been delivered at Findlay for shipment to Mansfield, or that that number of cases had been shipped to that destination. They further denied that 18 cases of rugs were placed in the car for shipment to Mansfield. They testified that they counted the number of cases that were delivered originally to the initial carrier at Findlay and that in all they only numbered 18, and 1 of the cases was to be shipped to New York and 17 to Mansfield. The billing clerk further testified that after the cases had all been delivered he counted them and made out a bill of lading originally for 17 cases to be shipped to Mansfield and 1 case to New York, but, there being some dissatisfaction on the part of the plaintiff by reason of freight charges, he made out another bill of lading in which the rate was reduced and in which the number of cases to be shipped to Mansfield was erroneously stated to be 18 instead of 17. The defendant claims that the testimony of these two witnesses show that but 17 cases of rugs were received for shipment to Mansfield, and explains how the error in the bill of lading occurred. But in view of the plaintiff's evidence it would have been error for the learned court below to have instructed the jury that the testimony of these two witnesses conclusively showed that but 17 cases of rugs had been delivered to the initial carrier for transportation, and that therefore the verdict should be for the defendant. The plain-

tiff made out a case for the jury by his own testimony and the bill of lading issued by the initial carrier. This raised the presumption which the defendant had to meet. The attempt to meet it was solely by the introduction of oral testimony which had to be submitted for the consideration of the jury. The credibility of the witnesses was for the jury, and not for the court. Whether the defendant met and overcome the plaintiff's testimony as to the disputed fact of delivery of the rugs to the carrier at Mansfield was a question clearly within the province of the jury. If it was decided by that body in favor of the defendant, there was no delivery to the initial carrier of the missing case of rugs, and, upon the failure of the connecting carrier to deliver it at the destination, there was no presumption of negligence on the part of the defendant which would impose liability in this case. If on the other hand the jury found that the missing case was delivered to the initial carrier to be shipped under the bill of lading to Mansfield, and the connecting carrier did not deliver it to the consignee, there arose a presumption of negligence on the part of the defendant which was not rebutted, and the plaintiff was entitled to recover. The single question of fact, determinative of the case, was for the jury, and the learned trial judge was right in refusing to enter judgment for the defendant, notwithstanding the verdict.

The judgment is affirmed.

ELKIN, J., dissents.

In re WALLACE'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

WILLS (§ 821*) — CONSTRUCTION—LEGACIES CHARGED ON REAL ESTATE.

Testator gave all his personal and real estate to his wife, and expressed a desire that certain money legacies should be paid out of the estate, and gave the balance of his estate and a share in his business to his wife. *Held*, that the real estate devise to the wife was not charged with the money legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the Estate of John J. Wallace. From a decree dismissing the petition to charge legacies on land, John J. Wallace and others appeal. *Affirmed*.

Miller, J., filed the following opinion in the court below:

"This is a proceeding on petition and answer to determine the status of certain legacies and the liability of testator's land to be charged therewith.

"John J. Wallace, testator, died July 21, 1907, leaving to survive him a widow, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

no children nor father or mother; his nearest blood relations are a brother and the latter's five children, also the children of a deceased sister; this sister died after the decedent, testate, appointing decedent's brother as guardian and trustee for her children.

"Testator's will is as follows: 'Pittsburgh, Pa., November 13, 1908. I, John J. Wallace, of 507 Winfield St., City of Pittsburgh, county of Allegheny, state of Pennsylvania, do hereby declare this as my last will and testament. Being in sound and perfect health and desirous of arranging my worldly affairs, I hereby will and bequeath as follows: All household goods, furniture, etc., all my personal jewelry, all monies, all stocks now held in my name, all real estate that I own, or have interest in at the time of my departure from this life, to my dear wife Maggie J. Trussell Wallace, who always has been a kind and loving wife and faithful companion, and I know that she will carry out my wishes as talked over between us. I desire that my sister Mrs. Agnes W. Green, shall have (\$10,000) ten thousand dollars out of my estate, to my nephews Orlando Green and Wallace Green, her sons (\$1,000) one thousand each and Mrs. Maggie Wallace, my wife, is to be their guardian. To James H. Wallace children (my brother's children) Rheams (\$5,000) five thousand dollars, Margaret, Elizabeth, Ruth and James H., Jr. (\$1,000) one thousand each, to be given to their father and mother for them. Balance of my estate and share in business to be given to my wife Maggie. [Signed] John J. Wallace. Witnesses: S. C. Moran, T. O'Carroll.'

"The executrix's account of the personal estate of testator at No. 104 March term, 1910, including the decedent's interest in the partnership business with his brother, under his father's will, shows no distribution to the petitioning legatees; there is no personal estate from which these legacies can be paid. The only estate remaining is testator's undivided one-half interest in a lot and business building thereon, situated on Liberty avenue, this city, which interest is valued at \$75,000.

"The bequests to the widow of household goods, furniture, jewelry, moneys, stocks, and real estate are specific and absolute. Having thus given her all his real estate, he expresses a desire that the general legacies shall be paid out of his estate, not out of what he had previously given her. This remaining estate not devised was his interest in the partnership; it is what he had reference to in the language 'balance of my estate and share in business' after the legacies were paid therefrom, what was left should in addition go to his widow; this does not change the absolute devise to her of the estate previously given; these leg-

acies were to be paid, if binding, out of the balance of his estate not otherwise given. The devise of the real estate to the widow vested in her as a purchaser; her legacy is preferred over general legacies (University of Pennsylvania's Appeal, 97 Pa. 187); she is the first taker, the principal object of his bounty (Watson v. Smith, 210 Pa. 190, 59 Atl. 988), taking under the will in lieu of her statutory rights; she stands on an equity superior even to that of a child (Finney's Appeal, 113 Pa. 11, 4 Atl. 60); the devise to her does not abate with other general legacies (Reed v. Reed, 9 Watts, 263).

"Even if there were doubt as to the standing of these general legacies, and conceding that payment thereof could be enforced out of personalty, they are not charges against the real estate devised to the widow. Primarily, general legacies are payable out of the personalty; only express language or necessary implication charges them upon the land (Shenk v. Shenk, 150 Pa. 521, 24 Atl. 680); a mere direction that a devisee shall pay a legacy does not create a charge on the land (Cable's Appeal, 91 Pa. 327); deficiency of personal assets does not create an inference of the intention to charge the real estate with payment (Heathcote's Estate, 209 Pa. 522, 58 Atl. 888); there is no direction to sell, no necessity to sell for the purpose of carrying out the binding provision of the will, nor such a blending of personalty and real estate as to indicate an intention to charge the real estate (Duvall's Estate, 146 Pa. 176, 23 Atl. 231). The petition must be dismissed."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Smith H. Shannon, for appellants. John M. Freeman, D. T. Watson, and Ernest C. Irwin, for appellee.

PER CURIAM. The decree is affirmed on the opinion of Judge Miller.

MOORE et al. v. THOMAS MOORE DISTILLING CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. RECEIVERS (§ 133*)—PROCEEDINGS—ANSWER TO RULE TO SHOW CAUSE.

The refusal to permit a party who has accepted notice before return day, of a rule to show cause why a receiver should not make a private sale, to file an answer 21 days after the return day nunc pro tunc as of the return day, will not be reversed where no explanation or excuse was offered for the delay.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 229; Dec. Dig. § 133.*]

2. APPEAL AND ERROR (§ 956*)—REVIEW—DISCRETION OF TRIAL COURT.

A ruling on an application for extension of time in which to plead or answer, being in the discretion of the trial court, will not be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reversed in the absence of gross abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3810, 3891; Dec. Dig. § 956.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by C. P. Moore and others against the Thomas Moore Distilling Company for a receiver. From an order refusing leave to file an answer nunc pro tunc to a rule why the receiver should not make a private sale, the bank of Pittsburgh appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Charles B. Prichard and Blakeley & Calvert, for appellant. W. B. Rodgers, for appellee.

PER CURIAM. The argument on behalf of the appellant has taken a much wider range than is called for by the single question raised by the appeal. The only assignment of error based on an exception relates to the refusal of the court to allow an answer to be filed nunc pro tunc to a rule to show cause, 21 days after the return day of the rule.

[1] The receiver of an insolvent distilling company was authorized by the court to sell its real estate, but was unable to obtain a satisfactory price. He petitioned the court, setting out that he had an offer for all the property of the company, real and personal, which he had submitted at a meeting attended by 80 per cent. of the creditors, all of whom favored its acceptance; that it was impracticable to sell the real estate separated from the personal property; that a part of the latter consisted of 9,287 barrels of whisky, for which the company had issued warehouse receipts, and in many instances duplicate receipts, thereby placing the title to the whisky in dispute. On this petition a rule was granted on all persons holding warehouse receipts to show cause why a private sale of the whisky, together with the real estate, machinery, etc., should not be made on the terms offered. The rule was granted January 24, 1911, returnable February 4, 1911, and notice of it was accepted by the attorneys of the appellant on January 28th. On February 25th, when the cause came on to be heard, the appellant asked leave to file an answer nunc pro tunc as of February 4th, the return day for the rule. No explanation or excuse was offered for the delay and leave was refused. To this ruling an exception was taken; no exception was taken to the order of sale.

[2] The allowance or refusal to allow an extension of time in which to plead or answer is a matter within the discretion of the court in which the proceeding is pending. It

is a power indispensable to the proper conduct of the business of the court, and nothing short of gross abuse would warrant a reversal of its order. *Holland v. White*, 120 Pa. 228, 13 Atl. 782, 783. In this case the discretion of the court appears to have been wisely exercised. The appellant had ample time in which to answer and no excuse for its default was offered. The interest of the creditors required prompt action by the receiver and the order of sale preserved any rights the appellant had.

The order is affirmed at the cost of the appellant.

McGONNELL v. PITTSBURGH RYS. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS.

Where the appellant assigns an entire charge as inadequate, he should indicate in his specifications of error wherein it is deficient, so that attention may be directed to the particular points he desires to make.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

2. TRIAL (§ 206*)—INSTRUCTIONS—RULES OF EVIDENCE.

In an accident case, where the testimony of medical experts is conflicting, the trial judge should call the jury's attention to the conflict and instruct them to reconcile the contradictions, and as to what was their duty if they could not do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 500; Dec. Dig. § 206.*]

3. DAMAGES (§ 216*)—ASSESSMENT—INSTRUCTIONS.

In a personal injury case, it is error for the trial judge to instruct that plaintiff is entitled to compensation by way of damages for delay and that it might be less than 6 per cent. or it might be any per cent. the jury would say was right.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. § 216.*]

4. DAMAGES (§ 225*)—INTEREST (§ 31*)—ASSESSMENT.

The damages in a personal injury action are assessed as of the date of the trial and not of the injury, and there can be no general compensation for delay, and such compensation should never be at a higher rate than 6 per cent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 567; Dec. Dig. § 225.* Interest, Cent. Dig. §§ 64-67; Dec. Dig. § 31.*]

5. DAMAGES (§ 173*)—ASSESSMENT—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries, testimony showing wages paid to a servant employed to perform necessary work for plaintiff, which she did for herself before the injury, is admissible, and proof of her diminution of earning power need not be clear and indubitable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of trespass for personal injuries by Mary McGonnell, individually and as executrix of the estate of John McGonnell, against

the Pittsburgh Railways Company. From a judgment for plaintiff, defendant appeals. Reversed with a venire facias de novo.

At the trial the plaintiff was permitted under objection and exception to prove her loss of earning power by showing that she had to employ more servants after her accident than before, inasmuch as she was not able to do a certain amount of work in her occupation as a keeper of a hotel or boarding house.

The court charged in part as follows:

"She is capable of earning, and she does not claim she is not, but she says she cannot do certain things that she used to do before, and that she is obliged to hire help. As throwing some light upon the value of her services, which she claims to have lost, she was permitted to testify to the value of the service of servants who had supplied her place. Now that is not the measure, what she has to pay some one, but it is evidence for you to take into consideration, if you find a verdict here, in arriving at the value of her labor. Whether that would be the full amount, or less, depends on how much of her service was lost, and as I say, I do not think she lost all of her service by any means.

"The verdict is always the present value, so far as the future losses are concerned, and you know perfectly well that it is worth more to a man to get \$100 to-day than it is to get \$1 a day for 100 days. That is a matter that always must be considered, and where money has been due for some time the jury may add, for its retention, compensation by way of damages for the delay, not interest as such. Perhaps several of you were on the jury the other day where the verdict said 'and interest,' and I was obliged to have that word 'interest' changed. If it happened to have said 'damages at so much per cent,' I guess it would have been all right. It might be less than 6 per cent.; it might be any per cent. that the jury would say was right. While 6 per cent. is the legal rate, money is sometimes not worth 6 per cent. You cannot always get it in any safe investment. For that reason the law allows the jury to fix it."

Verdict and judgment for estate of John McGonnell for \$500, and for Mary McGonnell for \$6,000. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Walter M. Lindsay, Clarence Burleigh, and William A. Challener, for appellant. Rody P. Marshall and Thomas M. Marshall, for appellee.

MOSCHZISKER, J. This was an action brought by John McGonnell and Mary, his wife, to recover for personal injuries to the latter. John died while the suit was pending, and it was continued by the widow on her own behalf and as executrix of the estate

of her deceased husband. The jury rendered a verdict in the sum of \$500 for the estate of John McGonnell, and one of \$6,000 for Mary McGonnell. Judgments were entered thereon, and the defendant has appealed.

[1] Where the appellant assigns an entire charge as inadequate, he should indicate in his specification of error wherein it is deficient, so that attention may be directed to the particular points he desires to make. This course was not pursued in the present case.

[2] In his argument, however, the appellant suggests that the charge failed to make any reference to the testimony of the medical experts, and urges that it was the duty of the trial judge to explain the nature of such testimony and the effect which should be given to it; that the jury's attention should have been called to the conflict in the testimony of these experts; that they should have been instructed to reconcile the contradictions, and as to what their duty was in case they could not do so. While these criticisms are justifiable, since no special instructions were requested, we might not reverse on them alone; but as there is at least one other error, which necessitates a retrial, we sustain the third assignment.

[3, 4] Plain error was committed in saying to the jury that the plaintiff was entitled to "compensation by way of damages for delay," and that "it might be less than 6 per cent.; it might be any per cent. the jury would say was right. * * *" In a personal injury case the damages are assessed as of the date of the trial and not of the injury. Hence there can be no general compensation for delay. 1 Sedgwick on Damages (8th Ed.) § 320; Pittsburgh Southern Ry. Co. v. Taylor, 104 Pa. 306, 317, 49 Am. Rep. 580; Richards v. Citizens' Natural Gas Co., 180 Pa. 37, 18 Atl. 600. Furthermore such compensation can never be at a higher rate than 6 per cent. The fourth assignment is sustained.

[5] It appears that for some years prior to her injury the plaintiff, Mary McGonnell, had kept a hotel at Atlantic City, N. J., and that she has since continued in the same business but changed her location to McKees Rocks, Allegheny county, in this state. While her former place differed from the present one in size and character, the occupation pursued by her is essentially the same. The first assignment complains of evidence introduced to show wages paid by the plaintiff to servants at her new hotel, who were engaged to do work which prior to the accident at her old place of business, she had been able to accomplish herself. Testimony showing wages paid to a servant employed to perform necessary work for a plaintiff, which before her injury she did herself, is always admissible (Willis v. Traction Co., 189 Pa. 430, 42 Atl. 1); and proof relied upon to show diminution of earning power need not

be clear and indubitable. *Simpson v. Railroad Co.*, 210 Pa. 101, 104, 59 Atl. 693. The testimony called to our attention is so vague and uncertain that no satisfactory conclusion concerning a definite actual loss could be based thereon, and it would be of little aid for any purpose; but we see no error in its admission. The only just criticism that can be aimed at the abstract from the charge covered by the second assignment is that in dealing with this testimony the trial judge failed to call attention to its vague and uncertain quality. Neither of these assignments is sustained.

The judgment is reversed with a venire facias de novo.

THOMPSON v. HAZELWOOD SAVINGS & TRUST CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. BANKS AND BANKING (§ 133*)—DEPOSITS—RECOVERY BY DEPOSITOR.

Notwithstanding the printed regulation in a deposit book issued by a bank that the deposit could only be withdrawn on four months' notice, the bank may show an agreement contemporaneous with the deposit that the depositor would leave the whole deposit in the bank till the note of a corporation of which he was president was paid in full, and on proof of such agreement by the evidence of two witnesses, a verdict and judgment for the bank, in an action by the depositor to recover the deposit after four months' notice, will be sustained.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 839-852; Dec. Dig. § 183.*]

2. BANKS AND BANKING (§ 186*)—DEPOSITS—LIEN OF BANK.

An agreement that a bank deposit should remain in the bank till a note of a corporation of which the depositor was president should be paid amounted to a pledge and gave the bank a lien on the deposit till the note should be paid in full.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 853-874; Dec. Dig. § 186.*]

3. BANKS AND BANKING (§ 133*)—DEPOSITS—COLLATERAL AGREEMENT—CONSIDERATION.

An agreement by a depositor to permit his deposit to remain in the bank till the note of a corporation of which he was president should be paid, if the bank would grant a renewal of the note, was supported by sufficient consideration.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 839-852; Dec. Dig. § 183.*]

4. FRAUDS, STATUTE OF (§ 23*)—COLLATERAL AGREEMENT—BANKING DEPOSIT.

An oral agreement by a bank depositor to permit his deposit to remain till a corporation of which he was president should pay its note in full was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

5. BANKS AND BANKING (§ 133*)—DEPOSITS—COLLATERAL AGREEMENT—CERTAINTY.

An agreement by a depositor to permit his deposit to remain in the bank till the note of

a corporation of which he was president should be paid, the note being for a fixed period, was not void for uncertainty.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 839-852; Dec. Dig. § 183.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of assumpsit by Frank T. Thompson against the Hazelwood Savings & Trust Company to recover the amount of a deposit. From a judgment for defendant, plaintiff appeals. Affirmed.

The facts are stated in the opinion of the Supreme Court.

Plaintiff presented the following points:

"(1) The agreement that defendant alleges the plaintiff, Thompson, made on October 15, 1907, when he made the \$10,000 deposit, viz., that he would leave it in the trust company in the savings department until the note of the Pennsylvania Bed Company was paid, is an agreement to answer for the default of another, and under the law is required to be evidenced by writing, and cannot be proved by good oath. There is no evidence in writing of this agreement. There is no legal proof of this agreement, and the verdict must therefore be for the plaintiff. Answer: Refused.

"(2) Under all the evidence the verdict must be for the plaintiff. Answer: Refused."

The court charged in part as follows: "The contention is—and there is where the dispute is too—that the deposit was made upon terms different from those set forth in the bank book, which was delivered to the plaintiff, namely, the defendant's contention is that he made that deposit upon the oral promise, given at the time the deposit was made, that the money should remain in the bank or trust company until that note was paid. And that is the question for you to determine in this case. Upon your determination of that question your verdict will be, whether in favor of the plaintiff or in favor of the defendant."

Verdict and judgment for defendant. Plaintiff appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John P. Hunter, Walter Lyon, G. C. Lewis, and R. H. Jackson, for appellant. John C. Bane and S. Harvey Thompson, for appellee.

MOSCHZISKER, J. On October 15, 1907, the plaintiff deposited the sum of \$10,000 with the defendant company, and received the ordinary bank book containing its rules and regulations, one of which was: "Deposits made in this savings and trust company can only be withdrawn on notice being given to the treasurer as follows: If the

sum proposed to be drawn be * * * any sum over \$1,500, four months' notice." On February 12, 1908, the plaintiff gave the required notice of his intention to withdraw the deposit, but the defendant refused payment upon the ground that the plaintiff had agreed that the money should not be withdrawn until a certain note of a third party, discounted by the defendant company, and renewed at the instance of the plaintiff, had been taken up. Whereupon the plaintiff brought this suit in assumpsit.

At the trial the defense showed that the plaintiff was president, stockholder, and creditor of the Pennsylvania Bed Company; that the defendant had discounted the latter's note for \$10,000; that it had become dissatisfied with the collateral and demanded payment; that on October 16, 1907, the plaintiff called at the defendant's office and proposed that, if it would renew the note of the bed company, he would deposit with the defendant company \$10,000 in cash; that this offer was declined, and the plaintiff was asked why if he had that much money, he did not pay the note himself, to which he replied, "They already owe me a good deal of money," adding that the bed company would pay the defendant "when they would not pay him, because he was a stockholder and the president of the company." The plaintiff then made this offer, "If you will renew the Pennsylvania Bed Company's note for three months, I will make you out a check for the interest, and I will deposit \$10,000 in the savings account and agree to leave it here until the note is paid in full," to which the defendant replied that it would accept the deposit and renew the note upon that understanding, "and no other way." The deposit was accordingly made and the note renewed. The trial judge charged: "If the defendant has satisfied you by clear, precise, and indubitable evidence, not by one witness only, but by two witnesses or more, that the plaintiff, when he made the deposit, agreed that it should remain in that bank until the note of the Pennsylvania Bed Company was paid, then you should find a verdict for the defendant. * * * If, on the other hand, you are satisfied the plaintiff did not make any such contract, or if the defendant has not satisfied you by the measure of proof which I have given you, then you should find a verdict in favor of the plaintiff." The verdict was for the defendant.

[1] The plaintiff has appealed, and contends that where a passbook is issued showing a deposit and containing regulations as to withdrawals, it cannot be proved "by parol evidence that such deposit was not to be withdrawn in accordance with such rules," nor can it be shown that the deposit "was not to be withdrawn until the note of a third person was paid"; that such proofs would not "constitute a defense to an action brought for such deposit after due notice of withdrawal"; that such a parol agreement

would be "a violation of the statute of frauds"; and that it would not "constitute such deposit collateral for such note"; further, that the alleged parol agreement in this case had no sufficient consideration to support it, and was too indefinite and uncertain to be enforced. The appellant also questions the admissibility of certain evidence introduced by the defendant showing that the plaintiff was "a creditor of such third person"; that fact not being "averred in the affidavit of defense."

The printed regulation above quoted and depended upon by the plaintiff cannot be said to constitute a contract that under any and all circumstances the deposit would be paid back upon four months' notice. The rule in question was for the benefit of the defendant company, so that money could not be withdrawn in less than the stipulated time; it would not prevent or defeat any special agreement to the effect that a given deposit should remain beyond that time; particularly is this so, in a case like the present, where the deposit was made and accepted upon a contemporaneous agreement not to withdraw it until the note was paid. We say it was made and accepted upon these terms, for the testimony is that the plaintiff's first offer was refused, and the deposit was only accepted upon his second offer, which was to allow the amount to remain until the note was paid in full; this undoubtedly was what induced the defendant to renew the note, and in that sense was part of the contract of deposit. The evidence upon this point was given by a number of witnesses whose testimony was in accord.

[2-4] The agreement that the deposit should remain amounted to a pledge of the plaintiff's money, and gave the defendant a lien thereon until the note should be paid in full. "The three elements necessary to constitute a contract one of pledge are: (1) The possession of the pledged property must pass from the pledgor to the pledgee. * * * (2) The legal title to the pledged property must remain in the pledgor. (3) The pledgee must have a lien on the property for the payment of a debt or performance of an obligation due him by the pledgor or some other person." 31 Cyc. 787. "The term—collateral security—means any security in addition to the original obligations." 31 Cyc. 786. "The law is very liberal in regard to the consideration required to support a pledge. Accordingly it has been held that such consideration may consist * * * of * * * an extension of time for the payment of a debt * * * without any new consideration." 31 Cyc. 795-6; *Downing v. Funk*, 5 Rawle, 69; *Kean v. McKinsey*, 2 Pa. 30. "A valuable consideration is one which is either a benefit to the party promising or some trouble to the party to whom the promise is made." *Muirhead v. Kirkpatrick*, 21 Pa. 237, 242. It may consist of a "benefit to the promisor or harm to the prom-

isee." *Arnold v. Stedman*, 45 Pa. 186, 188. In this case the plaintiff induced the defendant to withdraw its demand for the immediate payment of the bed company's loan, to extend the time three months, to forbear and waive its right to enter suit and secure a judgment during that time, and to accept a renewal note; all of which involved trouble and operated to the prejudice of the defendant if not to the benefit of the plaintiff. The bed company was financially embarrassed. On January 30, 1908, at the instance of the plaintiff a receiver was appointed, and when its affairs were wound up the total balance for distribution among creditors was but \$290.59. Under all the circumstances, we feel that the deposit was in the nature of a pledge of collateral, that there was sufficient consideration to support the plaintiff's promise, and that it was not within the statute of frauds.

[5] We cannot view the contract as void because of uncertainty in its terms. The renewal note was for a fixed period of three months, and the plaintiff definitely agreed that the deposit should remain with the defendant until the note was paid in full. The appellee contends that: "There was no necessity that the contract contain terms stipulating the method of the foreclosure of the subject-matter of the pledge. Equity has jurisdiction of causes of this character; and, upon a bill filed for that purpose, a proper decree will be entered, fully foreclosing the pledge, and adjudicating the rights of the parties." We are not now called upon to decide whether this remedy is open; nor shall we discuss that point until it is properly before us and we have had the benefit of argument thereon. The established facts, fixed by the verdict, that the plaintiff contracted to leave his \$10,000 with the defendant until the note of the bed company was paid, and that such note had not been paid, were sufficient to prevent a recovery in the present action; and in this connection that is all we determine.

The testimony introduced by the defendant to show that the plaintiff was a creditor of the bed company was objected to upon the ground that there "was no notice given of any such claim on the part of the defendant." When the plaintiff took the stand as a witness in his own behalf, he testified in chief that he was such a creditor, stating, "I had \$12,000 worth of the bonds, as security for a loan, and I had a note of the Pennsylvania Bed Company." And it was in evidence that when he asked for the renewal of the note he told the defendant that the bed company owed him "a good deal of money." We do not see that the admission of the testimony objected to could have done any material harm. Hence it is unnecessary to discuss the assignment going to that point.

The specifications are all overruled, and the judgment is affirmed.

GOTTSCHALL v. CAMPBELL et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. COURTS (§ 42*)—ESTABLISHMENT—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 5, § 1, providing that the judicial power of the commonwealth shall be vested in a supreme court, etc., "and in such other courts as the General Assembly may from time to time establish," authorizes the Legislature not only to establish courts similar to those enumerated, but also courts of a grade and character different from them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.*]

2. CONSTITUTIONAL LAW (§ 14*)—CONSTRUCTION—GENERAL RULES.

The language of a Constitution is to be interpreted in a plain and natural sense as understood by the people who adopted it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. § 14.*]

3. STATUTES (§ 93*)—SPECIAL OR LOCAL LAWS—ESTABLISHMENT OF COURT.

Act May 5, 1911 (P. L. 198), establishing a county court in Allegheny county, is not violative of Const. art. 3, § 7, forbidding local or special legislation, though it would be local and special had not the Constitution itself made a classification with reference to the creation, regulation, and powers of courts, in which Allegheny county is treated as a distinct division.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

4. STATUTES (§ 73*)—GENERAL LAWS—UNIFORMITY OF OPERATION—COURTS.

Act May 5, 1911 (P. L. 198), establishing a county court in Allegheny county of a different class or grade from any before created, and providing for only one court of that grade, is not violative of Const. art. 5, § 26, requiring all laws relating to courts to be general and of uniform operation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75; Dec. Dig. § 73.*]

5. COURTS (§ 42*)—ESTABLISHMENT—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Act May 5, 1911 (P. L. 198), establishing a county court in Allegheny county, is not violative of Const. art. 5, § 26, preventing the General Assembly from creating other courts to exercise the powers vested by the Constitution in the judges of the courts of common pleas and orphans' courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.*]

6. COURTS (§ 168*)—INFERIOR COURTS—AMOUNT IN CONTROVERSY.

Act May 5, 1911 (P. L. p. 199) § 6 (a), providing that in all civil actions where only a money judgment is sought to be recovered, and in all actions of replevin in which the sum demanded or the value of the property sought to be recovered does not exceed \$600, does not give jurisdiction in all civil actions without limit as to amount; the \$600 limitation being applicable to all the actions referred to.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 379, 413, 440; Dec. Dig. § 168.*]

7. STATUTES (§ 73*)—GENERAL STATUTES—UNIFORMITY OF OPERATION—COURTS.

That the procedure provided by Act May 5, 1911 (P. L. 198), for the county court of Allegheny county differs from that in the com-

mon pleas, does not lay the action open to the objection that it is not uniform.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75; Dec. Dig. § 73.*]

8. COURTS (§ 42*)—ESTABLISHMENT—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The provision of Act May 5, 1911 (P. L. p. 198), establishing a county court in Allegheny county for the service of writs of summons, is constitutional.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. § 42.*]

9. JURY (§ 81*)—RIGHT TO TRIAL BY JURY—ABRIDGMENT.

Act May 5, 1911 (P. L. p. 201) § 8, relating to trial by jury on request of either party and the payment of the jury fee in advance, is not an abridgment of the right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

10. COURTS (§ 160*)—INFERIOR COURTS—PROCEDURE—SET-OFF.

Act May 5, 1911 (P. L. p. 202) § 10, relating to set-off in the county court of Allegheny county, is constitutional.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 405; Dec. Dig. § 160.*]

11. COURTS (§ 160*)—INFERIOR COURTS—LIEN OF JUDGMENT.

Act May 5, 1911 (P. L. p. 203) § 11, authorizing liens by entering judgments of the county court of Allegheny county in the common pleas, is constitutional.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 405; Dec. Dig. § 160.*]

12. CONSTITUTIONAL LAW (§ 48*)—DETERMINING VALIDITY OF STATUTE—BURDEN OF PROOF.

One who asks to have a law declared unconstitutional assumes the burden of proving beyond all doubt that it is so.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

Moschzisker, Mestrezat, and Stewart, JJ., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by M. H. Gottschall against I. K. Campbell and others for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

H. K. Siebeneck, for appellant. D. T. Watson, Thomas Patterson, W. B. Rodgers, Wm. A. Stone, Joseph Stadtfeld, A. B. Hay, and Charles A. Woods, for appellees.

POTTER, J. By the act of May 5, 1911, P. L. 198, the Legislature established a county court in Allegheny county, and conferred jurisdiction upon it in civil actions wherein money judgments were sought, and in actions of replevin in which the sums demanded, or the value of the property replevined, does not exceed \$600; except in cases where the title to lands or tenements may come in question. Jurisdiction was also conferred in desertion proceedings and in appeals from summary convictions, and

from judgments in suits for penalties before a magistrate or court not of record.

Averring that the act is unconstitutional, the plaintiff in this case, a taxpayer of Allegheny county, filed a bill in equity against the county commissioners to restrain them from expending any of the funds of the county in providing accommodations for the new court. Defendants demurred to the bill, and the demurrer was sustained and the bill dismissed. Plaintiff has appealed and assigns for error the decree of the court below, dismissing the bill.

[1] The power of the Legislature to establish courts other than those named in the Constitution cannot be questioned. Article 5, § 1, of the Constitution, provides that "the judicial power of this commonwealth shall be vested in a supreme court, in courts of common pleas, courts of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' courts, magistrates' courts, and in such other courts as the General Assembly may from time to time establish." No one can fairly read this section of the Constitution, and maintain that the courts therein named are the only ones which the Legislature was empowered to establish. A reasonable construction of this language is that the power of the Legislature extends not merely to the establishment of other courts similar to those enumerated, but that it also includes the power to establish courts of a grade and character different from those expressly set forth.

[2] It is a cardinal principle in the construction of Constitutions that the language is to be interpreted in its plain and natural sense as understood by the people who adopted it. So interpreted, the power to create a court such as that provided for in the act before us is ample. It was under the power given by this section that the Legislature established the Superior Court. It would be late in the day to now challenge the existence of this power, 16 years after its first exercise in the creation of the Superior Court. The same power is adequate to establish county courts, and prescribe their jurisdiction.

[3] Having the power, the question then is, Was it properly exercised in this case? The act establishes a court for Allegheny county, and for that reason it is urged that the legislation is local and special, and violates section 7 of article 3 of the Constitution, which forbids local or special legislation; and it is also contended that it offends the provisions of section 26 of article 5, which requires that all laws relating to courts shall be general and of uniform operation, and prohibits the Legislature from creating other courts to exercise the powers vested by the Constitution in the judges of the courts of common pleas. The objection

that the legislation is local and special would be unanswerable, were it not for the fact that the Constitution itself has made a classification with reference to the creation, regulation, and powers of the courts, in which the county of Allegheny is treated as a distinct division, and the county of Philadelphia as another, and in each of which counties the courts as to their needs and requirements are distinguished from the remaining counties in the state.

The principle of constitutional classification, and particularly the classification of counties, has been clearly recognized in a number of our cases. Thus in *Morrison v. Bachert*, 112 Pa. 322, at page 330, 5 Atl. 739, at page 741, Mr. Justice Paxson said: "So far as the compensation of county officers is concerned, the Constitution has classified the counties of the state." In *Reid v. Smoulter*, 128 Pa. 324, at page 337, 18 Atl. 445, at page 447 (5 L. R. A. 517), Mr. Justice Clark said: "We are of opinion that the act of April 13, 1887 (P. L. 22), already referred to, is not in conflict with the Constitution, because special or local in its operation. The Constitution recognizes a class of counties, in each of which it is the duty of the Legislature to establish a separate orphans' court, and the act plainly applies to all the counties of this class." In *Rymer v. Luzerne County*, 142 Pa. 108, at page 113, 21 Atl. 794 (12 L. R. A. 192), it was said, per curiam, that Act March 31, 1876 (P. L. 13), there under consideration, "is neither a local nor a special law, for the reason that it applies to all counties of a certain class, and that class created by the Constitution itself." In *Wheeler v. Philadelphia*, 77 Pa. 338, answering the suggestion that a classification was bad which included only one member of the class, it was said (at page 350): "Classification does not depend upon numbers. The first man, Adam, was as distinctly a class, when the breath of life was breathed into him, as at any subsequent period. The word is used not to designate numbers, but a rank or order of persons or things." Therefore, if the need arises for it, a classification which includes only one city or one county may be valid, if the conditions warrant it, and the Constitution authorizes it.

The necessity for classification of the counties of the state, with respect to the courts, is clearly recognized in the Constitution. Thus, speaking with reference to the state at large, in article 5, § 4, it is provided: "Until otherwise directed by law, the courts of common pleas shall continue as at present established, except as herein changed; not more than four counties shall at any time be included in one judicial district organized for said courts." And in the next section it is provided that, whenever a county shall contain 40,000 inhabitants, it shall constitute a separate judicial district with

one judge; the Legislature to provide for additional judges as the business of the district may require. Counties of less population shall be formed into single districts, or if necessary, may be attached to contiguous districts as the Legislature may provide, subject of course to the limitation in section 4. By the same section the office of associate judge is abolished in counties forming separate districts. Section 9 directs that the judges of the courts of common pleas, learned in the law, shall be judges of the courts of oyer and terminer, quarter sessions of the peace, and general jail delivery, and of the orphans' court. Section 22 requires that, in every county wherein the population shall exceed 150,000, the Legislature shall establish a separate orphans' court, and permits the establishment of such a court in any other county. These provisions apply to the state as a whole, with few exceptions.

But in section 8 the courts in the county of Philadelphia and in the county of Allegheny are treated as in separate and distinct classes. It is provided that these courts shall from time to time in turn detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace in such manner as may be directed by law. Again, by section 6, the jurisdiction and powers of the district courts in each county were abolished, and courts of common pleas substituted therefor. In the same section the separation of each of these counties into a distinct class, as to which the enactment of legislation appropriate for one was not thought suitable for the other, appears in the creation of four courts of common pleas for Philadelphia county, as against two in Allegheny county; and the line of separation and distinction between the two counties is further broadened by the requirement that in Philadelphia all suits shall be instituted in said courts of common pleas without designating the number of said court, the several courts to distribute and apportion the business among them in such manner as shall be provided for by rules of court. Upon the other hand, in Allegheny county no designation of the number of the court is required in bringing suit; and each court is given exclusive jurisdiction of all proceedings at law and in equity commenced therein. The fact of a distinct classification is further shown in section 7, which provides that in Philadelphia the prothonotary of all of said courts is to be appointed by the judges, and is to hold office for three years, subject to removal by a majority of the judges. In Allegheny county the prothonotary is not appointed by the judges, and is therefore an officer to be elected by the people. Again, in section 12 it is provided that in Philadelphia there shall be established for each 30,000 inhabitants, one court, not of record, of police and civil causes, with jurisdiction

not exceeding \$100, such courts to be held by magistrates whose term of office shall be five years, and the office of alderman is abolished. No such court is provided for Allegheny county, or for any of the other counties.

It will be noted that these sections of the Constitution not only indicate a classification of counties with reference to the courts, but many of the provisions require special legislation to carry them into effect, or such changes "as shall be provided by law," to quote the phrase often used in various sections of the Constitution. This makes clear the intention that the Legislature should, as occasion arose, provide for further needs within and along the lines of classification indicated.

These extracts above noted, from the article of the Constitution which deals with the judicial power of the commonwealth, seem to demonstrate the fact that by the terms of the Constitution a classification is made as to the creation of the courts, and the distribution of their powers, by which the county of Philadelphia is to be treated as one division, the county of Allegheny as another, and the remainder of the state as another, with certain distinctions based upon the population and other conditions of the various counties. Obviously the Constitution classified the county of Philadelphia, as being distinct from other parts of the state, for the very purpose of permitting legislation affecting the courts of Philadelphia county, without including other parts of the commonwealth where the conditions and needs of the people are different. The same is true as to Allegheny county. Each of these counties was given the right to stand in a class by itself, in so far as legislation affecting its courts is concerned. The question as to whether or not Philadelphia constitutes a judicial class, separate and distinct from the state generally, was before the Superior Court in *Commonwealth v. Bell*, 4 Pa. Super. Ct. 187. The question there was as to the power of the court of quarter sessions of Lawrence county to extend its term for an additional week. It was claimed that the power was given by the act of June 10, 1881 (P. L. 113), which contained a proviso "that the provisions of this act shall not apply to cities of the first class." The appellant contended that this proviso rendered the act special legislation, and that it was therefore unconstitutional. Reeder, J., said (at page 193 of 4 Pa. Super. Ct.): "The act is also clearly constitutional. The claim that the proviso excepting cities of the first class from its application renders the entire act unconstitutional because it is special legislation is absolutely without merit. It is unnecessary for us to elaborate our opinion upon this question when the Constitution itself makes a special and distinct class of the courts of cities of the first

class." Counsel for appellant in this case is mistaken in saying that what was said in the case just cited as to the constitutionality of the act of 1881 was obiter dictum. The constitutional question was directly raised, and was passed upon by the Superior Court. True, that court considered the question to be so plain as to require no elaboration. See, also, *Wilkes-Barre v. Meyers*, 113 Pa. 395, 6 Atl. 110, where an act excepting from its provisions the city of Philadelphia (coextensive with the county of Philadelphia) was held not to be local because the Constitution itself made the exception to the requirement that all laws should be general. "It must be general, except as otherwise provided in the Constitution," was the statement; and Philadelphia was recognized as being classed by itself. The Legislature is entirely warranted in following the constitutional classification. Speaking of its power in this respect, this court, in *Wheeler v. Philadelphia*, 77 Pa. 338, said at page 349: "But the power existed at the time of the adoption of the Constitution; it had been exercised by the Legislature from the foundation of the government; it was incident to legislation; and its exercise was necessary to the promotion of the public welfare."

One new court of common pleas has been established in Philadelphia county and two in Allegheny county since the adoption of the Constitution. These courts were created by the Legislature, and the constitutionality of the acts has not been questioned, although they specifically named the particular county in which the courts were created. The present act establishing the new county court for Allegheny county can no more be said to be local or special than were the acts which created new courts of common pleas in these two counties. Such legislation, which otherwise would undoubtedly be regarded as local, is saved because the Constitution does make this classification, and the Legislature as well as the courts must recognize it. Where the classification is created by the Legislature, it may be necessary to inquire whether the distinctions in the subjects classified are real and proper, and are not created for the purpose of evading the Constitution. But in the present case the classification is that which appears in the Constitution itself; and, where it speaks, there can be no question. Holding, as we do, that the act before us deals with Allegheny county as specially classified by the Constitution, the legislation cannot be regarded as local or special. This disposes of the principal contention upon the part of appellant.

[4] As to the provision of section 26, art. 5, that all laws relating to courts shall be general and of uniform operation, it is evident that this requirement is fairly met when such laws are general and of uniform

operation as applied to a particular class or grade of courts. This is consistent with the further requirement in the next clause, that "the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the processes and judgments of such courts, shall be uniform." It is clear that uniformity within the respective classes or grades of courts is what the Constitution requires; otherwise, the end and aim of classification would be defeated.

The act under consideration provides for a new court of a different class or grade from any heretofore created. So long as there is but one court of this grade, the law regulating it is uniform in the constitutional sense. It is composed of one bench of judges whose number depends upon population. In the event that other courts of the same grade should be established, then all laws relating to that grade must be of uniform application.

[5] Another point pressed in the argument for appellant is that the creation of this new county court is prohibited by the last clause of section 26, which prevents the General Assembly from creating other courts, to exercise the powers vested by the Constitution "in the judges of the courts of common pleas and orphans' courts." It is contended that this means the powers vested in the courts, and not in the judges of the courts. Such a construction nullifies the plain inference to be drawn from the language of section 4, which is that, when directed by law, changes may be made in the common pleas. It is also in opposition to the provisions of section 1 of article 5, which expressly authorizes the Legislature to establish from time to time other courts than those already created. As the court below in its opinion well says: "It would seem, therefore, that the true construction of this clause of section 26 is to be obtained by taking its language literally, and holding that it applies only to the powers vested in the judges of the courts of common pleas; as, for example, the power of sitting in the oyer and terminer, but does not directly vest any powers in the courts of common pleas which may not be taken away by law." Unquestionably certain powers were conferred upon the judges as such, and not upon the courts in which they sat. In an earlier clause in section 26 there is a reference to the powers of the courts, and the contrast between the wording of this phrase and that which refers to the powers vested in the judges is significant and adds force to the argument that the Constitution means precisely what it says when it prohibits interference with the powers vested in the judges, rather than with the powers of the courts. We are not at liberty to adopt a construction which disregards the exact words of this section, particularly when it would create an inconsistency with other sec-

tions of the Constitution. We are bound to sustain a construction which will give effect to all provisions, if possible. The act of assembly before us creating the new county court does not divest the judges of the courts of common pleas or the orphans' court of any of their powers. Further it should be noted that the act does not infringe in any way upon the powers or jurisdiction of the courts of common pleas or of the orphans' court. Section 6 of the new act deals with the question of jurisdiction. Paragraph "a" confers jurisdiction in civil actions where the amount involved is limited; but it is only concurrent and not exclusive jurisdiction. This is clearly shown by paragraph "d," which provides that only the jurisdiction conferred in clauses "b" and "c" shall be exclusive. This means that the jurisdiction in civil cases conferred by clause "a" is not exclusive, but concurrent within the limitations fixed. In other words, any suitor may still bring his action in the common pleas if he so prefers, but may bring it in the county court if he chooses. If the suit be brought in the county court, it may be appealed to the common pleas. In such event the county court becomes the gateway to the common pleas; but, in either event, no matter whether the suit be originally brought in the common pleas or in the county court, the jurisdiction and powers of the common pleas are not abridged. The purpose and result can only be to relieve the common pleas of a part at least of the mass of comparatively petty litigation which, in this county, has almost blocked the wheels of justice. The dates upon the records of appealed cases that come before us oftentimes speak eloquently of the need of such relief as the act in question affords. It was a condition and not a theory that confronted the Legislature, and the need of relief was imperative. The method was a legislative question, to be exercised under the constitutional power of the General Assembly to establish other courts. It might have created other courts of common pleas, which would have deprived the present courts of a portion of their business, and shared with them their powers. Instead of so doing, the General Assembly chose a plan, apparently simple, effective, and speedy, by which to weed out in the preliminary stages, much of the litigation which may, under the terms of the act, if desired by the parties, eventually be taken into the courts of common pleas.

[6] We have no doubt as to the power of the Legislature to create such a court, and to prescribe its method of procedure. It would unduly prolong this discussion to take up in detail every feature prescribed. We can refer only to some of the principal points against which criticism is directed. Counsel for appellant suggests that the language in section 6a, which is, "in all civil actions wherein only a money judgment is sought to

be recovered, and in all actions of replevin in which the sum demanded or the value of the property replevined does not exceed six hundred dollars," gives jurisdiction in all civil actions without limit as to amount. But this construction is not justified. Obviously, in punctuating, a comma was omitted after the word "replevin"; but this does not really render the meaning obscure. It is apparent that the qualifying phrase, "in which the sum demanded," refers to the actions brought to recover a money judgment, just as the words "value of the property replevined" appropriately refer to actions of replevin. The limitation of \$600 applies to all the actions to which reference is made. This view is consistent with, and confirmed by, the language of section 10, which requires defendant to set off a counterclaim to an amount not exceeding \$600, or be barred.

[7] The suggestion that the law is not uniform, because the procedure provided for the county court differs from that which obtains in the common pleas, is without merit. It was intended that it should be more simple, and very properly so. That is one of the obvious advantages of the legislation. The practice as prescribed in clause "c," § 7, providing that plaintiff's statement of claim, not denied, shall be taken as true, is very similar to that prescribed by the practice act of May 25, 1887 (P. L. 271), and by rule 8 of the courts of common pleas of Allegheny county. The validity and propriety of such a rule cannot be seriously questioned. It serves to bring the parties directly to the issue.

[8] Objection is also made to the provision for the service of writs of summons. But surely, if the Legislature can create the court, it can provide for the service of its writs.

[9] In section 8 provision is made for a jury trial on request of either party, and the payment of the jury fee in advance. It is suggested that this provision is an abridgment of the constitutional right of trial by jury. But under the long settled practice in this state, under Act March 29, 1805, § 13 (4 Smith's Laws, p. 242), a jury fee must be paid before judgment can be entered on a verdict. A verdict is of little value unless judgment be entered upon it, and it is but a slight step further to require payment of the jury fee before the trial, instead of before judgment. It might as well be argued that a plaintiff was denied the right to a jury trial because compelled to pay for the issuing and service of a summons, before such trial can be had. In *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, it is held that a requirement that a jury fee shall be paid is not a denial or abridgment of the right of trial by jury. To the same effect is *Bank of Columbia v. Okeley*, 17 U. S. 225, 4 L. Ed. 559. As illustrating the same principle, it may be noted that in *McDonald v. Schell*, 6 Serg. & R. 240, it was

held that the act requiring the payment of costs before taking an appeal from an award of arbitrators, did not affect the right of trial by jury. See, also, *Warren v. Commonwealth*, 87 Pa. 45, where it is said (at page 52) that a provision requiring bond for appeal does not offend against the Constitution.

[10] The provisions as to set-off contained in section 10 seem to be taken almost verbatim from Act March 20, 1810, § 7 (5 Smith's Laws, p. 165), which relates to setting off counterclaims in suits before justices of the peace. The fact that a plaintiff appealing is required to enter security for costs only, though judgment for a set-off may be given against him, while a defendant must give security for debt, interest, and costs, may, from the standpoint of the Constitution, be a defect in the act; but, if so, it can be cured by amendment. But, as to that, we do not now decide. It is not essential to the main purpose of the legislation. If deemed of sufficient importance, the question can be raised and decided after fuller argument upon the precise point.

[11] The liens authorized under section 11 are acquired by entering judgments in the common pleas, practically in the same manner as they have been entered for over a century on transcripts from justices of the peace. Whether the transcript comes from one subordinate court or another can make little or no difference as to the character of the lien. If the Legislature has the power to create the court, it must also have the power to give force and effect to its judgments. The method here provided is not new, but is merely the adaptation of one which has existed in Pennsylvania since the act of March 20, 1810. The advantage of having all judgments which are a lien on real estate in the county entered in one set of indexes is apparent. The provision of section 11 that the lien shall be removed on the "perfection of the appeal" or the granting of a certiorari operating as a supersedeas is substantially like that of section 1 of the act of June 24, 1885 (P. L. 160), giving judgments entered on transcripts from magistrates' courts, the force and effect of judgments originally obtained in the common pleas, where no appeal or certiorari has been taken. As to the precise effect of this latter provision, we do not now deem it necessary to decide, preferring to leave it open for further consideration, if the need should arise. This feature, together with several other matters of detail to which reference has been made in the argument, is not essentially involved in the main purpose of the statute. Any such questions are of minor importance, and, if they arise in the future course of business in the court, they can be more fully presented and argued in detail, and the precise questions involved can be more fully considered than at the present time.

[12] That one who asks to have a law declared unconstitutional takes upon himself the burden of proving beyond all doubt that it is so has been so often declared that the principle has become axiomatic. In *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, at page 164 (59 Am. Rep. 759), Mr. Justice Black said: "There is another rule which must govern us in cases like this, namely, that we can declare an act of assembly void only when it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts." And again in *Erie & North-East R. R. Co. v. Casey*, 26 Pa. 287, the same Justice said (at page 300): "The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. One department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving beyond all doubt that it is so." In *Hilbish v. Catherman*, 64 Pa. 154, Mr. Justice Agnew said (at page 159): "We cannot declare this act unconstitutional unless we can say, in the language of Judge Tilghman, that 'its violation of the Constitution is so manifest as to leave no reasonable doubt.' *Commonwealth v. Smith*, 4 Bin. 117." And Chief Justice Sharswood said, in *Commonwealth v. Butler*, 99 Pa. 535, 540: "To justify a court in pronouncing an act of the Legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act."

It may be conceded that some of the clauses of the Constitution here involved are obscure, and that some of the questions here presented are not free from difficulty; but that is not sufficient to justify striking down the statute. We may rest the consideration of this case upon the conviction that it has not been plainly shown that any vital feature of the statute under consideration offends against any specific provision, or any necessarily implied prohibition, of the Constitution; and therefore the act must be sustained.

The assignment of error is overruled, and the judgment is affirmed.

MOSCHZISKER, J. (dissenting). I fully realize the conditions in Allegheny county and the general demand for the relief sought to be afforded by the statute under consideration, and for that reason I have studied this case with every desire to sustain the act, if possible, but it seems to me to be

clearly in conflict with the organic law of the state.

While Philadelphia and Allegheny counties are distinguished from the rest of the commonwealth in certain of the constitutional provisions pertaining to the judiciary which relate exclusively to them, yet such classification—if it can be so designated—is only for the specific purposes defined therein, and not for court purposes generally. The courts of those two great counties need the protection of the appropriate general provisions contained in the judiciary article as much as do the courts of the other counties of the state. The records of the development of this part of the Constitution show that its framers intended such protection; and from the article as a whole one cannot but believe that the people must have so proposed when they adopted it.

To my mind section 26, art. 5, expressly and unequivocally forbids the creation of other courts to exercise the powers vested in the common pleas; for the powers of the courts are administered by the judges, and, when the Constitution refers to the powers vested in the judges, it plainly means to include all the powers given to the courts. In this connection it is interesting to note from the records of the constitutional convention that the prohibition against the creation of other courts to exercise the powers vested in the common pleas was originally part of the particular section in reference to the courts of Philadelphia and Allegheny counties, and was removed therefrom and placed in section 26, so that the restriction might be general as to all common pleas courts; and, further, that the word "courts" was changed to "judges of the courts" evidently to meet the expressed objection that the former was not sufficiently comprehensive to take in the criminal jurisdiction of such judges. See 6 *Debates*, p. 256, pp. 507-509 and pp. 544, 545. To refer to the "judges" as comprehending the "court" is a common method of expression which was intentionally employed by the draftsmen of the Constitution. Volume 6, pp. 544, 545. It is quite certain that the expression would be thus accepted by the average man, and that the language used was so understood by the electors who finally passed upon and accepted the Constitution cannot reasonably be doubted.

In my opinion the legislative authority to make changes by law in the jurisdiction of the present courts, and the power to create other courts, are always subject to the constitutional limitations contained in section 26. This act not only gives to the court which it seeks to create many of the powers vested by the Constitution in the common pleas, but it further violates the prohibitions of the section in question when it takes from the quarter sessions of Allegheny county and transfers to the new court all jurisdiction in nonsupport and certain other cases; thus, in

effect, depriving the "judges of the courts of common pleas" sitting in the criminal courts of certain powers indirectly, but nevertheless undeniably, vested by the Constitution in such judges as ex-officio judges of the latter courts (section 9, art. 5), and making the jurisdiction and powers of the quarter sessions of that county different from those of all other courts of the same class or grade in the state.

For these reasons and for others which might be stated, I am obliged to dissent.

MESTREZAT and STEWART, JJ., join in the dissent.

GOTTSCHALL v. CAMPBELL et al.
(No. 2).

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by M. H. Gottschall against I. K. Campbell and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before **FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.**

H. K. Siebeneck, for appellant. **D. T. Watson, Thomas Patterson, W. B. Rodgers, Wm. A. Stone, Joseph Stadtfeld, A. B. Hay, and Charles A. Woods**, for appellees.

POTTER, J. This case was advanced, and argued with the appeal at No. 201 October term, 1911, *Gottschall v. Campbell*, 83 Atl. 286 (No. 1), in which an opinion has just been filed. As the same questions are involved, that opinion applies equally to this case; and the judgment is affirmed.

BAUMAN v. BEST MFG. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—ACTIONS—NONSUIT.

Where an employé is injured by the fall of a plunger from an overhead crane, caused by a cotter pin either breaking or working out of place, but there is no evidence that the pin was worn or defective, and the evidence is uncontradicted that it was seen in its place three hours before the accident, a nonsuit is properly entered in an action for the injuries.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1002, 1003, 1007, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to an employé caused by a cotter pin of a crane either breaking or working out of place, evidence of the general condition of the crane is irrelevant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of trespass for personal injuries by **Max Bauman** against the **Best Manufactur-**

ing Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before **FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.**

Lee C. Beatty, James B. Drew, and John B. Gloeckner, for appellant. **Wm. A. Stone, and W. Clyde Grubbs**, for appellee.

POTTER, J. [1] This is an appeal from the refusal of the court below to take off a judgment of compulsory nonsuit. The plaintiff sought to recover damages for personal injuries inflicted by the fall of a plunger from an overhead crane. This plunger was a solid piece of steel, weighing 12 or 15 pounds, working vertically through a hollow cylinder. It was attached to an arm at the top by means of two steel plates, through which ran a counter pin; and through this, in turn, at one end was inserted, solely for the purpose of keeping the counter pin in place, a small steel pin known as a "cotter pin." At the time of the accident it appeared that the counter pin must have worked out of its place, for the plunger fell. Neither of these parts was out of order in any way, and they were immediately restored to their places. The cotter pin, which had been in use, was, however, missing. It must have come out, but whether by slipping or from breaking was not shown; but as a result there was nothing to hold the counter pin in its proper place, and it, in turn, must have gradually worked out of its supports and permitted the plunger to fall. Between two and three hours before the accident, the craneman oiled the machinery, and observed that the cotter pin was then in place, and that it appeared to be rusty and was dirty and dusty. It could not well have been otherwise, situated as the crane was, in a foundry where molding was carried on. It was not shown how long the pin had been in use, or that it was worn or in any way unfitted for the use to which it was put. It had only one purpose to serve, and that was to prevent lateral motion in the counter pin. It bore no weight, and its mere presence was ordinarily sufficient to answer the purpose for which it was intended. As the trial judge said, there was nothing in the case to show that there was any wear upon the cotter pin, or to show that such pins ever wore out or became unfitted by use for their purpose. In *Bradbury v. Kingston Coal Co.*, 157 Pa. 231, 27 Atl. 400, where it was shown that a cotter pin broke after several years of use, it was held that, in the absence of evidence of a defect, it was error to submit to the jury the question whether the use of the pin was negligence. And in *Zahniser v. Torpedo Co.*, 190 Pa. 350, 42 Atl. 707, evidence which went no further than to show that a similar pin broke was held not to be sufficient to take the case to the jury. The

principle set forth in these cases was very properly applied to the facts of this case. Here there was some evidence of rust, but it was not intimated that this amounted to corrosion, or that it weakened the steel of which the pin was composed. The witness who observed the condition of the pin when lifting the plunger evidently regarded it as good; otherwise he would have changed the pin, or reported the need of a change. The only reasonable inference that can be drawn from the evidence is that the accident resulted from the disappearance of the cotter pin.

[2] Evidence as to the general condition of the crane was therefore properly excluded as irrelevant. Nor did it appear that the cotter pin was missing for any appreciable time before the accident. The crane man had seen it in place less than three hours before.

We agree with the court below that there was not sufficient evidence of any negligence upon the part of the defendant to justify the submission of the case to the jury.

The judgment is affirmed.

GEORGE v. SAFE DEPOSIT & TRUST CO. OF PITTSBURGH et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 386*)— SALES BY EXECUTOR—ESTOPPEL TO DENY VALIDITY.

Where a widow buys lands of her deceased husband at a sale by his administrator for the payment of his debts, and her daughter saw her purchase the property and pay the purchase money, acquiesced in the mother's ownership for 10 years till the mother's death, accepted an annuity from the property under her mother's will for 10 years, and never offered to reimburse her mother for money paid on the purchase of the property nor to return to her mother's estate the annuity received, she cannot claim an interest in the land as the heir at law of her father.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1570; Dec. Dig. § 886.*]

Appeal from Court of Common Pleas, Allegheny County.

Ejectment by Mary E. George against the Safe Deposit & Trust Company of Pittsburgh, trustee, and others for land in the Fifth Ward of the City of Pittsburgh. From a judgment for defendant non obstante veredicto, plaintiff appeals. Affirmed.

The following opinion was filed by Haymaker, J., in the court below:

"This is an action in ejectment for two lots of ground in the Fifth ward of the city of Pittsburgh, being numbered 20 and 21 in block 11 of the Plan of Lots of Elizabeth F. Denny, recorded in this county in Plan Book, vol. 6, p. 178, on which are erected seven brick dwelling houses. On the trial of the case we directed a verdict for the plaintiff.

"The common source of title was that of

Andrew Mulholland, the plaintiff's father. The statement of the case is practically this: Andrew Mulholland died intestate on the 6th day of September, 1884, leaving to survive him a widow, Margaret Mulholland, and one daughter, Mary E. George, the plaintiff, whose husband is still living. The widow and daughter renounced their right to administer the estate, and administration was granted to strangers. The administrators obtained proper authority to sell the lots in question at public sale for the payment of decedent's debts, and they were purchased by the widow on August 29, 1885, and the deed to her was acknowledged by the administrators in open court on November 14, 1885. The widow and her daughter resided continuously in one of these houses from the death of Andrew Mulholland on September 6, 1884, down to March 12, 1895, when the widow died. The widow devised the property in question to her executors in trust for various purposes, among which was the payment to the plaintiff of \$20 per month during her natural life, and in addition thereto \$100 annually for clothing, with authority in their discretion to increase the amount of the monthly payments. The will likewise directs the trustees to pay to decedent's brother, Joseph Sawyer, \$25 per month during his natural life. The will also provides that the whole estate shall go to any child or children of the plaintiff surviving her, subject to the provision made for the brother. In case of the death of the daughter without a child or children surviving, the testatrix provides for the disposition of her estate in a manner unnecessary here to relate.

"The plaintiff contends that, on the death of Andrew Mulholland intestate, she and her mother became cotenants in common of the land described in the writ, and that when the widow purchased the same at an orphan's court sale for the payment of debts that relation of ownership previously existing was not thereby changed, and that the widow could not by her will dispose of the interest of her cotenant, the plaintiff.

"The contention on the part of the defense is that the plaintiff accepted the provision made for her in her mother's will, and has regularly and without complaint received her monthly and annual payments for some ten years, and that having elected to so take she is now estopped to question her mother's title to the property. The plaintiff's answer to the allegation of estoppel is that she was under the disability of coverture, and the doctrine of estoppel or election does not apply to her.

"The defense relies on the following undisputed facts: That the administrators of Andrew Mulholland presented their petition to the orphan's court for leave to sell decedent's real estate for payment of debts

aggregating over \$19,000, and a citation was issued to the plaintiff, then of full age; the purchase of the property by the widow and the confirmation of the sale by the court; the exercise of entire ownership by the widow from the date of her deed of November 14, 1885, to the time of her death on March 12, 1896; the probating of her mother's will on March 15, 1895, whereby she disposes of the property in question; the acceptance by the plaintiff of legacies given her by her mother's will, payable monthly and annually, which the plaintiff received for a period of ten years; the payment by the trustees under the will, for the same length of time, the sum of \$25 per month to decedent's brother, with knowledge on the part of plaintiff; plaintiff's participation in the distribution of balance in hands of executors on filing of their first account; the first and final account of the trustees under the will of plaintiff's mother, showing the payment of \$3,516.01 to the plaintiff from February 5, 1897, to March 19, 1906, being the annuity provided for her in said will, and likewise showing payment of \$3,102.50 to the other annuitant, of which plaintiff had knowledge, and the presentation of a joint petition to the orphans' court by the plaintiff and Joseph Sawyer, legatees under the will of plaintiff's mother, to enforce payments due them under the provisions of said will, and the obtaining of the order and the enforcement of payment.

"The evidence is uncontradicted that the plaintiff not only accepted the annuity payable to her under her mother's will, for many years, and on one occasion employed counsel and enforced the provisions of the will in her favor in the orphans' court. She not only received her own annuities without protest, but had full knowledge of the payment of an annuity to her uncle during the same period of time. For all these years she recognized her mother's title to and ownership of the land in question, and this down to the time of bringing this action of ejectment. It also appears that her mother purchased the property for \$2,350, subject to certain mortgages against the same, and that plaintiff in no way endeavored to or did reimburse her mother in the purchase. There was an attempt on the part of the plaintiff to show that her mother made certain declarations to the effect that the plaintiff and her husband had contributed to the purchase of the property, but his evidence was so indefinite as not to be worthy of consideration. The plaintiff saw her mother purchase this property at a public sale, and pay the purchase price; she saw her from the time of her purchase to the day of her death—some 10 years—exercising every right of ownership over it; she saw her dispose of it by will, and she became a beneficiary thereunder, and enjoyed the fruits

of that will for 10 years. She enforced her rights as a legatee in and out of court, down to the time of bringing this suit, having received \$3,516.01, and now without proof of reimbursement for money paid by her mother on the purchase of the property, and without the slightest offer to return to the estate the amount of the legacy she has been regularly receiving for 10 years under her mother's will, she now claims the land as the heir at law of Andrew Mulholland, and that her unequivocal acts as legatee under her mother's will are not binding upon her by reason of coverture.

"We cannot agree with plaintiff in her contention, and are of the opinion that under the undisputed facts of the case the plaintiff is not entitled to recover, and that judgment should be entered for the defendant non obstante veredicto.

"And now, July 10, 1911, the rule for judgment non obstante veredicto is made absolute, and judgment is now entered for defendants on payment of verdict fee. The motion for a new trial is refused."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Morton Hunter, for appellant. W. H. S. Thomson, Smith H. Shannon, Ache & Wasell, and J. B. Eichenauer, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of the learned judge of the common pleas, entering judgment for the appellee non obstante veredicto.

STEVENSON v. HENDERSON et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

SCHOOLS AND SCHOOL DISTRICTS (§ 103*)—TAXATION—ASSESSMENT.

After the passage of Act May 18, 1911 (P. L. 309), known as the "School Code," school boards in levying school taxes for the year 1911 were bound to levy them in accordance with the School Code, and not with the law as it existed prior to the approval of such Code.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 240-245, 252; Dec. Dig. § 103.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by John Stevenson against J. R. Henderson and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Shafer, J., filed the following opinion in the court below:

"In this case an answer has been filed and the case set down upon bill and answer. The bill is by a taxpayer against the school directors and tax collector of the borough of Dormont, praying for an injunction to restrain them from levying and collecting an occupation tax in excess of \$1, and from re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quiring the payment of school taxes without allowing a discount of 5 per cent. The question raised by the case is whether the amount of school taxes which may be assessed is governed by the act of May 18, 1911 (P. L. 309), commonly called the 'School Code,' or is to be regulated by the laws theretofore in force. The act of May 18th expressly provides that it is to go into effect immediately upon its passage. This act expressly repeals the act of July 22, 1897 (P. L. 305), authorizing the levy of a per capita tax of not more than \$1, and, in effect, repeals the act of June 25, 1885 (P. L. 187), which allows the tax collector to allow a discount of 5 per cent. on taxes paid within 60 days. The School Code provides in section 2812 for the transition from the old system to that provided by the Code, and directs that "all school directors shall levy the school taxes at the time or times and in the manner heretofore fixed by law," and shall continue to serve until their successors have been duly elected and appointed under the Code, the time fixed for this change being, in districts of the fourth class, the first Monday of December, 1911. The act also provides that the first school year and the first fiscal year in districts of the fourth class, of which the borough in question is one, shall begin on the first Monday of July, 1911.

"As the School Code is in force since the time of its passage, it follows that all proceedings in regard to school matters are to be carried on under its provisions, and any exception to that rule must distinctly appear in the act. It is claimed by the plaintiff that the direction to the school directors now in office to levy the school taxes 'at the time or times and in the manner heretofore fixed by law' is a direction to them to levy such amount of tax as was theretofore authorized by law and to order the collection of the tax by the collector in the manner theretofore authorized. The contention of the defendants is that the clause in question has no reference to the amount of the tax or the subjects of taxation, or the manner of collecting the same, but only authorizes the directors in office at the time of the passage of the act to levy the taxes required by law—i. e., those required by the Code—at the time and in the manner theretofore in use. In other words, the question is: What is meant by the expression 'in the manner heretofore fixed by law'? We are clearly of the opinion that these words do not authorize existing school boards, in levying the taxes for the current year, as they are directed by the act to do, to determine the amount and incidence of the tax according to acts which have been repealed, but only authorized them to levy a tax under the provisions of the new law in the time and way provided for in the old law. The time is not in question, but the manner of levying the tax according to

the former law was that it should be the votes of not less than a majority of the members of the board. This method is slightly changed in the new law, which provides that the tax shall be levied by the vote of a majority of all members of the board, with a record of how each member voted.

"The school directors of the borough of Dormont, having levied a tax at a time required by the old law, and, so far as appears, having levied the tax by a vote of the majority of all the members of the board, but levied upon the subjects of taxation provided by the new law, seems to us to have done what the law requires, and the bill is therefore dismissed; costs to be paid by the plaintiff."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John A. Metz, for appellant. Hugh M. Stille, for appellees.

PER CURIAM. The decree is affirmed on the opinion of Judge Shafer.

DONNELLY et al. v. BYERS.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 138*) —SALES OF REAL PROPERTY—CONFIRMATION.

On the sale of real estate by executors for the payment of debts without order of court, the orphans' court may confirm the sale under Act April 13, 1854 (P. L. 368), providing that, in all cases wherein any of the courts might have authorized any sale or conveyance, such a sale or conveyance made without order of court may be ratified and confirmed; such provision being applicable generally and not confined to sales under the Price Act (Act April 8, 1853 [P. L. 503]).

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-566, 575; Dec. Dig. § 138.*]

2. EXECUTORS AND ADMINISTRATORS (§ 148*) —SALES OF REALTY—RIGHTS OF PURCHASER.

Where the same persons were appointed executors and trustees and given authority as trustees to sell real estate, and made a sale without order of court, but subsequently a petition was filed in the orphans' court for ratification thereof, all parties in interest waiving issue of citation or being served therewith, and citation being served on all creditors of the decedent who had filed suits to preserve the lien of their debts, and subsequently the fund raised by the sale was distributed and a dividend paid to the creditors, the purchaser could not, in an action on the bond given by him for the price, question the validity of the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 595-601; Dec. Dig. § 148.*]

Appeal from Court of Common Pleas, Allegheny County.

Assumpsit by Alice R. Donnelly and others, executors and trustees of Charles Donnelly, deceased, for use of the Commonwealth Trust Company of Pittsburgh, administrator d. b. n. c. t. a., against Eben M.

Byers on a bond to secure a balance of purchase money for land. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

Ralph Longenecker and Gordon & Smith, for appellant. Alvin A. Morris, Albert J. Walker, and Harold Allen, for appellees.

MESTREZAT, J. We see no merit in this appeal. When it was ascertained that the real estate devised by the testator in trust for his children was required for the payment of his debts, it was the duty of his personal representatives to sell it and apply the proceeds to that purpose. This they did by presenting a petition in proper form to the orphans' court, setting forth all the necessary jurisdictional facts, and praying for the ratification and confirmation of the sale, made to Byers, for the payment of the debts of the decedent. The widow and all of the children of the decedent and the Commonwealth Trust Company, sole trustee under the will of the decedent, being all the parties in interest either under the will of the decedent or as his heirs at law, except Charles Donnelly, Jr., waived the issuing of a citation and notice of the presentation of the petition to the court and joined with the petitioner in the prayer that a citation on Charles Donnelly, Jr., and on all the creditors of the decedent who had filed suits to preserve the lien of their debts, the statutory period of two years from the death of the decedent having then expired, to show cause why the court should not confirm and ratify the sale formerly made to Byers as a sale for the payment of debts. The citation refers to the petition, and recites that it prays "for confirmation of sale of certain real estate fully described in petition for the payment of debts to Eben M. Byers," and was served upon Charles Donnelly, Jr., and upon all of the creditors who had filed suits against the decedent's estate. The court entered a decree ratifying and confirming the sale theretofore made to the defendant Byers as a sale for the payment of debts "as if the said sale had been previously ordered and directed and * * * free from any lien whatever of the debts of said decedent."

[1] We have no doubt of the power of the court to ratify and confirm the sale made by the executors to Byers as a sale made for the payment of debts. The third section of the Act of April 13, 1854 (P. L. 369; 4 Purdon's Dig. [13th Ed.] p. 4030), provides that "in all cases wherein any of the courts of this commonwealth might have authorized any sale or conveyance, or letting on ground-rent or otherwise, and such sale, conveyance or letting may have been made without leave of such court, it shall be lawful for such court, if approving of such sale or convey-

ance or letting, to approve, ratify and confirm the sale, with the same effect as if such decree had preceded the sale, conveyance or letting." We do not agree with the learned counsel for the appellant that the authority conferred by this section of the act applies only to sales made under the Price Act (Act April 8, 1853 [P. L. 503]). It is true that the act of 1854 is a supplement to the Price Act, but, as suggested by appellee's counsel, the other two sections of the act expressly limit their application to sales made under the Price Act. Not so with the third section of the act. As will be observed, the section confers jurisdiction on the court to ratify and confirm a sale, "in all cases wherein any of the courts of this commonwealth might have authorized any sale or conveyance, * * * and such sale, conveyance or letting, may have been made without leave of such court." The section is of general application, and its authority may be invoked wherever the court could have previously authorized a sale or conveyance of real estate. This is the uniform construction placed by the lower courts on the section wherever the question has arisen, and the language is amply broad enough to sustain the construction.

[2] The agreement to sell the real estate to Byers was executed by the executors, and not by the trustees, of the decedent. The deed made in pursuance of the agreement was signed by the parties as executors and trustees. By his will, the decedent gave his trustees power and authority to manage and control all of the trust property, including the power to buy and sell real and personal estate and change realty into personality and personality into realty. The trustees, who were also the executors, therefore had full authority to make the sale to Byers, the proceeds of which by the terms of the will and by the law were first applicable to the payment of debts. That the sale was made by virtue of this authority did not prevent the orphans' court from subsequently ratifying it as a sale for the payment of debts. So long as the unsecured debts of the decedent remained unpaid, the executors and trustees could not sell for the purposes of the trust so as to discharge the land from the payment of debts. But the sale having been made, and it subsequently appearing that the proceeds were necessary for the payment of debts, the act of 1854 conferred power on the orphans' court to ratify and confirm the sale as a private sale made for the payment of debts. Prior to the sale to Byers made under the power in the will, the executors could have made a private sale of the real estate for the payment of debts, which the court, under the Act of May 9, 1839 (P. L. 182), was authorized to decree and approve.

It is conceded that the price agreed to be paid by Byers was the full value of the real estate. It further appears, as suggested above, that all parties in interest under the

will or as heirs at law who could be affected by the sale had notice of the application made by the administrator d. b. n. c. t. a. for the ratification of the sale as a private sale made for the payment of debts. All the facts necessary to give the orphans' court jurisdiction are averred in the petition. No objection to the confirmation of the sale has been made by any of the heirs, devisees, legatees, creditors, or other parties legally interested. We are therefore at a loss to see any substantial reason why the sale should be declared invalid at the instance of the purchaser. In the language of Judge Stowe in *Siebert v. Zinkand*, 26 Pittsb. Leg. J. 137, a similar case: "The property having thus by legal intent been sold for its full value, and the money representing the value of the land having gone into the orphans' court and there distributed, what real difference does it make to plaintiff (here, the purchaser) that the sale was made by her (here, the executors and trustees) as devisees (here, as executors and trustees) under the will, instead of being by her as executrix under order of the orphans' court?"

The executors received from Byers \$20,000 in cash and the bond on which this suit was brought. They filed an account in which they charged themselves with the cash and the bond, and turned them over to the Commonwealth Trust Company, administrator, the plaintiff in this action. Subsequently the administrator filed its first and partial account charging itself with the cash received from the executors. A decree for distribution was made of the balance shown in the administrator's hands by this account, and a dividend was paid to all of the creditors of the estate except Sarah Dawson Speer, executrix of Charles E. Speer, who was guardian of Mary R. Donnelly, Louise Donnelly, and Allen G. Donnelly, and P. J. Brennan, who had brought suit for a small sum. The acceptance of the dividend by the creditors was a ratification of the sale made by the executors. They cannot receive the money and at the same time deny the authority of the executors to make the sale which produced the fund out of which the dividends were paid. The creditors were fully advised that the sale was for the payment of debts. The citation served on them to show cause why the sale should not be confirmed distinctly disclosed the fact that the petition presented to the court asked "for the confirmation of sale of certain real estate fully described in petition for the payment of debts to Eben M. Byers." They were further advised as to the character of the fund out of which they received their dividends, and how it was produced, by the account filed by the executors. It is idle, we think, to contend that the creditors who received and receipted for the dividends were not fully aware that the fund out of which they were paid was produced by the sale of real

estate for the payment of the decedent's indebtedness. We are of the opinion that under the circumstances the acceptance by the creditors of the dividend on their indebtedness paid out of the proceeds of the fund produced by the sale of the real estate to the defendant is a ratification of the sale and estops the creditors from pursuing the land for the balance of their claim.

Our attention has not been called to any act of assembly, and we know of none, which requires notice to creditors by the executors of the intended application to the court for an order to sell real estate for the payment of debts or for the confirmation of a private sale made for that purpose. When a personal representative files his account, the Act of March 15, 1832 (P. L. 135), requires the register to give notice by publication and posting for four weeks that the account has been settled in his office and that it will be presented to the orphans' court for confirmation. Personal or actual notice is not required. *Priestley's Appeal*, 127 Pa. 420, 17 Atl. 1084, 4 L. R. A. 503. It is not alleged that the proper legal notice of filing of the account and presenting it to the court for confirmation was not given prior to the audit and settlement of the account and the distribution of the fund in the hands of the administrator. It was the duty of creditors to present their claims to the court for allowance. If Sarah Dawson Speer, as executrix of Charles E. Speer, deceased, late guardian of the three Donnelly children, had any claim against Donnelly's estate or the fund for distribution, it was her duty to present it at the proper time for allowance, and we must assume that she would have done so. The same is true of P. J. Brennan. That neither of these parties presented a claim or participated in the distribution of the fund in court is fully explained by the admitted facts. The three Donnelly children for whom Mr. Speer had been guardian were of age at the time of the application to the orphans' court, and joined in the prayer of the petition for the confirmation of the sale of this land to Byers as a sale made for the payment of debts. This was a release by them of the land from any claim they, as heirs, devisees, or creditors, might have against it. The fact that they joined in the application to sell as devisees and heirs and not as creditors is of no moment. The sale being for the payment of debts and approved by the court at their request, and they, having legal notice that an account had been filed by the administrator, accounting for the fund produced by the sale, were required to present their claims, if any they had, to the orphans' court for payment out of the fund for distribution. The affidavit of defense does not aver that Mrs. Speer, as executrix, has a claim against the estate which is a lien on the land nor that the wards of her late husband are indebted to his estate,

and it cannot be presumed. Brennan failed to take the proper proceedings to continue the lien of his debt, and hence he can have no claim against the real estate purchased by the defendant.

The judgment is affirmed.

BARRY v. JONES & LAUGHLIN STEEL CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

A master must not only provide a safe place to work, but maintain it in a reasonably safe condition by inspection and repair.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 185, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—SAFE PLACE TO WORK.

Where the scull of a steel mill falls in operation of the converters onto the roof-shield, it is the duty of the owner of the mill to keep the shield clean, and where the owner fails to perform this duty, and an employé is injured by the falling scull, the employer is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 256; Dec. Dig. § 107.*]

3. WORDS AND PHRASES—"SCULL."

The slag, dross, and other impurities in molten iron discharged from the top of the converter and driven on the roof-shield are called "scull."

Appeal from Court of Common Pleas, Allegheny County.

Action by James M. Barry against the Jones & Laughlin Steel Company. Verdict for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

William A. Challener, Clarence Burleigh, and John D. McKenna, for appellant. John C. Bane, for appellee.

MESTREZAT, J. This was an action of trespass brought by an employé to recover damages for injuries sustained while engaged in the service of his employer. The errors alleged in the two assignments are that the court refused to direct a verdict for the defendant, and subsequently declined to enter judgment for the defendant non obstante veredicto. The case turns upon which of two principles of law is applicable to the facts disclosed by the testimony on the trial of the cause. The position of the defendant company, the appellant, as stated by its counsel, is that the accident to the plaintiff was occasioned by the nature and the character of the work done, and that the plaintiff's injuries were caused from dangers which arose during the progress of the work for which the company was not liable. The plaintiff, the appellee, claims that his injuries resulted from the failure of the de-

fendant to furnish him a reasonably safe place to work, and in not using reasonable care to maintain it in such condition.

[3] The defendant company is engaged in the manufacture of steel on the South Side, Pittsburgh, and the plaintiff was employed as a vessel foreman in the Bessemer department of the plant. It was his duty to see that the converters were kept in good working order and that they were kept in operation. There was a vessel floor or platform extending around the converters which was about 12 feet above the ground floor. A railroad track was constructed on the platform, and upon that track the molten metal was brought in cars from any point in the mill to the converters and deposited in them. About 15 feet above the vessel floor there was a roof-shield of boiler iron constructed in the shape of a right angle triangle for the purpose of protecting the superstructure and roof of the mill from discharges from the converters. The hypotenuse of the triangle was parallel with the roof, the base was the horizontal face of the roof-shield and about 15 feet directly above the converters, and the perpendicular face of the roof-shield extended to the roof. After the molten iron is placed in the converter and it is elevated to a perpendicular position, a blast of cold air is sent through the tuyère to the interior of the converter for the purpose of expelling the slag, dross, and other impurities in the metal. These impurities, called "scull" by the workmen, are discharged from the top of the converter and driven against and deposited on the roof-shield. This recement on the roof-shield cools and hardens, and after accumulating falls, alighting on the vessel floor.

In the performance of his duties, the plaintiff was required to be on the vessel floor or platform. On the day of the accident, July 11, 1907, a portion of the molten metal in one of the cars had "spilled over" on the railroad track, and before the track could be used again it was necessary to remove the spilled metal. While the plaintiff was engaged in assisting to remove the metal, he was struck on the head by a piece of "scull," knocked to the ground floor, and very seriously injured. The plaintiff introduced testimony to show that it was the duty of the defendant to keep the "scull" cleaned off the roof-shield so that he and others who were required to be upon the vessel floor while engaged in operating the converters would be protected from injuries resulting from the fall of "scull" from the roof-shield. He testified that the "scull" needed constant attention, that it was the company's business to give it such attention, and that the company had, on other occasions, sent men with proper instruments to remove it. He says he knew that the "scull" was likely to fall, but that he also knew that

it was the duty of the company to have it removed, and that the company had, at other times, removed it from the roof-shield so as to protect the employes at work on the vessel floor. The plaintiff's evidence tended to show that at the place he was required to work he could not and did not see whether there was any accumulation of "scull" upon the roof-shield at the time of the accident.

The learned court instructed the jury that if the accumulation of the "scull" on the roof-shield would and did take place, and the defendant undertook and did from time to time keep the roof-shield cleaned of the "scull," and on the occasion of the accident neglected to do so, the plaintiff was entitled to recover; but if, as the defendant claimed, the accumulation of "scull" upon the roof-shield was a transitory danger that occurred in the progress of the work, it was not the duty of the defendant to keep it cleaned off the roof-shield, and the plaintiff would not be entitled to recover.

An employer, as we have frequently held, is not liable for injuries to an employe from dangers arising during the progress of the work and caused by the work done. He is not required to stand by during the progress of the work to see when a danger arises. It is sufficient if he provides against such dangers as may possibly or probably arise, and gives the workmen the means of protecting themselves; they should look out for such dangers and use the means provided. *Durst v. Carnegie Steel Co.*, 173 Pa. 162, 83 Atl. 1102. In such cases the employer cannot anticipate the unexpected danger, and hence cannot be required to make provision against it. But the case in hand is not ruled by this principle. The accident was not caused by the plaintiff nor by a fellow employe, nor was the cause of it unexpected and not to be anticipated by the employer. In the operation of the converters, the defendant knew that the "scull" would be discharged therefrom and be deposited on the roof-shield. That was inherent in the business and was certain to occur in the operation of the converters. The plaintiff and the other employes whose duties required them to be on the vessel floor had no control over the "scull" and were in no way responsible for its being deposited on the roof-shield or for its falling therefrom to the vessel floor. It was not their duty to remove it or in any way to interfere with it. The plaintiff, if the evidence is believed, did not and could not have seen the "scull" which fell and caused his injury. He was therefore not inviting the injury by standing under a known danger; on the contrary, he was where his duty required him to be and where he had reason to believe he would be protected by his employer from the falling recrement. Assuming the testimony produced by the

plaintiff to be credible, as the jury found, the defendant recognized the danger and on various occasions removed the "scull."

[1] It is clear that the question at issue in the cause is whether the defendant company furnished the plaintiff a safe place in which to perform his duties, and whether it continued to keep it in the same condition. The law is settled that it is not only the duty of the master to provide a safe place for the servant to work, but also to maintain it in a reasonably safe condition by inspection and repair. That is a direct, personal, absolute obligation from which nothing but performance can relieve the master. It was therefore manifestly the duty of the defendant company not only to see that the place in which the plaintiff had to work was safe when he entered upon the performance of his duties, but also to maintain the place in a safe condition while he was engaged in his work on the vessel floor. The company knew the "scull" would accumulate on the roof-shield and harden and fall, and would alight at the very point on the vessel floor where the plaintiff had to do his work. This was an ever present danger to all the employes on the floor, and the defendant company had full knowledge of it. It is true that the employes also recognized the danger, but it is equally true that if the defendant was required to keep the place reasonably safe and protect them from the known danger, it was its duty to maintain a constant vigil on the "scull" adhering to the roof-shield, and see that it was removed before it could harden and fall to the vessel floor.

[2] The employes engaged at this place assumed the dangers necessarily incident to their employment, but this rule cannot be extended so as to relieve the defendant here from the duty to keep watch on and remove the "scull" so as to protect the employes from the danger inherent in and arising from the operation of the converters. These dangers necessarily arose from the business, and being known to the defendant company, and it having the power and being its duty to afford protection against them, it cannot be heard to say that the dangers were incident to the service and therefore it is relieved from liability. The facts found by the jury, under a charge to which no exception was taken, show that the defendant company failed in its duty to furnish the plaintiff a reasonably safe place in which to perform his work, and that this failure of duty without negligence on part of the plaintiff resulted in the injuries for which this action was brought. It follows that the court committed no error in declining to direct a verdict for the defendant, or in refusing to enter judgment for the defendant notwithstanding the verdict.

The judgment is affirmed.

ENGLE v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

RAILROADS (§ 275*) — OPERATION—INJURIES TO PERSONS WORKING ON OR ABOUT CARS.

Act April 4, 1868 (P. L. 58), which provided that when a person sustained personal injury or loss of life while lawfully engaged on or about the roads, works, depots, and premises of a railroad, or in or about any car therein or thereon, of which company such person was not an employé, the right of action against the company should be such only as would exist if the person were an employé, is not applicable to defeat recovery, where plaintiff was injured by the negligent act of defendant railroad company while he was unloading a car on a switch, of which plaintiff's employer had the exclusive ownership and control, cars placed on which were always unloaded by such owner.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Theodore Engle against the Pennsylvania Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On a rule for judgment for defendant *n. o. v.* Swearingen, P. J., filed the following opinion in the court below:

"The plaintiff, at the time of the injury of which he complains, was employed as a laborer by the Duquesne Brewery, whose plant was located on the south side of Mary street between Twenty-First and Twenty-Second streets, Pittsburgh, Pa. The accident happened on November 26, 1906. On the 5th day of July, 1899, an ordinance was enacted by the city of Pittsburgh whereby said brewery was granted the right to construct and maintain a switch alongside Mary street, to connect with the tracks of the defendant near Twenty-Second street, for which it paid the city the sum of \$75 per annum. The work of constructing this switch was done by the defendant, but the Duquesne Brewery paid for the same on December 5, 1899. The switch was used exclusively by the brewery for delivering material to it and shipping its product. The defendant had charge of the switch locks. When a car consigned to the brewery arrived, the defendant shifted the car upon said switch to the required point in front of the brewery, and when the car was ready for removal, the defendant ran its engine upon the switch and took the car away. According to the uncontradicted testimony, cars upon said switch were always loaded and unloaded by the employés of the brewery—never by the employés of the defendant. The defendant had the right to take the car upon the switch, which had been consigned to the brewery, and it had the right, upon notice, to go upon the switch and remove the car therefrom. It had no other rights upon the switch. Upon the day of the accident, the plaintiff was, as an employé of

the brewery, unloading a car of coal, which was standing upon said switch. Whilst he was thus engaged, the work of unloading being uncompleted, an engine and tender of the defendant were run from the main line upon said switch and against the car upon which the plaintiff was at work as aforesaid, without notice or warning to the plaintiff of its approach. The plaintiff was knocked down, rendered unconscious, and sustained terrible injuries. Why the engine and tender were run upon the switch was not explained. The evidence of the defendant's negligence was clearly for the jury, and it was sufficient to sustain a verdict in favor of the plaintiff.

"The defendant presented a request for binding instructions in its favor, which was refused. The ground of this request was that the plaintiff was in the situation of a coemployé of the defendant's servants, by virtue of section 1 of the Act of April 4, 1868 (P. L. 58). Said section reads as follows: 'That when a person shall sustain personal injury or loss of life while lawfully engaged on or about the roads, works, depots and premises of a railroad company, or in or about any car therein or thereon, of which company such person is not an employé, the right of action to recover in all such cases against the company shall be such only as would exist if such person were an employé: Provided, that this section shall not apply to passengers.' Said section of the Act of 1868 was repealed by the act approved June 10, 1907 (P. L. 522); but, as this accident happened before that date, the first section of said statute was then in force, and its provisions govern.

"The argument of the defendant is that the place, where the plaintiff was injured, was part of its works, within the meaning of said act of 1868; that the defendant is a common carrier, and the duty of the common carrier is to deliver the goods shipped to the consignee, which includes unloading them from the car; that the plaintiff was actually unloading this car when he was injured, and was accordingly engaged in doing railroad work. Therefore the conclusion of the defendant is that the plaintiff cannot recover, because of the provisions of said act of 1868. It will be observed that the validity of this conclusion depends upon two propositions of the premises upon which it is based, viz.: (1) The place where the plaintiff was injured was railroad or premises, within the meaning of the said statute. (2) At the time the plaintiff was injured, he was injured in railroad work.

"In *Spisak v. Railroad Co.*, 152 Pa. 281, 25 Atl. 497, the Supreme Court says that the cases, under the act of 1868, divide themselves into two classes: 'In the first the place of the accident is clearly and for general purposes the "roads, works, depots or premises" of the railroad company. In such cases

it is sufficient if the person injured is lawfully "engaged or employed on or about" them, and is not a passenger. * * * The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company. In this class the nature of the employment at which the party injured was engaged at the time becomes material. If it is business connected with the railroad in the sense that it is ordinarily the duty of railroad employes, then while the party is engaged at it the statute treats him as a quasi employe, and puts his rights upon the same basis. If, however, the work has no relation to railroad work as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all.'

"It is not pretended that the place of the accident in this case was such as described in the first class, mentioned in the foregoing opinion. The switch was not within the exclusive control of the defendant. Was the switch railroad 'works or premises,' as described in the second class mentioned in the said opinion?

"The switch was the property of the Duquesne Brewery. True, it was located upon a street of Pittsburgh; but the title of the brewery is presumed to have extended to the middle line thereof, subject of course to the public easement. The brewery had obtained municipal consent to lay the switch and had paid for it. The defendant had the right to use the switch for the purpose of delivering loaded cars to the brewery and for the purpose of removing cars after they were unloaded. This was the extent of its rights upon the switch. While the defendant was engaged in the performance of these duties, said switch was railroad works or premises within the meaning of the statute; but while it was not so engaged the switch was not railroad works or premises. When the defendant delivered the car, in which the plaintiff was working, to the brewery upon said switch, its duty was ended. Its duty to remove the car had not begun, because no request to do so had been given. The fireman of the engine, which ran against the car in which the plaintiff was working, testified that the engine was neither going with cars for the brewery, nor going for the purpose of removing cars. This testimony was not contradicted. Consequently, at the time of this accident, the switch and the car upon it were in the exclusive control of the brewery and upon its premises. The defendant had no right to be there, and it was not there in the performance of any duty. We cannot therefore see how such switch, at the time of this ac-

cident, was in any sense railroad works or premises within the meaning of said statute. If it was not, the provisions of the statute are not applicable. *Christman v. Railroad Co.*, 141 Pa. 604, 21 Atl. 738; *Keck v. Railroad Co.*, 206 Pa. 501, 56 Atl. 47.

"Was the plaintiff engaged in railroad work, at the time of the accident? We thought, at the trial, that this was very doubtful, and so we left the question to the jury. It was not 'ordinarily' the work of railroad employes to load or to unload cars upon the switch in question. For six years prior to the accident that work had always been done by the brewery's employes, never by those of the defendant. Under these circumstances, we think *Noll v. Railroad Co.*, 163 Pa. 504, 80 Atl. 157, is authority. In that case, the plaintiff was employed by the Temple Iron Company to unload cars near its stockhouse. The railroad's employes never unloaded such cars. The crew of the railroad came into the yard and shifted the cars, upon request of the Iron Company, but uncontrolled as to speed and manner of running. While boarding a car for the purpose of unloading it, another loaded car was sent in by the railroad against the car which the plaintiff was attempting to board, and he was injured. The Supreme Court held that 'the plaintiff was not an employe of the defendant or on the footing of one under the act of April 4, 1868.' We can see no distinction between the facts of that case and the one at bar, with respect to the point under consideration. See, also, *Spisak v. Railroad Co.*, 152 Pa. 281, 25 Atl. 497.

"We cannot perceive any good reason why the railroad could not commit to a consignee the duty of unloading cars, delivered upon the latter's own premises. It is true the authorities cited by the defendant do indicate that unloading cars, no matter where, is railroad work; but the authorities above cited to our mind indicate the contrary. If, however, we are correct in our opinion that the place of this accident was not, at that time, the works or premises of the defendant, it is immaterial whether or not the plaintiff was engaged in performing railroad work. This being true, the rule for judgment, non obstante veredicto, must be discharged."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

Thomas Patterson and James R. Miller, for appellant. Meredith R. Marshall and Thos. M. & Rody P. Marshall, for appellee.

PER CURIAM. The judgment is affirmed on the opinion of Judge Swearingen, discharging the rule for judgment non obstante veredicto.

In re HAMMILL'S ESTATE.

Appeal of O'DONNELL et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)
PARTITION (§ 107*) — SALE—REPRESENTATIONS
BY AUCTIONEER—SETTING ASIDE SALE.

Where a purchaser at partition sale is induced to bid on the belief that the representations of the auctioneer would be ratified by the trustee conducting the sale, and they are not, the sale will be set aside, but where the representations were as to objectionable features which were visible, and the purchaser did not file objections to the return until three months after made, costs of the sale and proceedings to vacate would be imposed on him.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 362-374; Dec. Dig. § 107.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the estate of Owen Hammill. From the decree dismissing exceptions to decree setting aside sale, W. J. O'Donnell, trustee, and Margaret Hammill appeal. Affirmed.

Miller, J., filed the following opinion:

The Facts.

This matter comes on upon exceptions to a return of public sale in partition. From the pleadings and testimony, the following are the material facts: On the 12th of September, 1908, W. J. O'Donnell, Esq., was appointed trustee to make public sale in partition of certain real estate owned by the decedent. The sale was duly advertised, and the return day extended for successive long periods of time. On February 19, 1910, final return was made setting forth the various adjournments, and that for lack of sufficient bids the real estate was not sold. On April 16, 1910, an alias order for sale was made, the terms being fixed at one-third in cash, of which 10 per cent. should be paid at the time of the bid, and the remaining two-thirds in two equal annual payments, with interest at 6 per cent., secured by bond and mortgage, and return to this order was made on June 11, 1910, showing that the first described piece, located in the present Second ward, formerly Fourth ward, of the city of Pittsburgh, was sold to Philip Fitzgibbon for the sum of \$15,000, which return was confirmed nisi. On August 13, 1910, the purchaser was permitted to file exceptions to this return, to which answer was made. From these pleadings and testimony it appears inter alia that, upon subsequent examination of the title, the building upon the ground extends on the adjoining lot 9 inches in front and 10¼ inches in the rear; that, since the original order of sale had been made, the property had been very much damaged by reason of excavations in adjoining alley, the erection of a party wall by one of the adjoining owners, with the consequent destruction of the wall of this building; that certain uprights and other erec-

tions had been put upon the premises, whereby they were damaged; that the auctioneer stated to the purchaser, if he bid \$15,000, the damages by reason of the excavations and to the walls would be assigned, or the trustee would restore the premises to the original condition, and that the title was good. The auctioneer was not authorized to make these representations, and the trustee refuses to ratify the same, being bound by the terms of sale as authorized; that some of the heirs are in possession, and have given notice that they will not vacate the premises; that the purchaser at one of the previous offerings at public sale bid a higher price than \$15,000, at which time the party wall had not been built, nor had the excavation been made in the alleyway; that the adjoining owner admits he has all the property called for by his deeds; that no claim has been made upon this estate by reason of the wall being apparently 9 inches over the line; that the property in question is of the full width advertised, exclusive of the projection or extension of the wall on the adjoining property; this having been its location for more than 40 years.

The Law.

There can be no question as to the title; all the land purporting to be conveyed is undoubtedly covered by the deed to the ancestor in title. While it does appear that the wall of this old building extends beyond the lines of the lot, it is manifest that the adjoining owner has no claim thereto, because he admits he has all the ground purchased by him; nor does he assert any title to the portion questioned. It would seem, upon the uncontradicted evidence as to the length of time this wall has been upon the ground, that adverse possession, for a period far exceeding the statutory limit, settled the question of title as to the projection, and the estate has title thereto in addition to the width called for in the deed. Equally clear it is that the purchaser at this judicial sale is bound by the rule of caveat emptor, and that unless there are mitigating circumstances he has no ground for relief.

But it is held in *Vandever v. Baker*, 13 Pa. 121, and *Fabrig v. Schimpff*, 199 Pa. 423, 49 Atl. 237, 85 Am. St. Rep. 796, that, if he be misled by declarations of the crier at the sale, he may apply to the court to set the same aside; thus vesting in the court, having ordered the sale, a discretion which it should exercise on equitable principles. Apparently Fitzgibbon was induced to bid \$15,000 upon the belief that the representations of the auctioneer would be ratified by the trustee. He saw the objectionable features as to the excavations and the damage done to the wall; he knew this condition of affairs had taken place since he had made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his former bid, and that it would require an expenditure of money to put it in shape for entrance and use. While the trustee is not bound by this unauthorized assurance on the part of the auctioneer, it would not be equitable to hold the purchaser, who depends thereon, to the strict letter of the purchase, according to the advertised terms. He, however, is not free from blame; he permitted three months to elapse between the time of the return of sale and his application to file exceptions; in the face of the terms of sale he should have obtained additional assurances from the trustee. The probabilities are that some one else at this sale would have taken it freed from these particular declarations made by the auctioneer. Therefore, while the confirmation of the sale as to him will be vacated, it must be upon the payment of the costs that accrued on the present sale and the proceedings.

Decree.

And now, to wit, April 17, 1911, this cause came on to be heard upon exceptions to the return of sale made in the above-entitled case and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the exceptions be sustained and the sale is hereby vacated and set aside, and the trustee is ordered and directed to refund to Philip Fitzgibbon the amount of purchase money paid, viz., \$1,500.

And now, to wit, April 22, 1911, the above decree vacating sale is hereby amended so that the costs of the sale be paid by Philip Fitzgibbon, exceptant in above-entitled case.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Thomas L. Kane and Marlon H. Murphy, for appellants. Marron & McGirr, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the learned judge of the orphans' court.

PENNSYLVANIA R. CO. v. BRADDOCK BOROUGH.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

RAILROADS (§ 68*)—RIGHT OF WAY—"DEEP CUTTINGS."

Where a railroad is authorized by its charter to acquire land for its tracks not to exceed four rods in width, except in the neighborhood of deep cuttings or high embankments, the words "deep cuttings" mean such cuts as may be necessary to enable the company to use for its track the entire authorized 66-foot right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 159, 160; Dec. Dig. § 68.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by the Pennsylvania Railroad Company against Braddock Borough. Decree for complainant, and defendant appeals. Affirmed.

The following opinion was filed by Frazer, P. J., in the court below:

"The purpose of this bill was to enjoin defendant borough from entering upon land claimed to be part of plaintiff's right of way and constructing thereon a concrete wall. From the bill, answer, and proof we find the following facts:

"Findings of Fact.

"First. Plaintiff is a corporation organized and existing under and by virtue of a special act of assembly of the commonwealth, entitled 'An act to incorporate the Pennsylvania Railroad Company, approved April 13, 1846 (P. L. 312),' and the supplements thereto and amendatory thereof, with the following powers, inter alia:

"Section 1. That the president and directors of said company shall have power and authority by themselves, their engineers, superintendents, agents, artisans, and workmen, to survey, ascertain, locate, fix, mark and determine such route for a railroad as they may deem expedient, not however, passing through any burying ground, or place of public worship, or any dwelling house, without the consent of the owner or owners thereof; and not except in the neighborhood of deep cuttings or high embankments, or places selected for sidings, turnouts, depots, engine or water stations, to exceed four rods in width; and thereon to lay down, erect, construct and establish a railroad, with one or more tracks, with such branches or lateral roads as are hereinafter mentioned; and with such bridges, viaducts, turnouts, sidings or other devices, as they may deem necessary or useful; And in like manner by themselves, or other persons by them appointed or employed, as aforesaid, to enter into and upon, and occupy all land on which the said railroad or depots, warehouses, offices, toolhouses, engine and water stations, or other buildings or appurtenances hereinafter mentioned, may be located, or which may be necessary or convenient for the erection of the same, or for any other purpose necessary or useful in the construction, maintenance or repairs of said railroad; and therein and thereon to dig, excavate and embank, make, grade, lay down, and construct the same.

"Sec. 2. That said company shall not purchase or hold any real estate, except such as may be necessary or convenient for the making and constructing of said railroad, or for the furnishing of materials therefor, and for the accommodation of depots, offices, warehouses, machine shops, toolhouses, engine and water stations, and other approp-

plate appurtenances, and for the persons and things employed or used in or about the same.'

"Second. Defendant is a municipal corporation, organized June 8, 1867, under the laws of this commonwealth, and located in the county of Allegheny; the southern line of plaintiff's railroad being the northern line of the borough.

"Third. By virtue of a grant from the Merchants' & Manufacturers' Bank of Pittsburgh, dated June 8, 1847, and recorded in the recorder's office of Allegheny county, Deed Book Vol. 78, p. 378, plaintiff acquired 'a strip of land four rods in width, and such additional width as may be required and necessary in the construction and use of said railroad at deep cuttings and embankments,' the strip of land referred to being located a short distance west of the present station at Braddock, and includes the land in controversy in this proceeding.

"Fourth. By a plan of lots laid out by the Masonic Bank of Pittsburgh, recorded December 27, 1882, in Plan Book Vol. 6, p. 300, a street 40 feet in width and extending from Margaretta street in the borough of Braddock to the line of the Pennsylvania Railroad, known as Pitcairn street, was laid out and dedicated to public use, and has since that time been used by the public. The land embraced in this plan was part of the land owned by the Merchants' & Manufacturers' Bank at the time of its grant to plaintiff and referred to in the previous finding of facts.

"Fifth. In the fall of 1881 the plaintiff (having theretofore constructed over the land acquired by the grant of 1847 two tracks) permanently located its road over its land by grading the roadbed to four rods in width, one-half thereof on each side of the center line, with cuttings and fills to support the roadbed, and laid down thereon two more tracks, making four tracks in all upon its right of way, and put all of the tracks in use prior to May, 1882.

"Sixth. The surface of Pitcairn street where it abuts on the line of the plaintiff's property is from three feet to seven feet above the grade of the roadbed and tracks of plaintiff, and for the purpose of supporting the bed of the street at its established grade, the street having lately, by ordinance duly adopted, been improved by grading, paving, and curbing, defendant on or about October 17, 1910, began the construction of a concrete wall at the northerly end of Pitcairn street and about four inches south of the south 33-foot line of the right of way of plaintiff company, which when completed will be approximately 35 feet long, 5½ feet above the ground, 18 inches wide at the top with an increase of 6 inches for every 2 feet of height, to a thickness of 2½ feet at the bottom. The construction of the wall in question, as at present located, would take

the place of the slope existing at Pitcairn street since the spring of the year 1882.

"Seventh. In the construction of plaintiff's railroad at and east of Pitcairn street a cut was made necessary by a rise in the ground at that point. The cut begins at zero slightly west of Pitcairn street and becomes deeper as it progresses east toward Parker avenue; its deepest point being midway between Parker avenue and Pitcairn street. At the west side of Pitcairn street the cut from the surface of the street to the subgrade of the railroad is 4.09 feet, and to the top of the outer rail of the south track 3.33 feet. At the center line of the street the cut is 5.38 feet to the subgrade and 3.06 feet to the top of the outer rail, and at the east curb line of the street the cut is 7.06 feet to subgrade and 5.82 feet to the top of the outer rail. The extent of the cut at its highest point midway between Pitcairn street and Parker avenue does not appear by the testimony, except that the photograph shows it to be in the neighborhood of 12 feet, the gradient being 1½ to 1, and the toe of the cutting being at grade at the southerly line of the 4 rods width, the width of the slope is additional to the 4 rods width.

"Eighth. The cut at Pitcairn street is reasonably necessary in accordance with good engineering to enable plaintiff to use and occupy its full width of 66 feet for railroad purposes. No objection was made to the cut by any person until October 17, 1910, when defendant borough began the construction of the wall now complained of.

"Ninth. Plaintiff company has now four tracks constructed and in use at Pitcairn street, and five tracks both east and west of that point. To extend the fifth track in front of Pitcairn street and connect the ends of the tracks now laid will require the construction of 6,379 feet of new track. This the testimony shows plaintiff proposes doing in the near future, and if constructed the south rail of the fifth track will be located about six feet from the proposed wall if constructed.

"Tenth. If the plaintiff has the right under its charter to take additional land beyond four rods for the cut at Pitcairn street, and such additional land was conveyed by its grant from the Merchants' & Manufacturers' Bank of Pittsburgh, then the proposed wall of the borough at the end of Pitcairn street as now located is upon plaintiff's property. If plaintiff is confined at that point to a strip of land four rods wide by its grant, and no more, then the location of the proposed wall is outside of plaintiff's land.

"Conclusions of Law.

"First. The question involved in this proceeding is confined within narrow limits. Plaintiff by its charter is authorized to acquire land over which to construct its rail-

road, not, however, 'to exceed four rods in width,' 'except in the neighborhood of deep cuttings or high embankments.' Pursuant to this authority it acquired from the Merchants' & Manufacturers' Bank of Pittsburgh, for the consideration 'of the advantages which will result to said corporation from the location and construction of the Pennsylvania Railroad, and for the further consideration of the sum of one dollar, * * * a strip of land four rods in width, and such additional width as may be required and necessary in the construction and use of said road at deep cuttings and embankments, one-half thereof on each side of the center line of said railroad, extending in length as far as said railroad may pass over the lands of said corporation.' The land thus acquired lies a short distance west of plaintiff's station house at Braddock, and now adjoins the borough of Braddock on the north. In constructing its railroad over this strip of land, to afford plaintiff the use of its full four rods of land for track purposes, it became necessary to make a cut at one point which required a slope at a gradient of $1\frac{1}{2}$ to 1, and ranging in height from zero to possibly 12 feet. The north terminus of Pitcairn street is near the west end of the cut, and the street is on an average of approximately six feet above plaintiff's graded roadbed.

"If plaintiff's line extends to the outer edge or top of the slope of the cut, then the preliminary injunction should be made permanent; if only to the south 33-foot line, it should be dissolved. Plaintiff's charter authorizes it to hold land for track purposes to the extent of 66 feet in width. If such was not the legislative intention, there was no necessity for the reference in the charter to 'deep cuttings or high embankments,' and that such was the understanding of both plaintiff and the Merchants' & Manufacturers' Bank is apparent from the language of the grant, which not only conveys the 66-foot strip, but also 'such additional width as may be required and necessary in the construction and use of said road at deep cuttings and embankments.' If the cut beginning immediately west of Pitcairn street and extending eastwardly is considered a 'deep cut,' plaintiff's line extends to the top of the slope. In determining that question we are not confined to the immediate terminus of Pitcairn street, but must consider the cut as a whole. If no greater at any point than at the west end of the street, we should probably say it was not a 'deep cut'; but regarding it as a whole, and taking into consideration the fact that it increases gradually as it extends easterly until it reaches a height of at least 12 feet, we think it should, under the circumstances, be considered a 'deep cut,' and carry plaintiff's line to the top of the slope. The Legislature certainly never intended that one part of a cut should be treated as 'deep'

and another as 'shallow,' and thus cause the line of a railroad's property to be serrated and indented, and dangerous in the operation of trains, which would be the result if defendant's contention that the cut at Pitcairn street is not a 'deep cut' is upheld. The term 'deep cuts' as used in plaintiff's charter in our opinion is a relative term, and means such cuts in their entirety as may be reasonably necessary to enable plaintiff to use for track purposes the entire width of a 66-foot right of way. That conclusion is strengthened by the fact that provision is also made for acquiring land for depots and other purposes. It is not contended that the slope as it now exists at Pitcairn street is not in accordance with good engineering.

"The cases cited by defendant do not rule the question raised here. In those cases the taking was under the corporations' right of eminent domain; here plaintiff purchased not only a strip of land 66 feet in width, but such additional land as might be necessary in the construction of its road at deep cuttings and embankments. And this it had a right to do, as its charter expressly confers upon it the power to purchase or hold such real estate as may be necessary or convenient for making and constructing its railroad. If the cut at what is now the terminus of Pitcairn street was either necessary or convenient to enable plaintiff to use its full right of way for track purposes, and the uncontradicted testimony of its engineers shows that it is, then plaintiff had a right to purchase the additional land, and by the purchase acquired a good title, not only to the 66-foot right of way, but also to the top of the slope of the cut. The fact that the plan of the Masonic Bank shows Pitcairn street laid out to the 66-foot right of way of plaintiff cannot affect plaintiff's title, as the property was acquired by the bank and the plan laid out and recorded long after plaintiff secured and located its right of way.

"Second. The contention of defendant that the bill must be dismissed because plaintiff failed to show action on the part of its board of directors locating its road through this property cannot be sustained. We think such corporate action can be assumed, inasmuch as the testimony shows that the first tracks were laid upon the land acquired from the Merchants' & Manufacturers' Bank fully 60 years ago, and that the south line of the right of way is fixed by measuring from the center line of the tracks as originally located.

"Third. In accordance with the foregoing findings of fact and conclusions of law, we are of opinion that the plaintiff's right of way extends to the top of the slope at Pitcairn street in defendant borough, and that defendant has no right to construct at that point the proposed retaining wall north of the top of the slope as ascertained upon a gradient of $1\frac{1}{2}$ to 1.

"Let a decree be drawn making permanent the preliminary injunction heretofore granted. The costs of these proceedings to be paid by defendant."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Jos. F. Mayhugh, for appellant. James R. Miller, for appellee.

PER CURIAM. The decree appealed from is affirmed on the opinion of the learned president judge of the common pleas.

KELLY v. THOMAS et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. CORPORATIONS (§ 320*)—STOCKHOLDERS—SUING ON BEHALF OF CORPORATION.

Where a bill by a stockholder against three out of seven officers and directors of the corporation for an accounting and payment to plaintiff of moneys which should have accrued to the corporation but for the fraudulent acts of the defendants shows that no demand has been made on the officers and directors of the corporation, the presence of the corporation as a party to the record is indispensable to the maintenance of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1439; Dec. Dig. § 320.*]

2. CORPORATIONS (§ 683*)—FOREIGN CORPORATIONS—STOCKHOLDERS—ACTIONS.

A Pennsylvania court of equity has no jurisdiction over a bill by a stockholder of a foreign corporation which has no property, and does not conduct its business in the state on behalf of the company against a part of the officers and directors to compel an accounting for moneys fraudulently taken from the company, nor to review a judgment entered against the company in the state of its domicile on general allegations that the judgment was entered through the fraud and collusion of the corporate officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2062; Dec. Dig. § 683.*]

3. EQUITY (§ 150*)—PLEADING—BILL—MULTIFARIOUSNESS.

A bill by a stockholder on behalf of the corporation against certain of its directors and officers for accounting of moneys of which the company had been fraudulently deprived, for an accounting against another company for moneys obtained by sales which should have been made through the corporation, and to recover from the other company and the directors of the corporation a loss sustained by plaintiff through depreciation in the value of stock, is multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 342, 371-379; Dec. Dig. § 150.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by William J. Kelly against George W. Thomas and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Bill in equity for an accounting and payment to the plaintiff of all moneys due from sales of coal made by certain of the defendants which should have accrued to the bene-

fit of the Mississippi River Coaling Company, and of the moneys which should have been derived from coal that could and would have been sold by said company but for the alleged fraudulent and unlawful acts of the defendants; further, to compensate the plaintiff for the depreciation in the value of his stock in the said company, alleged to have been wholly destroyed by the acts or omissions of the defendants.

On demurrer, Swearingen, P. J., filed an opinion dismissing the bill, from which the following material excerpts are taken:

"The bill was filed by William J. Kelly, of New Orleans, La., against George W. Thomas, of Pittsburgh, Pa., Albert G. Thomas, of New Orleans, Martha A. Friend, Charles W. Friend, and Theodore W. Friend, executors of the will of James W. Friend, deceased, of Pittsburgh, Pa., F. N. Hoffstott, of either Pittsburgh or New York, C. Jutte & Co., a corporation existing under the laws of Pennsylvania, and the Mississippi Coaling Company, a corporation existing under the laws of Louisiana. * * *

"The complainant averred that he had made no demand upon the officers or directors of the Mississippi River Coaling Company to bring suit, for the reason that they were charged with a misfeasance set out in the bill, and that, therefore, such demand would have been useless. He also averred that his bill was brought in his own behalf and on behalf of any other stockholder who might desire to join. * * *

"The said executors of the will of James W. Friend, George W. Thomas, and C. Jutte & Co. have appeared. None of the other defendants named have appeared, and the record does not show that service was had upon any of them. The individual defendants who have appeared have demurred to the whole bill. * * * Therefore the averments of the bill, which are well pleaded, are to be taken as true. * * *

"The important averments are these: The complainant is the owner of 48 per cent. of the capital stock of the Mississippi River Coaling Company, and C. Jutte & Co. is the owner of 41 per cent. thereof, less four shares assigned to several persons to qualify them as directors. August 13, 1904, the complainant and C. Jutte & Co. entered into a written contract, whereby they agreed that a corporation should be formed under the laws of Louisiana, with a capital stock of \$100,000, for which the complainant and his associates were to subscribe, and the object of which was to build docks at the mouth of Lake Borgue Canal, in order to handle and store coal for the purpose of coaling steamers, supplying bunker coal and loading cargo or bunker coal for export; that complainant was to transfer to said corporation a lease of certain property for its purposes;

that C. Jutte & Co. was to loan the corporation \$40,000 upon its notes to be secured by the stock, as soon as the complainant had obtained a contract for C. Jutte & Co. to supply the Elder-Dempster Steamship Company with coal, and had produced reasonable assurance in writing that C. Jutte & Co. was to obtain like contracts from other lines; that the Dock Company was to handle no coal except that of C. Jutte & Co., and all contracts were to be made in the latter's name, and that the compensation of the Dock Company was to be all in excess of \$2.85 per net ton, but it was not required to handle coal at a compensation of less than 30 cents per ton. Pursuant to said contract, a corporation of the state of Louisiana was formed and was named Mississippi River Coaling Company, with a capital stock of \$100,000, which was subscribed by complainant and his associates. It was organized with a board of five directors. Complainant turned over to said corporation the lease, as he was required to do, for which he received \$99,600 of said stock. He transferred to C. Jutte & Co. \$52,000 of said stock, obtained a contract with Elder-Dempster Steamship Company and assurances from other companies, and in all respects fulfilled his obligations under the contract. C. Jutte & Co. loaned the sum of \$40,000 to the Dock Company and received the notes therefor and the collateral; and the coal tipple and docks were erected. Said George W. Thomas became president of the said Dock Company, his son, Albert G. Thomas, secretary and treasurer, and J. W. Friend a director. Complainant was also a director. Said George W. Thomas and James W. Friend were also controlling officers and directors in, and the principal owners of, the stock of C. Jutte & Co. * * *

"It was averred that the defendants, who controlled both corporations and had a large interest in C. Jutte & Co., fraudulently failed to enforce said contract in favor of the Dock Company and against C. Jutte & Co., and fraudulently violated the same for the benefit of C. Jutte & Co.; that, instead of selling coal through the Dock Company, C. Jutte & Co. sold coal directly to said Steamship Companies, and deprived the Dock Company of the large profits it would have made; that C. Jutte & Co. neglected to obtain other large and valuable contracts for the benefit of the Dock Company; and that said officers and directors permitted the coal tipple of the Dock Company to become out of repair and allow washes to occur under its foundations, which could have been prevented at small expense. It was also averred that on January 31, 1907, C. Jutte & Co. brought suit against said Dock Company in the United States Circuit Court for the Eastern District of Louisiana and service was had upon Albert G. Thomas, its secretary and treasurer, who was employed

by and interested in C. Jutte & Co., said suit having been kept secret from the complainant; that on July 5, 1907, judgment was rendered in favor of C. Jutte & Co. and against said Mississippi River Coaling Company in the sum of \$70,489.95, with interest on \$65,163.89 from January 1, 1907; and that the said claim was 'wrongfully and fraudulently excessive,' and was 'inflated and so made excessive as one of the means of depriving the Coaling Company of its property.' Execution was afterwards issued on said judgment and the property of the Dock Company was sold to officers and directors of C. Jutte & Co. for the sum of \$18,000; it being of the value of at least \$125,000. The complainant finally averred that his stock in the Dock Company, which was worth \$50,000, had been rendered worthless by reason of said acts of the officers and directors and controlling stockholders therein. * * *

"He prayed that the defendants be required to answer; that they be required to account for the sum 'that may be due your orator' from sales of coal which have been made and would have been made by the Dock Company and for the amount due 'from the defendants to your orator,' by reason of the violation of said contract; and that the 'defendants be required to pay the plaintiff' the amount found to be due. There was no prayer for any relief in favor of the Mississippi River Coaling Company. * * *

"The bill shows that whilst the original contract was between the complainant and C. Jutte & Co. one of the covenants was that a corporation was to be formed, and thereafter the dealings of C. Jutte & Co. were to be with that corporation, that such corporation was formed, and that both the complainant and C. Jutte & Co. have performed their initial obligations to it. In fact, there is no averment in the bill that any covenant with C. Jutte & Co. made with the complainant personally has been broken. Nor is there any averment that any of the defendants violated any contract made with him directly or committed any breach of duty which they owed to him as an individual. On the contrary, the averments are that C. Jutte & Co. subsequently broke the covenants it made with the Mississippi River Coaling Company—covenants found in the original contracts, it is true, but none the less made with the Dock Company—and that some of the defendants disregarded their duty to the Dock Company, not to the plaintiff, arising out of their fiduciary relations to it. It is charged that C. Jutte & Co., by some of the defendants, did not sell coal through the Dock Company; that it allowed the property of the Dock Company to depreciate; that it failed to secure other valuable contracts for the Dock Company. * * * Finally, complainant alleged that the defendant caused an

excessive judgment to be entered against the Dock Company and its property to be sold. * * * The bill avers that judgment was obtained in the United States Court, and upon that judgment the property of the Dock Company was sold."

The court determined that the "judgment was rendered in a court of competent jurisdiction. It was the duty of that court to determine, and it necessarily did determine, that the Dock Company was lawfully served with process, and was lawfully in court. Its judgment must be taken as a verity; * * *" and, further, that the Mississippi River Coaling Company was an indispensable party to the bill and no decree could be entered in its absence; that the bill was in effect an attempt to have the court interfere in the internal affairs of that company, and, since its domicile was elsewhere and it had no property in this state, to grant the relief prayed for would involve an interference in the internal affairs of a foreign corporation; that as against the demurrants the plaintiff was seeking relief solely in the capacity of a stockholder in the Coaling Company for wrongs done to that corporation; and that he had not shown a right to so proceed.

The demurrer was sustained, and the bill dismissed at the cost of the complainant.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Ernest Dale Owen, Wm. M. Galbraith, and Oliver K. Eaton, for appellant. Robert J. Dodds, William M. Robinson, and Reed, Smith, Shaw & Beal, for appellees.

MOSCHZISKER, J. The material facts in this case fully appear in the opinion of the court below published in connection herewith. The plaintiff alleged that the defendants, as officers of the Mississippi River Coaling Company (referred to by the court below as the "Dock Company"), had refused to enforce certain contracts against another corporation known as C. Jutte & Co., in which they were interested as stockholders and officers; that they had neglected to secure other valuable contracts for the Coaling Company; that they had failed to keep the property of said company in repair and had permitted it to be sold for an inadequate price under a judgment secured by C. Jutte & Co. through fraudulent collusion with them. These facts, if established, would constitute breaches of the defendants' duties to the Coaling Company, for which they would be directly liable to that corporation—not to its stockholders.

[1] The plaintiff avers in his bill that "no demand has been made upon the officers and directors of the Mississippi River Coaling Company to bring or conduct this suit, for the reason that the same is brought against

them, charging them with the misfeasance herein set out, and that such demand would therefore have been useless." It appears, however, that of the seven officers and directors of the Coaling Company only three are named as defendants in this proceeding and the appellant expressly admits that he has no case against Albert G. Thomas, one of the three. He does not aver in detail specific acts done by any of the defendants showing fraudulent collusion, but contents himself with general allegations of fraud based upon the averment "that the principal and controlling officers and directors of said Coaling Company, especially G. W. Thomas and J. F. Friend, and not including your orator, were also the controlling officers and directors, and the principal owners of the stock of the said C. Jutte & Co., and had a larger and greater interest in said C. Jutte & Co. than they had in said Coaling Company."

In *Wolf v. Railroad Co.*, 195 Pa. 91, 95, 45 Atl. 936, 937, the plaintiff charged collusion on the part of the directors of a corporation, and we said: "The averments of collusion relied on by the plaintiff are that, as the lessee is the owner of a majority of the shares of the lessor, the former elects and controls the acts of the officers of the latter. * * * The defect of this charge is that it does not rest on any facts averred, but on an inference that, by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. There is no presumption that officers will commit a breach of trust. The charge should rest on some act, affirmative or permissive, manifestly in violation of duty, and manifestly the result of fraud, and not of erroneous judgment." Fraud is largely a conclusion of law, and all our cases agree that general allegations which do not set forth the particular circumstances are not sufficient. Where it satisfactorily appears that a demand upon the officers of a corporation would be useless, such a course need not be pursued; but here the plaintiff has not made it plain from facts stated that a majority of the board of directors of the corporation in question had been, or probably would have been, faithless to their trust, hence he has not shown a right to maintain the suit in his individual capacity. We have held "The right of an individual stockholder to act for the corporation is exceptional and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act are imperative requisites. A refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a non-performance of a manifest official obligation, amounting to a breach of trust. There must

be averred and proved an actual application to the directors, and refusal by them to bring suit or to allow plaintiff to do so in the corporate name, and, where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation." *Wolf v. Railroad Co.*, 195 Pa. 91, 94, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867. A shareholder has no distinct and individual title to the moneys and property of a corporation. *Bidwell v. Railway Co.*, 114 Pa. 535, 541, 6 Atl. 729. In *McMullen v. Ritchie* (C. C.) 64 Fed. 253, 262, Mr. Justice Lurton, then a United States circuit judge, stated: "The injury done by the defendants, if any, was done to the corporation. The wrong, if objectionable, was one to be remedied by an action by the corporation, or by a shareholder for the benefit of the corporation upon the refusal of the corporation to sue. A stockholder cannot maintain a suit for the indirect injury done to him as an indirect result of an injury to the corporation. This is too obvious to need elaboration." These words are applicable to the present case.

While the Mississippi River Coaling Company was named as a defendant, it was never served, and did not appear. The learned court below rightly decided that the presence of this corporation as a party to the record was indispensable to the maintenance of the action. The rights of the plaintiff depended upon those of the Coaling Company, and the latter was not before the court. Not only was its presence necessary to the plaintiff, but the defendants were entitled thereto so that the corporation might be concluded by any decree entered against them, and the company itself was entitled to notice in order that its interests and the rights of its creditors might be protected. See quotations from standard text-books upon this point in *Willoughby v. Chicago Junction Rys. & Stockyards Co.*, 50 N. J. Eq. 656, 25 Atl. 277, 280, 281, and *Eldred v. American Palace-Car Co.*, 105 Fed. 457, 458, 44 C. C. A. 554. There is nothing upon the record to show that it was impossible to secure service upon the individual defendants in the domicile of the foreign corporation. They were officers of that company, and, in the absence of any averment to the contrary, it is but reasonable to assume that they could have been served in the state in which that corporation had its being and transacted its business.

[2] It appears from the bill that the dealings between Jutte & Co. and the Coaling Company were adjudicated in an action at law brought by the former against the latter in the year 1907, in the United States Circuit Court for the Eastern District of Louisiana, and that a judgment for a considerable sum was secured against the Coaling Company. The plaintiff sought to have the court below inquire into and practically set

aside that judgment as fraudulent, upon the general averment that the suit was "kept wholly secret from your orator"; that the service was upon the secretary and treasurer of the Coaling Company who was the son of one of the other defendants and in the employ of Jutte & Co.; that the claim adjudicated was "wrongfully and fraudulently excessive"; that Jutte & Co. "had no proper legal cause of action against the said Mississippi River Coaling Company"; that the proceedings were "wrongful, fraudulent and oppressive, and the judgment in said suit was procured by deceit upon the court * * * and was part of the general wrongful and fraudulent scheme and design of the defendants * * * for the purpose of preventing your orator from getting the benefit to which he was entitled as a stockholder of the said * * * Coaling Company." Had it been proper for the court below to review this judgment, it was not called upon to do so under these general averments. We are convinced that no error was committed in determining that "it would be highly improper * * * under the averments of this bill to undertake to ascertain whether or not the Dock Company was properly served with process and whether or not the judgment of that court was excessive in amount."

In the eyes of the law as laid down in this state the gravamen of the bill, so far as respects the demurrants, concerns the management of the internal affairs of a foreign corporation. As to this, we have said: "A Pennsylvania resident has no right to call upon the courts of his own state to protect him from the consequences of a voluntary membership in a foreign corporation. By the very act of membership he intrusted his money to the management of a corporation owing its existence to and governed by the laws of another state. * * * Without doubt, courts of equity in Pennsylvania have * * * jurisdiction to enjoin unlawful acts by such corporations; * * * but they have no jurisdiction as to their internal management. What constitutes internal management is well defined by *Stone, J.*, in *North State Copper & Gold Mining Co. v. Field*, 64 Md. 151 [20 Atl. 1039]. 'Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholder's meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and, in case of a foreign corporation, our courts will not take jurisdiction.'" *Madden v. Electric Light Co.*, 181 Pa. 617, 621, 622, 37 Atl. 817, 818, 38 L. R. A. 638. This was said in a case where the business and tangible property of the foreign corporation were within our own state, and where stockholders charged the corporate management

with conduct "which depreciated and rendered valueless their stock," and it was repeated under like circumstances in *McCloskey v. Snowden*, *supra*. The present corporation has no property, and does not conduct its business in this state.

We have examined *Sloan v. Clarkson*, 105 Md. 171, 66 Atl. 18, *Miller v. Quincy*, 179 N. Y. 294, 72 N. E. 116, *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, *State ex rel. v. North American Land & Timber Co.*, 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309, *Beale on Foreign Corporations*, §§ 300-312, 3 *Clark & Marshall on Private Corporations*, § 865, and the other cases cited by the appellants, and, while some of these do not entirely agree with the Pennsylvania doctrine, it is to be noted that in each instance where other jurisdictions have taken a more liberal view than our own in reference to granting relief involving an inquiry into the management of the internal affairs of a foreign corporation the business and property of the corporation affected were within the jurisdiction of the court. In view of the circumstances of the present case, we do not feel that a departure from our own rule would be justifiable; but in a case free from the peculiar difficulties of this one, where the foreign corporation was served and all the parties or property directly involved was within the jurisdiction of the court, if the actual exercise of visitatorial powers is not requisite to the relief, the rule as to noninterference should be restricted and not carried further than is absolutely required by universal fixed rules of law; for, where possible, we should prevent its use as a cloak to cover apparent fraudulent conduct on the part of officers of foreign corporations to the prejudice of Pennsylvania stockholders.

[3] For the reasons already stated, the court could have done naught else than dismiss the plaintiff's case; but, in addition, the demurrer raised the point that the bill was multifarious, and this also was well taken; for in effect it seeks to maintain, first, an action by the plaintiff as a stockholder of the Coaling Company on behalf of that company to recover against certain of its directors and one of its stockholders for losses growing out of an alleged fraudulent and collusive management of its affairs; next, an action of the same character against C. Jutte & Co. to recover profits made by that concern on coal sold which should have been disposed of through the Coaling Company; lastly, an action by the plaintiff individually against the directors of the Coaling Company and C. Jutte & Co. to recover for the depreciation in the value of his stock in the former company.

The assignments of error are overruled, and the decree of the court below is affirmed, at the cost of the appellant.

STANDIFORD et al. v. KLOMAN et al.
(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. VENDOR AND PURCHASER (§ 81*) — CONSTRUCTION OF CONTRACT — QUESTION OF LAW OR FACT.

Where the parties to a written option to purchase land execute, during the continuance of the option, a written contract, which states that its purpose is to give to the parties of the second part an extension of 30 days to carry out the terms of the written contract previously made, and which states that the terms of the contract are to be complied with on or before a given date, the construction of the contract is for the court, and will not be carried to the jury by parol evidence which was not introduced to throw light on the understanding of the parties by determining some extrinsic fact, but rather to show what had been done by each party within the stipulated time.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 136, 137; Dec. Dig. § 81.*]

2. CONTRACTS (§ 176*) — CONSTRUCTION — QUESTION OF LAW OR FACT.

As a general rule, the court, and not the jury, is the judge of the meaning of a written instrument, except in cases where the instrument is not to be understood without reference to extrinsic facts, in which case the jury may properly judge of the whole.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

3. VENDOR AND PURCHASER (§ 83*) — OPTION OR SALE.

Where the parties to a written option to purchase land execute a written contract, which states that its purpose is to give an extension of 30 days to carry out the terms of the written contract previously made, a recital in the second contract that the terms are to be complied with on or before a certain date does not convert the agreement from an option to a purchase and sale, especially where a letter by the seller to the purchaser with the new contract to be executed calls attention only to minor points of difference between the two agreements, and shows its intention that the new agreement was to be only an extension of the old one.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 138, 139; Dec. Dig. § 83.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of assumpsit by Harry Standiford and others against A. C. Kroman and others for breach of contract. From a judgment for defendants, plaintiffs appeal. Affirmed.

The contract in question was in writing, and its premises containing the names of the parties was as follows: "Memorandum of agreement made and entered into this 18th day of May, 1906, by and between H. Standiford, and associates of the city of Washington, District of Columbia, parties of the first part, and A. C. Kroman, and associates of the city of Allegheny, Pennsylvania, parties of the second part, all of whom having signed their names hereto are made parties to this contract." The remaining material portions of the contract are

quoted at length in the opinion of the Supreme Court. At the trial the court construed the contract of May 18, 1906, as an extension of the option previously given on February 26, 1906, and gave binding instructions for defendants. Verdict and judgment for defendants. Plaintiffs appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frederick L. Siddons, for appellants. Frederic W. Miller, W. A. Challener, and F. H. Phillips, for appellees.

STEWART, J. The action was for the recovery of damages for an alleged breach of contract. Plaintiffs were the holders of an option for the purchase of certain lands in Augusta county, Va., in all 8,975 acres. On 26th February, 1906, they entered into a written contract with the defendants, wherein, after reciting that steps had been taken to incorporate a company to be known as the American Manganese Mining & Manufacturing Company, with capital stock of 10,000 shares of the par value of \$100 each, to purchase and take over and develop the lands above mentioned and on which plaintiffs held an option, it is provided as follows: "That, in consideration of the premises and of aiding in the formation of said company, the said parties of the first part hereby agree to procure and have executed a good and satisfactory deed of general warranty, conveying all the aforesaid tract with the rights of way and other rights from the estate of John Wissler, deceased, now owning same to said American Manganese Mining & Manufacturing Company, or to such other grantee as the parties of the second part shall direct, and to deliver said deed in escrow to some bank satisfactory to both the parties hereto, to be held and delivered by said bank on the fulfillment of the conditions hereinafter set out. * * * The said parties of the second part agree to proceed as rapidly as possible to incorporate and organize the said American Manganese Mining & Manufacturing Company and pay the expenses of such organization being completed, that he will cause to be allotted to said parties of the first part for himself and his associates 4,380 shares of the capital stock of the said company, fully paid and nonassessable, and \$95,000 of the bonds to be issued by said corporation (or the net amount of cash realized from sale of the said \$95,000 of bonds), and a further consideration of \$55,000 in cash; that there is to be allotted to said parties of the second part the remaining 5,620 shares of the capital stock of said corporation fully paid and nonassessable and on the presentation of said certificate or certificates of said 4,380 shares of stock and said \$95,000 of bonds of said corporation (or the net amount of cash realized from sale of \$95,000 of bonds) and the payment of \$55,-

000 in cash to said party of the first part and associates, they will cause to be delivered to said parties of the second part or associates, or their assigns by the bank aforesaid, the deed above directed to be held in escrow; that said party of the second part and associates will have inserted in the by-laws of said corporation the provisions that the board of directors thereof shall number seven, and it is agreed that the said party of the second part shall for himself and his associates have the power and right to nominate and elect four of said seven of the board of directors, and that said party of the first part shall for himself and his associates have the power and right to nominate and elect the remaining three of said board of directors; that in all contingencies the control and management of said corporation shall remain and be in the said party of the second part and his associates; that in case the number of the board of directors be other than seven, said party of the second part and his associates shall have the power and right to nominate and elect a majority of the members of said board of directors, and said party of the first part shall have for himself and his associates the power and right to nominate and elect the minority of said board of directors. * * * This contract is made and executed by mutual consent of all parties hereto, for the purpose of giving the parties of the second part an extension of thirty (30) days' time to carry out the terms of the contract dated February 26, 1906, and executed by the same parties, and it is understood and agreed that the signing of this contract terminates the contract dated February 26, 1906, and the same is null and void. * * * The terms of this contract are to be complied with on or before July 1, 1906."

[1] It is to be observed that the purpose of the contract as here defined was to give the parties of the second part (the defendants) an extension of time to carry out the terms of a contract dated February 26, 1906, between the same parties. While the latter agreement in express terms abrogates the earlier, it yet imports and incorporates the terms of the earlier in such a way that the whole contract can be understood only as both are considered. The points of difference between the two are these: (1) The earlier gave a right to acquire the lands up to 1st June, 1906, the latter one, up to 1st July, 1906. (2) By the earlier, plaintiffs were to receive \$95,000 of the bonds to be issued by the corporation, while by the later this obligation could be discharged by paying the net amount received by the corporation on sale of the bonds. (3) The earlier concluded in this way, "This agreement to terminate and be null and void on and after June 1, 1906," while the later provides that "the terms of this contract are to be complied with on or before July 1, 1906." We are concerned here

only with the difference last mentioned and the clause in the later agreement which defines the purpose of its execution. It is the contention of the plaintiffs that the provision in the later agreement that the terms were to be complied with on or before July 1st created a binding obligation on the defendants to accept a conveyance of the land and pay therefor the stipulated price within the period named. The dispute is resolved into a question of construction. There was parol evidence in the case, but it was introduced not with a view to establish extrinsic facts to aid in determining the meaning of the parties; furthermore, what evidence of this kind was introduced presents no conflict whatever. The construction of the contract was therefore for the court. The court gave binding instructions for the defendant. On behalf of appellants it is insisted, first, that the question was one for the jury; and, second, if otherwise, that the construction placed on the contract by the court was erroneous. The first contention is based on a manifestly mistaken view of the evidence. True, there was parol evidence in the case, but this evidence, as we have said, was not introduced for the purpose of throwing any light on the understanding of the parties by determining some extrinsic fact on which the true construction of the contract depended, but rather to show what had been done by each party under the contract within the stipulated time. We are at a loss to know exactly why it was introduced, but certain it is that it was of no avail to show a contemporaneous construction by the parties, and, what is still more important in this connection, it disclosed no conflict. Our attention is directed to the testimony of Mr. Kroman, one of the defendants. With respect to the testimony of this witness we have only to say that, except as it identifies a letter written by Mr. Standiford, who represented all the plaintiffs, addressed to Mr. Kroman, representing all the defendants, and accompanying the agreement which had then been executed by the plaintiffs and was submitted for execution by defendants, it was entitled to no consideration, even if admissible. Whether Mr. Kroman and the other defendants read over the agreement before they signed it, and, if so, whether they observed that clause which did not occur in the earlier agreement and which gives rise to the present contention, were matters of no consequence whatever in the issue being tried. The testimony, except as we have indicated, had not the remotest bearing on the case, while outside this testimony and such other as bore on the same subject, there was no parol evidence whatever. Therefore there was nothing for the jury to decide.

[2] "It is a general rule that the court, and not the jury, are to judge of the meaning of a written instrument, except in certain cases, where the instrument is not to

be understood without reference to facts dehors the writing, and then it may be proper that the jury, who are to inquire into the facts, should judge of the whole. But, when that is not the case, the court is bound to give the construction; and if they refuse to do so and leave it to the jury it is error." *Watson, Adm'r, v. Blaine et al.*, 12 Serg. & R. 135, 14 Am. Dec. 669. An interesting case as defining the duties of the court in such cases, and very apposite here, is *Johnston v. Gray*, 16 Serg. & R. 361, 16 Am. Dec. 577.

[3] The learned trial judge construed the contract to be simply an extension of the option given by the contract of 26th February preceding, which contract it is conceded created no liability. In this he was entirely right. The later contract expressly states its purpose as being "to give to the parties of the second part an extension of thirty days to carry out the terms of the contract dated 26th February, 1906, and executed by the same parties." The terms to be carried out were not any new or different terms, but those contained in the earlier contract. If it be said that the terms referred to included only the price and times and manner of payment, kind, and extent of title to be conveyed, the answer is that, while all these things were necessarily included, the fact remains, it being conceded that the earlier contract is but an option, that one of its terms was that it should impose no obligation on the defendants to take the land, and therefore no liability for damages for failure to take. What reason could there be, gathering the intent from the language used, for concluding that the optional feature was not one of the terms to be carried out or observed? From the purpose as expressed, viz., to grant an extension of the time in which defendants could avail themselves of the option granted by the earlier contract, we derive a clear implication that in this contract, as in that, the carrying out of the contract rested in the option of the defendants.

But it is urged that what followed in the later contract, viz., "that the terms in the contract are to be complied with on or before July 1, 1906," is to be construed as an express agreement of purchase and sale. With respect to this it is to be observed, first, that the language here used does not necessarily import any such understanding or agreement. Quite as natural a construction, considering the relation the contract bears to the earlier one and the purpose of the new contract as expressed, would be that, except as defendant did comply with the provisions of the contract on or before July 1st, the contract would be at an end. The difference in phraseology between the two contracts, of course, is matter for consideration; but, in view of the circumstances, the situation of the parties, and especially the letter accompanying the agreement forward-

ed to defendants for their execution from Mr. Standiford, that it was the purpose of the parties to turn what had been but an option into an absolute sale seems so entirely improbable that the reasonable conclusion must be that the difference in phraseology meant no change of purpose whatsoever. Were there nothing else in the case we would regard Mr. Standiford's letter in itself conclusive on this point. The letter reads as follows: "Dear Sir: As per statement outlined in my letter of yesterday, I herewith enclose the agreement, copied from the old agreement, with such changes only to cover the extensions and the present arrangement for giving us the cash instead of the bonds—we using the term 'or cash, &c.' and a clause abrogating the old contract. In doing this we are giving you all the time we have to make our final payment on the property, and to get any further extension it would entail additional expense upon us." Could there be a more explicit acknowledgment that the plaintiffs themselves when they submitted the contract to defendants for execution understood that it was simply an extension of the option of 26th February? Specific mention is here made of the only points of difference between the two agreements. A reasonable inference from the language thus used, indeed one supported by rule of law, would be that if other differences than those mentioned appeared, except as clear mistake was shown, they would be ineffectual. But again, if, overlooking the significance of the word "only" as it occurs, it was intended by the later agreement to convert what by the earlier one was a mere option into an absolute sale, why was it that specific mention was made of minor changes, and not even remote reference made to the most radical change involving the parties in large responsibilities? When we are asked to say what the parties meant or intended by their contract, it is entirely safe to point to their own construction of it. This was said in *People's Natural Gas Company v. Braddock Wire Co.*, 155 Pa. 22, 25 Atl. 749, and we repeat it here. Further comment is unnecessary. We agree that the construction the contract received at the hands of the learned trial judge correctly expresses the true intent and meaning of the parties.

The assignments of error are accordingly overruled, and the judgment is affirmed.

O'DONNELL v. CITY OF PITTSBURGH et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. DEDICATION (§ 19*)—ACTS CONSTITUTING—REFERENCE TO PLAN.

A sale of lots according to a plan which shows them to be on a street implies a covenant to the purchaser that the street shall be forever open to the use of the public, and constitutes a public use, and the owner of any

lot in the plan may assert the public character of the street.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

2. DEDICATION (§ 19*)—OPERATION AND EFFECT—RIGHTS ACQUIRED.

The rights in dedicated streets acquired by a purchaser of lots by a deed referring to a plat being private contract rights are not affected by the failure of the municipality to act on the dedication.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 48*)—OPERATION AND EFFECT—RIGHTS ACQUIRED.

The owner of any lot or lots who has purchased with reference to a plan showing a street cannot obstruct or deny the public the right to use the streets or alleys shown on the plan, the easement being appurtenant to every lot, and becoming a property interest in the purchasers which may be protected by appropriate legal process.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 114; Dec. Dig. § 48.*]

4. DEDICATION (§ 19*)—REQUISITES—REFERENCE TO PLAN—EXECUTION.

As between parties claiming under the original proprietor and having notice of a plan of lots showing streets referred to in conveyances of the lots, it is immaterial whether the plan was signed, acknowledged, or recorded.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

5. MUNICIPAL CORPORATIONS (§ 654*) — STREETS—ESTABLISHMENT—EVIDENCE.

Where there is a plan of lots showing streets and alleys, a reference to a street in subsequent deeds as a public highway is proper and is not evidence that it was a street prior to the dedication by the proprietor who laid out the lots.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1428; Dec. Dig. § 654.*]

6. DEDICATION (§ 51*)—OPERATION AND EFFECT—RIGHTS ACQUIRED.

That the original proprietor of a plan of lots dedicated only 20 feet of a 40-foot wide street, the remaining 20 feet being dedicated by another person, does not defeat a purchaser's right to insist that the 20 feet shown on the plan should be kept open.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 95; Dec. Dig. § 51.*]

7. MUNICIPAL CORPORATIONS (§ 649*) — STREETS—REGULATIONS—PROPERTY SUBJECT—"HIGHWAY."

Act June 16, 1836 (P. L. 749), providing that streets, lanes, and alleys in the city of Pittsburgh laid out by private persons shall be deemed public highways, does not apply to lands laid out as lots situated in a township and subsequently brought within the city limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1423; Dec. Dig. § 649.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Malachy O'Donnell against the City of Pittsburgh and others for an injunction. From the decree, defendant H. K. Porter Company appeals. Affirmed.

Frazer, P. J., in the court below, found the facts to be as follows:

"First. Plaintiff is a citizen and taxpayer of the city of Pittsburgh, and that city is a municipal corporation of the second class under the laws of this commonwealth; and the H. K. Porter Company and the McConway & Torley Company are corporations of this commonwealth.

"Second. Plaintiff is the owner in fee simple of a lot of ground, being lot No. 32 in a plan of lots laid out by George A. Bayard, dated October 1, 1836, and recorded in the recorder's office of Allegheny county in Deed Book, vol. 73, p. 495, having a frontage of 50 feet on the southeast corner of Harrison street and Forty-Ninth street (formerly Allegheny street), and extending back of even width eastwardly along Forty-Ninth street 100 feet to Plum alley, upon which is erected a frame stable. Plaintiff's lot has for a number of years been leased to a dealer in coal, who uses the stable for stabling purposes and the remainder of the lot for storing slack coal thereon. The plan of George A. Bayard was recorded June 1, 1846, without either his signature attached or his acknowledgment. Subsequently on May 17, 1852, George A. Bayard signed and acknowledged the plan as recorded.

"Third. The plan of George A. Bayard referred to in the preceding finding contains the following: 'I, George A. Bayard, the proprietor of the ground in the above plan, and in consideration of enhancing the value of said ground, have given, granted and conveyed, and by these presents do give, grant and convey all the ground contained in the above-named streets and alleys for public highways, to be used and enjoyed as public streets and alleys forever. In witness whereof I have hereunto set my hand and seal this 17th day of May, A. D. 1852. 'George A. Bayard.' The plan referred to shows that Forty-Ninth street was the eastern boundary of the property owned by George A. Bayard, and that the strip of land donated by him for that street was 20 feet in width. The street at the time of the vacation ordinance complained of by plaintiff being 40 feet in width, when and from whom the other half of the land now included in Forty-Ninth street was acquired does not appear from the pleadings or the testimony. Whether Forty-Ninth street was an open and used thoroughfare previous to May 27, 1840, when plaintiff's lot was sold by George A. Bayard to Richard Fairfield, does not appear from either the pleadings or evidence.

"Fourth. Defendant the H. K. Porter Company was on and before July 18, 1910, the owner of all the real estate abutting on each side of Forty-Ninth street between Harrison street and the right of way of the Allegheny Valley Railroad, and had erected upon its property buildings for manufacturing

purposes, and was at that time, and is now, engaged in the manufacture of engines and machinery, and now contemplates closing and building upon the portion of Forty-Ninth street between Harrison street and the Allegheny Valley Railroad vacated by the ordinance of July 18, 1910, referred to in the sixth finding of facts.

"Fifth. On May 14, 1910, the H. K. Porter Company presented its petition to the select and common councils of the city of Pittsburgh, setting forth that it was a majority of the property owners in interest and in number abutting on Forty-Ninth street between Harrison street and the Allegheny Valley Railroad, and asking that councils vacate Forty-Ninth street between Harrison street and the Allegheny Valley Railroad. That street between the Allegheny Valley Railroad and the Allegheny river having been previously vacated by an ordinance of councils, is now occupied by buildings constituting a portion of the manufacturing plant of the McConway & Torley Company.

"Sixth. In response to the petition referred to in the preceding finding, councils subsequently ordained, and the mayor approved on July 18, 1910, an ordinance vacating Forty-Ninth street between Harrison street and the Allegheny Valley Railroad, as shown in plan of the borough of Lawrenceville, approved by the council of that borough March 22, 1867. A copy of the ordinance is 'Exhibit 1' in plaintiff's bill, and contains a section providing that its provisions shall not become effective unless the H. K. Porter Company, within 30 days from its approval, pays into the city treasury for the use of the city the sum of \$2,000.

"Seventh. On August 16, 1910, the H. K. Porter Company paid \$2,000 to the city treasurer and received a receipt therefor, the following being a copy thereof: 'Pittsburgh, August 16, 1910. Received of H. K. Porter Co. \$2,000.00, on account of being the consideration recited in the ordinance for the vacation of Forty-Ninth street from Harrison street to A. V. R. R. It is understood and agreed, however, that as this ordinance and the vacation of said street has been attacked, if the litigation be successful and the said street be not vacated, the money hereinbefore received shall be returned to the H. K. Porter Company.'

"Eighth. At the time of the passage of the ordinance of July 18, 1910, the city had constructed and in use on Forty-Ninth street between Harrison street and the Allegheny Valley Railroad, a public sewer, and also had laid in that portion of Forty-Ninth street pipes for supplying water to the public. By an agreement in writing entered into on the 13th day of July, 1910, between the city and the H. K. Porter Company and the McConway & Torley Company, it was agreed by and between all the parties that the vacation ordinance should not interfere

with the sewer and water pipes of the city, that the same should remain as now located, and that the city should always have the right to 'inspect, maintain, repair, reconstruct and enlarge the same as and when the said city may deem necessary, without any liability whatsoever to said corporations or either of them, their successors and assigns, and for that purpose shall have free ingress and egress with and for its employes, machinery, horses and materials.'

"Ninth. Forty-Eighth street, the next street west of Forty-Ninth street, is open and traveled to the Allegheny river, and at the point where the street crosses the track of the Allegheny Valley Railroad there is a railroad siding extending west for a distance of 300 feet, which has a capacity for the storing of 300 cars per day for loading and unloading purposes.

"Tenth. George W. McCandless, who is auditor of the McConway & Torley Company, acted for that company and also for the H. K. Porter Company in securing the passage of the ordinance vacating Forty-Ninth street and Valley street; a formal resolution of the board of directors of the latter company having been adopted September 20, 1910, approving, ratifying, and confirming all that he had done in behalf of the company in that matter."

The court entered the following decree:

"And now, August 2, 1911, this cause came on to be heard at this term, and was argued by counsel, and, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That a perpetual injunction issue restraining the H. K. Porter Company, defendant above named, its agents or employes, from closing or in any manner obstructing the southwesterly 20 feet of Forty-Ninth street, formerly Allegheny street, extending longitudinally from Harrison street to the Allegheny Valley Railroad, situate in the Ninth ward of the city of Pittsburgh, county of Allegheny and state of Pennsylvania, said 20-foot street, being more particularly located and laid out on the plan of lots, laid out by George A. Bayard, of record in the recorder's office of said county in Deed Book, volume 73, page 495. And said defendant, H. K. Porter Company, its agents and employes, are further enjoined from doing any act or acts whereby the plaintiff, Malachy O'Donnell, may be hindered or obstructed in the free and common use of said 20-foot street between said terminal points. The costs of these proceedings to be paid by the said defendant, H. K. Porter Company."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZSKER, JJ.

Samuel McClay, McCook & Jarrett, and Reed, Smith, Shaw & Beal, for appellant. Leonard K. Guller, for appellee.

MESTREZAT, J. The facts have been found and stated at length by the learned chancellor in the court below, and a brief summary of them here will be sufficient to enable us to dispose of the case. George A. Bayard was the owner of certain real estate in Peebles township, Allegheny county, and on October 1, 1836, laid it out in lots, intersected by streets and alleys, which he called "Hatfield." The plan was recorded June 1, 1846, without Bayard's signature or his acknowledgment. On May 17, 1852, Bayard indorsed upon the plan as recorded a dedication of "all the ground contained in the above-named streets and alleys or highways to be used and enjoyed as public streets and alleys forever," and then signed and acknowledged the plan. The plan as recorded also contained the following indorsement in writing on its face: "Plan of lots near U. S. Allegheny Arsenal laid out by George A. Bayard, Esq., October 1st, 1836, C. W. Remington." Subsequently the lots became a part of the borough of Lawrenceville and, later, of the city of Pittsburgh. The plan contains 48 lots with 4 streets and 2 alleys, and on the easterly side appears a street called Allegheny street. It also shows a line running its entire length from Butler street to Clay street 20 feet distant from the east property line with these words: "One half of a forty-foot street." This was Allegheny street, now Forty-Ninth street.

By deed dated September 9, 1839, Bayard granted and conveyed lot No. 1 in the plan to Ralph Lee. On May 27, 1850, by deed of that date, Bayard conveyed to Richard Fairfield "all that certain lot situate in the town of Hatfield, Peebles township, being the same lot marked in the plan of lots laid out by George A. Bayard, No. 32, bounded by Harrison street, Allegheny street, and Cherry alley, containing in front on Harrison street fifty feet, and running back one hundred feet." The title to this lot has, by subsequent mesne conveyances, become vested in the plaintiff.

Allegheny street, now Forty-Ninth street, has for many years been used as a public thoroughfare 40 feet in width, one-half of which, as above stated, was dedicated by George A. Bayard in his plan of lots. It appears by an ordinance enacted by the council of the borough of Lawrenceville that Allegheny street, subsequently known as Lathrop street, on the 5th day of March, 1866, was declared to be a public highway of a uniform width of 40 feet from Butler street to the Allegheny river "as laid down in the original plan of George A. Bayard, in that portion of the borough which is known as Hatfield." Forty-Ninth street between the tracks of the Allegheny Valley Railroad and the Allegheny river has been vacated, and is now occupied for manufacturing purposes.

By an ordinance, approved July 18, 1910,

of the city of Pittsburgh, Forty-Ninth street between Harrison street and the Allegheny Valley Railroad, as shown in the plan of the borough of Lawrenceville, approved by the council of that borough March 22, 1867, was vacated. The plaintiff, the owner of lot No. 32 in the Bayard plan, filed this bill against the city of Pittsburgh, H. K. Porter Company, and the McConway & Torley Company. The bill contains nine prayers for relief, one of which is that the H. K. Porter Company be restrained from closing or in any manner obstructing Forty-Ninth street, between Harrison street and the Allegheny Valley Railroad. This prayer for relief was granted by the court below, and a final decree was entered that a perpetual injunction be issued restraining the H. K. Porter Company "from closing or in any manner obstructing the southwesterly 20 feet of Forty-Ninth street, formerly Allegheny street, extending longitudinally from Harrison street to the Allegheny Valley Railroad, * * * said 20-foot street being more particularly located and laid out on the plan of lots laid out by George A. Bayard and of record in the recorder's office of Allegheny county," and further enjoining the H. K. Porter Company "from doing any act or acts whereby the plaintiff, Malachy O'Donnell, may be hindered or obstructed in the free and common use of said 20-foot street between said terminal points." No decree was entered against the city of Pittsburgh or the McConway & Torley Company.

It will be observed that this appeal, which was taken by the H. K. Porter Company, does not raise the question of the right of the city of Pittsburgh to vacate a street laid out in the Bayard plan of lots and dedicated by him to public uses. It is true that the bill prays that the ordinance vacating the street be declared void, but the prayer was not granted, and the decree simply went against the H. K. Porter Company, restraining it from closing or obstructing the street. The right of the court below, under the facts of the case, to enter the decree against the H. K. Porter Company, is the only question for determination here.

[1-3] If there is anything settled by judicial decision in this state, it is that a sale of lots according to a plan which shows them to be on a street implies a grant or covenant to the purchaser that the street shall be forever open to the use of the public and operates as a dedication of it to public use; and that the owner of any lot in the general plan may assert the public character of any street and the right of the public to use it. The rights in dedicated streets acquired by a purchaser of lots by a deed referring to a plat are private contract rights, and are not affected by the failure of the municipality to act upon the dedication. 3 Dill. on Mun. Corp. (5th Ed.) § 1083. The owner of real estate, so long as he infringes no law, may do with it as he

pleases; he has the right to dispose of it in any legal way which he may choose; he may sell it as a whole, or in parts; he may lay it out in lots intersected by streets and alleys, and sell the lots with or without a grant to the purchasers and the public of an easement over the streets and alleys. If he lay the property out in lots, according to a plan disclosing such streets and alleys, and sells a lot, the law implies a grant or covenant on his part that all the streets and alleys on the plan shall remain open for the use of the public. The price paid for a lot is enhanced by the value of the easement in the streets and alleys appurtenant to the lot. The consideration is not only for the lot but for the easement as well. The proprietor of the plan therefore cannot revoke the implied easement or dedication; nor can the owner of any lot or lots, having purchased with a knowledge of the plan in accordance with which the lots were sold, obstruct or deny to the public the right to use any of the streets or alleys shown on the plan. The easement over the streets is appurtenant to every lot and becomes a property interest in the purchaser of the lot which may be protected by appropriate legal process.

[4] In the case in hand, the right of the plaintiff, the owner of one of the lots in the Bayard plan, to restrain the H. K. Porter Company from building on or otherwise obstructing the 20-foot street in the plan is clear. Her predecessor in title purchased the lot, "being the same lot marked in the plan of lots laid out by George A. Bayard, No. 32." As between parties claiming under Bayard and having notice of the plan of lots, it is immaterial whether the plan was signed, acknowledged, or recorded. *Transue v. Sell*, 105 Pa. 604. Such parties are charged with notice of all the plan contains, including the streets and alleys, their location and width. The sale of a lot by Bayard to Lee in 1839 according to the plan, in the absence of anything disclosing a different intention, was an irrevocable dedication of all the streets and alleys in the plan to public use. 13 Cyc. 455; *Pittsburg v. Epping-Carpenter Company*, 194 Pa. 318, 328, 45 Atl. 129. And any subsequent purchaser of a lot in the plan can assert the public character of the streets. The plaintiff's predecessor in title purchased from Bayard in 1840, and hence became the owner of an easement over the streets which was appurtenant to her lot of which she could not be deprived by a subsequent purchaser affected with knowledge of the plan. The H. K. Porter Company is the owner of two lots in the plan, and the pleadings disclose that the company and its predecessors in title had notice that the lots were sold according to the Bayard plan. The plaintiff and the defendant both claim through Bayard and are affected with what appears in the chain of their title. The plan of lots is

directly in the chain of title of each of the parties, and on the face of the plan is a declaration that the lots were laid out by Bayard on October 1, 1836. The defendant company is therefore estopped from denying to the plaintiff any rights which she acquired through her predecessor in title who purchased one of the lots in this plan.

[5, 6] There is no evidence that Allegheny street was a public thoroughfare or dedicated to public use prior to the dedication by Bayard. It was a public highway in the sense that it was dedicated by Bayard and was used by the public, notwithstanding it was not accepted by the municipality. The reference to it therefore in the deeds as a public highway was proper, and is no evidence that it was such prior to the dedication by Bayard. The plan of lots having disclosed the dedication of the streets and alleys in 1836, the burden was upon the defendant to show that the street known as Allegheny street had existed prior to the Bayard dedication. This did not appear by the pleadings or the evidence. In fact, there was not a particle of evidence tending to show any such prior dedication. It is immaterial that the street was not laid out 40 feet in width by Bayard, and that the other half of the street was dedicated by another to public use. The plaintiff and other purchasers of lots in the Bayard plan had the right to insist that the 20 feet of the street, shown on the plan, should be kept open for public use.

[7] The act of June 16, 1836 (P. L. 749), providing that streets, lanes, and alleys within the city of Pittsburgh, laid out by private persons shall be deemed public highways, has no application to this case. When the lots were laid out, the plan was made, and the plaintiff's lot was sold to her predecessor in title by Bayard, the real estate was in Peebles township, Allegheny county, and not within the territorial limits of Pittsburgh. Subsequently it became a part of Lawrenceville, which later became a part of the city of Pittsburgh. Therefore at the time these lots were laid out and the plan was made Peebles township was not a part of the city, and the streets and alleys of the plan did not, by virtue of the act of 1836, become public highways. Under these circumstances, a city ordinance depriving a lot owner of his easement over the streets in the plan—a property right secured by contract—without compensation would offend both the federal and state Constitutions, and be void.

The decree is affirmed.

JOYNES v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. PLEADING (§ 248*) — AMENDMENT—STATEMENT—NEW CAUSE OF ACTION.

In an action against a railroad for overcharge of freight rates, the allowance of a sec-

ond amendment to the statement is not improper, where it merely amplifies the first, is not inconsistent with the original statement, makes no departure from the original cause of action, and adds nothing under which damages could be increased.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.*]

2. PLEADING (§ 248*) — AMENDMENT—STATEMENT—NEW CAUSE OF ACTION.

Amendments should be liberally allowed; the test of their propriety being whether they introduce a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.*]

3. CARRIERS (§ 202*)—CARRIAGE OF GOODS—OVERCHARGE—ACTION FOR DAMAGES.

In an action against a railroad for overcharge of freight rates on potatoes, where the official tariff of rates stated that when it was "practicable" for the potatoes to be weighed they should be charged for at the actual weight, but when it was not "practical" to weigh them estimated weights should govern, and the evidence shows that the railroad had ample facilities at various points to weigh the potatoes either by hand scales or track scales, a verdict and judgment for plaintiff will be sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915; Dec. Dig. § 202.*]

4. WORDS AND PHRASES — "PRACTICABLE"—"PRACTICAL."

"Practicable" and "practical" are defined as that that may be practiced or performed; capable of being put into practice; done or accomplished; feasible.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5483, 5484.]

5. EVIDENCE (§ 158*)—BEST AND SECONDARY EVIDENCE—RECORD CARDS.

In an action against a railroad for overcharge of freight rates, it was error to permit testimony as to the contents of record cards indicating that some cars had been actually weighed; the cards themselves being the best evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.*]

6. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for overcharge of freight rates, where there is other ample testimony to sustain a finding that it would have been practicable to have weighed the potatoes shipped, the error in admitting testimony as to the contents of record cards showing that some cars had been actually weighed was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

7. APPEAL AND ERROR (§ 237*)—PRESENTING QUESTIONS IN TRIAL COURT—RECEPTION OF EVIDENCE.

Where, after the refusal to withdraw a juror and continue the cause because of an improper statement by a witness, counsel rests upon his exception to the refusal without requesting the court to warn the jury to disregard the statement, the Supreme Court will assume that all the parties felt that no material harm was done and will not reverse the judgment for failure to strike the answer from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.*]

8. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

It is harmless error for the trial judge to refer to the "weight" and "preponderance" of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the evidence where defendant introduced no testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Court of Common Pleas, Allegheny County.

Trespass by W. W. Joynes against the Pennsylvania Railroad Company to recover damages for overcharge in freight rates. From a judgment for plaintiff, defendant appeals. Affirmed.

At the trial it appeared that plaintiff is a produce merchant at Pittsburgh. His principal business is the buying and selling of potatoes. During the years 1900 to 1905, inclusive, he purchased on the eastern shore of Maryland some 800 cars of Irish and sweet potatoes, all of which were consigned to him at the Pennsylvania Lines produce yards at Pittsburgh. The shipments were from 82 stations on the New York, Philadelphia & Norfolk Railroad Company, coming into Pittsburgh over the lines of the defendant. The defendant had in force a tariff duly filed with the Interstate Commerce Commission fixing the rates on potatoes, applicable to territory including the eastern shore, in part as follows: "The following estimated weights will apply in cars where actual scale weights cannot be ascertained: * * * Potatoes, white or sweet (in barrels) when it is practicable for agents to weigh same, will be charged at actual weight; but when it is not practical to weigh same, the following estimated weights will govern: Sweet potatoes,—when shipped in common or truck barrels, per bbl., 170 pounds. White potatoes,—when shipped in common or truck barrels, per bbl., 180 pounds." The contracts of carriage or bills of lading provided: "Owners or consignees shall pay freight * * * according to weights ascertained by any carrier hereunder. * * *"

The defendant collected freight for the plaintiff's potatoes on the basis of the estimated weights fixed by the above tariff. In February, 1906, the plaintiff brought suit to recover the difference between the freight paid, based on estimated weights, and that which he claimed should have been collected based on the actual weights, alleging that it had been practicable to weigh the shipments, and that he had continued to pay because he was kept in ignorance, by fraud and misrepresentation, of the fact that the freight was charged on estimated weights. Subsequently he twice amended his statement, and averred his bills of lading and that he was coerced into paying the freight. It was specially admitted in the court below by counsel for the defendant that "the charges were made on estimated weights and not on actual weights," and that, if the plaintiff was entitled to recover under the evidence, the amount claimed by his counsel at trial was correct and would not be questioned.

The court charged the jury, inter alia: "(a) The important question for you to determine is whether or not it was practicable to weigh these potatoes, shipped from the points named down on the eastern shore, * * * to the plaintiff here in Pittsburgh. It is claimed by the plaintiff that it was entirely practicable to weigh those potatoes. The defendant maintained it was not practicable. (b) The plaintiff claims to have shown you that at a great many of those stations there were scales that could have been used, that it was practicable to use those scales at the points of shipment in order to ascertain the actual weight of the potatoes, and that the company should have done so and should have charged, as provided by the Interstate Commerce Commission, for the actual weight instead of what was shown to be the estimated weight. They claim that if it was not practicable to weigh the potatoes at all of the stations, yet they passed through a number where it was entirely practicable to do so, and that it was the duty of the defendant company and especially incumbent upon them, if they could not have them weighed at the other points, to weigh them here in Pittsburgh, where the freight was payable by the plaintiff, and where it is claimed they have the facilities for weighing the potatoes. It was claimed they could readily have done this, and thus have determined the amount of freight to be paid by the plaintiff according to the actual weight of those potatoes. Now that is the question. Could they have done that at any of these points? Was it practicable for them to weigh these potatoes? Has the testimony on behalf of the plaintiff satisfied you by its weight that it was practicable? If so, the plaintiff is entitled to recover. (c) Now that is the question. Could they have done that at any of these points? Was it practicable for them to weigh these potatoes? Has the testimony on behalf of the plaintiff satisfied you by its weight that it was practicable? If so, the plaintiff was entitled to recover. If he has failed in that respect, the burden being upon him, your verdict must be for the defendant. The defense claim he has failed, and has thought it unnecessary to offer any evidence, claiming the plaintiff has not made out his case. In other words, the plaintiff has not shown you by the preponderance of evidence that it was practicable to weigh these potatoes. That is the question for you to determine, and if you determine that in favor of the plaintiff, you allow him the amount of his claim, and if he has not done so, your verdict must be for the defendant company."

The verdict was for the plaintiff in the sum of \$4,967.69; the defendant's motion for judgment non obstante veredicto was refused, and judgment entered on the verdict. The defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

James R. Miller, for appellant. Stephen Stone, for appellee.

MOSCHZISKER, J. [1,2] The first amendment to the statement of claim was allowed without objection or exception on the part of the defendant, and while the second was objected to upon the ground called to our attention by the first assignment of error, it merely amplified the other amendment and was not inconsistent with the original statement; although new matter was averred, the plaintiff made no real departure from the original cause of action, namely, the overcharge in freight rates, and he added nothing under which the damages could be increased. "Amendments should be liberally allowed, and the test of their propriety is whether they introduce a new cause of action." *Knapp v. Hartung*, 73 Pa. 290, 294; *Vervaeke v. Adams Express Co.*, 230 Pa. 647, 79 Atl. 764. The testimony objected to was relevant to the issues raised by the pleadings, and we see no error in its admission.

[3,4] The freight charges were collected by the appellant company under contracts of carriage which provided that the consignee should pay the freight according to the weights ascertained by any carriers thereunder. The official tariff stipulated that when it was "practicable" for agents to weigh potatoes they should be charged for at actual weight, but when it was not "practical to weigh the same," then estimated weights according to the schedule were to govern; and that "estimated weights will apply in cases where actual scale weights cannot be ascertained." The significant words used are thus defined in Webster's New International Dictionary: "Practicable, that that may be practiced or performed; capable of being put into practice, done or accomplished; feasible. Practical, syn.—see practicable." The bill of lading and the printed tariff taken together indicate that these words were used in their ordinary sense; they did not require any particular or elaborate construction on the part of the trial judge. He left it to the jury to say under the evidence whether the company could have accomplished the taking of the actual weight of the potatoes—whether it was feasible for them to have ascertained their actual weight. The contradicted evidence showed that there were hand scales at the various stations of original shipment which had a capacity of 500 pounds, and that barrels of potatoes were at times actually weighed upon such scales; that at several points between those stations and the place of delivery there were track scales

capable of weighing car loads of potatoes, where such work was actually done; and that Pittsburgh, the terminal point, had track scales in the produce yard upon which the actual weight could have been taken.

It appears that when potatoes are weighed in the cars, the actual weight per barrel is ascertained by dividing the total weight less the weight of the car by the number of barrels. This being so, it seems reasonable to assume that they could get the actual weight to almost as great a degree of certainty by weighing a number of barrels on hand scales at the original point of shipment and accepting the average. However this may be, we are not convinced that, under the documentary evidence, the court was wrong in submitting all of the opportunities for weighing the potatoes to the jury, for, had the defendant company desired, it could have written into its schedule and contract the stipulation that unless track scales existed at the original point of shipment potatoes should be charged for according to estimated and not actual weights.

[5-8] The trial judge was wrong in permitting the testimony concerning the contents of the record cards which indicated that some of the cars in question had been actually weighed at a station en route called Delmar. The cards themselves were the best evidence, and if the plaintiff desired to rely upon them to any extent he should have given notice to produce. But since there was ample other uncontradicted testimony to sustain a finding that it would have been practicable to weigh the potatoes, we feel that the mistake can be treated as harmless error, and for that reason the plaintiff should not be forced to a new trial. Nor, under all the circumstances, are we inclined to reverse because of the incident called to our attention in the fourteenth assignment. While the trial judge should at least have stricken the objectionable answer from the record and warned the jury to disregard it, yet since counsel for the appellant rested upon his exception to the refusal to withdraw a juror and continue the cause, and made no request of the court to warn the jury to disregard the answer, we think it is probable that all parties felt that no material harm had been done. The defendant introduced no testimony; therefore it was unnecessary for the trial judge to refer to the "weight" and "preponderance" of the evidence, but no possible harm could have been done thereby.

There was ample evidence to show that it was practicable to ascertain the actual weights, and that the freight payments were not voluntary. After considering in detail each of the matters called to our attention, we are not convinced of reversible error.

The assignments are all overruled, and the judgment is affirmed.

GRAY, Atty. Gen., ex rel. CAPELLE et al. v.
MAYOR AND COUNCIL OF WIL-
MINGTON et al.(Court of Chancery of Delaware. May 31,
1912.)INJUNCTION (§ 11*)—MUNICIPAL PROCEED-
INGS—RIGHT TO WRIT.

The Court of Chancery will not restrain the mayor and council of a city from taking further action on a proposed ordinance providing for a sale of land owned by the city, though a recital in the ordinance of the relinquishment of control over the land by the board of water commissioners, which was a jurisdictional fact, be untrue; injunction being properly withheld until the last practicable moment, when it appears that the mayor and council will take final and illegal action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 9-11; Dec. Dig. § 11.*]

Action by Andrew C. Gray, Attorney General, on relation of George S. Capelle and another, against the Mayor and Council of Wilmington and others. Restraining order dissolved, and preliminary injunction denied.

Suit by the Attorney General at and by the relation of George S. Capelle and Samuel Bancroft, Junior, to restrain the Mayor and Council of Wilmington from taking any further action on a proposed ordinance providing for the sale of a piece of real estate owned by the City of Wilmington, containing what is known as the Rodney Street Reservoir. Hearing had on rule to show cause why a preliminary injunction should not be issued.

Robert H. Richards, for complainants.
John W. Brady and Armon D. Chaytor, Jr., for defendants.

Injunction bill. The bill is by the Attorney General upon the relation of two citizens and taxpayers of the City of Wilmington, alleging that the City owns land bounded by Rodney, Eighth, Clayton and Ninth Streets, containing a reservoir for water, and so, a part of the water works of the City, full jurisdiction over and control of which was and is vested in the Board of Water Commissioners. There had been introduced into the Council an ordinance, which had had two readings, and which recited in the preamble that the land had been abandoned as a reservoir and was not necessary to the water supply system, and that "the Board of Water Commissioners of the City of Wilmington had expressed to the Council of the Mayor and Council of Wilmington its opinion that it [the land] is of no further use for that purpose to the City of Wilmington." The ordinance then authorized and directed the sale of the land at public sale.

It was further alleged in the bill that the recitals were untrue in fact, because the land was necessary for the water supply system, and, in fact, contained pipes actual-

ly used to supply water, and because the Board of Water Commissioners had never taken any action to show the land was not necessary, or relinquishing control or authority over the land.

The relators alleged that the sale of the land would be unlawful and injurious, and that it was the purpose and intention of the Council to take further action on the ordinance at its next meeting, and probably to adopt the same, and upon the adoption of the same and the approval thereof, a speedy sale could easily be made of the land. Irreparable injury to them and other taxables, if further action on the ordinance be permitted and the sale be effected, was also alleged.

Prayers were made to enjoin the members of the Council, naming them individually, from taking any further action upon, or voting on the ordinance, and further prayers to restrain the approval by the Mayor, and the making by the corporation of a sale under the ordinance.

A restraining order was granted on the day when the next meeting of the Council would be held after the ordinance was introduced, and a rule for a preliminary injunction was awarded. Ex parte affidavits were read at the hearing of the rule.

THE CHANCELLOR: Two main questions arose at the hearing: (1) Had the Board of Water Commissioners relinquished its control and authority over the land and determined that it was no longer necessary for the water supply system of the City? (2) If such control and authority had not been relinquished, could or should the Court of Chancery enjoin the Council from passing the ordinance authorizing a sale of the land?

It should be explained that the Council was formerly the legislative, as well as the executive, branch of the municipality, but that since 1883 the full jurisdiction, control, and management of the water supply system, and of all the land used for reservoirs and other property for storing and delivering water, was absolutely vested in the Board of Water Commissioners, so that until this Board relinquished control of the land the Council had no power to sell it. There was, and could have been, no contention to the contrary.

From the affidavits it is clear, beyond question, that at no time had the Board of Water Commissioners relinquished control, or taken any action to that effect, and that there was no basis for any claim that they had taken any official action which justified the conclusion that they considered the land unnecessary, or wanted it sold. It is not true that the Board had expressed to Council the opinion that the land was of no further use to the City, and the statement in

the recital that this opinion had been expressed was untrue. It is of no consequence, except, perhaps, as to the question of the imposition of costs, but there is no evidence to show that, before the ordinance was introduced, any effort was made to obtain from the Board of Water Commissioners their official views as to the need for the land and the desirability of selling it.

But though the recitals in the ordinance were untrue, and therefore Council had no legal power to sell the land, still, the question remains, should the Court enjoin the Council from taking further action on the ordinance?

There is no contention but that the Council had power to authorize the sale of the property, if the control of the Water Department had been in fact relinquished, and this is rather assumed than decided in this case. It was not a case, then, where the Council was seeking to do an act *ultra vires*: e. g., to create a public nuisance, or remove an official over whom it had no control. The deficiency of authority arose from the fact that some other municipal body had not relinquished its superior right of control of the thing over which the Council was seeking to exercise power and which it was seeking to sell pursuant to its general powers. Neither was it contended that the bill was not brought by the proper parties, and in the proper way, and it is assumed that the Attorney General, at the request of the relators as taxpayers of Wilmington, had a right as such to proceed in the manner in which they did. The same course was pursued in the case of Attorney General v. Wilmington, 4 Del. Ch. 575, which proceeding was effective, though the Court did no more than grant a preliminary order without rendering an opinion.

Again it is clear that the passage of the ordinance would not, of itself, have effected any definite result without further steps being taken to enforce it, or make it effective. Title to the property would not have been changed by the passage of the ordinance, and no rights, or authority, would have been conferred thereby. It would not have imposed upon any other municipal agents the duty to sell the land, but was an attempt to decide in favor of a sale thereof at some future time at public auction. It is true, also, that in attempting to so deal with the property the Council was acting, not in its public, but in its proprietary, character, much like the board of directors of any other corporation dealing with corporate property, rather than as a branch of the State government exercising governmental powers for the protection of the life or property of its citizens.

While there is some conflict in the decisions, not so much as to the principles of law applicable, but rather to the application thereof, it seems clear that in such a

case as that presented, the preventative powers of the Court of Chancery should not be exercised to enjoin the passage of the ordinance.

In the case of *Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 965, 18 L. R. A. 832, 36 Am. St. Rep. 438, there is a full discussion of the authorities on the subject of judicial power to restrain the exercise of legislative powers, and the conclusion was thus stated there:

"The weight of authority and the tendency of the more recent decisions are in favor of the position, that the restraining power of the courts should be directed against the enforcement, rather than the passage of authorized orders and resolutions or ordinances by municipal corporations."

Without reviewing the authorities, this is considered by this Court to be a safe statement of the law on the subject.

There are exceptions to this rule, and the case of *Roberts v. City of Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844, seems to be one. There the Court restrained the adoption by the legislative branch of the City government of an ordinance requiring the Mayor to convey certain lands of the City for an unlawful purpose. This was a case where the mere acting on, or the passage of, the ordinance might create rights and cause an injury to the City. In the case cited, the Court noted the dual character of a municipal corporation and held that a court of equity might enjoin the passage of an ordinance affecting the corporation in its private or proprietary character and not those affecting the corporation in its governmental or public capacity. But this distinction has not, it seems, been adopted and does not seem to be sound.

Instead of interfering with a legislative movement to the accomplishment of an illegal purpose, at the outset thereof, the court should rather act at the last practicable moment, giving ample time for appeals to be made to the reason and good judgment of the legislators. Here, there was a fact to be determined by the Council before it could exercise any control over the land in question, viz.: Had the Water Department relinquished control? The Court cannot assume in advance that the members of the Council will ignore the real facts and violate the obligations which they have assumed as legislators by voting to pass the ordinance in the face of the clear evidence against such relinquishment, such as has been presented to the Court in this case, and which perhaps might have been presented to the Council. It will be time enough to stretch forth the preventative arm of this Court when some attempt is made to enforce such an ordinance in case it be passed by the Council and approved by the Mayor. There are proceedings to be taken, even after the ordinance becomes a law, before the

land can be sold and conveyed away. It is a wiser course, then, not to interfere with the exercise of the legislative discretion, but rather to wait until some effort is made to act upon an invalid ordinance, unless injury is likely to result from the delay. Certainly in this case, even if the Court has power to restrain the passage of the ordinance, it should not exercise such power.

The composite and conglomerate character of the present charter of the City of Wilmington furnishes an opportunity for discord in the management and control of municipal property, such as that which has caused this litigation. At present there are several independent boards exercising power and performing duties for and on behalf of the City, and the confusion and conflict resulting therefrom is the natural outcome of an unscientific and unsystematic arrangement for administering municipal affairs. A charter should so co-ordinate the various governmental and administrative agencies as to make a conflict of authority and power between them difficult, if not impossible.

The restraining order will be dissolved and the motion for a preliminary injunction denied.

Let an order be entered accordingly.

McDONOUGH v. BLOSSOM.

(Supreme Judicial Court of Maine. May 10, 1912.)

1. EXCEPTIONS, BILL OF (§ 39*) — PRESENTATION—LACHES.

Petitioner's right to writ of review is not defeated on the ground of laches in failing to procure signature and allowance of a bill of exceptions before the trial judge died, where he had five days left within which to present the bill under an allowance of time.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.*]

2. JURY (§ 95*)—JURORS—DISQUALIFICATION—TRIAL OF SIMILAR CASE.

In actions brought on notes and defended on the ground of forgery by a third person, jurors who had tried a similar action, wherein identical facts were involved, were disqualified; and it was improper to refuse defendant a continuance on the ground of such disqualification, especially since defendant intended to call as a witness one who had been taken in custody in the presence of the jurors in the other action on a charge of perjury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 424-430; Dec. Dig. § 95.*]

3. JUDGMENT (§ 570*) — CONCLUSIVENESS — DISMISSAL.

A judgment of the law court, dismissing exceptions brought from the superior court for want of prosecution, not being on the merits, cannot be urged as res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

4. REVIEW (§ 8*)—RIGHT TO WRIT.

Petitioner being prevented without his own fault from taking cases from the superior to the law court on exceptions, through the death of the judge of the superior court before

exceptions were allowed, is entitled to present them by petition for review.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 8; Dec. Dig. § 8.*]

5. REVIEW (§ 8*)—RIGHT TO RELIEF—ESSENTIALS.

To entitle one to a writ of review, he must show that justice has not been done; that the consequent injustice was through fraud, accident, mistake, or misfortune; and that a further hearing will be just and equitable.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 8; Dec. Dig. § 8.*]

6. REVIEW (§ 16*)—SEPARATE ACTIONS—NECESSITY FOR SEPARATE PETITIONS.

Where one asks for review of two actions, he should present a petition in each action; but, where the same facts apply to both cases, a single petition may be discontinued as to one of the causes, without prejudice, and a writ of review issued in the other.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 16; Dec. Dig. § 16.*]

Report from Superior Court, Cumberland County.

Petition by Brian E. McDonough against Fred A. Blossom for writs of review in two actions at law. On report. Writ issued.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Michael T. O'Brien and Carroll W. Morrill, both of Portland, for plaintiff. M. P. & H. P. Frank, of Portland, for defendant.

HALEY, J. The petitioner asks for writs of review for two actions at law tried in the superior court for Cumberland county at the November term, 1910. The petition is based upon paragraph 7, § 1, c. 91, R. S. In the original actions the petitioner was defendant. The actions were upon two promissory notes. The defense was forgery. The defendant claims that one James Dunn forged many notes, among which were the two in suit in the above actions. Dunn has disappeared.

The case tried in the superior court immediately preceding the case against the petitioner was upon a note claimed to have been signed by one James Rowe, and claimed by said Rowe to have been forged by the said Dunn. The verdict was for the plaintiff. Immediately upon receiving the verdict, the justice holding the court, in the presence of the jury, ordered the defendant Rowe into custody for perjury. Rowe was taken from the courtroom by an officer, and in a few minutes, by order of the justice, was returned into court, and, in the presence of the jury, was placed under \$2,000 bonds to appear at the next term of the court to answer to the charge of perjury. The grand jury returned no bill against Rowe, which ended the criminal charge against him, but did return several indictments against Dunn for forgery, one of which was for forging the note which Rowe had testified was forg-

ed, and for giving which testimony Rowe was arrested for perjury.

Immediately after Rowe had recognized as above, the trial of the cases against the petitioner was begun. The defense being the same, the counsel for the petitioner requested a continuance upon the ground that the jury having in the preceding case passed upon the same question, and that the defendant intended to call as a witness said James Rowe, and the arrest of him by order of the court had prejudiced the jury against his testimony, were disqualified. The motion was denied by the presiding justice, who allowed an exception to his ruling, and a jury was impaneled, seven of whom had sat in the preceding case. The verdict was for the plaintiff in each case, and a motion for a new trial was made upon the ground that the verdict was against the law and the evidence. The time for filing the report of evidence and exceptions was extended to the February term, 1911, and the case marked "Law." At the February term, the time for filing the report of evidence and exceptions was again extended to the last day of the February term. On the 19th day of February, 1911, the judge of the superior court died, and the exceptions had not been signed by him. The case was entered at the June term of the law court, and motion and exceptions were overruled for want of prosecution.

[1] The petitioner claims a review because the judge of the superior court died before the expiration of the time allowed the petitioner to file his exceptions, and that there was no way to have the exceptions allowed, that the law court might pass upon them, because of the death of the presiding justice. The respondent claims there was laches on the part of the petitioner that bars him from being heard upon this petition; that there was ample time allowed for the filing of the exceptions; and that the petitioner should have had them signed and allowed in the lifetime of the justice of the superior court.

The record shows that the petitioner's right to file his exceptions was extended to the last day of the February term, and further shows that the February term adjourned on February 24th.

We cannot hold the petitioner guilty of laches in not presenting his exceptions to the judge for his approval before the 19th day of February, the day of the death of the judge, because he had several days after the 19th day of February in which to present them. All that the law required was that the exceptions should have been presented within the time allowed. No one, in preparing exceptions, would take into consideration the fact that the judge might die before the time fixed for filing the exceptions. The petitioner had until the last day of the February term in which to file his exceptions.

Several days before the close of that term the judge died, and they could not be allowed after his death. To hold that it was laches on the part of the petitioner not to have filed them before the death of the justice would be, in substance, to hold that an act of God would make the petitioner guilty of laches.

In Moulton, Petitioner, 50 N. H. 532, the court allowed an appeal by the administrator, when the party entitled to it had died just before the 60 days allowed for claiming it, saying:

"It was no neglect for him to wait, even if he had waited until the last day of the 60 days before claiming an appeal. The statute giving him that right, the appeal would have been well enough if he had lived; but his death, under the circumstances of the case, was a misfortune which defeated it."

[2] No authority has been cited, and we venture the assertion that none can be cited, upholding the ruling of the justice that the petitioner should proceed to trial at the time he was compelled to do so. The jury were disqualified by their verdict in the preceding case. The arrest of Rowe, who was a witness in the case of the petitioner, by order of the presiding justice, in the presence of the jury, when the evidence was the same as in his case, and his being placed under bonds in the sum of \$2,000 upon the charge against him, could but further prejudice the petitioner's case, and was a palpable error.

Garthwaite, Grinnin & Co. v. Tatum, 21 Ark. 336, 76 Am. Dec. 409, was an action upon a note executed at the same time as another note, upon the validity of which the jury had passed. The issues were the same. The plaintiff objected to the jury as disqualified. The court overruled the objection, and the case was taken to the higher court. Fairchilds, J., in delivering the opinion, said:

"By their verdict in the other case, the jurors had formed and expressed their opinion upon this case, and the fact that it was done on oath, after hearing all the facts and after full deliberation thereof, amid the solemnities and under the direction of judicial proceedings, could have no other effect than to incline them to render such verdict as they had rendered before. The law presumes them to have been under a disqualifying bias."

The same doctrine is laid down in *Burke v. State*, 66 Ga. 157; *Brandon v. State*, 75 Miss. 904, 23 South. 517; *State v. O'Connor*, 105 Mo. 121, 16 S. W. 510; *Golden v. State*, 75 Miss. 130, 21 South. 971; *Railway Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *Weeks v. Lyndon*, 54 Vt. 638.

[3] There are cases which hold that the discretion of the court in refusing or granting a continuance is not subject to exception; but the great preponderance of the cases are to the contrary, where there has

been a clear abuse of the discretion to the prejudice of the moving party. As stated in *Schwartz v. Drinkwater*, 70 Me. 409, which was a case in which exception was taken to the refusal of the court to continue the action: "Therefore whether the motion should be granted or not was for the judge to determine as a matter of discretion. His ruling, unless palpable error was committed, cannot be reviewed here." Also see cases cited in note to *Stevenson v. Sherwood*, 74 Am. Dec. 140. The petitioner attempted to reserve for the law court the question of whether there was a clear abuse of the court's discretion in denying the petitioner's motion for a continuance. He was prevented from doing so by the death of the judge; and the law court, when it overruled the exceptions for want of prosecution, did not pass upon the merits, or give judgment upon the merits, as there was not before the court any bill of exceptions, and its order dismissing the exceptions cannot be successfully urged as *res adjudicata* of the question presented by the petition in this case.

[4] There being no way that the petitioner could take his cases to the law court upon exceptions, it was his misfortune, not caused by his own act; and it is proper to present them by a petition for review. As said by the court in *Reynard v. Brecknell*, 4 Pick. (Mass.) 302: "If a party should be seriously injured by any determination of a court of common pleas on matters clearly within its discretion, such as the postponement or continuance of an action, we know of no remedy but by a petition for a writ of review. According to the general statute giving this power to sustain such petitions, on the hearing of which, if it be made to appear that injustice has been done to the party by his being hurried to trial unprepared, a review will be granted."

The same doctrine was approved in *Todd v. Barton*, 117 Mass. 291, and in *Converse v. Carter*, 8 Allen (Mass.) 568, the last case holding that a petition for review was a proper remedy, but denying the petition; the statute of Massachusetts granting reviews being similar to the statute in Maine.

[5] To entitle the petitioner to a review, he must prove to the satisfaction of the court:

- (1) That justice has not been done.
- (2) That the consequent injustice was through fraud, accident, mistake, or misfortune.
- (3) That a further hearing will be just and equitable.

Donnell v. Hodsdon, 102 Me. 420, 67 Atl. 143.

We think that the two first propositions are proved by the compelling of the petitioner to proceed to trial before a jury disqualified by law from sitting in his case.

The question to be determined is, Has justice been done by the verdict? It is surely equitable and fair that the petitioner shall have a fair trial before a jury that is unprejudiced; and we think there is sufficient evidence in this case to authorize us to say that, under the peculiar circumstances of the case and trial, justice has not been done, and that it is proper that he have the right to present his case to an unprejudiced jury.

[6] The petitioner asks for a review of two actions. There should have been a petition for a review in each action; but, as the same facts apply to both cases, the petitioner may discontinue as to one of the cases, without prejudice, and a writ of review issue in the other.

Writ of review to issue.

CAMPBELL v. CAMPBELL et al.

(Supreme Court of Rhode Island. May 27, 1912.)

1. NEW TRIAL (§ 143*)—GROUNDS—MISUNDERSTANDING OF JURORS.

In a proceeding for the allowance of certain claims against a decedent's estate in which there had been previous trials and an appeal, the court charged that all proceedings under the former decree were vacated by the appeal, that the jury were to determine whether decedent's estate was indebted to claimant for \$15,550 of any part of that sum, as if the claim was presented for the first time, that the former decree awarding claimant \$2,700 was not evidence that he was entitled to any sum, and the fact that the jury disallowed a large part of the claim was not evidence that he was not entitled to receive the full amount thereof, but that the jury would determine the case on the evidence and the law given by the court. *Held*, that claimant was not entitled to a new trial after a verdict for the estate on the affidavits of certain jurors that they did not understand that the case superseded the previous decree for claimant, and that, under their verdict, he would not receive the amount that had been previously awarded him.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

2. NEW TRIAL (§ 143*)—AFFIDAVITS OF JURORS.

In a proceeding to establish a claim against decedent's estate in which a verdict was rendered for defendants, affidavits of jurors filed almost a year after the trial on motion for new trial *held* to indicate that the affidavits had forgotten the actual state of the facts as shown by the evidence, and not that improper matter had been considered in arriving at their verdict, and insufficient to support the motion on the ground that claimant had not had a full and impartial trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 290-296; Dec. Dig. § 143.*]

Claim by Elisha J. Campbell against George E. Campbell and others. A verdict was rendered in favor of defendants, and plaintiff applies for a new trial. Denied.

See, also, 71 Atl. 369, 881.

Green, Hinckley & Allen, of Providence (Rush Sturges, of Providence, of counsel), for plaintiff. Irving Champlin and James Harris, both of Providence, for defendants.

PER OURIAM. This is a petition for a new trial, brought by Elisha J. Campbell, appellant, in a certain probate appeal, wherein he sought to obtain from the estate of his father, James Campbell, a larger allowance on his claims than was awarded by the commissioners appointed by the municipal court of the city of Providence on the estate of James Campbell. The appellant made claims aggregating \$15,550. The commissioners allowed \$2,700 and the municipal court confirmed this allowance. Elisha J. Campbell appealed from this decree, and upon a trial of the appeal in the superior court in December, 1907, the jury awarded him \$3,024. This verdict was set aside and a new trial granted upon certain exceptions alleged by the appellant and sustained by this court. Subsequently the appeal was again tried before a jury of the superior court in November-December, 1910, and the jury found against the appellant on his entire claim, awarding him nothing.

He now claims that he did not have a "full, fair, and impartial" trial, and petitions for a new trial on that ground (under Gen. Laws 1909, c. 297, § 2), and supports his petition by six affidavits, five of which are made by jurors who sat at the second trial, and one by William D. Hawkins, who was a witness called by the appellant at said trial. The affidavits of four of these jurors, Patton, Phillips, Johnson, and Knowles, are all to the effect that they considered that "the award of the probate court commissioners and the first superior court jury for approximately \$3,000 for Elisha J. Campbell stood and was not disturbed by the verdict of the jury in the said November and December trial." The affidavit of the juror Knowles (foreman) further states that, "if I had considered that the first award to said Campbell could have been wiped out by the verdict of my jury, I should have voted against said Campbell getting anything." The affidavits of the three other jurors above named make no statement as to what they would have done in the event they had not supposed the first award stood, and was not disturbed by their verdict. It appears, therefore, that none of these affidavits support the claim set up in the first ground of the petition that the jury "intended not to disturb the award of the commissioners, * * * and the verdict of the first superior court jury for approximately three thousand dollars (\$3,000)." They only show, if true, that four members of the jury supposed that the award of approximately \$3,000 to Campbell was not disturbed by their verdict; and it is not impossible that the other three would have had the same attitude as

the foreman, Knowles, if they had supposed the award could be "wiped out" by their verdict. But it appears by the transcript that the court fully explained the whole matter of the former proceedings to the jury, and instructed them that the findings in the former proceedings were not evidence for them to consider and were to be disregarded by them.

[1] The court charged the jury, in part, as follows: "Now, when an appeal is taken from a decree of the municipal court, all proceedings under that decree are vacated, and null and void. And the question for you to determine here is whether or not the estate of James Campbell is indebted to Elisha J. Campbell for \$15,550, or any part of that sum, or whether or not it is not indebted to him at all. You are to determine that question, gentlemen, just exactly the same as if this claim was presented here for the first time. The fact that the decree of the municipal court of the city of Providence allowed him \$2,700 of that claim is not evidence that he is entitled to that sum or any part of it, and it raises no presumption in his favor or against him. The fact that they disallowed \$12,850 of the claim that he presented is not evidence that he is not entitled to receive the full amount of his claim, and it raises no presumption for or against his right to have his whole claim allowed. In other words, gentlemen, you are to determine this case upon the evidence that has been presented in this case, and upon that evidence alone, and upon the law as the court gives it to you. You are to pay no attention to what the municipal court did. You are to pay no attention to what you, possibly, may have heard about the evidence in other cases. You are to try this case solely upon the evidence that you have listened to for the last three weeks, as given to you by the witnesses, and the documentary evidence." In view of this clear and explicit charge to the jury, we cannot believe that there was at the time of the trial any such misunderstanding as to the effect of the former award to the said appellant as is now attempted to be set up by the affidavits under consideration; and we are of the opinion that these affidavits are far from showing any just ground for the claim that there was any mistake in the verdict of the jury as rendered or that it failed to record their true and intended finding. We think the affidavits rather show that the several affiants in their statements made almost a year after the trial have forgotten what was the actual condition of the case as submitted to them, and have, out of a sort of good nature, yielded to the importunities of the appellant in an endeavor to relieve him from the seeming harshness of their findings.

[2] Two of the jurors, Patton and Johnson, also include in their affidavits a state-

ment, in effect, "that, although no evidence was introduced in the trial tending to warrant the inference or belief that the note for \$10,000 on which appellant based part of his cause of action was in fact made at a later date than appeared from the face thereof, I, together with the other jurymen, compared the signature of the maker of said note with his signature made elsewhere and at another time and as a result was of opinion that the note was really antedated, which opinion materially affected the verdict as rendered." With regard to these statements, it is to be noted that none of the other affiants corroborate them, although the statement is that "I, together with the other jurymen, compared," etc. It is curious, to say the least, that the other three jurors fail to remember this seemingly important matter, if it were true. But the basis of the statement is shown to be untrue, because it appears by reference to at least 13 different pages of the transcript that the appellant himself admits over and over again that, while the note bears date April 1, 1902, it was not signed until the fall of 1902; so that it is untrue that no evidence was introduced in the trial tending to warrant the inference or belief that the note for \$10,000 was in fact made at a later date than appeared from the face thereof. The fact being admitted was before the jury, and no comparison of signatures was needed to establish it. We fail to see how these facts as stated in these two affidavits could, if proved, have had any effect upon the verdict adverse to the appellant; and we are of the opinion that they fail to prove that they did, in fact, have any such effect, or, indeed, to prove to the satisfaction of the court that any such thing happened. In our opinion these affidavits show forgetfulness of the actual state of facts as shown by the evidence about a year before their date, but furnish no support for the petition, as they do not show that the trial was not "full, fair, and impartial." The affidavit of William D. Hawkins, who was a witness at the trial, called on behalf of the appellant, sets forth that he was during the trial questioned on the street by a man whose name he does not know, but whom he identified as a juror, who asked him, "What is this case anyway?" to which he says he replied, "All that I know about it is the note;" that the jurymen then inquired if there had not been another trial, and that on receiving an affirmative answer the jurymen asked how much Mr. Campbell had been awarded, to which he replied that the sum was "about \$3,000." There is no supporting affidavit from any jurymen as to this; nor is there any evidence to show either that this statement had any effect upon the mind of the person to whom it was made, or that it was reported to the other jurymen, or that it had

or could have had any effect upon the jury or any of them. The fact stated as to the amount formerly awarded to Mr. Campbell was before the jury, as shown by the part of the charge above quoted, and they were fully instructed regarding the same as above shown, after the time when this statement must have been made. In our opinion, while the conduct of this juror, if truly stated in the affidavit, was highly improper in thus seeking information, out of court, as to a case on trial, it utterly fails to show that any information was in fact conveyed, outside of what was in evidence before the jury, or that the information conveyed could have had any effect upon the verdict. This affidavit furnishes no support to the petition.

In thus discussing the effect of these affidavits on their merits, we are not unmindful of the arguments of counsel as against the legal admissibility of the affidavits of jurors intended to impeach their verdicts; nor are we unmindful of the decisions of this court and other courts in support of the general rule that "affidavits of jurors as to their own misconduct in or out of the jury room during the trial are inadmissible to impeach their verdict." *Phillips v. R. I. Co.*, 82 R. I. 10, 78 Atl. 342, 31 L. R. A. (N. S.) 930. Nor do we, by thus discussing these affidavits upon their merits, intend to imply that they may be of such character, as to come within the exceptions to the rule, as the counsel for the petitioner argues. We have preferred to show that, even if admissible, they do not set forth such facts as to warrant this court in arriving at the conclusion that the jury were misled or mistaken in rendering their verdict, and that they afford no proper ground for the granting of the petition. In our opinion these affidavits show, at most, a forgetfulness on the part of certain jurors as to the facts of the case as it was clearly submitted to them nearly a year before, rather than such facts as would even tend to show that they made any mistake in rendering their verdict as they did.

For these reasons, the petition is denied and dismissed.

CARNEY et al. v. HAWKINS.

(Supreme Court of Rhode Island. May 27, 1912. On Motion for Reargument, June 11, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 510*) —ACCOUNTING AND SETTLEMENT—ACTION— BURDEN OF PROOF.

On appeal to the superior court from a decree of the probate court allowing an administrator's or executor's account, such representative has the affirmative under rule 14 (law rules) of the superior court, and, where to prove certain items an executor merely presented as part of the record of the probate court a copy of his sworn account without a

showing that it was submitted or sworn to by him in open court, or that he was present in court at any time for cross-examination and without a stipulation that it should be accepted as evidence of his account, a decree allowing such items was improper.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2235-2256; Dec. Dig. § 510.*]

2. EXECUTORS AND ADMINISTRATORS (§ 506*)
—ACCOUNTING AND SETTLEMENT—CHARGES AND CREDIT—EVIDENCE.

A personal judgment against an executor without other evidence is insufficient to sustain an item of account charged as "paid on execution."

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2169-2177; Dec. Dig. § 506.*]

3. EXECUTORS AND ADMINISTRATORS (§ 281*)
—ALLOWANCE OF CLAIM—STATUTE OF LIMITATIONS.

Court and Practice Act 1905, § 891, provides that an action against a solvent estate on a disallowed claim must be brought against the administrator or executor within six months after notice of disallowance. After the disallowance of a claim by an executor, the claimant seasonably attempted to have a judgment against the executor as an individual, and amended it to make it a suit against the estate more than a year after the disallowance. *Held*, the attempted amendment was the institution of an entirely new suit against the executor, and, as it was not brought within the time required by the statute, no liability to pay the amount of the claim attached to the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1102-1104, 1106-1115; Dec. Dig. § 281.*]

4. LIMITATIONS OF ACTIONS (§ 175*)—WAIVER—POWER OF EXECUTOR OR ADMINISTRATOR.

The running of the statute of limitations against a claim against the estate of a decedent will absolutely extinguish the claim, and the effect of the statute cannot be waived by the executor or administrator.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 662; Dec. Dig. § 175.*]

5. PARTIES (§ 59*)—SUBSTITUTION—CAPACITY OF DEFENDANT.

Where a suit against a defendant personally was amended so as to make it a suit against him as administrator, there was a change in the cause of action, and the attempted amendment and judgment thereon were a nullity, so that a payment by the executor of the amount of the judgment could not be allowed as a charge against the estate.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 90-94, 165; Dec. Dig. § 59.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

James H. Carney and others appealed to the superior court from an allowance of the account of John B. Hawkins, executor. From an order of the superior court allowing items of the account, appellants bring exceptions. Exceptions sustained, and case remitted for new trial.

Edward M. Sullivan, of Providence, for appellants. Hugh J. Carroll, of Pawtucket, for appellee.

PARKHURST, J. This case is a probate appeal from the probate court of the city of Central Falls, which was taken by the appellants as residuary devisees under the will of James Gilbane from the allowance of the account of Hawkins, executor, by said probate court, and the reasons of appeal specify the items intended to be contested as follows, viz.:

Paid on execution in case of John J. Gilbane	\$ 77 20
Paid in settlement of case of Margaret Gilbane v. Estate.....	500 00
E. De V. O'Connor, Atty. fees.....	600 00
Retained for services.....	214 00
Monument erected in cemetery.....	350 00

After hearing of this appeal before a justice of the superior court, without a jury, jury trial having been waived, the justice allowed all of the contested items except that one specified as, "Paid on execution in case of John J. Gilbane, \$77.20," which was disallowed.

[1] The appellants excepted to this decision, and the case is now before this court upon the bill of exceptions. The decision of the justice states that "his account, sworn to, is submitted by the executor. There was no cross-examination of him by the appellants." But the transcript of testimony does not show that the executor was present in court, or that the account was submitted by him or sworn to by him in court, or that he was present at any time before the court so that he could be subjected to cross-examination. The only evidence submitted was offered by the appellants, and consisted of certain papers in several prior suits and proceedings relating to the charges for amounts paid to John J. Gilbane for \$77.20, and to Margaret Gilbane for \$500. No evidence was offered by the appellants as to the other items of the account set forth in the reasons of appeal. Nor does it appear upon the transcript that the appellants formally consented to the introduction and admission of the account sworn to by the executor as prima facie evidence of the correctness and propriety of the items therein charged, and waived the proof of the items of the account, as to which they had taken their appeal. This procedure was highly irregular. The mere presentation of a copy of the sworn account of the executor, produced with other papers from the probate court, as a part of the record of the probate court, to show what the appeal relates to, is not evidence of the propriety and correctness of the items of the account, and should not have been accepted as such by the trial judge, unless expressly stipulated by the parties. Upon appeal from a decree allowing an administrator's or executor's account by the probate court, the administrator or executor who presented the account for allowance in the probate court is "the party holding the affirmative" under rule 14 (law

rules) of the superior court, and should proceed in due form at the outset to present his account and the vouchers showing his expenditures, or other evidence in support of the items of the account as to which the appeal is claimed, so that the court may at the outset have evidence before it as to the contested items. Unless this procedure is followed, there is no evidence before the court upon which it can act as to the allowance or disallowance of the contested items, or upon which the appellants are required to offer any testimony (unless by stipulation as above referred to, which in this case there is nothing to show).

We find, therefore, in this case that the record does not show that the appeal was ever properly presented to the trial judge, or that there was any evidence before him as to the last three items of the account above set forth showing whether or not the several sums of \$600, \$214, or \$350, had been actually expended, or as to the propriety of the same as credits to the account. So that we find that when the trial judge allowed these items, as he did in his decision, he acted without evidence, and so without authority; and as to the allowance of these items, therefore, we sustain the appellants' exception to his decision.

[2] As to the other items in dispute, the transcript does show that evidence was offered by the appellants, upon which the trial judge could and did act. The item, "Paid on execution in case of John J. Gilbane, \$77.20," appears to have been based upon a judgment of the district court, and an inspection of the papers presented and referred to in the transcript shows that the judgment upon which the execution was issued was a personal judgment against said Hawkins, and not a judgment against the estate of James Gilbane, and so the same was properly disallowed. As to the claim of Margaret Gilbane, evidence also appears fully showing the basis of the claim and the proceeding relative thereto, and as to this claim we think the evidence was sufficient to warrant the trial judge in considering the same and making a finding thereon.

[3] As to this claim of Margaret Gilbane, it has been before this court in two prior proceedings. *Gilbane v. Hawkins*, 29 R. I. 502, 72 Atl. 723; *Carney v. Superior Court*, 30 R. I. 276, 74 Atl. 1018. From these cases it appears that Margaret Gilbane filed her claim against the estate of James Gilbane in the probate clerk's office seasonably after the death of James Gilbane for the sum of \$768; that these appellants objected to the allowance of the claim, and the same was disallowed by the executor; that thereafter suit was brought by Margaret Gilbane, in the district court, for the sum of \$500, remitting \$268, and that the appellants attempted to defend this suit by consent of the executor, and by their attorney in the dis-

trict court did in the name of John B. Hawkins claim a jury trial, and the case was certified to the superior court upon such claim. After it got there, Hawkins submitted to judgment for \$500, and the case was brought to this court upon exceptions alleged by these appellants, claiming the right to defend said suit. Upon examination of the papers in this court it was found that the action was brought against the defendant Hawkins personally, since it appears in the writ and declaration that the plaintiff declares against Hawkins on a contract of indebtedness and a promise by him only, without any allegation to show that it was originally an indebtedness of the deceased James Gilbane; and for that reason, because the judgment was not against the estate, the devisees under the will of Gilbane had no interest in it, and their proceedings to set it aside were dismissed. *Gilbane v. Hawkins*, 29 R. I. 502, 72 Atl. 723. Subsequently, when the same suit had been remitted to the superior court, the parties on May 19, 1909, attempted to so amend the suit as to make it a suit against the estate of James Gilbane by agreement signed by attorneys and filed in the superior court, whereby the former judgment was vacated, and the writ and declaration were amended; and on May 21, 1909, the attorneys filed an agreement in said superior court, whereby defendant, as executor under the will of James Gilbane, submitted to judgment for plaintiff for \$500 upon the amended writ and declaration. It is to be noted that the claim of Margaret Gilbane was disallowed by the executor May 7, 1908, and she was notified of such disallowance on the same day. So that it appears that more than a year elapsed before the writ and declaration were so amended, as above set forth, as to appear on their face to be an action against the estate.

It is the opinion of this court that, under the circumstances as above set forth, the amendment above set forth, whereby a suit, originally commenced against Hawkins individually, was, after more than a year from the notice of disallowance of the claim, converted into an action against the estate, was invalid. The provision of law applicable to a suit on a disallowed claim against an estate at the time this suit was brought is found in the court and practice act, as follows: "Sec. 891. If the estate is solvent, and commissioners are not appointed, suit must be brought on a disallowed claim within six months after notice is given to the creditor that the same is disallowed; and unless otherwise authorized, suit on such claims shall not be brought thereafter against the executor or administrator." It is manifest that the original suit brought by Margaret Gilbane against John B. Hawkins, being a suit against Hawkins person-

ally and not against the estate of James Gilbane, was not a suit brought within six months after notice of disallowance in contemplation of the statute above quoted. And it is equally clear that the attempted amendment of the suit as above set forth was, in legal effect, the institution of an entirely new suit against the executor after the statute of limitations had taken effect. The action in which judgment has been entered against the executor of the will of appellants' testator was not instituted within six months after notice to claimant of disallowance of the claim, and is therefore null and void under the special statute of limitations.

[4] A claim against the estate of a deceased person is absolutely extinguished by the special statute of limitations if not sued within six months after notice of disallowance of the claim. *Kenyon v. Prob. Court*, 27 R. I. 566, 65 Atl. 267; *Thompson v. Hoxsie*, 25 R. I. 377, 55 Atl. 930; *Mason v. Taft*, 23 R. I. 388, 50 Atl. 648. The executor cannot waive the special statute of limitations, and, when he attempts to do so, the court will, on its own motion, upon discovering the fact, apply the rule of the statute. *Kenyon v. Prob. Court*, *supra*; *Thompson v. Hoxsie*, *supra*.

[5] It has frequently been decided by this court that the amendments permitted by our statute do not include such amendment as would make one suit into another suit of a different form or for a different cause of action. *Wilcox v. Sherman*, 2 R. I. 540; *Thayer v. Farrell*, 11 R. I. 305; *Barnes v. Mowry*, 11 R. I. 420; *Dowling v. Clark*, 13 R. I. 650; *Viall v. Town Council*, 18 R. I. 405, 28 Atl. 344.

We are of the opinion that the suit as it was finally amended by authority of the superior court was a suit for a different cause of action against a party not the defendant in the original suit, and that the attempted amendment was a nullity, and therefore that the judgment rendered thereon was a nullity as against the estate of James Gilbane; that, therefore, the executor was not authorized to pay such judgment; and that this item in his account should have been disallowed by the superior court. The appellants' exception to the decision of the trial judge is therefore sustained; and the case is remitted to the superior court for a new trial as to all the contested items of the account, except as to the item of \$77.20 which was disallowed, and except also as to the item of \$500 paid in settlement of case of Margaret Gilbane, as to which it is ordered that the same be disallowed.

On Motion for Reargument.

PER CURIAM. Upon motion filed by appellee for leave to file a motion to reargue the above-entitled cause, after opinion deliv-

ered, we have made careful examination of the grounds of the motion and of the cases cited in support thereof, and are of the opinion that all of the grounds set forth in the motion were fully considered prior to rendering the opinion of the court. The cases cited relate to statutes and procedure in other states, and have no bearing upon the peculiar statute of limitations relating to suits brought to recover claims against estates under the law of Rhode Island, and are inapplicable here.

The motion is denied and dismissed.

GALVIN v. RHODE ISLAND CO.

(Supreme Court of Rhode Island. May 27, 1912.)

CARRIERS (§ 314*)—INJURIES TO PASSENGERS—DECLARATION—ACTIONABLE NEGLIGENCE.

Plaintiff, after alleging that defendant was the owner and operator of an electric railroad, alleged that plaintiff was in the exercise of due care being carried as a passenger in a certain wagon driven by a driver over whom plaintiff had no control, and that defendant suddenly, without any notice or warning, operated one of its cars along the track approaching the wagon from the rear, and that defendant so negligently managed the car that it struck the wagon, so that plaintiff was thrown therefrom with great violence and injured. *Held*, that the declaration sufficiently charged actionable negligence in that defendant so operated its car without notice or warning as to come into collision with the vehicle in which plaintiff was riding.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273—1280; Dec. Dig. § 314.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by William F. Galvin against the Rhode Island Company. From an order sustaining a demurrer to plaintiff's declaration, he brings exceptions. Sustained.

John W. Hogan and Philip S. Knauer, both of Providence, for plaintiff. Joseph C. Sweeney and G. Frederick Frost, both of Providence, for defendant.

PARKHURST, J. This is an action on the case for negligence brought by William F. Galvin against the defendant company for injuries received on Main street in Pawtucket on the 12th day of August, A. D. 1910, about 10 o'clock p. m.

The plaintiff, as alleged in the declaration, was riding as a passenger in an express wagon, driven by one Flora Gibbons. While the wagon was being driven in a northerly direction along Main street, the defendant company, by its servants, ran one of its cars along said Main street in a northerly direction after the wagon at high speed so that the car overtook and collided with the wagon in a violent rear-end collision, throwing the plaintiff to the street, and causing the

injuries complained of in the declaration.

In the superior court the defendant demurred to the declaration on the following grounds: "(1) That it does not appear in and by said plaintiff's declaration in what the alleged negligence of said defendant consists. (2) That it does not appear in and by said declaration that said defendant was guilty of any negligence whatever." This demurrer was heard before Mr. Justice Tanner, October 24, 1911, and sustained. The plaintiff duly excepted to the ruling sustaining the demurrer, and has alleged such ruling as error prejudicial to him in his bill of exceptions thereafter duly allowed. The case is now before this court upon said bill of exceptions; this being the only exception in the case.

The demurrer raises the sole question whether the declaration clearly and specifically points out actionable negligence on the part of the defendant. The second question suggested upon the plaintiff's brief, whether, as the declaration shows that the plaintiff was riding as a passenger in the wagon which was struck by the defendant's car, he is or is not obliged to negative, by allegation and proof, the negligence of the driver of the wagon, is not raised by the demurrer and will not be considered by this court. The declaration, in our opinion, shows, with sufficient clearness, negligence upon the part of the defendant in that its motorman, without notice or warning, drove its car into a rear-end collision with the wagon in which the plaintiff was a passenger.

The essential allegations of the declaration are: "The defendant company was the owner * * * of certain rails and railway tracks then and there laid, to wit, in Main street, a public highway in said Pawtucket, and was then and there the owner * * * of certain electric cars * * * then and there operated over and along said rails and tracks laid in said Main street. * * * And the plaintiff avers that, to wit, on the day and date aforesaid, *he was then and there in the exercise of due care upon his part all the while, and was then and there carried as a passenger in a certain wagon then and there driven by, to wit, said Flora Gibbons, over which driver the plaintiff avers he had no control, * * ** and which said wagon was then and there being driven in a northerly direction along said Main street, to wit, near the junction therewith of Pawtucket avenue (another public highway in said Pawtucket), when suddenly, *without any notice or warning*, the defendant operated one of its said cars over its rails and tracks along said Main street, approaching from the rear the wagon in which the plaintiff was riding; and said defendant so negligently managed, operated, and controlled said car that the same struck and collided with said wagon so that the same was broken and demolished and the

plaintiff was thrown therefrom with great force and violence," etc. Such averments have frequently been held by this court to constitute sufficient allegations of negligence in the defendant.

The charge of negligence in the declaration briefly stated is that the car of the defendant company, moving in the same direction as the wagon in which the plaintiff was riding, overtook the wagon without giving notice or warning of its approach and collided with the wagon.

In the case of *Parker v. Prov. & Stonington S. Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869, upon demurrer to a declaration in trespass on the case for negligence in a collision of vessels on the public waters of the state, the rules in relation to the necessary allegations of the declaration are set forth as follows: "May 29, 1891. Per Curiam. The court is of opinion that the declaration sufficiently states a cause of action by setting forth that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sank the vessel of the plaintiff's testator. This is the usual form of charging negligence in cases of highway collisions. The essential facts with reference to negligence are first, plaintiff's right to the highway; second, in the exercise of due care; and, third, defendant's interference with plaintiff's right by running into him. The defendant objects to this declaration upon the ground that it does not state in what the negligence consisted, and so does not inform him of the particular case he is called upon to answer, nor sufficiently protect him for the future in case of judgment. Undoubtedly a full statement to this extent is generally necessary, for in most cases there would be no case stated without it. Negligence consists in omitting to do a duty, or in doing it so carelessly as to bring injury to another. Ordinarily, therefore, unless the particular duty and its breach are set forth in the declaration, no negligence appears. These are the backbone of the declaration, without which it cannot stand. The details which prove the negligence need not be set forth, but there must be an averment of facts showing the duty and the general manner of its breach, or else no case is stated. But in collisions the force and injury are direct, and, except where the injury is caused by the carelessness of a servant, an action of trespass may generally be maintained, in which the averment of the force alone would be sufficient. 1 Chitty on Pleading, *127; 2 Id. *713, *860. In collisions, it is almost impossible to do more than state the fact that, while upon a highway, in the exercise of due care, the plaintiff was run into by the defendant. This raises a presumption of negligence nothing appearing to the contrary, because of the defendant's control of the agent of the injury, and because such accidents do not

occur without negligence. The plaintiff can seldom know or state just how it was done, whether by carelessness in one way or another, or even by design. In the case at bar, the plaintiff can neither be expected nor required to state in what particular way the defendant's servants on another boat were negligent. It is enough to state facts which naturally or necessarily raise a presumption of negligence."

And to the same effect, following the last cited case, is *Goldrick v. Union R. R. Co.*, 20 R. I. 128, 37 Atl. 635. In both of these cases the allegations of the declarations were essentially similar to those in the case at bar where there is a collision alleged with sufficient clearness to show that it was a rear-end collision, brought about by the negligence of the defendant without warning of approach, under such circumstances as to preclude the plaintiff from stating more facts regarding it than appear upon the face of the declaration.

Reference is also made to the following cases, where, upon proof of a state of facts, similar to those alleged in this declaration, relating to rear-end collisions, this court held such facts, as proved, to be sufficient evidence of negligence.

In the case of *Pawtucket Baking Co. v. Rhode Island Co.*, 32 R. I. 517, 519, 80 Atl. 665, this court held that a motorman who drives his car into a rear-end collision with a wagon upon the highway, without warning or notice of its approach, was guilty of a reckless act. Speaking through Mr. Justice Blodgett, the opinion holds as follows: "Inasmuch as the defendant offered no defense, we thus have presented affirmative testimony showing that the defendant's car collided with the rear of the plaintiff's covered wagon while being driven on the car track at about 9:30 p. m., and that no bell was rung to give warning of the approaching car. The record is silent as to whether the plaintiff looked or did not look to the rear for approaching cars, as it is silent as to the rate of speed of the car at the street crossing in question, the distance from the wagon at which the motorman first saw the wagon on this unbroken stretch of straight track of a quarter of a mile, as also it fails to show that the motorman made any, even the slightest, effort to stop the car at any time, or even whether his headlight was burning or not. So far as appears from this record in which the defendant has not seen fit to offer any explanation of the cause of the accident, it appears to have been a reckless act of the motorman in simply running down, from the rear, the plaintiff's wagon which was lawfully on the highway at that time and place, without notice or warning of any kind."

In *Dyer v. Union Railroad Co.*, 25 R. I. 222, 55 Atl. 688, this court, in considering a rear-end collision, said: "But a consideration

of the evidence shows that the negligence of the defendant was so clearly established that a new trial would be of no avail, since it clearly appears that the plaintiff was overtaken from the rear by the car of the defendant company, which was then running at a high and excessive rate of speed."

While in the case at bar there is no allegation with reference to the rate of speed at which the car was running, there is an allegation that the "defendant so negligently managed, operated, and controlled said car that the same struck and collided with said wagon," etc. We are of the opinion that the declaration clearly and sufficiently sets forth a prima facie case of actionable negligence, and that the superior court erred in sustaining the demurrer.

The plaintiff's exception is therefore sustained, and the case is remitted to the superior court, with direction to enter its order overruling the demurrer and for further proceedings.

RUTLAND RY., LIGHT & POWER CO. v. CLARENDON POWER CO.

(Supreme Court of Vermont. Rutland. May 20, 1912.)

1. EMINENT DOMAIN (§ 274*)—INJUNCTION AGAINST—RIGHT TO RELIEF.

An injunction against condemnation proceedings does not lie when the matter relied upon for the injunction may be urged as a defense to the proceedings themselves.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

2. EMINENT DOMAIN (§ 47*)—PROPERTY SUBJECT TO.

Property already devoted to a public use cannot be taken for another public use without legislative authority, whether it was acquired by condemnation or purchase.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

3. EMINENT DOMAIN (§ 13*)—RIGHT TO EXERCISE.

Existence of a public use is a prerequisite to the right to exercise the right of eminent domain.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

4. EMINENT DOMAIN (§ 47*)—"PUBLIC USE."

The term "public use," as used in the rule governing the right to condemn property already devoted to a public use, is employed in the sense in which it is used in the law of eminent domain, and it may be that the meaning of the term varies according to its application.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

5. EMINENT DOMAIN (§ 2*)—ANALOGY WITH POWERS OF REGULATION.

There is analogy between the powers of regulation and eminent domain to the extent

that, in both, distinction between public and private uses lies in the character of the use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

6. EMINENT DOMAIN (§ 198*)—PUBLIC NECESSITY—NATURE OF QUESTION.

The question of public necessity in a condemnation proceeding is one of fact.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 528, 528, 535-539; Dec. Dig. § 198.*]

7. EMINENT DOMAIN (§ 13*)—PUBLIC USE.

The public use essential to the exercise of the right of eminent domain appears from the character of the business and is to be safeguarded.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

8. EMINENT DOMAIN (§ 13*)—PUBLIC USE—LEGISLATIVE POWER.

Though the Legislature cannot make that public which is in essence private as affecting the right to condemn property, it can, by charter restrictions and provisions, make that private which would otherwise be public.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-53; Dec. Dig. § 13.*]

9. EMINENT DOMAIN (§ 66*)—PUBLIC NECESSITY—LEGISLATIVE POWER.

Whether a given locality shows a sufficient demand for electric current to warrant grant of the power of eminent domain to a corporation is a legislative and not a judicial question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

10. EMINENT DOMAIN (§ 35*)—PUBLIC USE—ELECTRIC COMPANIES.

In absence of charter limitations, a corporation which engages in the business of generating and distributing electric current for general sale for power purposes devotes the property to a public purpose as much as if it had limited its business to the sale of current for lighting purposes, and is entitled to exercise the right of eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 30; Dec. Dig. § 35.*]

11. EMINENT DOMAIN (§ 47*)—RIGHT TO EXERCISE POWER.

Acts 1910, No. 347, § 5, which authorizes a certain power company, when necessary, to take land or water rights, does not authorize condemnation of water power and rights held by another corporation with a purpose to devote them to a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

12. EMINENT DOMAIN (§ 274*)—ENJOINING CONDEMNATION PROCEEDINGS.

One hydroelectric company is entitled to enjoin another from prosecuting proceedings to condemn the former's water power and rights held with a purpose to devote them to public use; the complaining company not being entitled to avail itself of the matters relied on as a defense to the condemnation, because of the limitation in defendant's charter of the issues to be submitted, to the necessity of the taking and the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

Appeal in Chancery, Rutland County; Willard W. Miles, Chancellor.

Bill by the Rutland Railway, Light & Pow-

er Company against the Clarendon Power Company. From a decree pro forma overruling a demurrer to the bill, defendant appeals. Affirmed and remanded.

T. W. Moloney, F. S. Platt, and Clarke C. Fitts, for orator. Fred C. Davis, J. C. Jones, and John W. Gordon, for defendant.

POWERS, J. The orator is a corporation owning and operating an electric railway in the streets of the city of Rutland, and between that city and the village of Fairhaven. When this bill was brought, it was completing an extension of this railway from Fairhaven to Poultney. It also supplies electricity for lighting the streets of Rutland City, and the villages of Castleton, Fairhaven, Poultney, and Hydeville, and has entered into a contract to light the streets of Wallingford. It sells electricity to individuals in various towns in Rutland county for light and power. It owns, maintains, and operates dams, storage reservoirs, and power plants for the generation of the electric current required in its business. On account of the extension of its line to Poultney and its Wallingford contract, it requires additional power, and on September 2, 1910, it purchased a tract of land of about 46 acres, situated on Mill river, on which was an undeveloped, but valuable, water power. This power the orator proposes to develop and utilize in its said business. No claim is made that in any of the matters specified the orator is outside its chartered authority. It is this water power, together with a right of way across this land for a penstock, that the defendant, which is also a corporation authorized by its charter to manufacture and sell electric current, seeks to condemn under the proceedings herein enjoined.

[1] The bill is demurred to, and in support of the demurrer it is insisted that the court of chancery has no jurisdiction, since the orator may avail itself of the matters set forth in the bill as a defense to the condemnation proceedings, and so has an adequate remedy at law. This objection the orator does not meet when it points to the authorities holding that an entry under color of the right of eminent domain will, in certain circumstances, be enjoined. For, as shown in 5 Pom. Eq. § 466, restraining the condemnation proceedings is quite a different thing from restraining an actual entry thereunder. The rule is there stated to be that no injunction lies against the prosecution of such proceedings, when the matter relied upon as a ground for the injunction may be urged as a defense in the proceedings themselves. And it is generally so stated. 2 Lewis, Em. Dom. 296; Birmingham, etc., R. R. Co. v. Louisville, etc., R. R. Co., 152 Ala. 422, 44 South. 679; 15 Cyc. 987. But if the matter so relied upon cannot be urged as a defense to the proceedings to

condemn, equity has jurisdiction to enjoin the proceedings—and that upon the broad ground of the inadequacy of the legal remedy.

Our attention is called to various cases of our own, wherein this jurisdiction has been exercised by the court of chancery. The question here made, however, does not appear to have been raised in these cases, and consequently they cannot be accepted as conclusive of the right so to proceed—though they might influence our decision if we regarded it as a doubtful question. Accepting, then, the Pomeroy rule as a correct statement of the law of the subject, we turn to a consideration of its application to the case in hand.

[2] That property already devoted to a public use cannot be taken for another public use, without legislative authority, expressly given or necessarily implied, is the unquestioned law of this state. *Barre R. R. Co. v. M. & W. R. R. Co.*, 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877; *Rut. Can. R. R. Co. v. C. V. Ry. Co.*, 72 Vt. 128, 47 Atl. 899. And it makes no difference whether the property was acquired by condemnation or purchase. *Evergreen Cemetery Ass'n v. New Haven*, 48 Conn. 234, 21 Am. Rep. 643; 15 Cyc. 614; *Randolph, Em. Dom.* § 97.

[3] An attempt to give a sufficiently accurate and comprehensive definition of the term "public use" would be a perilous undertaking. The difficulty, if not impossibility, of formulating such a definition, is everywhere recognized. See *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, note to *Grafton v. St. Paul*, etc., Ry. Co., 22 L. R. A. (N. S.) 1. The cases wherein the meaning of the term is judicially considered are of three classes: Those dealing with the right of eminent domain; those concerning the law of taxation; and those involving the power of legislative regulation. Each of these attributes of sovereignty, though differing from the others in essential particulars, implies a public use as a necessary condition, and one without which it cannot be called into activity.

In seeking out the principle on which this right of legislative regulation is predicated, Prof. Wyman, in his recent work on *Public Service Corporations*, gives an interesting historical study of the subject and a careful analysis of the decided cases. As a result, he makes the whole question of public use, or what is the same thing, public calling, depend upon whether the calling involves a matter of public necessity and is monopolistic in character, in view of the economic, industrial, and commercial condition of the times. Taking monopoly as the criterion by which a given calling is to be tested, he determines its character as public or private, and classifies it accordingly. He divides monopolies into three classes: Natural,

state granted, and virtual. And his conclusion is that when one engages in a business which is fairly assignable to either of these classes, his business becomes affected with a public interest, and the rights of the public therein may be protected by legislative action, and the conduct of the business regulated accordingly. That a business purely private is not subject to such regulation is plain enough. It is only when the public has an interest in it that it has any rights to be so protected. Nor is the situation changed (according to Prof. Wyman's theory) if that business, for one reason or another, becomes locally or temporarily monopolistic, as where a local merchant for the time being controls the whole available supply of a given commodity, it is still a private enterprise, and (in the respect now under consideration) free from legislative regulation or control. On the other hand, a public calling may become locally, or temporarily, competitive, as where two railroads come to serve the same territory; but such do not thereby lose their character as public service corporations, and they remain subject to regulation and control.

The distinction, then, between a public and a private calling inheres in the nature of the undertaking. A railroad company is engaged in a business affected with a public interest, not because it is subject to regulation, but it is subject to regulation because it is affected with a public interest. On the other hand, selling merchandise in a country store is a private enterprise, not because it is free from legislative regulation, but it is free from such regulation because it is a private business.

[4] It is upon this theory that the court based its decision in the much discussed and oft cited case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, the doctrine of which in this respect has been repeatedly adhered to and affirmed. So far as the matter of regulation of public services is concerned, this theory affords a test of public use at the same time logical, workable, and satisfactory. It must be remembered, however, that the case in hand does not involve the power of regulation; we are here concerned only with the rule governing the right to condemn property already devoted to a public use. In this rule, the term "public use" is employed in the sense in which it is used in the law of eminent domain, and it may be that the meaning of the term varies according to its application. We have spoken at some length upon the subject of regulation with a twofold purpose: To meet the argument of those who say that the question of public use in condemnation proceedings depends upon whether or not the business for the benefit of which condemnation is sought is subject to legislative regulation and control, and to afford the basis of an argument by analogy. In *People v. Salem*, 20 Mich. 452,

4 Am. Rep. 400, Judge Cooley utters a caution against arguing from one governmental power to another, and asserts that property may be devoted to a public use with reference to one power of government, and be devoted to a private use with reference to another power of government. It was said in *Stiles v. Newport*, 76 Vt. 154, 56 Atl. 662, and again in *Frazier v. Slack*, 85 Vt. —, 81 Atl. 161, that the "public use" involved in the law of eminent domain is not the "public use" involved in the law of taxation; and the idea that the power to regulate is not determinative of the validity of a grant of the power of eminent domain lies at the very foundation of the decision in *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398.

[5] It is not necessary, however, to determine how far the analogy between the powers of regulation and eminent domain can be carried without breaking down. To this extent the analogy can be safely relied upon: In both these powers, the distinction between public and private uses lies in the character of the use. In the law of eminent domain, no less than in the law of regulation, this distinction is inherent, and corporations are to be classified according to the nature of the business in which they are engaged.

The result is that a railroad company, for instance, which everybody agrees is engaged in a public service, is a public service corporation, not because the power of eminent domain may be conferred upon it, but the power of eminent domain may be conferred upon it because it is engaged in a public service. It would be a public service corporation, though the power of eminent domain was not conferred upon it. So the business of the country merchant is purely private; but this is not so because the power of eminent domain cannot be conferred upon him; but the power of eminent domain cannot be conferred upon him because he is engaged in a purely private enterprise.

A determination of the character of a given enterprise cannot be made upon a consideration of legal principles alone. Economic conditions and the needs of the people must have attention. Without this, the power of eminent domain would lack that elasticity which is said in *Re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, to be essential to the end "that it may be exercised to meet the demands of new conditions and improvements, and the ever-varying and constantly increasing necessities of an advancing civilization."

On this subject Judge Cooley was an acknowledged conservative. The doctrine which he laid down, and which is generally, if not universally, accepted as the most accurate and satisfactory statement of the law of the subject, is as follows: "That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to

those matters of public necessity, convenience, or welfare which, on account of their peculiar character and the difficulty, perhaps impossibility, of making provisions for them otherwise, is alike proper, useful, and needful for the government to provide." Cooley, *Const. Lim.* (6th Ed.) 655. That the public must, to some extent, be entitled to use or enjoy the property taken, not by favor, but as a matter of right, is conceded. This, however, does not necessarily imply direct participation in that particular property; it is enough if that property contributes directly to the part of the business in which the public does participate.

It is not our purpose to attempt an extended review of the cases dealing with this subject. We shall, however, make brief reference to the principal cases holding that furnishing electric power is a private and not a public use. *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; *In re R. I. Suburban Ry. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; and *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526.

In the case first named, it was urged that while the plaintiff's charter did not command the performance of the company's public duties, it did recognize it as an "internal improvement company"; that it became a public service corporation, and the right of public control arose from the grant of the franchise of eminent domain; and that, when the company undertook to devote its property to a public use, it became subject to public regulations. The court admitted the soundness of these propositions, but held that the use which the public could have of the property was vague and uncertain, and that, by the charter, the company could use its entire product in its own business and for its own benefit. It was held that in such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and that the general laws specifying and regulating the public duties and obligations of internal improvement companies did not change the situation. The court then went on to say: "We do not mean to say, however, that under no condition can the right of eminent domain be conferred by the Legislature in furtherance of the establishment of plants for the generating of electric power or other power, light or heat, where public necessity requires it, and the public use or benefit is apparent, and safely guarded."

[8, 7] But the question of public necessity is a question of fact; the public use appears from the character of the business, and it is safely guarded for the obligation to serve all on equal and reasonable terms, facilities, and accommodations, and to faithfully perform its other public duties, springs from

the character of the business engaged in, independently of statutory provisions on that subject. To illustrate: A railroad company must afford reasonable facilities for the transportation of persons and property, must serve all on equal terms, must refrain from granting special privileges, whether there is a statute on that subject or not. It was so at common law. *Fitzgerald v. G. T. R. R. Co.*, 63 Vt. 169, 22 Atl. 78, 13 L. R. A. 70; *Beale & Wyman, Rate Regulation*, §§ 712-716, 719-724.

[8] These obligations spring from the nature of its business. This is not saying that such a corporation could not be so limited by its charter as to be made a private corporation. Though the Legislature cannot make that public which is in essence private, it can, by charter restrictions and provisions, make that private which would otherwise be public. In the Rhode Island case, a street railway company was denied the right to condemn land for a power house and coal pockets at a distance of five miles from its line, on the ground that it was for its private benefit and not for public use. We cannot agree that the public has no interest in the source of supply of power for such a railroad—whether purchased, or supplied by storage batteries, or by several stations. The public is interested in prompt service, in economical and reliable motive power, for larger expenses mean increased fares. In this particular, there is no difference between street and steam railways. As well might it be said that it was no concern of the public whether a trunk line railway was operated by steam generated by coal, coke, or wood, and therefore coal pockets were for private use. Nor can the assertion that the location chosen is a matter of convenience and not necessity avail to support the decision, for the question of necessity is one of fact, and not for the court to decide.

The Maine case approves Judge Cooley's rule as above stated, but holds that supplying electric power does not come within it. The case presents some peculiar features, and it is impossible to say how far the decision may have been influenced by them. But we cannot agree with the court's conclusion. To hold that the supplying of electric current for heat and power is not "furnishing facilities for its citizens in regard to these matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty, perhaps impossibility, of making provisions for them otherwise," or that it is not "proper, useful, and needful for the government to provide," is to close our eyes to conditions which surround us. Wherever access can be had to a transmission line, farmers are running their separators, churns, ensilage cutters, and in some cases milking machines, by this power. In the kitchen the electric range, washing

machine, and flatiron are in daily use; in the sickroom the electric pad, the electric stove, and the ozonator have become almost indispensable; the housewife runs her sewing machine, sweeps, dusts, and cleans house by electric power. And the usefulness of this agency is constantly spreading, and the time is fast approaching when electricity will come to be (if I may borrow a phrase from Mr. Asquith's recent speech to the Miners' Federation) "the lifeblood of the country's industries." It is especially important in this state, where, in spite of our disadvantage in the matter of transportation, the available water powers make possible a wide distribution of current for domestic and industrial purposes. The Maine case is reasoned on its own peculiar facts, though it is sought to establish a general principle. But the view taken was quite too narrow for that purpose. The proposition that industries can provide their own power is only true in a limited sense. It is a matter of common knowledge that the granite industry, both in Caledonia and Washington counties, has been entirely built over since the advent of electric power, and in both localities there is at present a demand for additional power. The small dealer can now engage in the business with a chance to succeed in competition with the large operator. The industrial activity in Windham county is made possible by recent electric development and installation. The Deerfield valley is in process of development; the Fifteen-Mile Falls on the Connecticut is projective. While this very case shows that the necessities of Rutland county are not yet supplied; for, with all of the resources of the orator available, the defendant finds it an attractive field to enter on a competitive basis.

[9] The Maine court shows that there was no demand on the part of the public shown by the case. But whether a given locality shows a sufficient demand for current to warrant the grant of the power of eminent domain is a legislative and not a judicial question. *Williams v. School Dist.*, 33 Vt. 271. Therein the power of the Legislature is coextensive with its power in the matter of taxation, which was said in *Burlington v. C. V. Ry. Co.*, 82 Vt. 5, 71 Atl. 826, to be, except for constitutional limitations, practically absolute.

[10] Our holding, then, is that, in the absence of charter limitations, a corporation which engages in the business of generating and distributing electric energy for general sale for power purposes devotes its property to a public purpose as much as if it limited its business to the sale of current for lighting purposes. Such business is affected with a public interest, both as regards the law of regulation and the law of eminent domain.

It is apparent that this holding goes quite beyond that in *Deerfield River Co. v. Wil-*

mington Power & Paper Co., 83 Vt. 548, 77 Atl. 862. It puts all corporations engaged in generating electricity for general sale into one and the same class, without regard to the presence or absence of special provisions in their charters regulating the conduct of their business.

[11, 12] The question whether the special provisions of the defendant's charter have the effect of making it a private instead of a public service corporation is not raised or considered. It remains to consider whether the matters set up in the bill can be urged as a defense in the condemnation proceedings.

The defendant's power of condemnation is found in section 5 of its charter (No. 347, Acts of 1910). It is there provided that if it becomes necessary for the defendant to take the land or water rights of another, it may, if the parties disagree on the question of necessity or damages, apply to two judges of the Supreme Court, who shall appoint commissioners to determine the necessity thereof and the damages occasioned thereby. No other questions are to be submitted to these commissioners; the terms of the act circumscribe the authority of the commissioners, and it cannot be extended by implication, since it is wholly statutory. These commissioners are like those in highway cases, whose jurisdiction is held to be just what the statute specifies. *State v. Williston*, 31 Vt. 153; *Alexander v. Montpelier*, 81 Vt. 549, 71 Atl. 720. We cannot sustain the defendant's claim that its charter should be construed as authorizing the condemnation of this water power and rights, notwithstanding the orator's purpose to devote them to a public use. This right is not expressly granted, nor can we say that it is granted by necessary implication. Since the orator could not avail itself of these matters in defending against the condemnation proceedings, it follows that the jurisdiction of the court of chancery was properly invoked.

The pro forma decree overruling the demurrer and adjudging the bill sufficient is affirmed, and the cause is remanded.

GROSS v. WOOD.

(Court of Appeals of Maryland. Jan. 31, 1911.)

1. NEW TRIAL (§ 109*) — PROCEEDINGS—MOTION.

While it is the proper practice where a motion for a new trial is made after judgment to join a motion to vacate the judgment, the court may properly grant a new trial without the motion to vacate, since the effect of granting a new trial is to vacate the judgment and verdict.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 230; Dec. Dig. § 109.*]

2. APPEAL AND ERROR (§ 70*) — ORDERS APPEALABLE—NEW TRIAL.

Where a motion for a new trial is filed after the expiration of the term at which the

judgment was rendered, an appeal lies from an order granting the motion; the effect being to vacate the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 367-385; Dec. Dig. § 70.*]

3. NEW TRIAL (§ 8*) — GROUNDS—SEVERAL PARTIES.

Plaintiff sued two defendants as joint tortfeasors, and, a verdict having been returned in favor of one of them, the court granted a new trial as to both on the application of the other, no appeal having been taken by plaintiff from the judgment rendered in favor of the successful defendant. *Held*, that since the defendant cast was not interested in or prejudiced by the verdict and judgment in favor of his co-defendant, neither having a right of contribution against the other, but each being responsible for his own wrong, the court erred in granting a new trial as to the successful defendant.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 11; Dec. Dig. § 8.*]

4. APPEAL AND ERROR (§ 548*)—BILL OF EXCEPTIONS OR AGREED STATEMENT.

Where an appeal was taken from an order granting a new trial, requiring a return of the evidence, it must be presented either by a bill of exceptions or an agreed statement of facts.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

5. EXCEPTIONS, BILL OF (§ 40*) — FILING—TIME—EXTENSION.

Where the time for filing a bill of exceptions was extended by an order entered December 14, 1910, to 60 days from that date, or to February 12, 1911, and on February 10, 1911, the time was extended to a date 30 days from February 14th following, such extension carried the time to and including March 16th, the order of February 10th being immediately operative without reference to the terms employed by the court to designate the day to which the time was extended.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

6. EXCEPTIONS, BILL OF (§ 51*)—SETTLEMENT—DISAGREEMENT.

Where the parties are unable to agree, the correctness of a bill of exceptions must be determined by the trial judge.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 78; Dec. Dig. § 51.*]

7. NEW TRIAL (§ 93*)—GROUNDS—EXCEPTIONS—LOSS—ILLNESS OF JUDGE.

Evidence *held* to show that defendant lost the benefit of his exceptions by reason of the illness and subsequent death of the trial judge, and therefore was entitled to a new trial, though the judge had been able to sign the bill during a portion of the period allowed for its preparation, during which, however, defendant was not bound to have it prepared.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 189; Dec. Dig. § 93.*]

8. EVIDENCE (§ 44*) — JUDICIAL NOTICE—DEATH OF JUDGE.

The Supreme Court will take judicial notice of the fact that a judge of a lower court of record died on a particular date.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 66; Dec. Dig. § 44.*]

9. APPEAL AND ERROR (§ 1173*)—DISPOSITION OF CAUSE—DIFFERENT DEFENDANTS—REVERSAL IN PART.

Since the power to grant or refuse a motion for a new trial is an equitable one presumed to be exercised in accordance with the

requirements of justice, an order granting a new trial as to two defendants will not be treated as a judgment of a court of law, which cannot be reversed as to one and affirmed as to the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4562-4572; Dec. Dig. § 1173.*]

Appeal from Superior Court of Baltimore City; James P. Gorter, Judge.

Action by Peter Bryson Wood, an infant, etc., against George H. Gross and another. From an order granting a new trial as to both defendants, plaintiff and defendant Gross appeal. Reversed as to Gross and affirmed on plaintiff's appeal.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, and THOMAS, JJ.

William S. Thomas and Henry W. Williams, for appellant Wood. William L. Marbury, for appellant Gross. Lawrence J. McCormick and Edwin W. Wells, for appellee.

THOMAS, J. Peter Bryson Wood, infant, by his next friend, brought suit in the court of common pleas of Baltimore city against Caesar H. Rosenheim and George H. Gross for injuries alleged to have been caused by the negligent and careless manner in which the defendants, their servants, and agents, operated automobiles on a public highway of Baltimore city. The case was removed to the superior court of Baltimore city, and the trial in that court resulted in a verdict in favor of the plaintiff against Rosenheim for \$3,000, and a verdict in favor of the defendant George H. Gross. The verdict was rendered on the 3d of November, 1910, and on the next day a motion for a new trial was filed in behalf of Rosenheim. On the 7th of November, 1910, judgment on the verdict was entered in favor of Gross for costs. On the motion of Rosenheim the court on the 26th of November, 1910, extended the time for filing bill of exceptions to 30 days from the date of "the final determination of the defendant's motion for a new trial." This motion was overruled on the 14th of December, 1910, and on the same day the time for filing the bill of exceptions was further extended for 60 days from that date. On the 24th of December, 1910, an appeal was entered on behalf of Rosenheim, and on the 10th of February, 1911, the time for filing the bill of exceptions was extended for "thirty days from February 14, 1911." The time for filing the bill of exceptions was extended on the 15th of March, 1911, to the 18th of March, and on the latter date was further extended to the 22d day of March, and again, on the last-named date, to the 24th day of March, 1911, on which day Rosenheim filed a motion for a new trial, and the court passed another order extending the time for filing bill of exceptions to and including the 10th day of April, 1911. On the 22d of April, 1911, the motion for a

new trial was, by leave of court, so amended as to include both defendants, whereupon Gross made a motion in open court that the motion for a new trial be not received as to him. This motion of Gross was overruled on the 13th of July, 1911, and on that date the court below granted a new trial against both defendants. The appeal in No. 74 is by George H. Gross, and the appeal in No. 75 is by the plaintiff from that order.

It is contended on behalf of the appellant, Gross, that, before the judgment in his favor could be legally stricken out, there should have been a motion asking for that relief, and that, even assuming that the effect of granting a motion for a new trial against him was to strike out the judgment in his favor, an appeal lies from that order, and that Rosenheim has shown no legal ground entitling him to have the judgment in favor of this appellant vacated.

The appellant in No. 75 (83 Atl. 341), who was the plaintiff below, insists that Rosenheim lost his right to have the bill of exceptions signed because of his failure to have the time for signing same properly extended, and that, moreover, he failed to show that he lost the benefit of his appeal because he was unable to get the bill of exceptions signed by the judge who sat in the case. On the other hand, Rosenheim contends, first, that the appeals should be dismissed because there is no appeal from an order granting a new trial, and because the evidence taken at the hearing of such a motion cannot be presented to this court by a bill of exceptions; second, that he lost his appeal by reason of the inability of the presiding judge to sign the bill of exceptions, and that he was therefore entitled to a new trial; and, third, that the rights of Gross might have been affected by the appeal entered in the case, and, as he lost his appeal without any fault on his part, a new trial was properly granted against both defendants. Counsel for Gross rely on the case of *Bailey v. Costello*, 94 Wis. 93, 68 N. W. 664, where the motion for a new trial was filed after a judgment had been entered and was denied by the court below, and on appeal the court said: "It was not erroneous to deny the motion for a new trial. It was not made until after judgment, and could not then be entertained unless joined with a motion to vacate the judgment."

[1] Undoubtedly the proper practice in such cases is to file a motion to strike out the judgment and for a new trial, and that is what was done in the case of *Preston v. McCann*, 77 Md. 30, 25 Atl. 687. But we think it equally clear that the effect of granting a new trial is to vacate the judgment and to set aside the verdict. In the case of *Evans v. Humphreys*, 9 App. D. C. 396, where the lower court found that it could not settle a bill of exceptions, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

therefore ordered that the verdict be set aside and that a new trial be granted, the appellate court said: "It is true that the order of court does not in express terms vacate the previous judgment. It only vacates the verdict and orders a new trial. Undoubtedly it would have been more regular, and the record would have been more complete, if the order had specified that the judgment as well as the verdict should be vacated; but that the effect of granting a new trial would be to set aside both the verdict and the judgment, without any specific mention of either, is the doctrine of sound reason. At common law, upon trial of issues by jury, a judgment rendered can only be based upon the verdict of a jury; and ordinarily a judgment without such verdict cannot be supported. When, therefore, a verdict has been set aside, a judgment based upon it must necessarily fall." And it is said in 16 Ency. of Law, 674: "An order granting a new trial as a general rule vacates a former judgment without any special order to set it aside, and sweeps away the verdict, and leaves the case as though no trial had been had." In the case of *Waters v. Waters*, 28 Md. 11, Chief Judge Bartol, referring to the granting of a motion for a new trial, said: "The verdict having been set aside and a new trial ordered, the case stood as if no trial had taken place, and no verdict had been rendered."

[2] While ordinarily there is no appeal from the granting of a new trial, where the motion is filed after the expiration of the term at which a judgment in the case was rendered, an appeal lies from an order granting the motion because the effect of the order is to vacate the judgment. In the case of *Craig v. Wroth*, 47 Md. 281, Judge Miller says: "The appellee's counsel has moved to dismiss the appeal upon the ground that the setting aside of the judgment was a matter of discretion in the court, and therefore not the subject of an appeal. If the judgment had been stricken out during the term at which it was rendered, this position would be sound. *Rutherford v. Pope*, 15 Md. 579. But, where a court takes such action after a lapse of the term, an appeal lies. This has been frequently decided, and we need refer only to *Graff v. Merchants' & Miners' Trans. Co.*, 18 Md. 364, where, as in this case, there was an order striking out a judgment of condemnation on an attachment, after the lapse of the term, and upon full consideration it was held the appeal would lie." This rule has been so firmly settled in this state it is not necessary to cite other cases. The judgment in favor of Gross was rendered November 7th, and the judgment against Rosenheim was entered on December 14, 1910, and the motion for a new trial was not filed until the 24th of March following. Under chapter 184, Acts 1896 (P. L. L. 1888, art. 4, § 171), in Bal-

timore city an order passed after the expiration of 30 days from the entry of a judgment has the same effect as if passed after the term, unless the motion was filed within the 30 days. *Preston v. McCann*, supra.

[3] The record in this case fails to show any ground whatever for the granting of a new trial against the defendant Gross. No appeal had been taken by the plaintiff from the judgment in Gross' favor, and Gross could not have been affected in any way by the appeal taken from the judgment against Rosenheim. Nor could Rosenheim have been benefited by a reversal of the judgment in favor of Gross. They were sued as joint tort-feasors, and in such cases, if there is no evidence sufficient to entitle the plaintiff to recover against one of the defendants, it is the usual practice in this state for the court to instruct the jury accordingly. *M. & M. Trans. Co. v. Eichberg*, 109 Md. 211, 71 Atl. 993, 130 Am. St. Rep. 524. The judgment in this case was not a joint judgment in any sense, and the defendant Rosenheim was not interested in or prejudiced by the verdict and judgment in favor of Gross. Each to the extent that he was guilty was responsible to the plaintiff for any wrong done him, but there was no right to contribution between such wrongdoers. 1 *Poe*, P. & P. §§ 114, 527, and 530; *Percy v. Clary*, 32 Md. 245; *Leppert v. Flaggs*, 101 Md. 71, 60 Atl. 450. This brings us to a consideration of the questions more particularly involved in the appeal (in No. 75), by the plaintiff below.

[4] The contention of the appellee that a bill of exceptions cannot be employed in such cases is not in accord with the precedents and decisions in this state, and we need only to refer to the case of *Tyrell v. Hilton*, 92 Md. at page 184, 48 Atl. at page 56, where Judge Pearce quotes the statement of Judge Alvey in *Dumay v. Sanchez & Gibson*, 71 Md. 508, 18 Atl. 890, that "the practice in this state is well settled as to the manner of presenting cases on appeal from rulings on summary motions to quash, or to set aside process. As in all other cases where extrinsic evidence is introduced at the trial, the facts must be properly presented in some authenticated form, and the mode of presenting them is either by bill of exceptions, or by agreed statement of facts," and the statement of Judge Bryan in *Coulbourn v. Fleming*, 78 Md. 215, 27 Atl. 1042, that "in this state, according to a long established practice, it is not obligatory to take a bill of exceptions in summary proceedings before the court, such as motions to quash attachments, to strike out judgments and such like matters."

[5] We cannot accept the view of the appellant, Wood, that Rosenheim lost his right of appeal on February 13, 1911, because on that date the order of December 14, 1910,

extending the time for filing the bill of exceptions, expired, and the order of February 10, 1911, did not take effect until February 14, 1911, a day later. The time for filing the bill of exceptions was, as we have said, extended by the order of December 14, 1910, to 60 days from that date—in other words, to February 12, 1911—and on February 10, 1911, before the time mentioned in the previous order had expired, and therefore, while the court still had control of the matter, the time was further extended to a date 30 days from the 14th of February, 1911. It can make no difference what terms the court employed in designating the day to which the time was extended. What the court did, and what it had the power to do, was to extend the time to the 16th of March, 1911, and it could not have done so more effectually by saying that it should be extended for 32 days from February 12, 1911, or for 34 days from February 10, 1911. The order of February 10th took effect immediately, and operated to extend the time for filing the bill of exceptions to the 16th of March following, including that day. The motion for a new trial, filed on the 24th of March, 1911, is not in the record, but it is conceded that the ground of the motion was that the defendant, Rosenheim, was unable to get the bill of exceptions signed because Judge Sharp, who presided at the trial of the case, was not able, by reason of his bad health, to sign it. The evidence shows that Judge Sharp was forced to take "a trip for his health on the 14th of December," 1910; that he was in the court of common pleas from the 10th to the 17th of January following, but by reason of his continued bad health was about the 1st of February again compelled to give up his work, and that he then went to Atlantic City, and remained there until about the 1st of March, when he returned home, and was "more or less" confined to his home and bed from that time to the time of taking the testimony under the motion for a new trial. It further appears from the evidence that counsel for Rosenheim prepared a bill of exceptions some time in January or February, but that they and counsel for the appellant, Wood, were unable to finally agree to what it should contain, and that Judge Sharp, after his return from Atlantic City, was unable and refused to sign the bill of exceptions unless it was agreed to by counsel.

[8] It would be useless to examine the evidence for the purpose of determining which of the counsel was correct as to what the bill of exceptions should contain. That was to be settled and determined by the judge who presided at the trial of the case.

[7, 8] The only question which the judge who heard the motion had to determine, and which we have to consider, is whether the defendant, Rosenheim, without any

laches on his part, lost the benefit of his exceptions by reason of the illness and death of Judge Sharp. It is said in *State, Use of Samuel, v. Weiskittle*, 61 Md. 48: "It is the established practice now, both in England and in this state, that where a party, without laches on his part, loses the benefit of his bill of exceptions by the death or illness of a judge, so that he cannot get his exceptions signed or sealed, he will be entitled to a new trial, notwithstanding the lapse of considerable time." That case was approved and followed in the case of *Preston v. McCann*, supra, and they also determine that a bill of exceptions cannot be signed by any judge other than the one who presided at the trial of the case. We think the evidence shows that to the time of the taking of the testimony in support of the motion the appellee, Rosenheim, had been unable to get the bill of exceptions signed because of the illness of Judge Sharp. It is true that Judge Sharp could have signed it had it been presented to him between the 10th and 17th of January, but said appellee was not required to have it prepared by that time, and, so far as the evidence shows, he had no reason then to suppose that Judge Sharp would not be able to sign it later. It is suggested by the appellee, Wood, that there is no evidence to show that Judge Sharp was not able after the hearing of the motion to sign the bill of exceptions, or that he is not still living. In answer to this suggestion, it may be said that the record also fails to show the date of the hearing of said motion, but it does show that he was ill and his condition worse at that time, and that the motion was granted on the 13th day of July, 1911, and this court can take judicial notice of the fact that Judge Sharp died on the 7th of July.

In the case of *Vahle et al. v. Brackenseik*, 145 Ill. 231, 34 N. E. 524, the Supreme Court of Illinois said: "The Appellate Court, as well as this court, will take judicial notice of who are the judges of the various courts of record of the state, and of their terms of office, and the organization and jurisdiction of such courts. * * * The court, of its own motion, will advise itself so as to verify matters of which it is required to take judicial notice. * * * We are required, therefore, to take judicial notice that the Honorable William Marsh was one of the judges of the Sixth judicial circuit, in which said county of Adams is situated, when the June term, 1891, of said circuit convened, and that on the 3d of July, 1891, the day of the entry of said decree, his term of office had expired, and that Oscar P. Bonny, who purports to have rendered said decree as judge of said court, was his successor in office." In the case of *Railway Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508, the Appellate Court of Indiana said in 1903:

"This court takes judicial notice that John L. McMaster was at the date of signing the bill of exceptions one of the judges of the superior court of Marion county." And in the case of *People v. McConnell*, 155 Ill. 192, 40 N. E. 608, the Supreme Court of Illinois held that that court would take judicial notice of the date when a particular judge resigned. In 1 *Greenleaf on Ev.* (16th Ed.) 13, § 6a, it is said in note 9 that the weight of American authorities is to the effect that superior courts are bound to take judicial notice of "who are justices of inferior tribunals," and it is said in 7 *Ency. of Ev.* 1010: "The court takes judicial notice of who have been and are its own judges. It also takes notice of the judges of various courts of record and general jurisdiction in the state where it sits, and who they were at a particular date." It is further urged by the appellant, Wood, that the time for the signing the bill of exceptions was not extended beyond the 10th of April, 1911, and that, even if Judge Sharp had been able after that time to sign the bill of exceptions, Rosenheim would have lost his right of appeal because of his failure to have the time further extended. But in this case the motion for a new trial was filed on the 24th of March, and from that time to the hearing of the motion Judge Sharp was not able to sign the bill of exceptions, unless counsel agreed to what it should contain, and a new trial was not granted until after his death.

[9] The power of granting or refusing a motion for a new trial is said to be an equitable one, and presumed to be exercised in accordance with the requirements of justice (*Waters et al. v. Waters et al.*, 26 Md. 53), and the order of the court below, granting the new trial, will not therefore be treated as a judgment of a court of law against the defendants, which could not be reversed as to one and affirmed as to the other (*Willner v. Silverman*, 109 Md. 360, 71 Atl. 962, 24 L. R. A. [N. S.] 895), but we will, for the reasons stated, reverse the order as to George H. Gross, the appellant in No. 74 appeals, and affirm it as to Caesar H. Rosenheim, the appellee in No. 75 appeals.

Order reversed as to George H. Gross, the costs to be paid by the appellee, Peter Bryson Wood, infant.

WOOD v. ROSENHEIM et al.

(Court of Appeals of Maryland. Jan. 31, 1911.)

Appeal from Superior Court of Baltimore City: James P. Gorter, Judge.

Action by Peter Bryson Wood, an infant, by Nannie Cook Wood, his next friend, against Caesar H. Rosenheim and another. From an order granting defendants a new trial, plaintiff appeals. Affirmed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, and THOMAS, JJ.

William S. Thomas and Henry W. Williams, for appellant. William L. Marbury, for George

H. Gross. Lawrence J. McCormick and Edwin W. Wells, for appellee.

THOMAS, J. For the reasons assigned in the opinion filed in No. 74 Appeals (83 Atl. 337), October term, 1911, the order of the court below appealed from must be affirmed as to Caesar H. Rosenheim, the appellee in this case. Order affirmed and case remanded, the costs to be paid by Peter Bryson Wood, infant, the appellant.

BAER et al. v. ROBBINS.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. APPEAL AND ERROR (§ 78*)—FINAL JUDGMENT.

Code, art. 75, §§ 12, 13, provides that, where issue is joined on a plea of set-off, judgment for the excess of the one claim over the other shall be given for plaintiff or defendant, according as such excess is found for the one or the other of the parties, if the excess is sufficient to support a judgment in the court where the cause is tried according to its established jurisdiction, otherwise the finding of such excess to be due shall be sufficient prima facie evidence of the fact of indebtedness for the excess, as on the award of arbitrators in a suit in a court having jurisdiction to determine the same. Article 26, § 17, provides that, if the verdict is below the jurisdiction of the court and a judgment of non pros. is entered, the record shall be a bar to any action for the same cause in any court whose jurisdiction shall be greater than the amount of such verdict, but the amount less costs which may be adjudged against plaintiff shall be a debt from the defendant to plaintiff, recoverable in a court having jurisdiction to that amount, or before a justice of the peace. *Held* that, where a non pros. was entered because the amount recoverable by plaintiff was below the court's jurisdiction owing to the partial recovery of defendant's set-off, the judgment was final and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 428, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 151*)—RIGHT TO APPEAL—SET-OFF—ALLOWANCE OF PART OF CLAIM.

Where defendant filed a set-off and was allowed only a part of his claim, and a non pros. was granted because plaintiff did not recover an amount equal to the court's jurisdiction, defendant was entitled to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Where, in an action to recover a balance of salary, plaintiff claimed that he was entitled to \$700 and expenses, while defendant claimed that he was not entitled to expenses and had been overpaid, an instruction was properly given that if the jury found that defendants employed plaintiff as their agent to purchase furs for the season of 1909 at a salary of \$700 and expenses, and plaintiff in pursuance of such agreement faithfully performed his duty as purchasing agent, then the verdict should be for plaintiff for \$700 plus such expenses as plaintiff reasonably incurred, less the amount plaintiff had already received on account of his salary and expenses; there being no contradiction in the evidence as to

the items entering into the account, except with reference to the conflicting theories.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 606, 698-812; Dec. Dig. § 252.*]

4. MASTER AND SERVANT (§ 80*)—ACTION FOR SALARY—DEFENSES.

Where plaintiff was employed by defendants to purchase furs at a salary of \$700 and expenses, it was no defense to an action for the balance due plaintiff that a part of what plaintiff had received had been paid out of an agency fund and not by defendants' direct remittance, nor that plaintiff did not faithfully perform his duties in that some of the furs he purchased from his minor sons, who obtained them from animals trapped on lands leased by them from their father for a rental consisting of a share of the profits of their trapping operations.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

5. MASTER AND SERVANT (§ 80*)—ACTION FOR SALARY—INSTRUCTIONS.

In an action by a servant for salary, he claimed he was entitled to \$700 and expenses, while defendants claimed he was only entitled to \$700 without expenses. The court, after charging that the burden was on plaintiff, instructed that if it was agreed that plaintiff should pay his own expenses, and the sums drawn by him to purchase furs for defendants and cash exceeded the cost of the furs delivered to defendants, then the verdict should be for defendants to an amount equal to the excess under defendants' counterclaim, and if they found that defendants directed plaintiff to draw no money for his own use or for his expenses from a certain bank account from which money was to be drawn for the furs, and that contrary to this direction plaintiff did make withdrawals for his own use and expenses, and by reason thereof defendants suffered a loss equal to the amount claimed by plaintiff, then the verdict should be for defendants, and if the amount paid by defendants on account of the checks drawn by plaintiff on the deposit, together with other amounts paid to plaintiff, in the aggregate exceeded the cost of the furs and the compensation plaintiff was to receive, he could not recover. *Held*, that such instructions were proper and fully submitted every aspect of the case from defendants' standpoint.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. § 80.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS TO CHARGE.

It is not error to refuse requests to charge, the substance of which are covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Baltimore City Court; John J. Doblen, Judge.

Action by Alexander G. Robbins against Lewis Baer and others, partners as Lewis Baer & Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Myer Rosenbush, for appellants. Robert W. Mobray, for appellee.

URNER, J. In the trial of this case in the Baltimore city court a verdict was ren-

dered in favor of the plaintiff for the sum of \$90. The suit being *ex contractu*, and the amount of the verdict being below the jurisdiction of the court, a judgment of non pros. and for the defendants for costs was entered. From this judgment the defendant has appealed. A motion to dismiss the appeal has been made upon the grounds: First, that the judgment is not final; and, secondly, that no appeal can be taken from a judgment by the party in whose favor it was rendered.

The suit was upon the common counts in assumpsit and was brought, according to the bill of particulars, to recover a balance of \$158 claimed to be due from the defendants to the plaintiff on account of salary. In addition to the general issue pleas, the defendants filed a plea of set-off, which averred that they employed the plaintiff as their agent to purchase furs during a specified period for a stipulated compensation of \$700, out of which he was to pay his own expenses, and that the furs purchased by the plaintiff for the defendants were to be paid for with checks drawn by him as agent against a certain bank account opened by the defendants for that purpose, and that under their agreement the plaintiff was not at liberty to withdraw any of the designated funds in payment of his compensation, but that he made such withdrawals on his own account, contrary to the agreement, and that the total purchases made by the plaintiff for the defendants, together with the total amount paid him by them, and the amounts drawn by him from the deposited funds for his own account, aggregated the sum of \$142.81 in excess of the amount of the value of the furs purchased by the plaintiff for the defendants and the amount of the compensation he was to receive for that service, and that the plaintiff was therefore indebted to the defendants to the amount of the excess stated, for which they claimed judgment.

To this plea the plaintiff replied, in substance, that according to his agreement with the defendants he was to receive \$700 as his compensation, and was also to be paid his expenses, and that he was permitted under the agreement to withdraw from the designated bank account funds to be applied to his expenses and compensation, and that the plaintiff did not make any withdrawals in excess of the amount he was entitled to receive, and that there was nothing due and owing from the plaintiff to the defendants for which they were entitled to claim a set-off or judgment.

The primary issue upon which the case proceeded to trial under the pleadings mentioned was whether the plaintiff was to be reimbursed by the defendants for the expenses incurred by him in performing the duties of his agency. According to the evi-

dence on both sides, the defendants were indebted to the plaintiff if he was entitled to have his expenses paid, and the plaintiff was indebted to the defendants if he was to receive under the agreement nothing more than the stipulated compensation of \$700. The verdict for \$90 in favor of the plaintiff was a finding against the defendants' contention, and the judgment entered was conclusive as to their right to recover in this suit the amount claimed in the plea of set-off.

[1] Where issue is joined upon such a plea, it is provided by statute that: "Judgment for the excess of the one claim over the other, as each is proved, with costs of suit, shall be given for the plaintiff or the defendant, according as such excess is found in favor of the one or the other of these parties, if such excess be sufficient to support a judgment in the court where the cause is tried according to its established jurisdiction; otherwise the finding of such excess to be due shall be sufficient prima facie evidence of the fact of indebtedness for such excess, as upon an award of arbitrators in a suit in a court having jurisdiction to try and determine the same." Code, art. 75, §§ 12, 13. It is further provided that: "Wherever, by reason of the verdict of a jury being below the jurisdiction of the court in which the same is rendered, a judgment of non pros. is entered, the record of such judgment shall be a bar to any action founded upon the same cause of action in that or any court, the limit of whose jurisdiction shall be greater than the amount of such verdict; but the amount of such verdict, less such cost as may be adjudged against the plaintiff, shall be a debt from the defendant to the plaintiff, recoverable in any court that may have jurisdiction to that amount, or before a justice of the peace, as the case may be; and a short copy of the verdict and judgment, with the legally taxed bill of costs, shall be conclusive evidence of the balance so recoverable." Code, art. 26, § 17.

In view of these statutory provisions, it is clear that, so far as the present suit is concerned, the judgment from which the pending appeal has been taken is a finality. It has been held that, by force of the section last quoted, such a judgment as the one here in question conclusively establishes the amount of the debt. *Berkley v. Wilson*, 87 Md. 223, 39 Atl. 502. It is therefore a proper subject of appeal unless the defendants are precluded from such action in this case by reason of the judgment having been rendered in their favor.

[2] The filing of the plea of set-off placed the defendants in the position of plaintiffs with respect to the claim upon which the plea relies. Such a plea is "in form substantially equivalent to a declaration in a cross-suit by the defendant against the plaintiff," and in his replication the plain-

tiff pleads precisely as he would to a declaration. 2 *Poe's Pleading & Practice*, § 825. If the defendants in this suit had established their contention to the satisfaction of the jury, they would have recovered a verdict and judgment for the amount of the claim stated in their plea. The judgment actually rendered, though in their favor, did not accord them the measure of recovery to which their plea of set-off was directed. While it is the general rule that an appeal cannot be taken from a judgment by a party in whose favor it was rendered (*Coates v. Mackey*, 56 Md. 420), yet an exception to this rule is recognized in cases where the judgment "is for less than the amount or short of the right claimed" (2 *Poe's Pleading & Practice*, § 825). The motion to dismiss the appeal must, accordingly, be overruled.

The rulings of the court below to be reviewed are embraced in 12 bills of exception, of which 11 are concerned with questions of evidence and 1 with the granting and refusal of instructions to the jury. We have discovered no error in any of the rulings as to the admissibility of evidence, and as no reference was made to any of them in the argument on behalf of the defendants, we shall not discuss them in detail.

It appears by the twelfth bill of exceptions that one prayer was granted at the instance of the plaintiff, while of the 15 presented by the defendants the first, second, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth were refused, the third was conceded, the fourth, sixth, and thirteenth granted, and the fifth withdrawn. Special exceptions to the plaintiff's prayer were filed and overruled.

[3] The prayer granted at the request of the plaintiff instructed the jury that if they should find from the evidence that the defendants employed the plaintiff as their agent for the purpose of purchasing furs for the defendants for the season of 1909 and 1910, and agreed to pay the plaintiff a salary of \$700 and expenses, and that the plaintiff, in pursuance of this agreement, faithfully performed his duties as such purchasing agent, then the verdict should be for the plaintiff for the sum of \$700 plus such expenses as the jury might find that the plaintiff reasonably incurred on behalf of the defendants, less such amount as the jury might find the plaintiff had already received on account of his salary and expenses and such unpaid checks as the jury might find to be outstanding; and the jury were further instructed that they might allow interest in their discretion on any balance found by them to be due from the defendants to the plaintiff.

The objections urged to this instruction are that there is no evidence legally sufficient to support it, and that according to the undisputed proof in the case the plaintiff did not faithfully discharge his duties under his agreement with the defendants. We are unable to sustain these objections. The

plaintiff's contractual duty was to purchase furs for the defendants in Dorchester county and ship them to the latter in Baltimore. This duty was regularly and fully performed during the whole of the period covered by the agreement, and there is nothing in the record to suggest that the service as rendered was not entirely satisfactory. The total cost of the furs purchased and shipped was \$21,712.72, and the plaintiff's checks on the agency bank account and his drafts honored by the defendants and their cash payments to him aggregated \$22,488.86. This total was subsequently increased to \$22,638.61 by some checks issued by the plaintiff during the agency but not presented for payment until after its termination. The excess of the checks, drafts, and cash payments credited to the defendants over the amount of the plaintiff's purchases for their account was \$925.89. As against this the plaintiff charged the expenses incurred by him as agent amounting to \$397.64, leaving a balance of \$528.25 to be credited on the \$700 salary. Upon the theory that the plaintiff was entitled to be reimbursed for his expenses, the amount remaining due him from the defendants would have been \$171.75. According to the opposite theory, he would be found to have been overpaid to the extent of \$229.89. There was no contradiction in the evidence as to the items entering into the account between the parties; but there was proof tending to support each of the conflicting theories as to the question of liability for the agent's expenses. The plaintiff's granted prayer submitted to the jury from his point of view this controverted issue of fact, and in this respect the instruction was clearly correct.

[4] The contention is made, however, that the plaintiff drew upon the agency fund in bank for his salary and expenses contrary to the understanding that these deposits should be used solely for the purchase of furs, and that some of the purchases were made by him from his own sons, who had not reached their majority and who obtained the furs from animals trapped on lands leased by them from their father for a rental, consisting of a share of the proceeds of their trapping operations. It is insisted that in these particulars the plaintiff's conduct was in violation of his contractual and fiduciary obligation. Such considerations do not in our judgment affect the present issue. If the defendants were in fact indebted to the plaintiff to the extent he claims, they can certainly not be released from the unpaid balance of the debt simply because a part was satisfied out of the agency fund and not by their direct remittance; and as there is no indication that the defendants were prejudiced in any way by the purchase of furs from the sons of the plaintiff, we are unwilling to hold that, merely because their minority would have entitled their father

to the proceeds of the labor they expended in this enterprise, the defendants should be relieved of their liability to pay for the service which the plaintiff rendered and which they accepted. The objections both general and special to the granted prayer of the plaintiff were properly overruled.

[8] By the defendants' granted prayers, the jury, after being advised that the burden of proof was on the plaintiff, were instructed that if they found from the evidence that the compensation agreed upon was \$700, out of which the plaintiff was to pay his own expenses, and that the sums drawn by the plaintiff by checks signed by him as agent, together with amounts received from the defendants in drafts and cash, exceeded the cost of the furs delivered by the plaintiff to the defendants, then the verdict of the jury should be for the defendants for an amount equal to such excess. They were further instructed that if they should find that the defendants directed the plaintiff to draw no money for his own use or for his expenses from the bank account mentioned in the evidence, and that contrary to this direction the plaintiff did make withdrawals for his own use or expenses, and by reason thereof the defendants suffered a loss equal to the amount claimed by the plaintiff, then the verdict should be for the defendants; and if the jury further found that the amounts paid by the defendants on account of the checks drawn by the plaintiff on the bank deposits in question, together with the amounts paid by the defendants to the plaintiff and the total amount of the unpaid checks shown by the proof, in the aggregate exceeded the cost of the furs delivered to the defendants by the plaintiff and the compensation which the plaintiff was to receive from the defendants, then the verdict should be in favor of the defendants for the amount of such excess.

[9] The instructions thus granted upon the application of the defendants fully and fairly submitted every aspect of the case which they were entitled to have the jury consider, and therefore, if the other prayers offered by them had been sound in principle and correct in form, they would have been superfluous, and the refusal of the court below to grant them could not have been held to constitute injurious error. But all the rejected prayers are objectionable in theory. The first denied the legal sufficiency of the evidence to entitle the plaintiff to recover. The second sought to make an issue of the purchase of furs by the plaintiff from his sons, and the ninth, eleventh, and twelfth are open to this and the additional objection, which is common also to the seventh and eighth, that they assume as a fact that the plaintiff drew money from the agency bank account for his own use, although there was no evidence to show that he made any such withdrawals for his individual purposes as

distinguished from his expenses as agent of the defendants. The tenth prayer, notwithstanding the absence of any proof to support such an issue, would have submitted to the jury the question, among others, as to whether the plaintiff withdrew money from the deposited funds for his own uses and purposes. The fourteenth prayer directed a verdict for the defendants on the ground that the plaintiff had not charged himself with all the checks issued by him as agent of the defendants whereas the record shows that all the outstanding checks mentioned in the evidence, which were chargeable to the plaintiff, were properly taken into account at the trial. The fifteenth prayer proposed to instruct the jury that the checks to be credited on the plaintiff's claim would reduce the amount below the jurisdiction of the court, and the verdict should therefore be for the defendant. This last prayer was plainly contrary to the theory of the statute we have quoted (Code, art. 26, § 17) and the construction it has received in *Williams v. Fredlock Mfg. Co.*, 94 Md. 111, 50 Atl. 421.

We concur in all the rulings presented by the record before us, and the judgment will be affirmed.

Judgment affirmed, with costs.

J. S. YOUNG CO. et al. v. STATE, to Use of KABAT et al.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTY OF MASTER—MATERIALS AND APPLIANCES.

It is the duty of a master to use reasonable diligence to provide proper materials, appliances, and instrumentalities for the accomplishment of the work assigned to the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§§ 101, 102*)—DEATH OF SERVANT—EXTRAORDINARY PERIL.

It is the duty of a master not to knowingly or negligently expose his servant to any extraordinary or unreasonable peril in the course of his employment against which the servant, by the exercise of ordinary care and prudence, either from a want of knowledge or skill, could not protect himself.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 258*)—DEATH OF SERVANT—ACTION—DECLARATION.

Plaintiff was employed as a night fireman in charge of one of defendant's boilers, which was provided with an exhaust pipe emerged from the wall near the waters of Baltimore harbor. Deceased opened a stopcock in the pipe, after which there was an explosion, and deceased's body was later found in the harbor, where he had been killed or drowned. A declaration contained three counts, the first charging that deceased, while exercising due and ordinary care, attempted to turn the cock, when the pipe suddenly burst from an explosion of steam, and deceased was shocked, stunned, and forced by the explosion into the

waters of the bay, where he was killed or drowned. The second count alleged that deceased was so assigned to work on and about the boiler and exhaust pipes without warning or notice, that the pipe burst from an explosion of steam, and deceased was shocked, stunned, and forced by the explosion into the water, where he was killed or drowned; and the third count charged that by reason of the old, worn, and bad condition of the pipe, which was known to defendants, but unknown to deceased, it exploded and shocked and stunned him to such an extent as to cause his death. *Held*, that each of the counts stated a good cause of action.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

4. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—NEGLIGENCE—PROXIMATE CAUSE—BURDEN OF PROOF.

In an action for death of a servant by defendants' alleged negligence, the burden is on plaintiff not only to prove the negligence, but to show that the negligence charged resulted in decedent's death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

5. NEGLIGENCE (§ 1*)—"ACTIONABLE NEGLIGENCE."

"Actionable negligence" is an act or omission of duty which is the proximate cause of an injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

6. MASTER AND SERVANT (§ 129*)—DEATH OF SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Where decedent, a fireman at defendants' works, was seen uninjured after an explosion of an exhaust pipe which caused him to become greatly excited and run into the building, where he obtained a torch, with which he again went toward the broken pipe, where the torch was extinguished, and nothing more was seen of decedent until his body was found, the next morning, in the waters of the harbor, which was within a few feet of the pipe, there was no causal connection between the explosion and the breaking of the pipe and decedent's death so as to sustain a recovery therefor on the theory of defendants' negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by the State, for the use of Rosa Kabat, widow, and by Helen M. Kabat and another, infants, by their mother and next friend, Rosa Kabat, and Joseph Kabat and John Kabat, against the J. S. Young Company and the MacAndrews & Forbes Company. Judgment for plaintiffs, and defendants appeal. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

William L. Rawls and William L. Marbury, for appellants. Fleet W. Cox and Robert F. Leach, Jr., for appellees.

BURKE, J. This is the defendants' appeal from a judgment entered against them

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

in the Baltimore city court in a suit of the state, to the use of the widow and children of Vincent Kabat, who was found dead in the waters of the Baltimore harbor on the night of December 14, 1909. The defendants operate a manufacturing plant in the city of Baltimore in which were installed a number of boilers. The deceased was a fireman in charge of one of these boilers, and had been in the employ of the defendants in that capacity for about 25 years. Attached to the boiler in his charge on the night in question was an iron pipe which extended through the wall of the defendants' building. At or near the point where this pipe emerged from the wall, there was placed a stopcock, or valve, which was designed and used to relieve at certain times the pressure of steam upon the boiler. This was done by opening the valve. From the point where the stopcock was placed there was a short pipe running to the ground, where it connected with another pipe, which led to the waters of the harbor, a distance variously estimated from $3\frac{1}{2}$ to 12 feet. There is evidence in the record tending to prove that the ground between the wall of the defendants' factory and the water was rough and uneven, and, there being no light or guard rails along the harbor, the place at the time Kabat met his death was dangerous.

The declaration contained three counts, in which the defendants were charged with three specific acts of negligence: First, in assigning the deceased "to work upon and about an engine and boiler the exhaust pipes of which were run from the premises of the defendants over to and in the water of the harbor of Baltimore, about which said exhaust pipes there was no protection, guard, or shield to prevent a person having occasion to be about the same from falling into said water"; second, that the deceased "was put to work upon and about an engine and boiler, the exhaust pipes of which were run from the premises of the defendants over to and in the water of the harbor of Baltimore, which exhaust pipes the defendants knew, or by the exercise of ordinary care on their part might have known, to be dangerous, unsafe, and unfit for use, because the same were defective and worn out and not capable of the uses to which they were put, and the cock at the end of said exhaust pipes was defective and known to the defendants to be defective, and of which dangerous and unsafe conditions the said Vincent Kabat was not advised, and could not have known by the exercise of ordinary care on his part"; and, third, in requiring him in the performance of his duty to relieve the steam from the boiler through an exhaust pipe which was "old, worn, in bad condition, and defectively constructed and installed by unskillful and incompetent employes, all of which were known to the defendant, but of which Vincent Kabat was in ignorance."

The first count alleged that as the deceased attempted to turn the stopcock so as to relieve the boiler and pipes from the pressure of steam, "and in the exercise of due and ordinary care in so doing, said pipe suddenly burst from an explosion of steam accumulated in the same, whereby the said Vincent Kabat, husband and father as aforesaid, was shocked and stunned and forced by said explosion into the water of said harbor of Baltimore, whereby he was killed or drowned." The second count charged that "on or about the 14th day of December, 1909, while the said Vincent Kabat was so assigned to work upon and about said engine and boiler and exhaust pipes, without warning or notice to him, said exhaust pipes burst and exploded from an explosion of steam accumulated in the same, whereby the said Vincent Kabat, husband and father as aforesaid, was shocked, stunned, and forced by said explosion into the water of said harbor of Baltimore, whereby he was killed or drowned." In the third count it is alleged that by reason of its old, worn, and bad condition, known to the defendants, but unknown to the deceased, the pipe burst and exploded, whereby Kabat was shocked and stunned to such an extent as to cause his death.

The issues to be tried were presented by the plea of not guilty. At the conclusion of the testimony offered on both sides the plaintiff submitted one prayer, which was on the measure of damages. This prayer was granted. The defendants filed a special exception to this prayer upon the ground that there was no evidence in the case that the death of Vincent Kabat was due to any negligence on their part. This exception was overruled by the court. The court granted an instruction of its own, by which the jury were told that, if they found from the evidence that the deceased was in a position of safety at any time after the violent explosion or escape of steam mentioned in the testimony, they should find their verdict for the defendants. The defendants submitted three prayers, the granting of either one of which would have defeated a recovery by the plaintiffs. These prayers were refused. The record presents but one bill of exception taken by the defendants to the action of the court upon the prayers and the special exception filed thereto by the defendants.

The real question in the case relates to the propriety of the rejection of the defendants' three prayers each of which asked the court to withdraw the case from the jury. The first prayer asserted that *under the pleadings* the equitable plaintiffs had offered no legally sufficient evidence to entitle them to recover; the second asserted that the equitable plaintiffs had offered no legally sufficient evidence to show any negligence on the part of the defendants in respect to any duty owing by them to the deceased; and the third that by the uncontradicted evidence the deceased by his own negligence directly contributed to

the happening of the accident which caused his death.

[1-3] The defendants were bound to use due and reasonable diligence to provide the proper materials, appliances, and instrumentalities for doing the work assigned to the deceased. Nor were they justified in knowingly or negligently exposing him to any extraordinary or unreasonable peril in the course of his employment against which from the want of knowledge or skill he could not, by the use of ordinary care and prudence, under the circumstances, guard himself. Each count of the declaration is framed upon these familiar principles of law, and each, therefore, stated a good cause of action.

[4] It is equally well settled that to sustain the action it was incumbent upon the equitable plaintiffs not only to offer evidence legally sufficient to prove the negligence of the defendants under the rule stated, but they were bound to offer evidence legally sufficient to show that the negligence charged resulted in the death of Vincent Kabat.

[5] Actionable negligence is an act or omission of duty which is the proximate cause of an injury. No matter to what extent or in what respect a party may be negligent, such negligence does not constitute a cause of action unless the negligence charged and the injuries sued for bear the relation of cause and effect. In legal contemplation, actionable negligence and injury are cause and effect. The effect of the defendants' first prayer, which referred to the pleadings, was to confine or limit the right of recovery to the issues made by the pleadings.

[6] An examination of the evidence, in the light of these well-recognized principles, has led us to the conclusion that the equitable plaintiffs have wholly failed to establish their case, and that the defendants' first and second prayers should have been granted.

How this unfortunate man came to fall into the water is a matter of pure speculation or conjecture. Certainly, his death was not caused by the negligence charged in the declaration, although it is doubtless true that he would not have fallen in the water had not the explosion occurred; but the evidence is clear that that explosion did not cause his death, or precipitate him into the water, as alleged in the declaration. Dealing with the evidence according to its general import and effect, it is shown that Kabat, in company with Thomas Stephansky, went to the stop-cock referred to and opened it for the purpose of relieving the pressure of steam on the boiler, and that the exhaust pipe burst or exploded. This was quite a violent explosion, causing the escape of a considerable quantity of water and steam from the broken pipe, and blowing a hole in the ground under or near the pipe. Kabat was not injured by this explosion, but he became greatly excited thereby and ran into the building, where he was in a place of entire safety. He got a

torch from the witness Olscowsky, and went on the outside of the building towards the broken pipe. It was dark on the outside, and the wind blew out the torch, and Olscowsky, who was with Kabat, came inside of the building. Nothing more was seen of Kabat until he was found dead in the waters of the harbor. These facts were shown by the testimony adduced on behalf of the plaintiffs. The witness Thomas Stephansky in the early part of his examination in chief was asked how Kabat met his death, and he replied, "Well, he fell into the water when the pipe blew out." It was upon this statement that the plaintiffs relied to take the case to the jury; but it is perfectly obvious that the witness did not mean that Kabat was injured by the explosion, or that he fell into the water at the instant it occurred, because he proceeded to give an account of what occurred after the explosion in which the facts as to Kabat's return to the building, his procuring the torch, and going on the outside towards the pipe are fully shown. In this he is corroborated by the witness Olscowsky. It is evident that the statement by Stephansky was merely a general description of the occurrence which he subsequently fully explained in his testimony.

It is apparent from the facts stated that the equitable plaintiffs on the evidence introduced in their own behalf failed to establish, or to offer any evidence tending to establish, the issues made by the pleadings.

The evidence shows that the body of the deceased when taken from the water was badly scalded; but when or how he received these injuries is not shown. It is, however, clearly shown that he was not so injured at the instant the pipe exploded, as alleged in the declaration. It is probable that after the torch was extinguished he approached the pipe and came in contact with the escaping steam, and in his excitement stumbled or fell into the water. But this is a mere inference.

Judgment reversed without a new trial, with costs to the appellants.

RESSMEYER v. NORWOOD.

(Court of Appeals of Maryland. Jan. 31, 1912.)

1. MORTGAGES (§ 61*)—CONSIDERATION—AFFIDAVIT—STATUTES.

Code Pub. Gen. Laws 1904, art. 21, § 30, provides that no mortgage shall be valid except as between the parties, unless there be indorsed thereon an oath or affirmation of the mortgagee that the consideration is true and bona fide as therein set forth. *Held*, that where a husband executed a mortgage to his wife to secure an alleged indebtedness of \$6,657, and she made an affidavit that the consideration was true and bona fide, when, in fact, he was not indebted to her in any sum, but the mortgage was made to be assigned to a trustee for certain of the mortgagor's merchandise creditors, the mortgage was void as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against the mortgagor's creditors, irrespective of the question of intent to defraud.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 150; Dec. Dig. § 61.*]

2. MORTGAGES (§ 61*)—CONSIDERATION—AFFIDAVIT—INVALIDITY—ASSIGNMENT.

Where a mortgage was invalid as against the mortgagor's creditors because the affidavit of the bona fide character of the consideration, required by Code Pub. Gen. Laws 1904, art. 21, § 30, was untrue, it was also invalid as to an assignee thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 150; Dec. Dig. § 61.*]

3. MORTGAGES (§ 61*)—CONSIDERATION—AFFIDAVIT—INVALIDITY—INDEMNITY.

A husband, though not indebted to his wife, executed a mortgage to her on certain realty to secure an alleged indebtedness to her, which was, in fact, an indebtedness to certain merchandise creditors under an agreement that she was to assign the mortgage to a trustee for the benefit of such creditors, which she thereafter did. *Held*, that the mortgage being invalid as violative of Code Gen. Pub. Laws 1904, art. 21, § 30, requiring an oath or affirmation of the mortgagee that the consideration is true and bona fide as therein set forth as against all persons except the parties thereto, it could not be sustained as a mortgage of indemnity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 150; Dec. Dig. § 61.*]

4. FRAUDULENT CONVEYANCES (§ 104*)—TRANSFERS BY HUSBAND TO WIFE—VALIDITY.

No acquisition of property passing from husband to wife after coverture is valid if it has been granted to her in prejudice of the rights of the husband's subsisting creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 337-344; Dec. Dig. § 104.*]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 145*)—MORTGAGE—VALIDITY.

Where a husband who was not indebted to his wife executed a mortgage to her to secure an alleged indebtedness, which, in fact, represented his indebtedness to certain creditors, under her agreement to assign the mortgage to a trustee for such creditors, which she thereafter did, the mortgage, if treated as an assignment for the benefit of creditors, was void as against subsequent attaching creditors; its legal effect, purpose, and intent being to hinder, delay, and defraud the husband's unsecured creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 40-42; Dec. Dig. § 145.*]

6. ATTACHMENT (§ 322*)—RETURN—DESCRIPTION OF PROPERTY.

An officer's return of attachment recited that on December 24, 1908, at 11 o'clock a. m. he attached, seized, and took of the lands of the alleged debtor: "1st. All that lot of ground containing 40 acres of land more or less. 2nd. All that lot of ground containing 192 acres of land, more or less. 3rd. All that lot of ground containing 2½ acres of land, more or less. All the above property situated in Woodville district, Frederick county, Maryland, and improved with 2 frame dwelling houses, 2 barns and other necessary outbuildings thereon"—and that he made known unto two persons named, tenants on the farms, to appear before the court on the first Monday of January, 1909. *Held*, that such return was

not fatally defective for insufficiency of description of the property levied upon.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1153-1159; Dec. Dig. § 322.*]

7. BANKRUPTCY (§ 195*)—ATTACHMENT—VALIDITY.

Liens under attachment proceedings obtained more than four months prior to the institution of proceedings in bankruptcy were valid as against the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 298-305; Dec. Dig. § 195.*]

Appeal from Circuit Court, Frederick County, in Equity; Edward C. Peter and John C. Motter, Judges.

Action by Henry F. Rasmeyer, as trustee, against Charles A. Norwood, mortgagee. From a decree awarding a surplus in mortgage foreclosure proceedings to attaching creditors as against a second mortgagee, plaintiff appeals. *Affirmed*.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

Glenn H. Worthington, for appellant. Milton G. Urner and Albert S. Brown, for appellee.

BRISCOE, J. The fund here in controversy is the surplus proceeds arising from the sale of mortgaged real estate, situate in Frederick county, and owned by Charles C. Tebbetts, of Washington city, D. C. The surplus in dispute is claimed on the one part by the appellant as assignee of an alleged second mortgage on the property, and on the other by certain creditors of the mortgagor, under attachment proceedings, in the circuit court for Frederick county. The property was sold on the 12th day of May, 1909, under the first mortgage, and, after the payment of the mortgage debt, interest, and costs of the sale, the residue of the proceeds of sale was distributed in the proceedings by auditor's account A to Henry F. Rasmeyer, the assignee of the second mortgage and by auditor's account B to certain creditors of the mortgagor under their attachments. There were exceptions filed to each of these auditors' accounts by the parties in interest in the court below, and from an order of the circuit court for Frederick county sustaining exceptions to and rejecting account A, and finally ratifying and confirming account B, with certain modifications, this appeal has been taken. The facts of the case, upon which the appellant and appellees base their claims and contentions, are fully set out in the record, and, briefly stated, are these:

Charles C. Tebbetts and Minnie V., his wife, on the 10th day of July, 1906, conveyed by deed of mortgage to Charles A. Norwood of Frederick county certain tracts of land, containing 234 acres, more or less, situate and lying in that county to secure an indebtedness of \$6,500. The real estate was sold un-

der this mortgage, and the surplus proceeds of sale, as we have said, is the fund here in controversy. On the 23d day of May, 1908, Charles C. Tebbetts and Minnie V. Tebbetts, his wife, as parties of the first part, conveyed by way of second mortgage to Mrs. Tebbetts, the wife, as party of second part, the identical property as described in the first mortgage to Norwood. The second mortgage recites that: "Whereas Charles C. Tebbetts is justly indebted to the party of the second part, in the sum of six thousand six hundred and fifty-seven (\$6,657.00) dollars, lawful money of the United States, secured to be paid by his certain bond or obligation bearing even date herewith in the penal sum of thirteen thousand three hundred and fourteen dollars (\$13,314.00) and conditioned for the payment of the sum of six thousand six hundred and fifty-seven (\$6,657.00) dollars on the first day of January, 1910, and for the better securing of this sum of money mentioned in the condition of the bond, and also in consideration of ten dollars, paid by the party of the second part conveyed the real estate mentioned therein, upon the terms and conditions therein set forth." On the same day of the execution of the mortgage Mr. Tebbetts gave and delivered to his wife, Mrs. Tebbetts, the bond or obligation mentioned in the mortgage, which recites: "Know all men by these presents: That I, Charles C. Tebbetts, of the city of Washington, in the District of Columbia, am held and firmly bound unto my wife, Minnie V. Tebbetts, of the same place, in the penal sum of thirteen thousand three hundred and fourteen dollars (\$13,314.00), lawful money of the United States, to be paid to her, her executors, administrators or assigns, for which payment, to be made, I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal, dated the 23rd day of May, one thousand nine hundred and eight. The condition of the above obligation is such, that if the above-bounden Charles C. Tebbetts, his heirs, executors or administrators, shall pay, or cause to be paid to the above-named Minnie V. Tebbetts, her executors, administrators or assigns, the sum of six thousand six hundred and fifty-seven dollars (\$6,657.00) on the first day of January, 1910, and the interest thereon to be computed from the date hereof, then the above obligation shall be void, otherwise to remain in full force and virtue. Chas. C. Tebbetts. [Wafer Seal.] Witness: Lawrence Huffy."

The mortgage was properly executed by Mr. and Mrs. Tebbetts, and was duly recorded on the 28th day of May, 1908, among one of the land records of Frederick county. To the mortgage was also attached a certificate by a notary public of the District of Columbia that Mrs. Tebbetts, the mortgagee, appeared and made oath in due form of law that the consideration named in the mort-

gage was true and bona fide as therein set forth; that she had not required the mortgagors or any person for them to pay the tax levied on the interest covenanted to be paid in advance, nor would she require the same, or any tax levied thereon, to be paid by the mortgagors, or any person for them during the existence of the mortgage. It also appears that on the day of the execution of the second mortgage Mrs. Tebbetts executed and delivered to the appellant, Ressmeyer, of the city of New York, a deed of assignment of this mortgage and of the bond duly acknowledged before a notary public of the District of Columbia. The assignment is as follows: "Know all men by these presents that I, Minnie V. Tebbetts, the wife of Charles C. Tebbetts, of the city of Washington, District of Columbia, party of the first part, in consideration of the sum of ten dollars, and other valuable considerations, lawful money of the United States, to me in hand paid by Henry F. Ressmeyer, of the city of New York, party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over and by these presents do grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain indenture of mortgage, bearing date the 23rd day of May, in the year one thousand nine hundred and eight, made by said Charles C. Tebbetts and Minnie V. Tebbetts, his wife, together with the bond or obligation therein described, and the money due or to grow due thereon, with interest to date, and to hold the same unto the said party of the second part his heirs, executors, administrators and assigns forever, subject only to the proviso in the said indenture of mortgage mentioned. And I do hereby make, constitute and appoint the said party of the second part my true and lawful attorney irrevocable in my name or otherwise, but at his proper cost and expense, to have, use and take all lawful ways and means for the recovery of the said money and interest, and in case of payment, to discharge the same as fully as I might or could do if these presents were not made. In witness whereof I have hereunto set my hand and seal the 23rd day of May, 1908. Minnie V. Tebbetts. [Wafer Seal.] Sealed and delivered in the presence of: Lawrence Huffy."

On the 23d day of May, 1908, the date of the second mortgage, the following agreement in writing was made and entered into between Charles C. Tebbetts, Minnie V. Tebbetts, his wife, and Henry F. Ressmeyer, and duly acknowledged before a notary public. "Agreement made and entered into this 23d day of May, 1908, at the city of New York and state of New York, between Charles C. Tebbetts of the city of Washington, District of Columbia, party of the first part, Minnie V. Tebbetts, his wife, of the

same place, party of the second part, and Henry F. Ressimyer of the city of New York, state of New York, party of the third part, witnesseth: That whereas said party of the first part is indebted to the firm of Aitken, Son & Co., of New York City, in the sum of \$3,835.00; to Leon Rheims Co., of New York City, in the sum of \$926.00; to H. Herrmann, conducting the business of a milliner in the City of New York, in the sum of \$1,258.00; to the Second National Bank of the city of Washington, District of Columbia, in the sum of \$800.00; to the firm of Moreland Bros., of said city of Washington, in the sum of \$475.00, and to Saks Fur Co., of said city of Washington, in the sum of \$363.00, making a total indebtedness in the sum of \$6,657.00; and whereas the said party of the first part desires his said creditors to abstain from taking legal proceedings to enforce the collection of their several demands, and as an inducement the said party of the second part has agreed to guarantee the payment of said demands, and it has been agreed upon between the parties hereto that a certain farm belonging to the party of the first part located in Frederick county, Maryland, shall be mortgaged in an amount equal to the aggregate sum of said various demands, which mortgage shall be executed by the party of the first part to the party of the second part and shall be assigned by the party of the second part to the party of the third part, with the understanding that the said assignment shall be considered an assignment in trust, and that the said party of the third part shall out of the proceeds of said mortgage or the bond accompanying the same, satisfy the said demands, or should the proceeds thereof not be sufficient then prorate the proceeds among said several demands proportionate to the size thereof: Now, therefore, in consideration of the premises and the sum of one dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged, it is hereby covenanted and agreed by and between the parties hereto, as follows, to wit: First. The party of the second part hereby guarantees the payment of said several demands at the times the same may fall due and payable as per notes now outstanding or hereafter to be given. Second. The party of the first part agrees to deliver to the party of the second part a bond in the penal sum of \$13,314.00 secured by a mortgage on his farm in Frederick county, Maryland, to secure the payment of said aggregate indebtedness of \$6,657.00, to be paid to the said party of the first part on the 1st day of January, 1910. Third. The said party of the second part agrees immediately upon receipt thereof to transfer said bond and mortgage to said Henry F. Ressimyer and also to deliver to said Henry F. Ressimyer the said original mortgage and bond. Fourth. The said Henry F. Ressimyer agrees to record said mortgage but

not to record said assignment of said mortgage, with the understanding that the said party of the third part shall have the right to record said assignment of said mortgage in case any default shall be made in any payments of the notes or demands, or in case judgment shall be recovered against either the party of the first part or second part or bankruptcy proceedings be commenced against them, or either of them. Fifth. The said party of the third part shall hold the said bond and mortgage as trustee during his life, for the following uses and purposes, to wit: To receive the money which may become due thereunder and to divide the same pro rata and in proportion to the various claims and demands above set forth, among the owners of said demands and if necessary to foreclose said mortgage with the understanding that all expenses shall first be paid out of the proceeds thereof. It is further understood that any and all payments that may be made by the party of the first or second part to any of the aforesaid creditors shall first be deducted from the share of such creditors which may become due him out of the proceeds of said mortgage. In witness whereof the parties have hereto set their hands and seals the day and year first above mentioned. Charles C. Tebbetts. [Seal.] Minnie V. Tebbetts. [Seal.] Henry F. Ressimyer. [Seal.] Teste: Lawrence Hufty. Robert G. Hunter."

Mr. Tebbetts on the 23d day of May, 1908, the date of the mortgage, made the following affidavit, which is filed as an exhibit in the case: "District of Columbia—ss.: I, Charles C. Tebbetts, being duly sworn depose and say that I am the owner of a certain farm more particularly described in a certain indenture of mortgage to be delivered by me simultaneously with the execution of this affidavit to Minnie V. Tebbetts, my wife, and which is to be assigned to Henry F. Ressimyer of New York City, to secure various demands against me, and I further depose that there are no liens or incumbrances on said property, except a first mortgage now held by Charles A. Norwood for \$6,500.00 the interest on which is all paid up to January 1st, 1908, this affidavit being made for the purpose of inducing the firms of Aitken, Son & Co., Leon Rheims Co., and others to abstain from taking legal proceedings for the collection of their several demands against me. Chas. C. Tebbetts. Sworn to before me this 23rd day of May, 1908. Lawrence Hufty, Notary Public, District of Columbia. [Place of Notarial Seal.]"

While the deed of assignment of the mortgage was executed on May 23, 1908, it was not recorded until April 29, 1909, and the agreement between the parties (Exhibit X) and the affidavit (Exhibit Y) were not filed in the case until December 17, 1910. The appellees, the attaching creditors, claim under three writs of attachments issued on the

19th and 22d of December, 1908, and on the 23d of January, 1909, and levied upon the lands of the mortgagor as a nonresident debtor. On the 1st day of February, 1909, judgments of condemnation nisi were entered on these attachments. Charles C. Tebbetts was adjudged a bankrupt on the 10th day of August, 1909, in the Supreme Court of the District of Columbia, and one Lucas P. Loving was appointed and qualified as his trustee in bankruptcy.

Upon the facts thus stated, the appellant contends (1) that the schedule returned by the sheriff in the three attachment cases is sufficient for want of accuracy of description of the property attached; (2) that the mortgage of May 23, 1908, was a good technical mortgage, valid and binding on all persons concerned, and the assignment thereof was likewise a good assignment in fulfillment of the agreement made some day between the parties thereto and Charles C. Tebbetts; and (3) that even if the mortgage of date May 23, 1908, were not a good technical mortgage, yet, taken in connection with all the papers executed at the same time, it is good as against the appellees as an equitable mortgage, or as an assignment for the sale of property upon a contingency for the benefit of creditors. Upon the part of the appellees, it is conceded, that if the mortgage to the wife is legal and valid, being prior in date to the liens acquired by the attaching creditors, the appellant is entitled to the fund in controversy.

It is, however, earnestly insisted upon their part that both the mortgage and its assignment to the appellant, Ressmeyer, are fraudulent and void as against the attaching creditors, and, if this be so, it is asserted, they are entitled to the fund, under the liens secured, upon the property. Now, the principles of law which control and govern courts of justice in the consideration of instruments of writing of the character of the mortgage and of the assignment set out in the record now before us are settled and well defined. In the case at bar the consideration stated in the mortgage is a debt of \$6,657 due from Mr. Tebbetts, the mortgagor, to Mrs. Tebbetts, his wife, the mortgagee, and one of the conditions is that the mortgagor should pay this sum of money and the interest thereon when it should become due according to the bond or obligation given by the husband to the wife. The affidavit made by Mrs. Tebbetts to the mortgage, and indorsed thereon, specially states that the consideration set out in the mortgage is true and bona fide as therein stated. According to the undisputed evidence, and specially the agreement between the parties and the assignee made and entered into on the very day the mortgage was executed, it appears that the real and true consideration for the mortgage was not a bona fide debt from the husband to the wife, as stated therein, but

that the mortgage was executed for the purpose of being assigned by Mrs. Tebbetts, mortgagee, to Mrs. Ressmeyer, the assignee, to secure certain special creditors of the mortgagor.

[1] By section 30, art. 21, Code of Public General Laws, it is provided that no mortgage shall be valid except as between the parties thereto, unless there be indorsed thereon an oath or affirmation of the mortgagee that the consideration in said mortgage is true and bona fide as therein set forth. In *Denton v. Griffith*, 17 Md. 301, this court in passing upon this section of the Code said: "The purpose of this law was to prevent fraudulent transfers of property upon false or pretended considerations, and to that end required an affidavit as to the truth and good faith of the consideration expressed in the deed." Here the deed contains a money consideration, alleged to have been paid to the grantor, whilst the affidavit shows an indebtedness by one party to the other, without even stating that such debt was the consideration of the instrument, which might have been done if that was the design of the transaction, for a debtor may pay his debt, on agreement with the creditor, by a transfer of property. But we are dealing with a deed which is valid or void under the act of assembly, according to the manner of its execution. It does not provide that the affidavit may show some bona fide consideration, but intends that it shall appear by the oath of the party taking the deed that the consideration mentioned therein was the true cause of making it. A deed executed in this way appears to us to be within the mischiefs intended to be provided against by the Legislature, for frauds could be committed under cover of such instruments, which creditors might have no means of exposing. Looking to the body of the deed, the consideration might give it one character, and that expressed in the affidavit another and quite a different effect. It would be an absolute sale or a mortgage according as such discrepancy between the instrument and the affidavit might be viewed by the tribunal to pronounce upon it, when, as we think, the law requires they should show the same consideration. In *Cockey v. Milne*, 16 Md. 200, it was held that the want of the affidavit under the act was fatal to the validity of the mortgage, whether it be assailed by a creditor or a subsequent bona fide purchaser. The act avoids the instrument as to all persons except the grantor. "In our opinion," said the court, "the act was designed, not merely for the prevention of fraud, but for the benefit of creditors who may claim against such an instrument as void in law. Under the act, however, the question of actual fraud may stand." In that case, *supra*, the title of the appellee acquired under the attachment proceedings, was held good against any title asserted under the mort-

gage. *Charles v. Clagett*, 3 Md. 82; *Fouke v. Fleming*, 13 Md. 392; *Waters v. Dashiell*, 1 Md. 455; *Nelson v. Hagerstown Bank*, 27 Md. 51. In *Marlow v. McCubbin*, 40 Md. 132, Judge Miller, in delivering the opinion of the court, said the consideration mentioned in the instrument, if fabricated and false, could not be bona fide, nor, if untrue, could it be therein set forth in good faith. We therefore hold upon the authorities cited, and for the reasons stated, that the mortgage in the case at bar is void and invalid in law under section 30, art. 21, of the Code, as against the creditors of the mortgagor, independent of the question of actual or intentional fraud upon the part of the parties to it.

[2] Holding, then, that the mortgage is not valid as against the creditors of the mortgagor for the reasons stated, it is quite clear that the assignee of the mortgage stands in the same position as the assignor, and has no better claim than the assignor. *Cumberland Coal Co. v. Parish*, 42 Md. 614; *Avirett v. Barnhart*, 86 Md. 546, 39 Atl. 532. The deed in this case being strictly and technically a mortgage within the meaning of the Code, it is clearly subject to its provisions, and, this being so, we think the statute for the reasons given avoids the instrument as to all persons except the parties thereto. *Cockey v. Milne*, 16 Md. 200; *Nelson v. Hagerstown Bank*, 27 Md. 73; *Marlow v. McCubbin*, 40 Md. 132; *Snowden v. Pitcher*, 45 Md. 260; *Belknap v. Wendell*, 11 Fost. (N. H.) 101.

[3] Nor do we think, under the facts and circumstances of the case, that the mortgage can be upheld and sustained as a mortgage of indemnity. Mr. Hillard in his work on *Mortgages* (volume 2, p. 369), says: "Although a note for a given sum may be valid as an indemnity for a contingent liability, if a mortgage is given to secure such note, the true character of the note as an indemnity must be stated in the condition. If stated as a debt in the condition and affidavit, it will be invalid as to creditors. So, if the whole sum secured is described as a debt, when a part of it is merely an indemnity, the whole will be invalid, against creditors, whether there is any fraudulent design in the misdescription or not." And for this statement of the law he is supported by authority. *Belknap v. Wendell*, 11 Fost. (N. H.) 101; *Southwick v. Hapgood*, 10 Cush. (Mass.) 122; *Denton v. Griffith*, 17 Md. 301. The cases relied upon and cited by the appellant are entirely unlike this, and rest upon some equitable principle not applicable here. To sustain the validity of this mortgage as a lien upon the evidence in the record now before us would not only be opening the door to the commission and concealment of frauds and the other mischiefs which the law was passed to prevent, but would defeat the very object and purpose of the Legislature in requiring an affidavit, that the consideration in the mortgage is true and bona fide as therein stated.

[4] It is well settled that no acquisition of

property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors, and a deed made by a husband to a wife for a simulated consideration will be treated as a fraud upon his creditors. Code, art. 45, §§ 1, 2, p. 1274; *Downs v. Miller*, 93 Md. 602, 53 Atl. 445; *Folsom & Co. v. Detrick Co.*, 85 Md. 70, 36 Atl. 446.

In this case the evidence shows that the husband was insolvent, and in fact was not indebted at all to the wife at the date of the execution of the conveyance. There was no valid consideration paid by the grantee and the assignment was upon a secret trust for the benefit of certain creditors of the grantor, and this assignment, although executed on the 23d of May, 1908, was not recorded until the 29th of April, 1909.

[5] It would seem, then, to be beyond dispute, even if we treat the mortgage as an assignment for the benefit of certain creditors of the grantor, that the conveyance would be void as against the attaching creditors here, because its legal effect, purpose, and intent was manifestly to delay, hinder, and defraud the creditors of the grantor. *Gebhart v. Merfeld*, 51 Md. 325; *Spuck v. Logan*, 97 Md. 158, 54 Atl. 989, 99 Am. St. Rep. 427.

[6] The schedule returned by the sheriff, we think, furnished a sufficient description of the property attached to identify the lands seized, and to lay a proper foundation for the judgments of condemnation. The schedule states: "I have this 24th day of December, 1908, at 11 o'clock a. m., attached, seized and taken the lands, tenements, goods and chattels and credits of the said Charles C. Tebbetts in and to the following real estate, to wit: 1st. All that lot of ground containing 40 acres of land more or less. 2nd. All that lot of ground containing 192 acres of land, more or less. 3rd. All that lot of ground containing 2½ acres of land, more or less. All the above property situated in Woodville district, Frederick county, Maryland, and improved with 2 frame dwelling houses, 2 barns and other necessary out-buildings thereon. And have made known unto Milton Dayhoff and Granville Dayhoff, tenants on said farms, to appear before said court on the first Monday of January, 1909." It will be thus seen, that the description of the property here returned by the sheriff fully answers the requirements of the law, and is free from any valid objection. *Jarboe v. Hall*, 37 Md. 345; *Murphy v. Cord*, 12 Gill & J. 182; *Berry v. Griffith*, 2 Har. & G. 337, 18 Am. Dec. 309.

[7] As to the claim of the trustee in bankruptcy, we need only say that the liens under the attachment proceedings were obtained more than four months prior to the institution of the proceedings in bankruptcy, and are perfectly valid under the bankrupt law as against the trustee in bankruptcy. Ken-

drick & Roberts v. Warren Bros., 110 Md. 54, 72 Atl. 461.

It follows, therefore, that the decree of the circuit court for Frederick county, dated the 9th day of May, 1911, sustaining the exceptions of the attaching creditors to auditor's account A and rejecting the same, and finally ratifying and confirming auditor's account B as amended, will be affirmed.

There were other questions argued and suggested at the hearing, but we will not discuss them, because we find them unnecessary for the purposes of this decision.

Decree affirmed, with costs.

POPE v. FERGUSON.

(Court of Errors and Appeals of New Jersey.
April 19, 1912.)

1. SALES (§ 405*)—CONTRACTS OF SALE—ASSIGNMENT BY BUYER—ACTION FOR PRICE.

One contracting to buy old iron plates of a steamboat which was being dismantled agreed to sell the same to a third person, provided the plates were reasonably flat, did not thereby assign his contract with the seller, but merely resold the plates bought, and he could sue the seller for breach of contract for failure to deliver plates.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1147-1155; Dec. Dig. § 405.*]

2. ESTOPPEL (§ 58*)—"ESTOPPEL IN PAIS"—ACTS CONSTITUTING.

A buyer in a contract of sale of old iron ship plates taken off a steamboat being dismantled agreed to sell all the plates to a third person, provided they were reasonably flat. After the last of the deliveries made by the seller, the buyer, by letter and orally, informed the seller that he had assigned the original contract of sale. *Held*, that the buyer was not estopped from asserting that he had merely resold the goods to a third person, and he could sue for the seller's failure to make further deliveries, since, to constitute estoppel in pais, the party against whom it is sought to be enforced must have made some representation, the effect of which would be to influence the conduct of the one seeking to enforce the estoppel and inducing him to so change his position as to materially injure him, if the party making the representation is allowed to deny its truth.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2494-2496; vol. 8, p. 7654.]

3. SALES (§ 262½*)—CONTRACTS—IMPLIED WARRANTY.

One contracting to sell from 700 to 800 tons of old iron ship plates, "same to be all the iron plate taken off the steamboat * * * now being dismantled," impliedly warrants that the vessel will produce at least 700 tons, and he may not relieve himself from delivering the minimum amount, though the vessel does not, in fact, produce such quantity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 740-748; Dec. Dig. § 262½.*]

4. SALES (§ 418*)—BREACH OF SELLER—REMEDY OF BUYER—MEASURE OF DAMAGES.

Under P. L. 1907, p. 336, § 67, providing that, where a seller wrongfully neglects to deliver the goods and there is an available market for such goods, the buyer's measure of damages, in the absence of special circum-

stances showing proximate damages of a greater amount, is the difference between the contract price and the market price at the time deliveries ought to have been made, a buyer's measure of damages for the seller's failure to deliver the goods is, where there is an available market for the goods, the difference between the contract price and the market price of the goods when they ought to have been delivered, unless there are special circumstances authorizing additional damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

5. SALES (§ 418*)—BREACH OF CONTRACT BY SELLER—MEASURE OF DAMAGES—STATUTES—CONSTRUCTION.

The court, in construing P. L. 1907, p. 311, entitled, "An act concerning the sale of goods and to make uniform the law relating thereto," must avoid such a construction as will throw the statute out of harmony with the rules of law generally prevailing on the subject, and the court must ascertain whether there is any generally accepted rule prescribing the measure of damages for a seller's failure to deliver goods where the buyer has made a contract for the resale thereof before the exception from the general rule of damages declared in section 67 of the act will be applied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

6. SALES (§ 418*)—BREACH OF CONTRACT BY SELLER—MEASURE OF DAMAGES—STATUTES—CONSTRUCTION.

Since the general rule is that a buyer who has contracted to resell the goods cannot recover the profits made on a resale as damages for the seller's failure to deliver, unless the seller at the time of the sale knew of the contract of resale, the special circumstances referred to in P. L. 1907, p. 336, § 67, providing that, where a seller neglects to deliver the goods, the measure of damages, in the absence of special circumstances, is the difference between the contract price and the market price at the time the goods ought to have been delivered, do not justify additional recovery by a buyer who, after his contract to purchase, made a contract to resell to a third person, but, on the failure of the seller to deliver, he can recover only the difference between the contract price and the market price at the time the delivery ought to have been made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

Garrison, Parker, Bergen, and Voorhees, JJ., dissenting in part.

Error to Supreme Court.

Action by Thomas J. Pope against John W. Ferguson. There was a judgment for plaintiff, and defendant brings error. Reversed.

Randolph Perkins, of Jersey City, for plaintiff in error. Brinkerhoff & Fielder, of Jersey City, for defendant in error.

GUMMERE, C. J. The plaintiff and defendant on the 4th day of December, 1908, entered into the following contract for the purchase and sale of old iron ship plates: "Sold for: F. Ferguson & Sons, Hoboken, N. J. To the order of: Thos. J. Pope. Quantity: 700 to 800 tons. Description: Old iron ship plates, approximately 6 ft. long by 30 to 36" wide, 3/8" thick and over, same to be all the iron plate taken off the steamboat New York now being dismantled at Newburgh, N. Y. Price: Fourteen dollars

and fifteen cents per gross ton of 2,240 lbs. Delivered free f. o. b. cars or lighter, at buyers' option, Newburgh, N. Y. Terms: Cash against shipping documents, showing gross and net weight and tare of each car, same to be accurately determined. How sold: Delivery to be made as follows: 70 tons promptly; balance as conditions permit (weather and ice). Delivery of all to be completed by June 30th, 1909. Accepted: [Signed] John Ferguson, Seller. Dec. 4, 1908. Accepted: [Signed] Thomas J. Pope, Buyer."

Some days after the making of this contract the plaintiff accepted an offer from the firm of B. Nicoll & Co. to purchase from him so many of these plates as should be reasonably flat. The offer and acceptance were in writing, and are as follows: "Dec. 11, 1909. Mr. Thomas J. Pope, 59 Beekman Street, City—Dear Sir: We will pay you two dollars (\$2.00) per gross ton for every ton of iron ship plate delivered either on lighter or f. o. b. cars Newburgh, providing the plates are reasonably flat. This material is to be delivered to our order by F. Ferguson & Sons, who are dismantling the steamboat New York. In addition to the above \$2.00 per gross ton, we are to pay Mr. Ferguson's bills which will be rendered on \$14.10 per gross ton basis. We will advance you five hundred (\$500.00) dollars on account of this purchase, with the distinct understanding that if there is not sufficient tonnage delivered to us to more than offset this \$500.00 advanced; i. e., 250 tons or more, you are to refund to us at the rate of \$2.00 per ton for such shortage. Yours very truly, [Signed] B. Nicoll & Co. I hereby acknowledge receipt from B. Nicoll & Company the \$500.00 mentioned above in this letter, and agree to its terms. [Signed] Thomas J. Pope. Dec. 11th, 1908."

On the same day that the transaction with B. Nicoll & Co. was closed, the plaintiff wrote the defendant stating: "I have sold to B. Nicoll & Company all of the iron plate which is to come from the steamboat 'New York' which you are wrecking, and you will oblige me greatly if you will make all bills of lading covering this material out to their order." After the notification the defendant proceeded to make shipments directly to B. Nicoll & Co. of such plates as were taken from the vessel. The total amount shipped by him was 35 tons, the last shipment being made December 17, 1908, and this suit is brought by the plaintiff to recover the loss sustained by him through the failure of the defendant to ship the rest of the iron plates called for by his contract. The trial resulted in a verdict in favor of the plaintiff for \$1,375.09.

The first and second assignments of error are directed at the refusal of the trial court to order a nonsuit at the defendant's request, and its refusal of defendant's

motion that a verdict be directed in his favor. The ground of each of these applications was that there had been an absolute assignment by the plaintiff of his contract with the defendant to B. Nicoll & Co., and that consequently any right of action which had resulted from the breach of the contract by the defendant was in B. Nicoll & Co., and not in the plaintiff.

[1] The agreement between the plaintiff and B. Nicoll & Co., which has already been recited, did not constitute an assignment of the defendant's contract with the plaintiff, but was a resale to B. Nicoll & Co. of the plates purchased by the plaintiff from the defendant. No other agreement with relation to the subject-matter of the defendant's contract was entered into between the plaintiff and B. Nicoll & Co. The contention of the defendant, therefore, was unsupported by the fact.

[2] He insisted, however, that plaintiff was estopped from denying that there was such an assignment, because of a letter written by him to the defendant on April 12, 1909, in which he stated that he had "assigned, transferred and set over to the firm of B. Nicoll & Co." the original contract, and because of a conversation between himself and the plaintiff in the latter part of March, 1909, in which a similar statement was made by the plaintiff. But each of these statements was made some months after the last of the defendant's deliveries, and did not at all influence him in his subsequent conduct with relation to the subject-matter of his contract. To constitute an estoppel in pais, the party against whom it is sought to be enforced must have made some representation, either by act or word, the normal effect of which would be to influence the conduct of the person who seeks to enforce the estoppel, and which induces him to so change his position as to materially injure him if the party making the representation is allowed to deny its truth. *Phillipsburgh Bank v. Fulmer*, 31 N. J. Law, 55, 86 Am. Dec. 193; *Dewees v. Manhattan Ins. Co.*, 35 N. J. Law, 376; *Mutual Life Insurance Co. v. Norris*, 31 N. J. Eq. 585; *Hart v. Kennedy*, 47 N. J. Eq. 61, 20 Atl. 29. The trial court, therefore, correctly disposed of the motion to nonsuit, and the request to direct a verdict for the defendant.

From what has been said in disposing of the assignments of error just discussed, it necessarily follows that the instruction of the court to the jury to the effect that the claim of the defendant that his contract with the plaintiff had been assigned to B. Nicoll & Co. was unsupported by the proofs in the case, and that the plaintiff was not estopped from showing that it had not, in fact, been so assigned, which is also made the subject of an assignment of error, was entirely proper.

It is further contended that there was

error in the instruction of the court to the jury as to the damages which the plaintiff was entitled to recover. The instruction complained of was as follows: "The evidence in this case is that the profit to the plaintiff was \$2 a ton, which was the difference between the amount which the plaintiff was to pay the defendant and the amount which he was to receive from B. Nicoll & Co., to whom he sold the iron in New York. The failure of the defendant in this case to furnish the iron to him or to anybody else, of course, has prevented him from filling his contract with the party in New York, consequently his damages would be \$2 a ton for the amount of iron not delivered. The minimum amount being 700 tons, and 35 tons of it having been delivered, leaves 665 tons for which the plaintiff would be entitled to his profit at \$2 a ton." It is insisted that this instruction is erroneous in two respects: First, because it assumes that the amount of iron which the defendant was obligated to deliver was at least 700 tons, without regard to the actual amount which might be salvaged from the vessel; and, second, because the true measure of damages was the difference between the price contracted for between the plaintiff and defendant, and the market price of the material sold, at the time of the breach of the contract.

[3] So far as the first point is concerned, we consider the instruction proper. The statement in the contract that the quantity of iron plates was 700 to 800 tons was a material part of the agreement, an implied warranty by the defendant that the vessel would produce at least the minimum amount specified, and he could not, therefore, have excused himself from delivering this minimum amount, even if the vessel had not, in fact, produced that quantity.

[4] I turn now to the consideration of the second criticism upon the instruction. It is to be observed that, since the codification of the law relating to sales of personal property by the act of May 7, 1907 (Pamphl. Laws, p. 311), the remedies of the buyer are controlled by that act. In cases where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, section 67 of the act provides that: "Where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." In the present case it appeared by uncontroverted evidence that the market price of the same kind of material which was the subject-matter of the contract had gone up after the contract was made, and that about the time

of the breach complained of it was selling at from \$14.65 to \$15 per ton. The amount of the damages, therefore, which the plaintiff was entitled to recover, was the difference between the contract price and the market or current price of the ship plates at the time when they ought to have been delivered, unless the making of the subcontract for their sale by the plaintiff to B. Nicoll & Co. was such a "special circumstance" as to take the case out of the general rule of the statute.

[5] The primary purpose of the codification as expressed in its title was to make uniform the law concerning the sale of goods. Any construction of the statute, therefore, which would throw it out of harmony with rules of law generally prevailing, relating to that subject, would be in direct violation of its expressed object. It is consequently necessary to ascertain whether there is any generally accepted rule existing in other jurisdictions, prescribing the measure of damages in actions by the vendee, for failure to deliver the goods, where he has made a contract for the resale thereof.

[6] The underlying principle applicable in the admeasurement of damages in actions for breach of contract where the loss resulting therefrom is enhanced by special circumstances is thus stated by Baron Alderson in the leading case of *Hadley v. Baxendale*, 9 Exch. 341: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." And the reason therefor given by the learned baron is that: "If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract; for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them." This principle, which is commonly known as the second rule of *Hadley v. Baxendale*, has been

universally accepted both in England and this country as a correct exposition of the measure of liability in the class of cases with which it deals. Many of the decisions in which this rule has been applied were rendered in cases which involved breaches of contracts for the sale of goods where the vendor had wrongfully neglected or refused to deliver them to the vendee, and the vendee had suffered special damage by reason of his inability to perform a subcontract of sale made by him with a third person. The English decisions relating to the breach of such contracts are reviewed in Benjamin on Sales, § 1237, and the text-writer deduces from them the following principle: That, if at the time of the sale the existence of a subcontract is not made known to the seller, a knowledge on his part that the buyer is purchasing with a general intention to resell, or notice of a subcontract, given to him subsequent to the date of the contract, will not render him liable for the buyer's loss of profits on such subcontract, and an examination of the cases reviewed by him shows the correctness of his deduction.

The same principle is to be deduced from the American decisions, many of which are collated in 24 Am. & Eng. Ency. of Law, p. 1155, in support of the text that "the profits which the purchaser could have made by a resale of the property, in case it had been delivered by the seller, are not an element of damages, when the seller at the time of the sale was not informed of such contract for resale, as such profits cannot be considered as within the contemplation of the parties at the time of sale." In 35 Cyc. p. 465, the result of the many American decisions there cited is thus summed up by Prof. Cooley in his article on Sales: "It is generally conceded that the buyer cannot recover the profits on a special contract of resale unless the existence of such contract was disclosed to the seller. If, however, the seller knows that the purchaser has existing contracts for resale, and the contract is made in contemplation of such resale, the buyer may recover as damages the profits or losses by reason of the breach. There can be no recovery of profits on special contracts of resale made after the contract of purchase." This being the state of the law at the time of the codification of the law of sales by our Legislature, and the purpose of that codification being to make uniform the law relating thereto, we are entirely clear that it was not the intention of the Legislature to except from the general rule of damages declared in the sixty-seventh section of the act cases in which, after the making of a contract for the sale of goods, the buyer has made a contract for the resale thereof.

We conclude, therefore, that the criticism of the plaintiff in error upon that part of

the charge now under consideration is well founded, and that the true measure of damages was the difference between the contract price and the market or current price of the goods contracted for at the time when they should have been delivered.

The other assignments relied on by the plaintiff in error are based upon the rulings of the trial court on matters of evidence. We have examined them, but do not consider them of sufficient importance to justify discussion. We find them to be without merit. As the case must go back for a retrial, we make this brief reference to them.

For error in the charge the judgment under review must be reversed, and a venire de novo awarded.

GARRISON, J. (concurring). I concur in the reversal of this judgment upon the ground that the measure of damages was the difference between the contract price and the market price as stated in the opinion of the Chief Justice.

I do not concur in the view that there was a warranty that 700 tons at least would be produced from the wreck. The circumstances in view of which the agreement was made show that nothing more than an estimate could have been made or have been understood as being made. The wide margin, viz., "700 to 800 tons," is in accord with this view, as also is the definite statement that follows such estimate, viz., that what is sold is "all the iron plate taken off the steamboat New York now being dismantled at Newburgh, N. Y.," where she lay sunk under the waters of the river. A definite statement of the subject of sale should prevail over what is evidently an attempted estimate just as a fixed monument prevails over a course that runs so many links and chains more or less. I am unable to spell a warranty out of the undertaking expressed in the written memorandum in this case.

The \$2 a ton profit on the resale to Nicoll & Co. was clearly not a legal measure of damage not only for the fundamental reason given by the Chief Justice, but also because such price was agreed to be paid for such plates only as were reasonably flat, and hence could not without specific proof be extended to cover the whole subject of such resale.

I am requested by PARKER, BERGEN, and VOORHEES, JJ., to say that they concur in the foregoing views.

BOGGESS v. BALTIMORE & O. R. CO.
(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. RAILROADS (§ 275*)—INJURIES TO LICENSEES—NEGLIGENCE.

Where a railroad permits consignees to enter its yard to unload cars, and it was necessary for consignees to go diagonally across

intervening tracks to get to their cars, the railroad is liable for the death of a consignee killed by the negligent operation of a train while diagonally crossing such tracks.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

2. DEATH (§ 67*)—DAMAGES—EARNING CAPACITY.

Where deceased received a salary as manager of a firm business or a percentage of the profits for such services, such salary may be shown in establishing his earning capacity, and if he was engaged alone in a business requiring little capital, the profits of such business could be shown.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 88; Dec. Dig. § 67.*]

3. DEATH (§ 67*)—DAMAGES—EARNING CAPACITY—EVIDENCE.

That a husband engaged in a small business with only a nominal capital gives his wife a monthly allowance with which to maintain his family for a long period of years is a fair inference that the money came from his earnings, and evidence is admissible to show his earning capacity.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 88; Dec. Dig. § 67.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Minerva Elizabeth Boggess against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Trespass to recover damages for death of plaintiff's husband.

At the trial it appeared that the deceased was killed in defendant's yard on January 20, 1908, while diagonally crossing a track in order to reach a car which he intended to unload. The evidence tended to show that the death of the decedent was due to the negligent operation of a locomotive.

The court charged, in part, as follows:

"If you find that such permissive right of crossing and using these tracks existed, then the company was bound to take notice of such right, and to take such reasonable measures for the safety of its shippers so using the tracks, as to reasonably, by ordinary care, protect them from danger; there being in such case no presumption that the track was clear at such point, as there is in other parts of the road where such permissive use does not exist.

"If you believe from the weight of the evidence that such shippers used defendant's tracks for reaching their cars, then such use established a permission by the company, or what is known as a permissive use, to the shippers so to do, if it existed as many years as the testimony of some of the witnesses indicates; and the company thereby incurred a liability or duty as to that class of shippers to see to it that its operations on those tracks were controlled with reasonable care.

"The company could have canceled this right of way or permissive use, if it existed, by due notice to shippers. Indeed, there

is an act of assembly in Pennsylvania permitting all property owners, whether railroad owners or private owners, by placarding their property, to notify people not to trespass. If the company did not do so, and you find from the weight of the evidence that the permissive use as described then existed, as to crossing the tracks, the company was bound to recognize the incidental danger connected with the conditions that prevailed, so far as the safety of such shippers was concerned, in the operation of its engines along said tracks, by the exercise of prudent and reasonable methods.

"Was there, gentlemen, such permissive use at the location in question? If so, did the company in the operation of its cars use that degree of reasonable care which under the circumstances it was bound to do? You must be satisfied by the weight of the evidence that the company, or its agents and officers at this location, had notice, either actual or constructive, by a reasonably long lapse of time, by reasonably frequent and general use by those and other shippers, before you can determine that there was a permissive crossing. Did the company have such notice that these tracks were used in manner and form as indicated by the testimony so as to constitute a permissive way? That is for you.

"The defendant presented, *inter alia*, the following points:

"'Ninth. The jury must disregard the evidence as to the amount of profits made by the deceased, G. W. Boggess, in his business during the time that he was in partnership with the two other men named by the plaintiff.' This point is affirmed, as qualified by the terms of my charge later on this question.

"'Tenth. The jury must disregard the evidence as to the amount of profits made by the deceased, G. W. Boggess, in his business prior to the time that he was in partnership with the two other men named by the plaintiff.' This point is refused with the preceding qualification.

"'Eleventh. The jury must disregard the evidence as to the amount of profits from his business which was devoted by the deceased, G. W. Boggess, to the support of his wife and family during the time that he was in partnership with the two other men named by the plaintiff.' This point is refused, with the preceding qualification.

"'Twelfth. The jury must disregard the evidence as to the amount of profits from his business which was devoted by the deceased, G. W. Boggess, to the support of his wife and family prior to the time that he was in partnership with the two other men named by the plaintiff.' This point is refused.

"Now, gentlemen, to elaborate and explain the true meaning of what I suggested to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

you, for fear that I may not have been clear, I will qualify all these answers by saying to you and by impressing upon you that the evidence to show the profits of the deceased in a partnership business, and that he furnished money in considerable amounts to his family, is not to be considered in estimating the damage sustained by reason of his death; but I say to you further, and the Supreme Court of this state has said within a few months, that although profits derived from a business cannot be considered as earnings, yet in many cases profits derived from the management of business may properly be considered by the jury as measuring the earning power. And this is especially true, the Supreme Court says, when the business is one which requires and receives the personal attention and labor of the owner. With these qualifying suggestions as to my answers to these points on this subject, I submit the matter to you."

Verdict and judgment for plaintiff for \$10,000.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

William Watson Smith and Gordon & Smith, for appellant. David A. Reed, Allen H. Kerr, and Young & Clay, for appellee.

ELKIN, J. The husband of appellee was struck and killed by a shifting engine in the freight yards of appellant company. He was a dealer in produce and went to the freight yards on the morning of the accident to take charge of a car of produce consigned to him, which car was standing on a side track in the freight yards at a customary place for the purpose of delivery. The car was delivered at that point in order that the consignee might have reasonable and safe access to it for the purpose of unloading and removing the produce which belonged to him. The shipper, as he had the right to do, designated the terminal point at which the car was to be delivered; but the railroad company in the exercise of its control and supervision of freight shipments placed the car on a track in the freight yard selected by itself as a proper place to make the delivery. By placing the car at that point the consignee and those acting under his authority had a right to assume that the place was reasonably safe for the purpose intended, and that access would be afforded for the purpose of removing the produce.

[1] The learned court below clearly points out that, no matter by what route the car was approached, it was necessary to cross other tracks of the railroad company before reaching it. By the diagonal way spoken of by the witnesses in the case, only one track had to be crossed, while by taking the wagon route over the planked crossings, it was necessary to cross several tracks before the car in question was reached. It is not therefore

a case in which the right to recover damages is defeated because the injured party chose a dangerous route when near by there was a perfectly safe route free from danger. The main contention of appellant is that the deceased husband was guilty of contributory negligence per se because in attempting to reach the car he took the diagonal way across the intervening track, instead of following the wagon way over the planked crossings. This position is asserted upon the theory that the case at bar is controlled by the rules of law applicable to grade-crossing cases. We cannot accept this as a sound view of the law to be applied to the facts of the case at bar. This case is essentially different from the grade-crossing cases relied on by appellant and comes more nearly within the reason and spirit of the rule laid down in *Kay v. Railroad Company*, 65 Pa. 269, 3 Am. Rep. 628; *Taylor v. Canal Company*, 113 Pa. 162, 8 Atl. 43, 57 Am. Rep. 446; and *Curtis v. De Coursey*, 176 Pa. 446, 35 Atl. 183. In discussing a somewhat similar question in the case last cited, the present Chief Justice said: "Persons delivering or receiving freight did not enter and use the yard by the mere permission or passive acquiescence of the company. They were not strangers or mere licensees as to whom no duty in regard to the safety of the premises, except as to unexpected or secret dangers, arose. They were there by invitation in its technical sense, and by right. Their use of the yard was for the mutual interest of both parties in carrying on their business arrangements, and there was an implied understanding by the company that it should be reasonably safe. The duty of the company did not differ in kind from that which it owed to passengers in the care of its platforms and stations." Duties grow out of circumstances, and that which in some instances would be deemed due and proper care may under other circumstances become negligence and want of care. In the present case, the freight yards are not like those portions of the road used exclusively for the running of trains, where the railroad company has the right to expect and demand a clear track. Here was a large freight yard intended as a proper place to deliver shipments to consignees. The railroad company constructed the yard and placed cars in that yard at points of its own selection for the purpose of having the freight unloaded and removed. There was an implied duty upon the railroad company to provide reasonably safe access to the cars in order that the consignments of freight could be unloaded and removed by those who had the right to do so. The railroad company, its officers and employes, knew the kind of use made of the yard, and in shifting trains or cars were bound to exercise care, having due regard for this authorized or permissive use. The decedent was not a trespasser, or a mere licensee; but at the time of the accident was

on the property of the railroad company on his way to the car which contained his produce in the exercise of his undoubted right to have access to his own property. He chose the diagonal way, claimed to be a permissive way, and this is the sense in which the question of a permissive use came into the case. The planked crossings used by wagons were the only ones definitely marked in the yards; but even when these were used, it was frequently necessary to cross other tracks in order to reach cars at different points where they were left standing. From this it follows that the danger of crossing tracks was not obviated by using the planked crossings. Under these circumstances, we are of opinion that the question of the permissive use of the diagonal way under the evidence was properly submitted to the jury. It was not a question of establishing a particular grade crossing by permissive use, but whether there was a permissive use of the diagonal way as a means of access to cars standing upon the tracks. The evidence was sufficient to warrant a jury in finding that consignees had been afforded access to cars delivered in the freight yard by a permissive use of the diagonal way. We think this was a question for the jury and we find no error in its submission.

In several of the assignments of error the question is raised whether it was proper to admit testimony tending to show the profits of a partnership business as an element of damages in determining the earning power of decedent. It is well settled as a general rule that such testimony is inadmissible as a measure of earning power. Profits arising from a partnership business are produced in part at least by the capital invested, or by the services of the partners, or by both. Profits thus derived are not a fair measure of the earning power of one of the partners. In a suit to recover damages for personal injuries, it is the loss of individual earning power that is to be considered, and not earnings or income from capital invested by the injured party either individually or in connection with others. This always has been the rule; but it is contended that some of our recent cases have authorized a departure from it, at least that they are in the nature of exceptions to the general rule. The cases relied on do give color to the respective contentions of the parties, and need some explanation in order that the rule may be better understood and more definitely settled. Appellant relies on *McHugh v. Schlosser*, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699, *Goodhart v. Railroad Company*, 177 Pa. 1, 35 Atl. 181, 55 Am. St. Rep. 705, *McCracken v. Traction Company*, 201 Pa. 384, 50 Atl. 832, and many other cases of like import. These cases lay down the rule as to the proper measure of damages for personal injuries. One of the elements of damage recognized in all the cases is the loss of earning power, and whether temporary or

permanent, as a result of the injury suffered. When the injuries result in death, there is a total loss of earning power, and it is for the jury to say what that loss is under the evidence when properly instructed by the court as to the true measure of damages. In the present case the death of the husband caused a total loss of earning power, and the only question is how that loss shall be properly determined. The appellee and her daughter testified that for six months prior to the accident the decedent in connection with two other partners was engaged in a partnership business under the name of the Merchants' Produce Company, and that the partners contributed the capital and decedent managed the business. The partnership business was conducted in a two-story building which was entirely occupied. Prior to the formation of the partnership the deceased husband had been engaged in the same business as an individual for 12 or 13 years. These witnesses testified that at the time of his death and during all the time he was in the produce business the decedent earned about \$3,000 a year. On cross-examination appellee admitted that the earnings referred to represented profits arising from the partnership business and profits resulting from his individual business prior to the formation of the partnership. It was also in evidence that during the time the husband conducted his business as an individual he occupied all of his own two-story building, and presumably used his own capital. The right to introduce this character of evidence is asserted on the authority of *Wallace v. Railroad Company*, 195 Pa. 127, 45 Atl. 685, 52 L. R. A. 33, *Buckman v. Railway Company*, 227 Pa. 277, 75 Atl. 1069, and *McLane v. Railways Company*, 230 Pa. 29, 79 Atl. 237. It must be conceded that these cases, if not read in the light of the facts upon which they were decided, might very properly be cited to sustain the contention of appellee. They were not intended as a departure from the general rule, but only as exceptions in cases where the earning power of an injured party could only be measured by profits derived from the management of the particular business in which he was engaged. In such cases much must necessarily depend on the character of the business. A trucker, or a huckster, having no other business, and giving his entire time to the particular business in which he is engaged, has no earning power except that resulting from the profits derived under his personal management from the sale of truck or produce. In such a case the capital invested is small and inconsequential and is represented by a horse and wagon and perhaps enough money to purchase a load of produce. His earnings depend upon the success with which he manages the business, and not upon the tools with which he works. In cases of this character—and there are many of them—it is proper to show profits derived from management as a measure of

the earning power of a person so engaged. Even in such cases, profits mean the excess of receipts over expenditures—in other words, net earnings—and this should always be kept in mind in the trial of cases of this character.

[2] Mr. Justice Sharswood, in *Pennsylvania Railroad Company v. Butler*, 57 Pa. 335, stated the rule to be compensation for the loss sustained without any solatium for distress of mind, and that the proper measure of the loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life. This rule differently phrased has been reiterated over and over again from that time to the present. It will be noticed that the earning power contemplated is that resulting from the intellectual or bodily labor of the injured party in his business or profession. Profits derived from invested capital are clearly excluded. In the case at bar profits derived from the partnership could not be considered as a measure of damages in determining the earning power of the decedent, and under the evidence we cannot escape the conclusion that they may have been so considered. We do not mean to say that it would be improper to show that the deceased husband received a salary as manager of the partnership business, or if he gave his services as manager for a percentage of the profits, that it could not be shown what his share of the profits was for the purpose of determining what he earned as manager. If he received a salary as manager, or if as compensation for his management he was to receive a certain share of the profits, it would be competent to prove these facts in establishing his earning power. The examination of the witnesses did not proceed along these lines, and we think the testimony as to profits derived from the partnership should have been stricken from the record when the motion was made for that purpose. As to the profits derived from his own business during the years it was conducted by the decedent as an individual, the situation is somewhat different. It was clearly incompetent to show profits derived from capital invested; but the record does not inform us how much capital was invested, or how his profits may have been affected by the invested capital. There was the capital invested in the building in which the business was transacted, and its rental value at least should be deducted. He must also have had considerable capital invested in order to transact so large a business; and profits arising from this investment could not be considered in ascertaining his earning power based upon intellectual or bodily labor in the management of the business. He no doubt had an earning power as the manager of his own business; but that earning power

must result from his own management and bodily labor, and not from earnings derived from invested capital. The testimony in the present case does not satisfactorily show how his earnings were derived. It may be that, when the case is again tried in the light of what is here said, earning power resulting from the management of the business, excluding invested capital, may be more definitely shown. Inasmuch as the case is to be again tried, it may be well to suggest that earning power which is to be compensated in such cases must necessarily be the subject of substantive proof. The best proof possible under the circumstances is always required, but the nature of the proof must necessarily depend to some extent upon the kind of business or employment. If a decedent is receiving a fixed salary at the time of his death, that would be a proper measure of his earning power; but if he is engaged in a small business of his own and depending upon profits for a livelihood, his earning power must be determined in some other way.

[3] Where a husband, engaged in a small business with only a nominal capital invested and having no other means of support, gives his wife a monthly allowance with which to maintain his family, for a long period of years, it is a fair inference that the sums of money so given come from his earnings, and in a proper case such proof is admissible to show earning power at least to the extent of the amount so furnished. In the present case the deceased husband furnished his wife for several years immediately preceding his death a monthly allowance of \$150 or \$200 for the purpose of maintaining his family, and since the evidence shows he depended upon these earnings for a livelihood, we think it was proper to submit this proof to the jury on the question of earning power. This, perhaps, would not be true if considerable sums had been furnished at irregular intervals, or if there was nothing to indicate that the money so furnished represented his regular earnings. In *McCracken v. Traction Company*, supra, relied on by appellant, there was nothing to indicate that the allowance represented regular earnings, or that it was not paid out of invested capital, or that it was even paid at regular intervals. In the case at bar this evidence is sufficient to carry the case to the jury on the question of earning power, but there was error in submitting the testimony relating to profits as hereinbefore pointed out. For this reason we reverse the case.

As to the negligence of the defendant, and the contributory negligence of the decedent, we are of opinion that the case was for the jury, and upon these questions we see no reversible error in its submission.

Judgment reversed, and a venire facias de novo awarded.

CAUDELL v. BALTIMORE & O. R. CO.
(Supreme Court of Pennsylvania. Jan. 2,
1912.)

RAILROADS (§ 275*) — OPERATION—INJURIES
TO PERSONS ON TRACK.

A railroad company is liable for the death of an employé of a consignee, who was killed by the negligent operation of a train while he was crossing intervening tracks diagonally to the car containing the shipment, where it appears that the company permitted persons to enter its yard to unload produce, and there were certain plank crossings used by wagons, but it was also necessary for consignees and their employés to go diagonally across the intervening tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 873-877; Dec. Dig. § 275.*]

Appeal from Court of Common Pleas, Allegheny County.

Action of trespass by Estella Caudell against the Baltimore & Ohio Railroad Company for damages for the death of plaintiff's husband. From a judgment for plaintiff for \$4,000, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

William Watson Smith, of Pittsburgh, for appellant. David A. Reed, of Pittsburgh, for appellee.

ELKIN, J. Two errors are assigned—one the refusal of the trial judge to give binding instructions for defendant, and the other the refusal to enter judgment non obstante veredicto upon the whole record. As viewed by appellant this means that the case should not have been submitted to the jury; the evidence being insufficient to sustain a recovery. For this reason stated in *Boggess v. Railroad Company*, 83 Atl. 356, in an opinion just handed down, we think this position is untenable. The learned counsel for appellee in the counter history of the case concisely state the facts, in substance, as follows: Defendant railroad company had been accustomed to place incoming cars of produce on a particular track in the middle of the freightyards. The clerk who controlled these cars was stationed in the yard office, in a small building used by produce merchants for telephone and weigh scale purposes. It was necessary for the produce men to make frequent trips between the cars containing their produce and the yard office. There were two possible routes between these points—one by way of two planked wagon crossings; the other by a diagonal route across the tracks. The route by way of the planked wagon crossings was longer and required six open tracks to be crossed at grade. The diagonal route was much shorter and required the crossing of only one open track. The evidence warranted a finding that for several years prior to the accident it had been customary for

the produce men, their employés, and their customers to use the diagonal route in going from the yard office to the cars containing produce and returning therefrom. There was also evidence tending to show that the yard crews knew of this custom, and there was no denial by appellant. Nothing was done by the railroad company by notice or otherwise to indicate that the use of the diagonal way was objectionable. This permissive use seems to have been acquiesced in by all parties concerned. The accident which resulted in the death of the husband occurred early on a Monday morning in January. This was the busiest day of the week, and Caudell, an employé of Boggess, was accompanying his employer to the car containing produce when he was struck and killed by a shifting engine running backward with tender ahead. There is some conflict in the testimony as to whether the two injured persons were walking longitudinally on the track, or were crossing it diagonally to the point where the car of produce was located. But this question was submitted to the jury.

The testimony is also conflicting as to the precise time of the accident, but all the witnesses agreed that it was before sunrise. It was foggy, and persons could not see a long distance. The fireman who was running the engine at the time, looking ahead, saw the two decedents when within 40 to 60 feet of the point where they were struck on the track. He admits that he could have applied the air brake and stopped the engine before the men were struck. He did not do so because he thought they would step off the track before the engine reached them. The men evidently did not know of the approach of the engine, and as a result forfeited their lives. The engine was not only running backward, but the headlight was not lighted. No bell was rung or other warning given to notify decedents of impending danger until it was too late. Under these circumstances, the question of the negligence of appellant was for the jury, and the same may be said as to the contributory negligence of the deceased husband. Both questions were submitted to the jury by the learned trial judge in a fair and impartial charge free from just criticism.

The main contention of appellant here is that Caudell should have been declared guilty of contributory negligence as a matter of law; in other words, that by going upon the track by the diagonal route instead of by the planked wagon crossings he was guilty of negligence per se. We have discussed this question fully in *Boggess v. Railroad Company*, 83 Atl. 356, and will not further elaborate it here. We deem it sufficient to say that under the facts of the present case the rigid rules applicable to grade crossings do not apply. This is not in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

any proper sense a grade crossing case. The question involved here is the duty of a railroad company to afford reasonable and safe access to a car containing a shipment of produce standing on a track in a freightyard for the purpose of being unloaded. It is a question of the right to use a permissive diagonal way, not necessarily a distinct and defined diagonal crossing, as a means of access to the car in question. We think that all questions raised by this appeal were under the facts for the jury, and that they were properly submitted.

Judgment affirmed.

LAMB et al. v. REDDING et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

SCHOOLS AND SCHOOL DISTRICTS (§ 69*)—LOCATION OF SCHOOL BUILDINGS—DISCRETION OF DIRECTORS.

Where the board of school directors plans to abandon a well-located school site on which a school building with good foundation has been partially erected, to sell the site and the building, which cost together \$70,000 for \$10,000, and to purchase another site and erect thereon another building at a total cost of \$150,000, such plan being in manifest disregard of public interests, there is an abuse of discretion, and a court of equity may interfere by injunction for the protection of the public.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 174; Dec. Dig. § 69.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by William Lamb and others against D. L. Redding and others for an injunction against the School Board of the School District of McKees Rocks Borough. From a decree for plaintiffs, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. S. Martin and Edward F. Duffy, for appellants. James Balph, R. A. Balph, and Albert B. Schultz, for appellees.

STEWART, J. Appellants constitute the present school board of the school district of McKees Rocks in Allegheny county. Their immediate predecessors purchased at a cost of \$17,500 a lot of ground on which to erect a new and additional school building. In preparing the ground for the proposed new building, laying the foundation, and erecting the superstructure to the height of the first floor, they expended of the public money the further sum of \$52,000, making in all an expenditure of about \$70,000. The building has remained in that unfinished condition. Appellants now propose to abandon the site so chosen and improved, purchase another at a cost of \$27,000, and erect thereon a school building estimated to cost when completed \$125,000. The appellees, taxpayers of the

district, filed their bill complaining of this proposed action, and asking that the board be restrained from carrying out their purpose. In the answer filed appellants seek to justify their action by the following considerations: First, that it is doubtful whether the foundations constructed on the present site are sufficient to support the contemplated structure; second, that to complete the building on which work has been begun would open the door for claims now pending, or which may be made, for work and material employed and furnished in and about the uncompleted building, which in equity and good conscience ought not to be paid; and, third, that it rests wholly in the discretion of the board to say whether the proposed change shall be made. The sixth finding of the learned chancellor who heard the case relates to the first of these considerations, and is as follows: "From the weight of the evidence the fact is found that the foundations of the May avenue site, as reinforced with the walls thereon, and the superstructure as now existing, are entirely safe, and will admit with safety of the completion of the superstructure originally contemplated, or of any part thereof, or of adaptation to or modification thereof. It further appeared, not only from the weight of the evidence, but from personal examination of both places, that this particular site is commodious, elevated, quiet, one block distant from street car lines, with abundant opportunity for light and air. The further fact appears that it is feasible to erect upon any one of the two wings of the present superstructure a building in accordance with the original plans, or a modification thereof on new plans, containing eight rooms with all the necessary conveniences, at a cost of from \$22,000 to \$25,000 for each wing; and it would appear that these wings could be erected and completed ready for occupancy, the whole superstructure built up and roofed, even if not finished at present, on the basis of the original plans, or a modification thereof by independent plans, at a cost within the estimated cost of the new site and a completed building thereon." With respect to this finding we have only to say that an examination of the evidence shows that it is abundantly supported and admits of no qualification. The chancellor further finds that the utmost that could be realized on a sale of the present site with the unfinished building would be \$10,000. With regard to the second consideration, the chancellor says: "It does not follow that the use of the present structure in whole or in part enlarges the rights of any of the so-called claimants. Whatever rights they may have existed when this work was stopped." This is too evident to call for discussion. With the two reasons specifically alleged thus disposed of, in a way meeting our entire approval, all that remains is the question of discretion. If it appeared that the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

posed abandonment of the present site was demanded because of its inadequacy, or because of considerations affecting the public health, or because the adoption of a new site would result in advantages bearing some reasonable proportion to the expenditure required, or that there was reasonable ground for difference of opinion with respect to these matters, the court would be without jurisdiction to interfere with the determination of the board as to its line of action. That all the things here complained of—that is to say, the abandonment of the present site regardless of the amount expended thereon, and the selection and purchase of the one proposed—are within the power delegated to the school board, is not open to question; and presumably the determination of the board to do these things rests upon considerations of public welfare, and has been reached by the exercise of intelligent judgment in connection therewith. The burden of showing to the contrary, when the action of a school board is challenged with respect to matters committed to its discretion, is a heavy one; for the power of the courts in such cases is exceedingly limited, and they are permitted to interfere only where it is made apparent that it is not discretion that is being exercised but arbitrary will or caprice. Discretion involves the exercise of judgment incidental to the proper performance of the duty delegated. When the contention is that the proposed action is unwise, no matter by what consensus of opinion this is shown, the law will refer it to mistaken judgment over which it has no supervision. But if it cannot be so referred, if the facts admit of no other conclusion than that the determination of the board has been influenced by other considerations than the public interests, no matter what these may have been, the law will regard it as an abuse of power, a disregard of duty, and it becomes the duty of the courts to interfere for the protection of the public. Not only does the evidence in this case overcome the favorable presumption in support of the board's action, but it makes it impossible to connect that action with the exercise of judgment or proper regard for public welfare. Two of the specific reasons the board assigns for the proposed change are shown to be absolutely baseless while the third is little better than a substitution of arbitrary pleasure for the discretion which the law allows.

The learned chancellor, after a careful review of the evidence, finds no room for difference of opinion with respect to what the public interests require in the premises, and reaches the following conclusion: "It is evident as a result of this hearing that the best interests of this district are seriously and injuriously affected by the defendant's proposed action. Almost all the public money spent will have been absolutely wasted. It is clearly demonstrated from the overwhelming

weight of the evidence that whatever may have been the original defect in the foundation of a part of this building, and whatever may have been the extravagance or waste of the former board, and those with whom it contracted, including the apparent exorbitant cost paid for work and material hitherto furnished and done upon this structure, that it is now entirely safe and secure. To abandon it in the light of these facts, which, if the board did not know before, it certainly can ascertain from this record, has no semblance of justification. It is obvious that the accommodations now desired and those for many years in the future can be secured by proceeding upon either one or both of the wings of the present building at a cost less than the purchase price of the new site, so far as each wing is concerned. To abandon a good site and a safe structure which has cost the district in the neighborhood of \$75,000 in actual cost, and from which it could not realize \$10,000 by a sale, to begin the erection of a new structure upon the proposed new site, with the uncertainties of foundations and the uncertain cost of an uncertain building, should not be sanctioned." In this conclusion we concur. We should sustain the school board in the present contention if the evidence left us at all in doubt, not as to the wisdom of their policy, for that is no concern of ours, but as to whether that policy was determined upon by public considerations alone. Unfortunately it does not, but is convincing that public interests have been subordinated if not wholly ignored.

The appeal is dismissed, and the decree is affirmed.

PARKS v. LEWIS FOUNDRY & MACHINE CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where an employé, familiar with the operation of the machinery in a foundry, goes on the runway of a traveling crane without giving the usual warning to the craneman, and the crane starts and injures him, he is guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 683, 723-742; Dec. Dig. § 236.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Thomas J. Parks, as administrator, and individually, against the Lewis Foundry & Machine Co. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

L. K. Porter, S. G. Porter, and F. H. Phillips, for appellant. W. S. Dalzell, for appellee.

POTTER, J. This action was brought to recover damages for personal injuries suffered by Charles J. Parks while engaged as a crane operator in the employ of the defendant company. Upon the trial, at the close of plaintiff's testimony, a judgment of compulsory nonsuit was entered, and, from the refusal of the court below to take off this judgment, this appeal has been taken. The injured boy was engaged in operating an electric crane which traveled upon runways some 200 feet long, at a height of about 60 feet from the ground. Two cranes were in use upon the same runway. Access from the ground to the runway was had by means of ladders placed at the central point. At the time of the accident it was discovered that a device known as the controller, used in operating the crane, was out of order, and Charles J. Parks, after leaving his crane at the proper place at the end of the runway, took the controller to the shop for some attention. In doing this he passed along the track upon which the crane ran up to the central point and descended the ladder. While returning to his post, as he came up the ladder he saw the other crane at rest some 50 feet along the runway from the ladder towards the opposite end of the building. It appears from the evidence that he knew that the operator of the other crane could not, from his cage, see any one walking along the runway. He also knew that the noise of the machinery was so great that the only effective means of communicating with the craneman was by signal. He might have given the necessary signal while upon the ground, before ascending the ladder, but he did not do so. Without having given any warning to the other craneman, he climbed upon the runway, and started to walk along the rail towards his own crane. Having gone but a short distance, he discovered that the other crane, which had been stationary, was in motion and was approaching him. He then turned back and attempted to regain the ladder. Before he was able to do so he was struck by the oncoming crane and injured.

It was contended that the defendant company was negligent in not providing ladders at the ends of the runways for the use of employees rather than at the central point. The location of the ladder was not, however, the proximate cause of the injury in this case. That unfortunate result was brought about by the young man's failure to take the obvious precaution of warning the other crane operator before entering upon the trackway. He was thoroughly familiar with the premises and with the operation of the cranes, and his testimony shows that he fully appreciated the danger of being run down by the active crane while he was on the track. His failure to give notice of the perilous position in which he was about to place himself can only be regarded as contributory

negligence. This was the conclusion reached by the trial judge, and from it we can see no escape.

The judgment is therefore affirmed.

CARNEGIE BOROUGH v. PITTSBURGH, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

WATERS AND WATER COURSES (§ 61*) — OBSTRUCTION OF STREAM—MANDATORY INJUNCTION.

On a bill by a borough against a railroad company to compel the removal of a pier from a stream, where the court finds that the pier obstructed the stream so as to be a public nuisance, a mandatory injunction will be granted.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 54; Dec. Dig. § 61.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Carnegie Borough against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Decree for plaintiff, and defendant appeals. Affirmed.

Frazer, P. J., found the facts to be as follows:

"Findings of Fact.

"First. Plaintiff is a municipal corporation of the county of Allegheny, incorporated under the general borough laws of this commonwealth.

"Second. Defendant is a railroad corporation subsisting under the laws of the state of Pennsylvania, and owns and operates a line of railroad connecting the city of Pittsburgh with points West. A portion of its line is situated within the municipal limits of plaintiff's borough.

"Third. Two streams, Chartiers creek and Campbell's run, flow through plaintiff's borough. The latter flows approximately east and west, and empties into the former.

"Fourth. In the operation of its railroad defendant has constructed, and maintains and uses, a bridge over Campbell's run, about 250 feet above its mouth, upon which bridge are constructed and laid down seven tracks. The bridge is 44.4 feet in width, extends up and down the stream about 100 feet, and is from 5 to 7½ feet above the bed of the stream. Previous to filing the bill in this case, the superstructure rested upon and was supported by stone abutments located upon the banks of the run. A short time before the entering of these proceedings defendant began erecting midway between the abutments of its bridge a concrete pier, which it has since completed, four feet in width and extending the full length of its bridge.

"Fifth. There are at present, and have been for some time, two other bridges over Campbell's run in the immediate neighbor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

hood of defendant's bridge: (a) A highway bridge owned by Allegheny county, located 110 feet above defendant's structure, which highway bridge connects Railroad avenue with Highland avenue, both of which are prominent streets of plaintiff borough. This bridge has a span of 31 feet in length, across the stream, and is 7.72 feet in the clear above its bed. (b) A private bridge immediately below defendant's structure, with a span of $28\frac{1}{2}$ feet and a clearance of $8\frac{1}{2}$ feet above the bed of the stream. The east abutment of this latter bridge is located almost directly in front of the east half of the bed of the stream, as divided by the new concrete pier of defendant's bridge, and materially interferes with the flow of water, ice, and débris under that portion of defendant's bridge.

"Sixth. The channel of Campbell's run below defendant's bridge is contracted by the private bridge referred to in the preceding finding to $30\frac{1}{2}$ feet, and is further reduced by cribbing upon the east side and a stone wall on the west side to 20 feet, to a point near its mouth. Where it empties into Chartiers creek, its channel width is 25 feet.

"Seventh. The watershed of Campbell's run is precipitous territory, and, when sudden or heavy rains occur, the stream rises quickly, and discharges a considerable volume of water, at times the water carrying with it large quantities of ice and débris.

"Eighth. Upon several occasions during the past 10 or 12 years, following extraordinary rains or thaws, the channel of Campbell's run, at defendant's bridge, has become closed with either ice or débris, thereby causing the water to flow upon the streets of the borough in that immediate vicinity and carrying with it driftwood, ice, and other débris.

"Ninth. The concrete pier constructed by defendant under its bridge materially lessens the space for the flow of water under defendant's bridge, and as conditions now exist in the bed of the stream under defendant's bridge, and by the interference in its east channel by the abutment of the private bridge below, the danger of flooding the streets of the borough and interfering with travel thereon is considerably increased.

"Tenth. The purpose of defendant in reconstructing its bridge is to provide for the increased weight of its cars and motive power, and also to eliminate the supports, which in the present bridge, now rise about two feet above the roadbed. The reconstructed bridge is to have a level surface over its entire stream and thus do away with the present supports, which defendant claims are dangerous, and likely to result in death or injuries to its employés. The testimony does not show that any employé of defendant company was ever injured by the supports of the present bridge.

"Eleventh. A bridge of sufficient strength to provide for the increased weight of defendant's rolling stock can be erected with-

out a pier in the middle of the channel of Campbell's run at a slight increase in cost over the proposed bridge with a middle pier."

The court entered a decree enjoining the defendant from obstructing the stream.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. S. Dalzell, for appellant. Jas. H. Duff, for appellee.

ELKIN, J. The only difficulty we see in determining the questions raised by this appeal is whether upon the whole record equity had jurisdiction to grant the relief prayed for. It must be conceded that the matters complained of did not constitute a nuisance per se. The proposed pier was not in itself a nuisance, but might become so by reason of its location, surroundings, and probable dangers resulting from narrowing the channel and thus causing the waters to overflow the banks in times of floods to the injury of the lives and property of the residents of the complaining borough. In this sense it might be a nuisance within the meaning of the law. The answer denied that the pier, when erected, would cause the injuries complained of, and the evidence was conflicting as to the probable results of such an obstruction in the stream. Under these circumstances, appellant contends that the nuisance must first be established in an action at law before equity will interpose its strong arm to grant relief. *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441, *New Castle v. Raney*, 130 Pa. 546, 18 Atl. 1066, 6 L. R. A. 737, *Mowday v. Moore*, 133 Pa. 598, 19 Atl. 626, and *Wood v. McGrath*, 150 Pa. 451, 24 Atl. 682, 16 L. R. A. 715, are relied on to sustain this position. This contention gives the rule recognized in these cases a significance not warranted by the facts. In three of these cases the bills were filed by individuals to abate nuisances in their nature private. In *New Castle v. Raney* it was held that where the testimony as to whether a milldam, maintained for water power purposes for half a century and about which a city had grown up, has become a public nuisance or not, is conflicting, a bill to abate it will be dismissed, without prejudice to the right of complainants to bring an action at law. It will be observed that the relief sought was in the nature of a mandatory injunction requiring the removal of a dam which had been lawfully maintained for a long period of years, and the evidence upon which the municipal authorities based their right to demand such relief was not only conflicting, but doubtful. These cases were distinguished in *Commonwealth v. Stevens*, 178 Pa. 543, 36 Atl. 166, by the learned court below sitting as a chancellor, and upon appeal this court affirmed the decree there made enjoining defendants from obstructing the stream in the manner proposed. In the opin-

ion filed in that case this court said: "The defendants claim that they cannot be lawfully enjoined from erecting the wall at the point in the stream where they have located it until it has been determined in a common-law action that they have no right to build it there. The reason given for the claim is that the evidence in regard to their right and the effect of the wall upon the overflow in times of freshets and floods is conflicting. They cite as justifying their claim *New Castle v. Raney*, 130 Pa. 546, 562 [18 Atl. 1066, 6 L. R. A. 737], *Mowday v. Moore*, 133 Pa. 593, 612 [19 Atl. 626], and *Wood v. McGrath*, 150 Pa. 451, 458 [24 Atl. 682, 16 L. R. A. 715]. These cases were brought to the attention of the learned judge of the court below, and were plainly and satisfactorily distinguished by him from the case at bar." This can only mean that the reasons given by the court below for the distinctions made were satisfactory to and approved by this court. That case rules the case at bar upon the question of jurisdiction. In that case, as in this, the proceeding was instituted by the municipal authorities for the purpose of restraining private parties from obstructing a stream of water in such manner as to be a public nuisance. There, as here, the chancellor found the facts from conflicting testimony and made the decree accordingly. Upon the question of jurisdiction, the present case cannot be reversed without in effect overruling that case. In every essential particular it is on all fours with the present case. It is the latest case in which this exact question has been considered, and in our opinion it is controlling here. The evidence was ample to sustain the facts found by the learned court below, and we would not feel warranted in reversing the findings of fact or the conclusions of law based upon the facts so found.

The decree is affirmed upon the record here presented without prejudice to the right of appellant to ask for a modification of the decree in the court below in the event that the negotiations alleged to be pending, whereby the obstructions in the stream below the bridge in question are to be removed at the expense of the railroad company, are successful, and the obstructions removed as contemplated. When this is done and the stream is thus widened, the court may very properly modify the decree, if convinced that the dangers complained of will be thus obviated. Costs to be paid by appellant.

BOYD v. KIRCH.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. APPEAL AND ERROR (§ 982*)—REVIEW—DISCRETION OF TRIAL COURT.

An application to open a judgment entered on warrant of attorney is addressed to the equitable powers of the court, and on appeal

the question is whether there has been a proper exercise of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3877-3879; Dec. Dig. § 982.*]

2. JUDGMENT (§ 68*)—EXECUTION—EVIDENCE.

When the genuineness of a writing is in dispute and the issue is that of forgery, the writing is not of weight, and the burden of establishing its genuineness is on the plaintiff in the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. § 68.*]

3. JUDGMENT (§ 68*)—EXECUTION—EVIDENCE.

Where defendant testifies that he did not sign the note on which judgment has been entered against him and that he was not at its date indebted to plaintiff in any amount, and he is corroborated by two witnesses who were familiar with his handwriting and knew his signature, an order opening the judgment was proper, though his testimony was contradicted by plaintiff and by experts, who expressed the opinion that the note was genuine.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 113, 116, 118, 120, 123, 125, 127; Dec. Dig. § 68.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by L. R. Boyd against John P. Kirch. From an order making absolute rule to open judgment, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCHISKEB, JJ.

John D. Meyer, John C. Bane, and R. W. Irwin, for appellant. W. S. Maxey and A. H. Mercer, for appellee.

FELL, C. J. [1] An application to open a judgment entered on a warrant of attorney is addressed to the equitable powers of the court, and on appeal the question is whether there has been a proper exercise of judicial discretion. The cases are rare where there have been reversals of the findings of a judge sitting as a chancellor, because his opportunity to reach a correct conclusion from conflicting testimony, when the character and knowledge of the witness are involved, is much better than ours on appeal. An apparent preponderance of testimony against a finding is not sufficient to lead to a reversal, when there is testimony, which, if believed, will sustain it. *Stelmeyer v. Siebert*, 190 Pa. 471, 42 Atl. 880, 70 Am. St. Rep. 641.

[2] When, on a rule to open a judgment, a want of consideration, or a contemporaneous parol agreement varying the terms of the note, or a like defense is set up, it should be established by a clear preponderance of proof. A mere conflict of testimony is not sufficient to entitle the defendant to a trial; but when the genuineness of the writing is in dispute, and the issue is that of forgery, the writing is not of weight. Its execution is the subject of inquiry, and there is no presumption arising from the writing itself to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

overcome. While the measure of proof required cannot be defined by rule, it may be said generally that, where a defendant has testified that a writing is a forgery, he is entitled to go to a jury, although the counter proof is of equal force. The burden of establishing the genuineness of a disputed paper is on the party offering it. *Schomaker v. Dean*, 201 Pa. 439, 50 Atl. 923; *Kaier Co. v. O'Brien*, 202 Pa. 153, 51 Atl. 760.

[3] The defendant testified that he had not signed the note on which the judgment was entered, and that he was not at the time of its date indebted to the plaintiff in any amount. He was corroborated by two witnesses who were familiar with his handwriting, and knew his signature. His testimony was contradicted by the plaintiff and by experts who expressed the opinion that the note was genuine. Upon this testimony, and in view of the unusual character of the transaction testified to by the plaintiff in explaining why the note was made, the judgment was opened.

The order is affirmed at the cost of the appellant.

GEIGER v. PITTSBURGH RYS. CO.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CARRIERS (§ 321*)—TRIAL (§ 253*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

Where the driver of a beer wagon gets into an altercation with the crew of an open street car, and in attempting to get on the car to go to the car barn and make a complaint, as he alleged, which purpose was denied by the company, he was killed by another car colliding with him, it is error to submit to the jury only the question whether deceased was a passenger or intending passenger, giving no instructions as to what was necessary to constitute him such a passenger, and ignoring the question of contributory negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.* Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. CARRIERS (§ 238*)—CARRIAGE OF PASSENGERS—WHO ARE PASSENGERS.

In an action against a street railroad company for causing death, where the decedent was killed while forcing his way into the car from the wrong side at an unusual and improper place, he could not be regarded as a passenger, and the mere fact that he had succeeded in getting his feet upon the running board, and even upon the body of the car, was not sufficient to make him one.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 973; Dec. Dig. § 238.*]

3. CARRIERS (§ 321*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for causing death of an alleged passenger, it was error to leave it to the jury to say whether decedent's injury resulted from his being struck by the motorman without giving instructions as to the scope of the motorman's employment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1247, 1326-1337, 1343; Dec. Dig. § 321.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Mary Geiger, as survivor of Adam Geiger, and individually, against the Pittsburgh Railways Company for death of plaintiff's son. From a judgment for plaintiff, defendant appeals. Reversed, with venire facias de novo.

The circumstances of the accident are stated in the opinion of the Supreme Court.

The defendant presented the following points:

"Third. A person attempting to board a car by climbing over the guard rail on the blind side of an open car is not a passenger, and the mere fact that he gets into the body of the car in safety does not make him a passenger." Answer: "Refused."

"Fourth. The deceased, Michael Geiger, in attempting to board an open summer car on the blind side, placed himself in a dangerous position, and was guilty of contributory negligence; therefore, the plaintiff in this case is not entitled to recover." Answer: "This point is affirmed, if you find that this accident arose from the facts that this point will cover, namely: That this man placed himself in a dangerous position, where he ought not to have placed himself, and where he took the risk; and, if he lost his life there, that then he was guilty of contributory negligence and she could not recover in this case."

The court charged in part as follows: "And if you arrive at the conclusion from the weight of the evidence that this Michael Geiger was a passenger or an intending passenger, and did not go to that front platform for the purpose of renewing this altercation, then there could be a recovery in this case. And then you come to the question of damages."

Verdict and judgment for plaintiff for \$2,898. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART; and MOSCHZISKER, JJ.

William A. Challener and Clarence Burleigh, for appellant. Rody P. Marshall and Thos. M. Marshall, for appellee.

POTTER, J. [1] This was an action of trespass brought by Adam Geiger and Mary Geiger, his wife, against the defendant company, to recover damages for the death of their son, Michael Geiger. The latter was the driver of a beer wagon. On the evening of September 6, 1909, he stopped his wagon and two-horse team in front of a saloon on the corner of Twenty-Seventh and Carson streets, Pittsburgh. Geiger went into the saloon, leaving the team standing between the curb and the street railway track. An open summer car came along, and, owing to the narrow space between the track and the

curb, was unable to pass. Geiger was called out of the saloon, and, instead of promptly starting his team and clearing the way for the car, he engaged in an altercation with the men in charge of the car. He attempted to board the car, as appellant claims, for the purpose of assaulting the motorman; but counsel for appellee maintain that it was for the purpose of riding to the car barn, in order to make complaint against the motorman and conductor. Geiger was prevented from getting on the car at the side nearest the curb by the motorman of another car which had also been stopped, and he went around in front of the car, falling over the fender as he passed, and tried to board the car from the inner side. He got up on the running board and put one leg over the chain or bar that prevented access to the front platform on that side. The evidence indicates that while in this position he was struck by a car coming from the opposite direction on the other track, and so injured that he died in a short time. It was contended on the part of plaintiff that the motorman either struck or struck at Geiger while he was attempting to get upon the platform.

The trial judge refused binding instructions for the defendant, and submitted the case to the jury, who found a verdict for the plaintiff. The defendant has appealed, and in the fourth assignment of error counsel have alleged the inadequacy of the charge, in that the jury were instructed that if they found the decedent was a passenger or an intending passenger, and did not go to the front of the platform for the purpose of renewing the altercation, there could be a recovery in this case. This instruction to the jury gave no intimation whatever as to what was necessary under the circumstances to constitute Geiger an actual or intending passenger. It was also inadequate, in that it ignored the question of contributory negligence, and permitted the jury to infer that the case might turn entirely on the question of whether Geiger was or was not a passenger or intending passenger at that time. This error is repeated and emphasized near

the conclusion of the charge, where the court says: "So that, as the court has said to you, the first question for you to determine in this case is whether this Michael Geiger was ever a passenger upon that car or an intending passenger. If he was not, then there can be no recovery in this case."

[2] It is very difficult, under the evidence in this case, to reconcile the verdict of the jury in favor of the plaintiff with any proper understanding by the jury of what was required to constitute a passenger. If Geiger was hurt while forcing his way into the car from the wrong side, and at an unusual and improper place, he should not have been properly regarded as a passenger at the time, and the jury should have been plainly so instructed. If Geiger was attempting to get upon the car by climbing over the guard rail from the wrong side, just before he collided with the other car, the mere fact that he had succeeded in getting his feet upon the running board, or even upon the body of the car, would not be sufficient to constitute him a passenger.

[3] The learned trial judge also left it to the jury to say whether or not Geiger's injury resulted from his being struck by the motorman. It does not appear, however, that the jury was given any instructions as to the scope of the motorman's employment. If his alleged action in striking at Geiger was not within the line of his employment, or if it was in self-defense, in attempting to protect himself from the unprovoked assault of Geiger, the defendant company should not have been held responsible. The circumstances of the accident were most unusual. As disclosed by the evidence, the conduct of Geiger in attempting to mount the car at the time and place and in the manner in which he did was apparently without any valid reason or excuse. The case called for unusually complete and careful directions to the jury in order to insure a just verdict. We feel that the charge did not adequately cover the essential questions involved.

The fourth assignment of error is sustained, and the judgment is reversed, with a venire facias de novo.

SHUBERT v. NIXON AMUSEMENT CO.

et al.

(Supreme Court of New Jersey. May 24, 1912.)

(Syllabus by the Court.)

1. THEATERS AND SHOWS (§ 4*)—CONTRACT OR TORT—EJECTION FROM THEATER.

At common law, the sale of a theater ticket creates only a personal license to enter the theater and enjoy the performance for which such ticket is sold, using the seat assigned, if any. Such license is revocable at the will of the proprietor of the theater, who may lawfully require the licensee to leave the theater without assigning any reason therefor, and, in case of refusal, eject such licensee without unnecessary force; and, in case of such revocation and ejection, no action in tort will lie, but only an action in contract for the price of the ticket and incidental damages arising out of breach of the contract of sale of the ticket.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. FORMER DECISION CONTROLLING.

Wood v. Leadbitter, 13 M. & W. 838, followed and approved.

Action by Lee Shubert against the Nixon Amusement Company and another. Heard on demurrer to the plea. Overruled.

The suit was in tort for damages for being ejected from a theater. By the first count of the declaration, it is averred that the Nixon Amusement Company was the lessee of a certain theater, and defendant Ziegfeld was the manager of a play that was being produced thereat; that plaintiff purchased tickets for four orchestra seats and paid for them, entitling himself and three of his friends to occupy said seats at a certain specified performance; that he and his friends went to the theater and gave up their tickets, retaining the seat checks, entered the theater, and occupied the seats, and while they were so occupying them, and before the curtain rose for the performance, the said Ziegfeld and the defendant company, by its agents, wrongfully and maliciously did order and compel plaintiff and his guests to leave the theater, and thrust them out in the presence of divers persons, whereby they were deprived of the right to witness the performance, and plaintiff was deprived of his property in the tickets, and was also injured in his good name and credit, and did suffer great mortification and embarrassment of mind and feelings, and was subjected to the disdain and contempt of the people, etc. The second count sets up a similar state of facts, but invokes the civil rights act of May 10, 1884 (C. S. 1442).

The demurrer is to the second plea, which sets up in defense to the entire declaration that before and at the time when, etc., the defendant tendered to the plaintiff the money he had paid for the tickets in question, and did request him and his friends to leave the seats occupied by them, and to depart from

the theater, but that plaintiff and his friends refused to comply with this request, whereupon defendants caused them to be put out of the theater, using no unnecessary force, as it was lawful for them to do. The specific causes of demurrer to this plea are that the plea and the tender set up therein constitute no justification for the ejection complained of.

Argued June term, 1911, before GUMMERE, C. J., and PARKER and VOORHEES, JJ.

McCarter & English, of Newark, for plaintiff. Riker & Riker, of Newark, for defendants.

PARKER, J. [1] The defendants first attack the declaration as insufficient in law, as under this demurrer they are entitled to do. So far as concerns the first count, the objections now made to it were previously passed upon in this cause when defendants demurred to the declaration, and their demurrer was struck out. They should not again be considered. We are of opinion, however, that the second count is bad. Assuming that for a violation of the civil rights act, *ubi supra*, a civil action for damages will lie, as well as the penal action provided in that act, the declaration is wholly wanting in any averment that plaintiff was ejected because of race, color, or previous condition of servitude, or for any cause or reason not "by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." Hence no violation of the act is made to appear. This results in the elimination of the second count; and the plea stands as a plea to the first count only. The next question, therefore, is as to the sufficiency of the plea in this regard.

The position of the defendants is that the sale of the tickets gave rise only to a personal license, revocable at any time, and whose revocation would confer no right of action, except for the money paid, with such incidental damages as would arise from the expense and inconvenience of going to the theater to no purpose. Plaintiff, on the contrary, contends that the sale of the tickets conferred a right to the seats for the performance in question, or at least an irrevocable license, and that an actionable wrong was committed in refusing to permit plaintiff and his party to occupy them; and if this position be untenable, and if it be held that defendants could revoke the license and cancel the tickets before the holders had taken their seats, the license had become an executed one after they were seated, and was then irrevocable.

[2] The leading case on this subject is *Wood v. Leadbitter*, 13 M. & W. 838, 14 L. J. Ex. 161, 16 E. R. C. 49, decided in 1845. In that case, plaintiff had paid a guinea for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

admission to the grand stand at the Doncaster races. He was either in the grand stand inclosure, or on the stand itself (page 841), when ordered to leave, and, on refusing, was put out without unnecessary violence. His guinea was not returned or tendered. The question whether the license, which the replication set up, was revocable or irrevocable was fully considered by the court, which sustained a charge that it was lawful for the owner of the premises, under whom defendant justified, to order plaintiff out, without returning the guinea or assigning any reason. The opinion of the court, delivered by Baron Alderson, contains an elaborate review of earlier authorities, and overruling the case of *Taylor v. Waters*, 7 Taunt. 374, which held that a ticket to the opera house was an irrevocable license, lays down the rule that such a ticket confers a license essentially revocable; that the fact that a valuable consideration was paid makes no difference; for, if any action would lie, it would have to be founded on a breach of contract, and would not be the result of having acquired by the ticket a right of going upon the stand in spite of the owner of the soil.

In this country, the decisions are not entirely in accord; but the majority of them appear to follow *Wood v. Leadbitter*.

In *McCrea v. Marsh*, 12 Gray (Mass.) 211, 213, 71 Am. Dec. 745, plaintiff had a theater ticket to the family circle, and was stopped at the head of the stairs. But the court said: "According to the decision in *Wood v. Leadbitter*, even if the plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it at any time during the exhibition, and upon his refusal might have removed him, using no unnecessary force." It was held that plaintiff might recover in contract the price of his ticket and all legal damages sustained by the breach of the contract implied by the sale and delivery of the ticket; but that an action of tort would not lie. Other decisions to the same effect are *Burton v. Scherpf*, 1 Allen, 133, 79 Am. Dec. 717; *Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349; *Taylor v. Cohn*, 47 Or. 538, 84 Pac. 388, 8 Ann. Cas. 527. In *Buenzie v. Amusement Ass'n*, 29 R. I. 23, 68 Atl. 721, 14 L. R. A. (N. S.) 1242, the suit was in assumpsit, and the damages were confined to pecuniary loss. A similar case is *Luxenberg v. Keith Amusement Co.*, 64 Misc. Rep. 69, 117 N. Y. Supp. 979.

In *People v. Flynn*, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420, involving a complaint of criminal conspiracy between several managers to prevent a professional critic from obtaining access to their theaters, it was ruled that such exclusion was lawful.

Cases looking the other way are *Cremore v. Huber*, 18 App. Div. 231, 45 N. Y. Supp.

947, in which it was held that the trial court properly refused to charge that plaintiff was bound to leave on request; *Smith v. Leo*, 92 Hun, 242, 36 N. Y. Supp. 949, an ejection from a dancing class after plaintiff had been enjoying its privileges for some time; and *Drew v. Peer*, 93 Pa. 234, principally relied upon by plaintiff. Of *Cremore v. Huber* it may be said that the element of assault was in the case. *Drew v. Peer* was a suit by a husband for ejection of and assault on the wife, per quod. The action was held to be properly in case, and the question whether there was a license, or right, was held immaterial. The court thought obiter that there was more than a license. This case is distinguished, if not overruled, in the later case of *Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349, already cited, where it is said that "a theater ticket is to be regarded as a mere license, for the revocation of which before the holder has actually been given his seat, and has taken it, the only remedy is in assumpsit for a breach of the contract." *Smith v. Leo*, 92 Hun, 242, 36 N. Y. Supp. 949, is apparently in point, and if now followed would lead to overruling this demurrer.

In *Weber Stair Co. v. Fisher*, a Kentucky case, unofficially reported in 119 S. W. 195, exemplary damages were allowed for what was evidently a wanton and unprovoked assault; the court intimating that if plaintiffs had been treated politely they could not have recovered. A circumstance in the case was that their tickets read for another performance, through an error of the box office; and by a second error of the ticket taker and usher plaintiffs had been actually seated.

Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344, is the celebrated ticket speculator case, and turned on a clause in the ticket that it would be void, if sold on the sidewalk. The court calls the ticket itself a license, issued pursuant to a contract; but this language was in no way essential to the ruling on which the case turned, which was that the ticket was forfeited by breach of the condition as to selling it on the sidewalk.

The case of *Wood v. Leadbitter* has been relied on a number of times as authority in our reported cases. In *Den ex dem. Richman v. Baldwin*, 21 N. J. Law, 395, 404 (1848), it is cited twice, first in connection with the definition of a license, and again as authority for the proposition that a parol license (i. e., one not under seal) to go and remain for a certain time on another's land, though for a valuable consideration, unless coupled with an interest, is revocable at the will of the licensor. In *Central Railroad v. Hetfield*, 29 N. J. Law, 206, 221 (1861), Chief Justice Whelpley, in his dissenting opinion in this court, cited it as authority for the

same rule in a case where the question was whether the railroad could justify under a parol consent as irrevocable; the charter giving it the right to occupy lands "with the consent of the owner." It was held in this court that a parol consent was sufficient and irrevocable, if given pursuant to the charter; but in the Court of Errors and Appeals the judgment was reversed, and the Chief Justice's view upheld. *Hetfield v. Central R. Co.*, 29 N. J. Law, 571.

In *N. J. Midland Railway v. Van Syckle*, 37 N. J. Law, 496 (1874), the consent was by deed, and on page 501 *Wood v. Leadbitter* is again cited on the question of license. In the equity reports, it is cited to the same point in *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142, 153, *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248, 253, *Morton v. Morton*, 47 N. J. Eq. 158, 165, 20 Atl. 286, and in *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492, 502, 66 Atl. 427, where the late Vice Chancellor Pitney, sitting as advisory master, fully recognizes its authority, though distinguishing the case then under consideration. The decision in *Veghte v. Raritan Water Power Co.* was reversed in 21 N. J. Eq. 463, on principles of equity and construction of the clause "written consent or permission" in the defendant's charter, and without impairing the force of the rule as established at common law.

The revocability of a license, even when valuable consideration has been paid, is asserted by the Court of Errors and Appeals in *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702, and by the Court of Chancery in *Eckert v. Peters*, 55 N. J. Eq. 379, 36 Atl. 491.

In view of the substantially uniform approval of and reliance on the decision in *Wood v. Leadbitter* in our state adjudications, it must fairly be considered to be adopted as part of our jurisprudence; and whatever views may be entertained as to the natural justice or injustice of electing a theater patron without reason, after he has paid for his ticket and taken his seat, we feel constrained to follow that decision as the settled law, and leave the question of changing it to the Legislature, to whom the decision of such questions belongs.

It is argued that the fact that plaintiff and his party had passed into the theater and taken their seats should differentiate this case from *Wood v. Leadbitter* and other decisions to the same effect. Assuming that the point is adequately raised by the demurrer, it cannot avail the plaintiff; for in *Wood v. Leadbitter* plaintiff may have been actually in the grand stand, as already noted, and as commented on in *McCrea v. Marsh*, supra. It would be difficult, if not impracticable, to draw a line somewhere between the gate of the ticket taker and the

end of the performance, on one side of which the proprietor could revoke his license, and on the other he could not, or to hold that the license was executed any more effectually after the licensee had taken his seat than when he passed into the theater.

The demurrer to the plea will therefore be overruled.

MATLACK v. LLOYD, Circuit Judge.
(Court of Errors and Appeals of New Jersey.
May 2, 1912.)

MANDAMUS (§ 187*)—APPEAL—DECISIONS REVIEWABLE—REFUSAL OF WRIT.

The Supreme Court's refusal of a mandamus, not involving the constitutionality of a statute, is not reviewable on error.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

Error to Supreme Court.

Mandamus, on the relation of Joshua Matlack, against Frank T. Lloyd, as Judge of the Burlington Circuit Court. Writ refused, and relator brings writ of error. Writ of error dismissed.

Joshua Matlack, of Mt. Holly, pro se.

PER CURIAM. The respondent, as judge of the Burlington circuit court, made an order opening a judgment by default in an action pending in that court, wherein relator was plaintiff; whereupon relator applied to the Supreme Court for a writ of mandamus to require said judge to vacate such order. The Supreme Court made a rule refusing this application, and this rule is what is sought to be reversed by the present writ of error.

In *Neptune Township v. Mannion*, Collector, etc., 73 N. J. Law, 816, 65 Atl. 440, this court, in dealing with a case where the Supreme Court had made a rule to show cause why a writ of mandamus should not issue, and had afterwards discharged that rule and refused the writ, the case therefore presenting the same essential features as the present, used this language: "The refusal by the Supreme Court of a mandamus, and its discharging a rule to show cause why a mandamus should not issue, is not reviewable on error (*Layton v. State*, 28 N. J. Law, 575; *American Transportation Co. v. New York, Susquehanna & Western Railroad Co.*, 59 N. J. Law, 156 [35 Atl. 1118]; *Paterson v. Shields*, 59 N. J. Law, 426 [36 Atl. 891]), except in cases covered by the amendment to the mandamus act, which is to be found in its original form in 2 Gen. Stat. p. 2002, § 13, and which is reproduced in a condensed form in section 6 of the mandamus act of 1903. Pamphlet Laws 1903, p. 381. Those cases in which a review by writ of error is granted are limited by the terms of the amendment to cases decided in the Supreme Court upon the constitutionality of a stat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ute. The legislation was thus applied in this court in *Cooper v. Springer*, 65 N. J. Law, 594 [48 Atl. 605]. The court, finding that the case did not turn in any way upon such a question, dismissed the writ of error.

The present case, like that just cited, and from the opinion in which the above quotation is taken, does not involve the constitutionality of any statute, and consequently comes within the rule laid down in the several decisions of this court cited and followed in the *Mannion Case*, and applied to the award of a peremptory writ in the later case of *Morris & Cummings Dredging Co. v. Bayonne*, 76 N. J. Law, 573, 70 Atl. 134.

The writ of error must accordingly be dismissed.

JARMAN v. FREEMAN.

(Court of Chancery of New Jersey. March 23, 1912.)

1. EASEMENTS (§ 44*)—EXTENT—WAY.

Where a deed grants the use in common of a passageway extending on one side of the lot granted between the lot granted and the land of the grantor, as a private way for travel and drainage, and the grantor reserves the fee, the grantee cannot enlarge the easement to accommodate land other than that to which it is appurtenant, and has only the right to enjoy the estate granted, while the grantor, who owns the fee in the way, and whose rights are not founded in grant, may use his property for any purpose consistent with the full enjoyment of the easement; but he cannot extend the use of his way to other lands so as to impair the easement which he has granted.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

2. EASEMENTS (§ 6*)—WAYS — PRESCRIPTIVE RIGHTS.

A use of a way by one under a claim of right at such times as his convenience and business needs require for the purpose of hauling goods to and from a building is such a continued use as will in time ripen into a prescriptive right, and the use, if unauthorized, invades a clear legal property right calling for the exercise of injunctive relief.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 14, 15, 27-33; Dec. Dig. § 6.*]

Suit by Thomas J. Jarman, executor, against Abraham Freeman. Injunction prayed for granted on final hearing on pleadings and proofs.

See, also, 78 N. J. Eq. 464, 79 Atl. 1065.

Chandler & Robertson, for complainant. Bourgeois & Coulomb, for defendant.

LEAMING, V. C. [1] The facts of this case, as they appeared at the return of the order to show cause for a preliminary injunction, are set forth in 78 N. J. Eq. 464, 79 Atl. 1065. A preliminary injunction was denied because it was then thought that complainant's conduct had induced defendant to erect his warehouse at the end of a certain alley in the belief that he would be permitted by complainant to use the alley,

which use the bill sought to restrain. But for that aspect of the case a preliminary injunction would have been issued at that time.

At final hearing it has been established as a fact that defendant erected his warehouse with full knowledge that complainant would contest any effort upon defendant's part to use the alley for the purpose of hauling goods to and from that building.

A further examination of the views expressed by me at the preliminary hearing touching the rights of the parties, in the absence of the equitable bar referred to, confirms the views then expressed. My conclusion then was that the owner of the servient tenement could not, against the owner of the dominant tenement, extend the use of the way to lands other than those for which the way was established by the terms of the grant, when such added use should be operative to interfere with the full enjoyment of the easement in behalf of the dominant tenement or to increase the burden of repair which accompanied the easement.

It is now manifest that the continued use of the alley by defendant for the purpose of hauling goods to and from his warehouse will not only interfere with the full enjoyment by complainant of the easement as contemplated by the grant, but will also necessarily increase his burden of repair. The grant to complainant vests in him the right to use the alley as a way for the benefit of his adjacent land at any time. This right is in common with and is to be exercised in connection with a similar right of use of the alley by the owner of the fee for the benefit of his adjacent land. It follows that the right of use of the alley thus vested in complainant is only restricted by the similar right of the owner of the fee, and any extension of the use of the alley by the owner of the fee for the benefit of other lands is necessarily operative as a restriction of complainant's privileges coextensive with the magnitude of the extension, and the burden of repair is in like manner increased by the extended use.

[2] Complainant's legal title to the easement is not denied, and the nature or extent of the rights incident to such an easement is not in substantial dispute. The answer asserts as a defense acquiescence on the part of complainant and avers that the use of the alley by defendant will not interfere with its use by complainant or add to the burden of its maintenance. The evidence offered to sustain the defense of acquiescence fails to disclose any acquiescence in the use of the alley for any such purposes as the same is now being used by defendant. The claim that defendant's use of the alley will not disturb complainant's use or add to the burden of maintenance also fails. It is clearly unnecessary for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

evidence to disclose any specific instance in which defendant has excluded complainant from the use of the alley at a time when complainant has desired to use it. The evidence discloses that the use which defendant has been making of the alley, and which he proposes to continue to make of it, is under claim of right to use it in such manner and at such times as his convenience and business needs shall occasion for the purpose of hauling goods to and from his warehouse. Such use is a continuous use and will in time ripen into a prescriptive right. This class of invasions or threatened invasions of a clear legal property right calls for the exercise of the preventive powers of this court.

I will advise that an injunction issue restraining defendant from using the alley in question for the purpose of hauling goods to and from his warehouse.

SUPPLEE et al. v. COHEN et al.

(Court of Chancery of New Jersey. April 15, 1912.)

1. COVENANTS (§ 103*)—CONTRACT—FULFILLMENT.

Where a contract for the sale of a city lot provided that the vendors, agreed that they would provide that no building should be erected on the lot adjoining the premises sold, on the west, nearer than three feet from the party line, such covenant was not fulfilled by the deed of conveyance, since the vendors' agreement to "so provide" could only be fulfilled by perpetuating the covenant in any deed of conveyance the vendors should thereafter make of the lot adjoining on the west.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. § 103.*]

2. COVENANTS (§ 72*)—BUILDING COVENANT—RESTRICTIONS.

Where a contract for the sale of a city lot contained a covenant by the vendors that they would provide that no building should be erected on the next west adjoining lot nearer than three feet from the party line, the purchasers were entitled to rely on the vendors' engagement to protect them against the erection of a building on the adjoining lot, in violation of such restriction, without any new engagement for that purpose being made at the time of the passing of the title, in the absence of any evidence that at the time of settlement either party had understood that the covenant was waived.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 73-76; Dec. Dig. § 72.*]

3. COVENANTS (§ 51*)—USE OF ADJOINING PROPERTY—"BUILDING" RESTRICTIONS.

Where defendants covenanted that no building should be erected on a lot adjoining the property sold nearer than three feet from the party line, the term "building" was not limited to the main body of the structure erected on such adjoining lot, but included overhanging bay windows and eaves.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 1, pp. 889-892; vol. 8, p. 7593.]

4. COVENANTS (§ 51*)—BUILDING RESTRICTIONS—POPULAR RESTRICTION.

Where, in a suit to enforce a building restriction prohibiting the erection of any building nearer than three feet from the party line of the lot conveyed, there was no evidence that either of the parties to the covenant knew that a similar covenant, with reference to another tract of land in the city, had received a popular construction that it did not apply to overhanging windows and eaves, or that they knew that any buildings on such other tract had been so located with bay windows and eaves overhanging the restricted space in such tract, which was three-fourths of a mile distant from the property in question, complainants' right to enforce the covenant was not affected by such popular construction placed on the covenant as to the other property.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

5. INJUNCTION (§ 62*)—COVENANTS—BUILDING RESTRICTIONS.

Complainants' rights under a covenant prohibiting the construction of any building on the adjoining property nearer than three feet from the party line, are property rights in the restricted space and enforceable by injunction, without proof of special damage for violation thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127, 129; Dec. Dig. § 62.*]

6. INJUNCTION (§ 23*)—RIGHT TO RELIEF—BUILDING RESTRICTIONS—COVENANTS.

Defendants sold to complainants a city lot with a covenant providing that no building should be erected on the next lot adjoining on the west nearer than three feet from the party line. Defendants having commenced the construction of a building on the adjoining lot, notice forbidding encroachment of a bay window and eaves over the line was served before the building was erected, and a bill to enforce the covenant promptly filed. Defendants completed the building and filed a cross-bill to reform the covenant, in which they were not successful. *Held*, that complainants should not be deprived of a mandatory injunction, requiring the defendants to remove so much of the bay windows and eaves as extended into the restricted space, on the ground that the damage that would be suffered by them in vacating such space would be disproportionate to the benefits accruing to the complainants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 22; Dec. Dig. § 23.*]

Bill by William C. Supplee and another against Therese Cohen and another. Decree for complainants.

The bill seeks the enforcement of a restrictive building covenant. The covenant which complainants seek to enforce is found in a written agreement wherein defendants agreed to sell to complainant William C. Supplee a certain house and lot, and among other things covenanted that no building should be erected on vendors' adjoining lot nearer than three feet from the line which separated the two lots. Pursuant to the agreement of sale defendants subsequently conveyed the lot to complainant Helen F. Supplee, who is the wife of William C. Supplee; the conveyance being made to the wife at the request of her husband. In the deed of conveyance no covenant was inserted touching the engagement of defendants not to build within

three feet of the line between the property sold and the property retained. Subsequently defendant Therese Cohen erected a dwelling upon the lot retained by her in such manner that, while the foundations and main body of the buildings are three feet distant from the division line between the two lots, an overhanging bay window and the eaves of the house project to a point less than three feet from that line. The decree now sought is to compel defendants to remove the overhanging bay window and eaves, or to remove the building so that no part of the eaves and bay window will be nearer than three feet from the division line between the two lots.

James H. Hayes, Jr., and U. G. Styron, both of Atlantic City, for complainants. Bourgeois & Coulomb, of Atlantic City, for defendants.

LEAMING, V. C. [1] The covenant contained in the agreement of sale, which covenant complainants now seek to enforce, is as follows:

"And further, the parties of the first part do hereby agree to and with the party of the second part that they shall so provide that no building shall be erected upon the lot adjoining said premises on the west, nearer than three feet from the party line between said lots."

Defendants urge that the deed of conveyance which was made pursuant to the agreement of sale was necessarily operative to discharge all obligations arising under the agreement of sale. I am unable to adopt that view. That effect should only be given to such stipulations in the agreement of sale as could be appropriately discharged by the deed of conveyance. By the agreement of sale defendants agreed to "so provide" that no building should be erected on the adjoining lot in the manner stated. That engagement could not be fulfilled or its fulfillment appropriately secured by a clause to the same effect in the deed of conveyance to complainant. The engagement was, in effect, that defendants would not at any time build upon the adjoining lot contrary to the manner specified and would prevent their grantees from so doing. A covenant in the deed of conveyance to complainants would not have been operative to prevent a grantee of defendants' adjoining lot from building contrary to the covenant, for a grantee of that lot would not be charged by the record with notice of a covenant in complainants' deed. An appropriate method of perpetuating the covenant contained in the agreement of sale would be by a covenant in any deed of conveyance defendants should thereafter make of the adjoining lot owned by them.

[2] I am convinced that complainants were entitled to rely upon defendants' engagement to protect them against the erection of adjoining buildings without any new engagement for that purpose being made at the time

of the settlement, in the absence of any evidence to the effect that at the settlement either party understood that the covenant in question was waived.

By a cross-bill defendants seek to have the covenant in question reformed, alleging that the real agreement between the parties touching the location of any building thereafter to be built on defendants' lot was with reference to the main body of such building and did not include a restriction against an overhanging bay window or eaves. The evidence is clearly insufficient to justify a decree of reformation.

[3] It is also contended in behalf of defendants that, even though the covenant should not be reformed, the restriction touching the distance the "building" should be erected from the line must be understood to refer to the main body of the building and not to overhanging bay windows or eaves. I am unable to adopt that view. The covenant is that no building shall be erected nearer than three feet from the division line. The language used is entirely clear and exact and certain in its meaning, and in the absence of some circumstance sufficient to disclose that the parties used the language adopted by them in a restricted sense, the covenant must be understood in accordance with the natural import of the language used. When a person covenants that he will not erect a building within a specified distance from the line between his property and the adjoining property, he necessarily covenants that he will not erect any part of a building within the distance named; to read into such a covenant a reservation that it shall apply only to the main body of the building and shall not apply to projecting bay windows or eaves is clearly without justification unless circumstances exist to warrant the conclusion that such a reservation was intended by the parties. Covenants of this nature are uniformly recognized as designed to afford a given space for air, light, and view; an occupancy of the restricted space in the manner already stated is necessarily a violation of the terms and spirit of the covenant. As hereinbefore stated, the natural import of the language "that no building shall be erected * * * nearer than three feet from the party line" is that no part of a building shall be so erected. That view has heretofore received the sanction of this court and of the Court of Errors and Appeals in *Hemsley v. Marlborough Hotel Co.*, 65 N. J. Eq. 167, 55 Atl. 994; a c., 68 N. J. Eq. 596, 601, 61 Atl. 455; *Wahl v. Stoy*, 72 N. J. Eq. 607, 66 Atl. 176. In these cases bay windows which overhung a restrictive building line were regarded as violations of a covenant that no building should be erected nearer than a specified distance from a given line.

[4] It is also urged in behalf of defendants that circumstances exist which disclose that the parties to the covenant here in question used the term "building" with the

mutual understanding that bay windows and eaves projecting over the restricted space were not to be regarded as in violation of the covenant. As already stated, the evidence failed to disclose any mistake of the parties in the execution of the agreement. But it is urged that certain other similar covenants in Atlantic City have been heretofore treated as not applying to bay windows and eaves which overhang restricted spaces, and the claim is made that it must now be held that the present parties adopted the language of the covenant here in question with a like purpose in mind. In support of this contention it is shown that a certain tract of land known as the "Chelsea tract" has been subjected to a covenant requiring all buildings to be located not less than five feet from the side lines of lots, and on that tract there existed at the date of the covenant here in question 195 buildings. Of these 98 had bay windows projecting over the restricted spaces, and 186 had eaves so projecting. There is no evidence in this case that establishes the fact that either of the parties to the present covenant knew that the Chelsea covenant had received a popular construction of the nature referred to, or even knew that any buildings on that tract were so located that bay windows or eaves overhung the restricted spaces. The part of the Chelsea tract nearest the premises here in question is three-quarters of a mile distant. I think it is entirely clear that the covenant here in question can be in no way affected by any possible popular construction which the Chelsea property holders may have given to a similar covenant. It would seem that the most that can be said touching the Chelsea covenant is that the property holders in that district have not seen fit to enforce it.

[5] It is also contended in behalf of defendants that complainants are not materially injured by the encroachment complained of. The projecting bay window extends but 17 inches and the eaves but 16 inches over the restricted space. The distance from the nearest part of defendants' building to complainants' building is 13 feet 8 inches. Under these circumstances it is obvious that no considerable damage is being suffered by complainants by reason of the encroachments. But in cases of this class it is unnecessary for complainants to prove that damage is sustained by them. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 208, 216; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 615, 61 Atl. 369. The rights which accrue to complainants under a covenant of this nature are property rights in the restricted space. It may be that at this time the space between the two buildings is adequate to afford such light, air, and view that complainants suffer no present inconvenience; but complainants may desire at some future time to utilize that part of their lot, now

vacant, between their present building and the line which separates the two lots. In such case the present encroachment of defendants' building over the restricted space would clearly be operative to materially lessen the enjoyment by complainants of the light, air, and view which they would enjoy with defendants' building located pursuant to the covenant. The continued occupancy by defendants of the restricted space will, in time, ripen into an adverse right. Without the relief afforded by the remedial process of this court complainants could only prevent defendants' use of the restricted space ripening into a right by successive suits at law for damages essentially nominal in amount. It is for these reasons that a court of equity is obliged to afford relief in a case of this nature even though no considerable damage is presently suffered by complainants.

[6] Nor can it be here appropriately contended by defendants that the damages which will be suffered by them in vacating the part of the restricted space which they now occupy will be disproportionate to the benefits accruing to complainants. Notice forbidding the encroachment was served on defendants by complainants before the building was erected, and the present bill was promptly filed. Defendants have completed their building well knowing of complainants' claim and in the face of the present bill. A preliminary writ of injunction was refused because of a cross-bill filed by defendants to reform the covenant. Under these circumstances, defendants cannot now reasonably complain of the loss they may sustain in being compelled to comply with their covenant.

At the time the bill was filed another structure had been erected by defendants upon the restricted space in the nature of a "spite" fence some 10 feet in height. Defendants now concede that that structure was in violation of the covenant and have removed it. The writ to be issued need not, therefore, have reference to that structure.

I will advise a decree for a mandatory writ of injunction requiring defendants to remove so much of the bay window and eaves of their house as are less than three feet from the division line which separates the lots of complainants and defendants.

BAERENKLAU et al. v. PEERLESS REALTY CO. et al.

(Court of Chancery of New Jersey. Feb. 21, 1912.)

1. DAMAGES (§ 74*)—LIQUIDATED DAMAGES.

A penalty, stipulated in a contract for a breach thereof, is oftentimes construed as a liquidation of damages agreed by the parties to be paid in the event of a breach, in lieu of the ascertainment and award of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 176; Dec. Dig. § 74.*]

2. DAMAGES (§ 74*)—BREACH OF CONTRACT—LIQUIDATED DAMAGES.

Where it is difficult to ascertain the damages for a breach of contract, the parties thereto may stipulate for the payment of a specified sum as liquidated damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 176; Dec. Dig. § 74.*]

3. VENDOR AND PURCHASER (§ 330*)—BREACH OF CONTRACT BY PURCHASER—MEASURE OF DAMAGES.

The measure of damages for a purchaser's breach of contract by refusal to take the land is the difference between the contract price and the value of the land, and in case the land has increased in value there may be really no damages, and only in case of a decline in value may there be any substantial recovery.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 953-956; Dec. Dig. § 330.*]

4. SPECIFIC PERFORMANCE (§ 101*)—PERFORMANCE BY PLAINTIFF—NONPERFORMANCE—WAIVER.

A contract for the sale and purchase of real estate stipulated for the payment of the price in installments, and declared that on default in payment of any installments for 60 days all installments previously paid should, at the option of the vendor, become forfeited. The purchaser paid installments irregularly, in some instances in advance and in some instances after a default for 60 days. The vendor accepted the past-due installments without objection. *Held*, that the vendor waived its right to claim a forfeiture, and the purchaser on paying the balance of the price, with interest, could compel specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 290, 295, 311-317; Dec. Dig. § 101.*]

Suit by Albert Baerenklau and another against the Peerless Realty Company and another for the specific performance of a written contract to convey real estate. Heard on bill, answer, replication, and proofs taken in open court. Decree for complainants.

Francis V. Dobbins, of Jersey City, for complainants. Jacob L. Newman, of Newark, for defendants.

STEVENSON, V. C. (orally). I shall first dispose of the case of Albert Baerenklau and August Faust against the Peerless Realty Company, which was tried and argued day before yesterday.

The suit is brought by these complainants to compel the specific performance of a contract to convey real estate in the town of Woodbridge, Middlesex county, in this state. The owner of the property who entered into the contract with the complainants, which contract is now before me, at that time was the Rahway Park Realty Company. The contract was made between the Rahway Park Realty Company, of the first part, and these complainants Baerenklau and Faust, of the second part. It bears date February 16, 1900, and provides for the sale of 30 lots in a large tract which the company had laid out, to the complainants for the price of \$1,200, which was to be paid as follows: One

hundred dollars at or before the signing of the agreement and at least \$40 on or before the 16th day of every month thereafter, beginning April 16, 1900. After a number of installments had been paid, including the first installment of \$100, all the interest of the Rahway Park Realty Company was transferred to the Peerless Realty Company, the present defendant; no new equity having been in any way introduced into the case by this assignment. The Peerless Company took the place of the Rahway Park Realty Company and assumed its obligations.

The complainants paid their \$100, and then, from month to month, made, I think, 22 payments. Was it, Mr. Dobbins? "Mr. Dobbins: I think it was"—making, in all, \$980, and then they tendered a payment of \$40 to the company, and the company declined to accept it. A little later, I think a month or two later, the complainants tendered the entire balance of the purchase price, with interest, amounting to \$260, or \$270, to the company and demanded their deed, and this tender was refused. The complainants now file this bill to compel the specific performance of this contract to get their deed, upon their paying the remainder of the purchase price.

The only defense set up in the answer, apart from mere formal denials which were not sustained by the evidence, is based upon the following covenant in this contract of February 16, 1900: "The party of the second part agrees that should any default be made in the payment of any installments as herein provided, and such default continues for sixty days, all installments previously paid shall, at the option of the party of the first part, without any notice or demand, be and become forfeited irrevocably and beyond demand and be retained by the party of the first part as liquidated damages, and thereupon this agreement shall determine and be of no further effect. The party of the first part, however, in the event of default as aforesaid, has the right to enforce specific performance of this agreement."

Although it is not perhaps a very important feature of the case, it is worth while to point out at the start the hardship of this contract—the one-sidedness of it. The realty company at all times, in case of a default for 60 days in the payment of any one of these installments, has the option, if we take this contract just as it reads, either to compel the purchasers, these complainants, to pay the rest of the price and take their deed—which, no doubt, they would do if the land declined in value, or if the price was a large price compared with the value of the land and the default had been made at an early stage of this business when only perhaps one installment had been paid—or to keep all that had been paid and declare

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the contract ended and all rights of the purchasers extinguished, which, of course, they would have a powerful, selfish motive to do in this case, as \$980 of the \$1200 had been paid.

The defendants stand before this court with \$980 of the complainants' money in its treasury, the land not having declined in value, and they say: "We will keep the land. We won't accept your \$270, the remainder of the principal and interest. We will keep your money and we will keep your land." It is a case of very, very great hardship. It would, perhaps, be singular if nowhere in law or equity any escape could be found for these unfortunate complainants.

I want, at the beginning, to advert to the legal character of this contract and its legal construction, a matter which was suggested to counsel during the argument, but which they did not consider. I should not at present discuss the matter at all if the decision of this case turned upon it—turned upon the legal construction of this contract or the extent of its enforceability in the courts of law. It would be my duty, I think, to order a reargument. But the decision in this court is controlled by another point, and inasmuch as the case may go to the appellate court for final determination, it may be worth while, and I think it is proper, to suggest to counsel some of the strictly legal questions which appear upon the face of this covenant for a forfeiture.

[1] Of course, it is now familiar law that, in both courts of law and equity, a "penalty," so called, in a contract is oftentimes construed as a liquidation of damages—as an alternative amount which the parties agree shall be paid in lieu of the ascertainment and award of damages—and, on the other hand, courts are very courageous in construing an agreement which expressly provides for liquidated damages as an agreement providing for a penalty only.

A great deal of the law on this subject, illustrating how the phrase "liquidated damages" has been construed as equivalent to "penalty," has arisen in cases where an agreement has contained a great many different covenants relating to different things the breach of which involved different amounts of damage, and then there is, in conclusion, a sweeping provision that, if there is any default in any of the covenants in the agreement contained, the party of the one part shall pay to the party of the other part a certain specified sum of money, which shall be deemed liquidated damages and not a penalty. The courts have refused in very many cases to enforce that sort of a contract. They have treated the sum specified as a penalty.

The leading case in this state is *Whitfield v. Levy*, 35 N. J. Law, 149, a decision of the Court of Errors and Appeals, in which Mr. Justice Depue, with his characteristic indus-

try and learning, examines a long series of authorities. In that case Mr. Justice Depue points out that oftentimes the courts will find, in a contract which provides for the payment of a sum as liquidated damages, an *intent* otherwise in the minds of the contracting parties; an *intent* to secure performance; an intent, perhaps, generally to provide for compensation for a breach, and that there really is not an intention, as the parties seem to say, that a large sum of money shall be paid, in the event of the breach of a condition of one covenant among a number where the damages, in fact, must be very small.

Well, perhaps, that is as far as we have gone in New Jersey in dealing with this subject; but there is a line of cases, I think, in England, and I think in many of the states in this country, which are more courageous and take a different view. These cases are cited, to some extent, in the article on liquidated damages in the nineteenth volume of the American and English Encyclopedia of Law, pages 410 and 411. I will read the section, one of the sections, on that page. It is entitled, "Where Sum Named Disproportionate to Actual Damages."

General Rule: The general rule, as stated, where the sum named in a contract to be paid on a breach is wholly disproportionate to the actual damages sustained, is that the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance, and not for a liquidation of the damages. But the view is believed to be not so much that such circumstance is indicative of the intent of the parties to stipulate for a penalty as that the courts refuse to depart from the rule of actual compensation, where this can be ascertained.

[2] I doubt if any contract could be found in a reported case which is exposed to more obvious criticism than the one here before this court at present. The damages never could be difficult of ascertainment under this contract. One of the main reasons for permitting parties to liquidate their damages, or to stipulate for the payment of a sum in lieu of having an award and ascertainment of damages—one of the main reasons is because of the difficulty of exactly measuring the damages. The courts say that the parties are competent to say what shall be the measure of compensation for a breach; it is difficult for a court and jury to ascertain it.

[3] There is no such difficulty here. The rule defining the measure of damages is well settled. At whatever stage there might be a violation of this contract, the measure of recovery is well ascertained, what the realty company could recover, in case of a violation of this contract on the part of these complainants to take the land and pay the price. They are entitled to the difference between the contract price and the value of the property. In the event of the property rising in value, there really is no

damage at all. Only in case of a decline in value is there any substantial recovery possible on the part of the realty company, the vendor under this contract.

And then, in this case, we have not a definite sum—\$500, \$1,000, \$50—which the parties deliberately select and say, "That shall be the measure of damages that shall be paid in lieu of having the actual damages ascertained." Nothing of the kind. The contract provides that the whole amount paid, which might be \$40, one installment, or might be \$1,160, the whole amount paid, in case of a default for more than 60 days shall be forfeited, and the forfeit is then to be taken as the amount which the parties agree upon as a liquidation of the damages.

A more grotesque transaction than that, from a legal standpoint, could hardly be imagined. The parties have not fixed upon any certain sum as the measure of, or substitute for, the defendants' damages. If the covenant is to be literally enforced, it is somewhat in the nature of a wagering contract, in view of the various and uncertain causes which might produce the fatal default and the widely different amounts of money ranging from \$100 to \$1,160, which the defendant might receive for its so-called "damages," according as the default might occur after a few or after many installments had been paid. We have here not a case of indefinite damages, difficult of exact ascertainment, "liquidated" at a definite sum agreed upon by the parties, but very definite damages, easily ascertained, liquidated at an amount which the parties do not fix and could not have contemplated—the amount of a widely varying forfeit, which might be \$100 or might be \$1,160, or any intermediate sum.

It may be that the courts of law of this state would feel obliged to enforce this covenant according to what seems to me to be its perfectly plain meaning, unless by some subtle process of artificial reasoning a fictitious "intention" otherwise could be extracted from the verbiage of the covenant and be equitably imputed to the parties.

But whether the courts of law of New Jersey, or the Court of Chancery of New Jersey, would hold that this covenant is legally enforceable so as to permit the defendant, first, to declare a forfeiture, and then appropriate the entire amount forfeited as a liquidation of his damages—whether any court would so decide I do not say. I merely indicate to counsel interested that there are strong grounds for holding that the whole legal fabric of the defendants' defense might be swept away.

[4] But, in the absence of argument and in the absence of mature consideration of this matter, I deem it my duty not to pass upon this question of penalty or liquidated damages, which I certainly would have to do if, in my judgment, the case did not turn upon another point.

Whatever the legal effect of this covenant may be, whatever its legal construction, whatever the extent of its legal enforceability, when it comes to equity the case is very different. The question is whether this forfeiture and agreement for the liquidation of the damages by the appropriation of the forfeited money can be made a bar to the relief of the complainants in equity. The relief of specific performance which they pray for? The leading case in this state bearing on this branch of the case is *Grigg v. Landis*, 21 N. J. Eq. 494, a case in the Court of Errors and Appeals, decided in 1870, in which the opinion was written by Mr. Justice Scudder. I read from 21 N. J. Eq., page 501: "Penalties, forfeitures, and re-entries for conditions broken are not favored in equity, and constitute a large branch of equitable relief. Usually, they are held to be securities for the payment of money and the performance of conditions, and where compensation can be made for nonpayment and nonperformance equity will relieve against the rigid enforcement of the contract. This is upon the general principle that a court of equity is a court of conscience, and will permit nothing to be done within its jurisdiction which is unconscionable."

Prof. Pomeroy, in his work on Specific Performance, in sections 334 and 335, in dealing with the distinction between conditions precedent and conditions subsequent in contracts, points out: "That equity can and does grant relief in case of the breach of such a condition, provided that adequate compensation can be made." And he proceeds as follows: "No relief, however, will be granted in case of a subsequent condition if the breach of it was intentional, willful, nor where it will not admit of compensation. When, however, the only default of the plaintiff is delay, and the position of the defendant has not been materially changed thereby, a performance after the stipulated time may entitle the plaintiff to a decree for a specific execution, since mere lapse of time is not, in general, a sufficient ground in equity for the refusal of relief. A forfeiture caused by the nonpayment of money, however express may be the language of the contract, will, as a general rule, be relieved from, on the theory that interest is a sufficient compensation."

It would seem that the complainants' case is clearly within these principles, and yet I do not find that it is necessary for me to stand the case on those principles because of another important feature of the case which, to my mind, makes the true determination of this controversy absolutely clear.

The complainants paid their money irregularly. In some instances, perhaps more than two, they paid two installments within one month. I think in one or two instances they paid in advance. Am I right about that, Mr. Dobbins?

"Mr. Dobbins: In six instances."

The Court: A larger number than I supposed. They paid their installments in advance, and then they fell behind and were in arrears for perhaps two weeks, three weeks, four weeks, and finally, in December, 1910, after they had paid about \$740—more than half the consideration, the price—they made a monthly payment of \$40 three or four days after they had been in default for 60 days. They went to the office of the company and tendered their money, and the money was received without objection. Nor does it appear that the company in any way pointed out to the complainants that they were in arrears or warned them that a repetition of the offense would bring about a forfeiture. They accepted the money. And then, in January—on January 24, 1911—the complainants, being, I think, nine or ten days in arrear, made another payment, and that was accepted. In February they made another payment, which was, I think, three weeks, twenty days, in arrear; and then in March they made another payment, and a still longer period had elapsed during which they were in arrear, and all these four payments in succession were received by the land company without protest and without warning after the complainants had been in default for more than 60 days.

Now, I think it is very clear that this conduct on the part of the realty company amounted to a waiver of their right to claim a forfeiture without notice, without warning, so that the complainants could again be put upon their guard. They established an order of business between themselves and the complainants which is inconsistent with the terms of this covenant. They lured the complainants along to make these payments, to pay \$160, and kept still and said nothing about any forfeiture at all, and after the \$160 had been added to the \$700 or \$800 previously paid, so that the aggregate amount of money which the complainants had paid had reached \$980, then they shut down and said: "You are too late; we now elect to declare a forfeiture and appropriate this money as the measure of damages agreed upon in the contract."

Equity will not allow transactions like that.

If courts of equity could tolerate a performance of that character, they might as well close. The idea still prevails that in courts of equity the human conscience has some function; that the rigidity and the hardship of the law are mitigated.

I think it is very plain that this is the sort of a case in which the defendants have sought to set up an unconscionable defense, and that their defense rests essentially upon their own conduct—is the product of their own conduct. They have by their conduct largely created the conditions out of which this defense arises and upon which the defense is based.

My conclusion is that the complainants are entitled to a decree for specific performance in the usual form in a case like this, providing for the payment of the balance of the price, with interest, by the complainants, and the delivery of the deed by the defendants. Whether it is necessary to have the decree carried out under the direction of a master may be determined on the settlement of the decree.

O'GORMAN et al. v. CROWLY et al.

(Court of Chancery of New Jersey. April 25, 1912.)

1. WILLS (§ 686*)—TESTAMENTARY TRUSTS—DISCRETION OF TRUSTEES.

The second paragraph of a will gave to testator's executors \$25,000, in trust to pay the income to testator's son during his natural life, but further provided that said executors could terminate "said trust and to pay to my said son the said sum of \$25,000 whenever in the opinion of my executors his mental and physical condition is such that he is competent to attend to affairs," but that if the son die during the continuance of the trust, and before the payment of such sum to him, that it be paid to his issue; and the fourth clause gave the residue to testator's niece, and, in case she be not living at testator's death, then to her issue, and if there be no issue then living to testator's son. *Held*, that the authority to pay the \$25,000 to testator's son was a mere naked power resting in the executors' discretion, and not a power coupled with a trust, so that the executors could not be compelled to pay it to the son, upon a showing that the son was competent to attend to his affairs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631-1637; Dec. Dig. § 686.*]

2. WILLS (§ 672*)—TESTAMENTARY TRUSTS—IMPERATIVE DIRECTIONS.

A mere discretion in the trustees is a mere power; but an imperative discretion implies a trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579-1581; Dec. Dig. § 672.*]

3. TRUSTS (§ 140*)—DISPOSITION OF ESTATE BY WILL.

If one had no control during his lifetime over the corpus of a trust fund held in trust for him, he could not dispose of it by will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 183-187; Dec. Dig. § 140.*]

Suit by Richard O'Gorman and others, executors, against Mary Crowley and others. Judgment for defendants.

John Bigelow, of Newark, for complainants. Thomas A. Davis, of Orange, for defendant Mary Crowley. Edward O. Stanley, Jr., of Newark, and John P. Hill, of Baltimore, Md., for Stella Lawson and others.

HOWELL, V. C. On July 28, 1901, David Ledwith died, leaving a son, James H. Ledwith, and leaving a will, which was admitted to probate by the surrogate of Essex county. It contains the following provisions, which are brought in question in this suit: "Second. I give and bequeath to my executors hereinafter named the sum of twenty-five thousand dollars in trust to keep the

same safely invested and to pay the income therefrom to my son, James Herbert Ledwith during the term of his natural life, but I authorize and empower my said executors to terminate said trust and to pay to my said son the said sum of twenty-five thousand dollars whenever in the opinion of my executors his mental and physical condition is such that he is competent to attend to affairs. If, however, my said son shall die during the continuance of said trust and prior to the payment to him of said twenty-five thousand dollars, I direct that said sum of twenty-five thousand dollars shall be paid to his issue then living, and if there be no issue of my said son, then living, said sum of twenty-five thousand dollars shall fall back into and become part and parcel of my residuary estate and shall be disposed of as directed in the fourth clause of this my will."

"Fourth. All the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situate, I give, devise and bequeath unto my niece Mary Crowley, daughter of my sister Mary, and now residing in Jefferson street, Orange, New Jersey. In case my said niece be not living at the time of my death, then I give, devise and bequeath my said residuary estate to her issue, and if no issue of hers be then living, I give, devise and bequeath the same to my son James Herbert Ledwith, or if he be then dead, to his issue then living, and if no issue of his be then living I direct that my said residuary estate shall be distributed according to the laws of the state of New Jersey in case of intestacy."

By the will, he named Richard O'Gorman and John T. Brennan as executors thereof, and they now file their bill for the purpose of obtaining directions as to the distribution of the estate.

James H. Ledwith died, without issue, on August 16, 1910. He was then a resident of New York. He left a will, which was admitted to probate in that state, by which he devised all his estate to his executors, in trust to pay to a Mrs. Riker the sum of \$1,200 per annum as long as she might live, in equal quarterly payments, out of the income derived therefrom, and to pay the balance to the defendants Mary Lawson, Stella Lawson, Rosa Lawson, and Noble Lawson, who were his cousins, or to such of them as might be living, in equal shares, at the death of Mrs. Riker. The residuary legatee under David Ledwith's will and the residuary legatee under James H. Ledwith's will are made defendants. All have answered, except Noble Lawson; Mary Crowley claiming the fund as the residue of David Ledwith's estate, upon the ground that there was a direct devise of the sum to her by his will, in case the complainants should not have paid the principal of the trust fund to James H. Ledwith in his lifetime, and the Lawsons claiming as

residuary legatees of James H. Ledwith, upon the ground that it was the duty of the executors, under the circumstances, to have paid the principal sum of the trust fund to James H. Ledwith in his lifetime, and under the circumstances James H. Ledwith had the equitable title thereto, which passed to them under his will at the time of his death.

[1] This question involves a construction of the second paragraph of David Ledwith's will and a determination of the inquiry whether it ever became the duty of the executors to transfer to the life tenant the principal of the trust fund; and this involves the further inquiry whether the authority given to the executors was a mere naked power resting in their uncontrolled discretion, or whether it was a power coupled with a trust, which made it their imperative duty to have distributed the fund to James H. Ledwith, upon the ascertainment of the fact of his competency "to attend to affairs." It must be conceded that if the direction given in that behalf to the executors rested wholly in their discretion this court can have no jurisdiction to compel its exercise. If, on the other hand, the provision is a power joined to a trust, so that an imperative direction can be found in the will, then, under certain circumstances, this court might compel the exercise of the power, or exercise it itself in favor of the *cestui que trust*. If this be found to be the case, then the further question arises whether it must have been compelled in his lifetime, or whether his residuary legatees, the Lawsons, after his death, can be permitted to bring a suit for that purpose.

[2] It may be said generally that a mere discretion is a mere power; but that an imperative discretion implies a trust. The general rules on the subject are found in 1 Perry on Trusts (6th Ed.) § 248, under the title "Trusts That Arise by Construction from Powers." They have likewise received considerable illustration in this state. In *Read v. Patterson*, 44 N. J. Eq. 211, 14 Atl. 490, 6 Am. St. Rep. 877, Mr. Justice Depue, speaking for the Court of Errors and Appeals, stated the rule as follows: "Where the power given to trustees is wholly discretionary to do, or not to do, a particular thing in their discretion, the court has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bona fide*, and their determination is not influenced by improper motives. Where the power is coupled with a trust or duty, the court will enforce a proper and timely exercise of the power; but, if it be given upon a trust to be executed in the discretion or upon the judgment of the trustee, the court will not interfere with the trustee's discretion in executing the trust, unless he has exercised his discretion *mala fide*." In that case, there was a clear expression of the intention of

the testator of an imperative direction to pay out a portion of the trust funds for particular purposes, in his discretion; that is to say, he was required to make the payment, but the amount and the manner and the times and the other circumstances attending it were discretionary with him. And, concerning this branch of the case, Mr. Justice Depue says further: "A court of equity will examine into the conduct of a trustee in the execution of his discretionary powers, and will assume control over the trustee's conduct, and, if need be, will take upon itself the execution of the trust; but the court will exercise this prerogative with great caution, and will not displace the trustee from exercising his functions, unless, upon a consideration of the reasons and grounds upon which he has acted, it appears that he has abused his trust, and that his acts in the premises have not been within the limits of a sound and honest execution of the trust." I understand this case to decide that this court will never interfere with the discretion of a trustee, where it is a matter of pure discretion on his part whether he will or will not do a certain thing; but, where the doing of this specified thing appears to be imperative, but the methods or details are discretionary with him, then and in such case the court will exercise a control over his discretion, but that only in a case where he has acted *malà fide*, or has abused his trust. In some cases, the court will go so far as to execute the trust itself on equitable principles.

In *Larkin v. Wikoff*, 75 N. J. Eq. 462, 72 Atl. 98, 79 Atl. 365, affirmed 77 N. J. Eq. 589, 78 Atl. 1134, the opinion written by Vice Chancellor, now Chancellor, Walker, illustrates the doctrine quite fully. There the controversy arose out of a deed of trust, by which the donor conveyed real estate and gave personal property upon a trust to maintain a house of worship. It contained this provision: "Whenever from any cause it shall seem to the said trustees clearly expedient to discontinue the plan of holding the said property for said use as aforesaid, they, the said trustees, being the judges and fully authorized to decide such discontinuance upon all or any case whatever, then in such case of non-user, abandonment or discontinuance the said trustees shall hold the said land and all buildings thereon as the property of the said trustees for the use of the First Presbyterian Church," etc. They decided to discontinue the use of the property for religious purposes, and to sell the same; and the question was whether this action was within their uncontrolled discretion or not. The Vice Chancellor collects all the cases, and holds that, where a power is given to trustees to do, or not to do, a particular thing at their discretion, the court has no jurisdiction to lay a command or a prohibition upon them as to the exercise of that

power, provided their conduct be *bona fide*, and their determination is not influenced by improper motives. One of the cases referred to is *Talbott v. Marshfield*, 2 Dr. & Sm. 285, decided by Vice Chancellor Kindersley, in which it appeared that it was the intention of the testator that, if a certain exigency arose, the trustees should, if they saw fit in the exercise of their discretion, notwithstanding the gift in remainder, hand over the corpus of the fund to the persons entitled for life. He held that the court would not interfere with the honest exercise of such discretion, and that the mere exercise of such a power would afford no reason why the money should not be paid into court, and that, inasmuch as the power might never be exercised, the bringing of the money into court would not in the slightest degree prevent its being exercised.

On behalf of the residuary legatees under James H. Ledwith's will (the Lawsons), three cases were cited which I am constrained to hold have little or no application to the question in hand. They are *Weiland v. Townsend*, 33 N. J. Eq. 898, *Pedrick v. Pedrick*, 48 N. J. Eq. 813, 21 Atl. 946, and *Dillingham v. Martin*, 61 N. J. Eq. 276, 49 Atl. 143, all cases in this court. In *Weiland v. Townsend*, there was an imperative duty cast upon the trustees to provide for the support of members of the testator's immediate family; but the amount was necessarily left to the discretion of the executor. It was there held, in accordance with the rule which I have attempted to state, that, in case of the failure of the trustee to act, the court would execute the trust through a successor, to be appointed by substituting equitable rules in place of the arbitrary power. In *Pedrick v. Pedrick*, there was a direction for the payment to the complainant (a son) by the executor of one-third of the residue of the estate at such times and in such sums as the executor should deem most for the legatee's good, and giving further directions about the manner in which the executor should act, in case the son did not make proper use of his money. Here was likewise an imperative trust; the manner of its execution alone being discretionary with the trustee. It was held that this was a sort of trust which the court would take jurisdiction over. In *Dillingham v. Martin*, the real question decided was whether a substituted trustee had the right to perform all the acts which the will of the testator authorized the original trustees to perform. There the succeeding trustee was appointed by the orphans' court; and it was held that, under the peculiar terms of the will and of the orphans' court act (P. L. 1898, p. 715), the succeeding trustee did not have the right and could not in his own discretion and on his own judgment make the advances which the original trustee had the authority to make, at his discretion, in accordance with the

terms of the will; yet the Chancellor says that it does not follow that the court would not superintend the execution of the trust under equitable rules, and require the substituted trustee to distribute the fund in accordance therewith, upon a proper presentation of facts for that purpose. It is quite clear, upon reading the provisions of the will in that case, that there was an imperative duty cast upon the original trustee; and that the trust belonged to that class which the court will superintend.

In view of the rules laid down in *Read v. Patterson*, let us examine the provision of the will to ascertain what the duty of the executors was. They were (1) to set apart \$25,000 and keep the same safely invested, and (2) to pay the income therefrom to James H. Ledwith during the term of his natural life. These requirements were scrupulously complied with by them. Having created this situation, he next authorized his executors to terminate it and pay the corpus of the estate to the life tenant "whenever in the opinion of my executors his mental and physical condition is such that he is competent to attend to affairs." I find in this no imperative direction to pay the principal sum to the life tenant. There is no construction of these words which could lead to that conclusion. The executors held a fund which they were authorized to pay in a certain way; but where are the words which indicate that it was the intention of the testator that they should be bound to make the payment? The testator had created a situation which the executors might change in their discretion; but where do we find in this will any expressions which require them to do so? There is nothing to indicate that the testator had any such positive and absolute direction in his mind; nor is there anything in the situation as developed by the evidence which could lead to any such conclusion. The fact that the life tenant never made any demand upon the executors for payment of the money to him indicates his satisfaction with the conditions; and it may be said, perhaps, that his acquiescence might be all the warrant that the executors would need for their nonaction.

I must therefore hold that the discretion given by this will to the executors was a mere power, to be exercised at their own will, over which neither the life tenant nor this court could have exercised any authority; that there is no imperative trust, for the breach of which an appeal could be had to this court; and that this court has no jurisdiction whatever in that matter.

[3] Having decided in favor of the residuary legatee under the David Ledwith will, I do not feel it necessary to decide the question whether the Lawsons are in a position to lay claim to the fund or not. In their answer, they claim that the trust under the

David Ledwith will was terminated during the life of James H. Ledwith; and that before his death he became entitled to receive from the complainants, as his absolute property, the principal of the trust fund. The argument to support this view is that there came a time in the life of James H. Ledwith when, as a matter of fact, and without reference to the thought of the executors on the subject, his mental and physical condition was such that he was competent "to attend to affairs," whatever that may mean. It will be readily observed from the views which have been already expressed that this provision of David Ledwith's will was not automatic or self-executing. The trust could not determine itself; neither could James H. Ledwith put an end to it by his will, nor by any other act. It required the authority and power of the executors, who might act or not, as they saw fit. If James H. Ledwith was not invested with title to or control over this property in his lifetime, and he certainly had no such power or control. I do not see how he could dispose of it by will, or authorize any one to intermeddle.

My conclusion is that the executors must transfer the funds in their hands to the defendant Mary Crowley.

LYNCH v. PUBLIC SERVICE CORPORATION.

(Court of Errors and Appeals of New Jersey.
May 9, 1912.)

1. STREET RAILROADS (§ 100*) — INJURIES—CONTRIBUTORY FAULT — USE OF PUBLIC HIGHWAYS.

Coasting on a public street is not such an illegal act, constituting a public nuisance, as will bar a child so coasting from recovering for injuries received in a collision with a street car.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 217, 218; Dec. Dig. § 100.*]

2. STREET RAILROADS (§ 102*)—COLLISIONS—NEGLIGENCE.

Where one engaged in coasting on a public street was injured in a collision with a street car in consequence of the negligence of the motorman, and not in consequence of any contributory negligence, he could recover from the street railroad company for the injuries received, though coasting is a public nuisance.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 186, 194, 200, 203; Dec. Dig. § 102.*]

3. STREET RAILROADS (§ 117*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a person, injured in a collision with a street car while coasting on a public street, was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

4. STREET RAILROADS (§ 117*)—COLLISIONS—NEGLIGENCE—QUESTION FOR JURY.

Whether a motorman in charge of a street car colliding with a person coasting on a public

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

street was guilty of negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Trenchard, Voorhees, and Vredenburg, JJ., dissenting.

Error to Supreme Court.

Action by Mildred Lynch, by next friend, against the Public Service Corporation. There was a judgment of the Supreme Court for defendant, and plaintiff brings error. Reversed, and new trial granted.

Benjamin M. Weinberg, of Newark, for plaintiff in error. Lefferts S. Hoffman, of Newark (Leonard J. Tynan and Howard MacSherry, both of Newark, on the brief), for defendant in error.

VROOM, J. The accident upon which this suit was based occurred at about 5:30 in the afternoon of January 7, 1910, in the city of Newark, at the corner of Montclair and Mt. Prospect avenues. The plaintiff, a child of 13 years, was riding down Montclair avenue on a bobsled with a number of other persons, and the injury she received was occasioned by the bobsled coming into collision with a trolley car of the defendant company.

It appeared from the evidence that Montclair avenue was a street used by children and others for coasting, and that on the afternoon in question many had taken advantage of the sport. Montclair avenue runs east and west, and is intersected by Mt. Prospect avenue, which runs north and south, and upon the latter the defendant runs and operates trolley cars; that the trolley company was aware of the use of Montclair avenue for coasting appears, and it caused all of its cars at that time which were going north to stop at the first or southerly crossing, and all the cars going south to stop at the first or northerly crossing. It appeared that a number of boys stood at the corner of Montclair and Mt. Prospect avenues from time to time and signaled to the sleds and also to the cars. The plaintiff had by invitation made two trips down on the bobsled in question, and the accident occurred on the third trip. The sled was equipped with a bell, which was kept ringing all the way down the hill. The sled was about 12 feet in length, and could be steered.

On the trip when the accident occurred, a young man stood at the corner of the avenues in question and signaled to the sleds to come down the hill. Soon after he did this, he saw a car coming along Mt. Prospect avenue from the south, and which was then about a block away. Fearing the car was not going to stop, he ran towards it the length of a lot about 85 feet, and signaled it to stop. The car, as it got to him, slowed up; he jumped from the track, when the

motorman put on a burst of speed and ran his car across Montclair avenue and collided with the bobsled. It also appeared that the person steering the sled saw the car slow up and then start again; whereupon he started to turn his sled up Mt. Prospect avenue, and would have made the turn, but the car put on the burst of speed, which caused the collision. The plaintiff received severe and permanent injuries as a result of the collision.

At the close of the plaintiff's case, the defendant moved for a nonsuit, which was granted by the court, and judgment entered thereon.

In granting the motion for a nonsuit, the trial judge said that "on a motion to nonsuit two questions arise in this case: First, is there evidence tending to show that there was want of due care in the operation of the car which was a cause of the accident. Secondly, does it appear that the plaintiff by her own fault contributed to the injury? In this question, the word 'fault' is used, not in a popular sense, but in a legal sense. There is evidence to go to the jury on the question whether the car was operated with due care. I pass at once to the other question, which is this: Does it appear from the plaintiff's own case that her own fault was a proximate, direct, and immediate contributing cause of the injury? The declaration alleges that the bobsled was lawfully crossing Mt. Prospect avenue. If this be true, the plaintiff was not at fault. Is it true? The decision of the motion to nonsuit turns on the answer to this question." He further went on to say that an act which seriously interferes with the legitimate use of a public highway and endangers the safety of the travelers upon it is a public nuisance, and that one who voluntarily and intelligently participates in such act is, in a legal sense, a wrongdoer; but he added that coasting on a public highway was not always and necessarily a public nuisance; that it depended on circumstances. He further held that to coast downhill on a bicycle, if under control, was not a nuisance, and it would not be a nuisance to coast downhill on runners, provided it is in the power of the person who guides the vehicle to check and stop it if occasion requires; but that it was improper to launch upon a highway a traveling body of great weight, which is incapable of control as to its speed, and capable of imperfect control as to its direction.

The contention on the part of the defendant was even broader than the ruling of the trial court. It was that the plaintiff interfered with its rights upon the public streets, and that, against the company, she was a trespasser, and the duty of the company was such as is due to any trespasser, to wit, merely to refrain from willfully injuring her.

We think the view taken of the case by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the trial court was erroneous. The granting of the nonsuit at the close of the plaintiff's case could be justified only upon the ground that the act of the plaintiff was a public nuisance, in fact, a nuisance per se, the existence or nonexistence of which is admittedly a question of law purely. If the act was not a public nuisance, then whether or not the particular thing, act, omission, or use of property complained of was in fact a nuisance was to be determined by the jury. 21 Am. & Eng. Ency. p. 621.

[1] We cannot concede that coasting upon a public street is an illegal act, so as to constitute it a public nuisance. Public highways are intended for pleasure uses as well as business uses; and it is difficult to see why a sled coasting downhill should be said to be a public nuisance any more than a sleigh drawn by horses going down the same highway.

The matter of the coasting or sled riding in a public street has been a subject of decision in several jurisdictions; and we agree with the contention of the plaintiff in error that the most logical opinion upon the subject is that of Justice Cooley, in the case of *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105, where he held that "coasting does not necessarily interfere with the customary use of the street, and might be indulged in with no serious inconvenience to any one, not only in many places in the country towns, but even within the limits of incorporated cities and villages. We are accustomed to make our public ways four rods in width, but it is not expected that the whole four rods will be occupied for travel; and it is possible to make use of parts of the public highway without encroaching at all upon the portions kept in repair and used for passage. * * * It could not be seriously contended that for the municipal authorities to permit coasting upon such a street would be to license a public nuisance. On the contrary, as the sport is healthful and exhilarating, it seems sufficiently proper, if the street is not put to other public use, that this diversion be allowed, if not expressly sanctioned. The sport itself is not entirely foreign to the purposes for which public ways are established; for the use of these ways for pleasure riding is perfectly legitimate, and coasting is only pleasure riding in a series of short trips repeated over the same road, not differing essentially from the riding in sleighs, of which so much is seen on the streets of northern cities, when suitable weather and proper conditions invite to their enjoyment." See, also, *Hutchinson v. Concord*, 41 Vt. 272, 98 Am. Dec. 584; *Faulkner v. City of Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *Jackson v. Castle*, 80 Me. 119, 13 Atl. 49.

[2] If it be true that the plaintiff was engaged in a sport which, when indulged in in

the public streets, amounted to a public nuisance, yet we think that if her injury resulted from the negligence of the motorman, and not from any negligence on her part, she was entitled to recover. *D., L. & W. R. R. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442.

[3,4] The question of the negligence of the motorman and the contributory negligence of the plaintiff was clearly for the jury. There was evidence which shows that the motormen of the defendant's cars were aware that the hill on Montclair avenue was being used by children and others for coasting, and that a young man was usually at the intersection of Montclair and Mt. Prospect avenues to warn trolley cars of the approach of coasters, and that the motorman of this particular car had received warning of the approach of this bobsled. Whether the plaintiff can be held negligent in doing what she did with these precautions having first been taken is for the jury; and whether the motorman, who apparently understood the signal by first slowing down his car, and then disregarded it by putting on a "burst of speed," was himself negligent manifestly was a question for the jury.

The judgment of nonsuit must be reversed, and a new trial granted.

TRENCHARD, VOORHEES, and VRE-
DENBURGH, JJ., dissent.

VREELAND v. ERIE R. CO. et al.

(Court of Chancery of New Jersey. March 20, 1912.)

EMINENT DOMAIN (§ 17*)—PROPERTY RIGHTS—INVASION.

Where the cutting of fire lines under authority of Laws 1909, p. 102, providing that fire lines may be cut on property adjoining railroad right of ways, is over the objection of a property owner affected, and the public necessity for cutting the lines is the direct result of the establishment and operation, under public authority, of the railroad and for the protection of the public against the danger consequent upon such operation, the consequent destruction of trees and other herbage, without compensation to the owner, is an invasion of his constitutional rights of private property, regardless of the value of the property destroyed.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 90; Dec. Dig. § 17.*]

Bill by James R. Vreeland against the Erie Railroad Company and another to enjoin cutting of fire lines. Conclusions for complainant.

William I. Lewis, of Paterson, for complainant. Edmund Wilson, Atty. Gen., and Nelson Gaskill, Asst. Atty. Gen., for defendant Forest Park Reservation Co.

TEN BYCK, Advisory Master. The complainant seeks to enjoin the defendants from carrying into effect their purpose to enter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upon complainant's woodlands and cut trees, brush, etc., for the purpose of constructing "fire lines," under the authority of the statute passed in 1909 (chapter 74), entitled "An act for the protection of woodlands." The purpose of this act is to protect woodlands from danger of fire from locomotives operated upon railroads adjoining such lands.

In the case of *Costigan v. Pennsylvania Railroad*, 54 N. J. Law, 233, 23 Atl. 810, the court holds that no private owner can have any remedy for special injuries arising incidentally from the operation of railroads, except such as are due to negligence; these include the sounding of whistles, the emission of smoke and sparks, noise, vibration, smells from freight, interference with highways, and all public injuries. The franchise granted, permitting such operation, legalizes acts which are the necessary concomitants of the use of the franchise, and which would otherwise constitute public nuisances. But such permission does not legalize acts which are a direct invasion of private property, under color of the franchise, nor confer the right to impose any servitude upon adjoining property, even though that be necessary for the construction and operation of the road. For the use or occupation of property, the railroad must purchase or condemn, and pay for the rights acquired. The appropriation of private property to such use, by any other means than purchase or condemnation, would be a violation of the constitutional prohibition. The rule is the same whether the appropriation be temporary or partial, or whether it be total or complete; the difference being only in degree. In that case, it was held that injury to adjoining property, caused by the additional lateral pressure of the high embankments built by the railroad, was actionable.

In the present case, the necessity for the cutting of the trees, etc., and construction of the fire lines arises solely from the fact of the proximity of the railroad and its operation. For the incidental danger from fire resulting from such operation, and thus legalized, the owner has no remedy, and no redress in case of actual damage from fire, except such as may result from negligence. But the Legislature could not authorize the railroad company, either for the purpose of construction or operation of its road, to take or injure any property or property rights of the adjoining owner, without compensation. This would be a direct invasion of private property.

If the company had authority to cut fire lines, such cutting would undoubtedly greatly reduce the possibility of fire, and would in all probability preserve the company from all liability to adjoining owners, arising from fire; and even the negligent permission of sparks to escape from a locomotive would, in such case, not result in starting any fires.

But such authority, if granted only for the purpose of preserving the railroad from possible liability, and if not required on account of any danger to the public, would have been clearly unconstitutional.

This question arises: The public having legalized the nuisance and the danger consequent on it, and having already subjected the adjoining owner to serious and constant danger, for which he is in no wise responsible, and for which he never received any compensation, can it go still further, and by the exercise of the police power protect itself from the consequences of such grant, taking for that purpose the private property of the owner, without any compensation to him, by authorizing the destruction of every tree and other growing thing on the 10-foot strip, and the cutting out, as the statute provides, on the whole strip of 100 to 200 feet in width?

Many of these trees may be of great value. The principle involved does not depend, however, upon the value of the property. *Costigan v. P. R. R. Co.*, supra.

In my judgment, it is clear that such taking cannot be justified under the police power. This is not a case where the danger to the public is caused by any inherent difficulty or trouble existing in or upon the land itself, such as justifies the drainage of wet lands, or the cutting of weeds, etc., growing on city lots, under the police power. Nor is it required as a consequence of the use to which the owner himself has put the premises, such as the necessity for the installment of running water and sewer connections in tenement houses (see *New York Health Dept. v. Rector*, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710), or the construction of fire escapes on factories and large buildings.

The case more nearly resembles, in principle, that of the drainage of a public highway through lands of a private owner. There the public good required that the highway should be drained, but the court held that no such easement could be created, without making compensation to the owner. *Ward v. Peck*, 49 N. J. Law, 42, 6 Atl. 805; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61; *Field v. West Orange*, 46 N. J. Eq. 183, 2 Atl. 236. Nor can the government take away, for public purposes, the rights of individuals to the advantages of streams of water, without compensation. *Ten Eyck v. Del. & R. Canal Co.*, 18 N. J. Law, 200, 37 Am. Dec 233.

That the state may, under the police power, and where the public good requires it, regulate the use of property, and that damages which are merely incidental to such regulation need not be compensated for, is not disputed. But such laws operate prospectively only, and do not authorize the destruction of existing property, unless the property itself

amounts to a nuisance, and is a source of imminent public danger. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Jackson v. Miller*, 69 N. J. Eq. 182, 60 Atl. 1019.

The police power operates prospectively. It cannot require existing frame buildings to be torn down nor lowered in height, nor refuse the right to make ordinary repairs. *Freund on Police Power*, § 538. But it does extend to improvements and alterations which may result in rendering part of the property useless, and destroy their value as property. This is not a taking, but is a necessary incident to regulation. As the minor part has value only as serving the purposes of the principal property, it must necessarily yield to the requirements of the latter. Thus requirements for sewer connection and for running water may render useless wells or cisterns, or they may even be required to be abated. *Freund*, § 542.

In *Hale v. Lawrence*, 21 N. J. Law, 714, 47 Am. Dec. 190, the Court of Appeals, reversing the Supreme Court (whose opinion is reported in *American Print Works v. Lawrence*, 21 N. J. Law, 248), held that the defendant, who was the mayor of New York City, could not justify the destruction of goods in a building, which was blown up to prevent the spread of fire, under a statute authorizing the destruction of the building, and providing for compensation therefor, as the statute did not authorize the destruction of the goods, nor provide for compensation for their destruction; that the destruction of the building, for which compensation was provided, and of the goods (if the construction of the New York courts, holding that the statute extended also to the goods, should be followed, which it was not) was an official act under the law of eminent domain; that if the statute did include the goods it was unconstitutional, not having provided for any compensation, although the destruction was for public benefit; that it was for the benefit of the public, and could not be justified under the law of necessity, as would have been the case if the act had been done by an individual, or a number of individuals, whose property or particular district was actually threatened; that the action of such individuals might have justified such destruction, under the law of necessity.

Afterward the defendant filed amended pleas, setting up the defense that, on account of imminent danger, it was necessary to blow up the buildings, without waiting to remove the goods. These pleas were sustained by the Supreme Court (23 N. J. Law, 9), and, on appeal, by the Court of Appeals (23 N. J. Law, 590, 57 Am. Dec. 420), under the common-law doctrine of necessity, to avoid imminent danger, and irrespective of any statutory authority. The court (*Carpenter, J.*) says (pages 604-606 of 32 N. J. Law [57 Am. Dec. 420]): "The necessity must be immedi-

ate, imperative, and in some cases extreme and overwhelming. Mere expediency or utility will not suffice. * * * That branch of the doctrine (self-preservation, or public preservation under urgent necessity) is to be distinguished from that mere appropriation for public utility under a general state of necessity, and which comes within the doctrine of eminent domain. They are both spoken of sometimes as grounded on necessity; and they doubtless are so. But the latter stands strongly distinguished from that urgent necessity, which, for immediate preservation, imperatively demands immediate action. His case, who should throw up trenches on his neighbor's land for the protection of a town from an immediate hostile attack, as regards his justification, would certainly stand on a very different footing from one who, under the authority of law, should do the same act in order to guard the town from prospective and merely possible future harm. * * *

It is not necessary for my purpose to intimate any opinion as to whether, in the last case, the individual would or would not be personally responsible; but certainly the sufferer would come within the constitutional provision." (The opinion here quotes, on the same line, of overruling and urgent necessity, from the case of *Mayor of New York v. Lord*, 17 Wend. 290, 297, and 2 Kent's Com. 338.) On page 613 of 32 N. J. Law (57 Am. Dec. 420), Judge Randolph states that the plaintiff might take issue on the plea of necessity; and if the jury found that it did not exist the plaintiff might recover. Thus it seems that only actual and immediate necessity, and not mere apprehension of danger, although reasonably entertained, could justify the action of the defendant in that case.

At page 615 of 32 N. J. Law (57 Am. Dec. 420), the opinion further distinguishes the law of necessity from that of eminent domain. Among the latter, the court places the taking of property for fortifications. This further illustrates the principles discussed by Judge Carpenter in his reference to the throwing up of trenches. In accordance with these principles, the defense of public safety by the construction of fortifications or trenches, required by urgent and immediate danger of invasion, or defense by means of the destruction of houses, trees, or other property, or the protection of the public by such destruction, or the taking of property in time of immediate and urgent danger by fire, may all be justified under the police power; but the construction of forts or trenches on private property, or the appropriation of such property for the same purposes of defense or protection, but not under stress of immediate necessity or imminent danger, falls, not within the limits of the police power, but under the law of eminent domain; and for such taking compensation must be made.

Freund says (section 521): "The taking or

destruction of property, being an extreme measure, is justified only within the narrowest limits of actual necessity, unless the state chooses to pay for it." And in section 534 (citing *American Print Works v. Lawrence*, 23 N. J. Law, 590, 57 Am. Dec. 420): "It is not an exercise of lawful governmental authority; but it *relieves from acts otherwise tortious*. * * * It may be doubted whether the Legislature has power to positively authorize and regulate such destruction without providing for compensation." And in section 535: "As a matter of fact, Legislatures do not assume such power. It is always accompanied by the statutory duty of compensation. The principles of the police power are much more truly expressed in this statutory regulation than in the so-called law of necessity."

The *American Print Works Cases* are extensively commented upon in *Valentine v. Englewood*, 76 N. J. Law, 509, at page 514, 71 Atl. 344, at page 348, 19 L. R. A. (N. S.) 262, 16 Ann. Cas. 731 (Court of Appeals, opinion by Swayze, J.); but that case did not involve the precise point here in question.

In *Re Opinion of the Justices*, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745, the Supreme Court of Maine gave an advisory opinion as to the constitutionality of an act regulating the cutting of trees by the owners of wild lands. I think this case is not in point. No part of the property was taken. It may be remarked that many of the cases cited by the court are those upholding the right to destroy property constituting a nuisance per se, and other cases clearly within the police power; but these cases do not seem to furnish any support in theory for the conclusions announced by the court in that case.

The apparent public necessity for cutting fire lines in the present case is the direct result of the establishment and operation, under public authority, of the railroad, and, aside from the question of benefit to the railroad company, is for the protection of the public against the danger consequent upon such operation. To subject the particular owner, who was so unfortunate as to be within the prescribed area, to the loss of a valuable part of his property would be to invade his constitutional rights. This would be so, even if a similar danger had arisen, not from the operation of the railroad, but solely from natural causes, provided it was not the result of any inherent danger to the public in the property itself. The obligation to make compensation is much stronger where the public itself, for the purpose of establishing a convenient and necessary, although highly dangerous, means of transportation on a public highway, has caused and permitted this dangerous situation to exist.

ROSENTHAL et al. v. BLATT.

(Court of Chancery of New Jersey. May 3, 1912.)

1. TRADE-MARKS AND TRADE-NAMES (§ 85*)—INJUNCTION.

Under equitable principles, the chancery court will not enjoin alleged unfair competition by the use of a trade-name similar to complainants' name "London Shop," so far as complainants seek to benefit from a suggestion by their name that their stores are connected with a London store, which is untrue.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 94; Dec. Dig. § 85.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—INJUNCTION—SUFFICIENCY OF EVIDENCE.

In a suit to restrain the use of the trade-name "Page of London," on the ground that its use amounts to unfair competition with complainants' business conducted under the name "London Shop," evidence held not to show that the use of its name tended to deceive the public, so as to be unfair competition.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 9*)—NAMES SUBJECT—NAMES OF CITIES.

There can be no exclusive right to the use of the word "London" as a trade-name.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 13; Dec. Dig. § 9.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNFAIR COMPETITION.

The test of whether the use of a trade-name amounts to unfair competition is whether the public is likely to be deceived thereby.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. § 79; Dec. Dig. § 68.*]

Suit by Louis Rosenthal and others against Max Blatt. Bill dismissed.

Joseph B. Perskie and Bolte & Sooy, all of Atlantic City, for complainants. Eugene Schwinghammer and C. L. Goldenberg, both of Atlantic City, for defendant.

LEAMING, V. C. Complainants are owners of a business conducted by them as partners in three certain stores fronting on the Boardwalk in Atlantic City; the business in each store being conducted under the trade-name of "London Shop." The business so conducted is that of retail stores for the sale of gentlemen's furnishing goods, hats, caps, and ladies' millinery. Since the establishment of complainants' business under the name stated, defendant has established a store, fronting on the Boardwalk, the business of which is being conducted under the trade-name of "Page of London." The business conducted by defendant is similar to that of complainants. Complainants now seek an injunction to prevent defendant from using the name "Page of London" in connection with defendant's business, alleging as a ground for relief that the name "London Shop" used by complainants has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

become favorably known to the public as complainants' trade-name, and that the use of the name "Page of London" by defendant is operative to deceive the public as to the identity of the several stores, and to lead patrons of complainants' business to make purchases from defendant's store, under the belief that that store is one of the stores operated by complainants.

On the application for a preliminary injunction, I summarized my view of the law controlling controversies of this class as follows:

"This court may appropriately protect a complainant against unfair competition when it is found that the defendant is conducting a business in such manner that there exists, upon the part of defendant, express or implied representations that the business conducted by defendant is that of complainant. The reputation and good will which a man acquires are property rights, which are entitled to protection against wrongful invasion; and the public is entitled to protection against fraud. A trade-name appropriately used to designate a particular business of certain individuals will, in consequence, be protected. See 28 American & English Encyclopedia of Law (2d Ed.) pp. 345 to 348. The present inquiry is therefore whether defendant has adopted a trade-name so nearly resembling the trade-name of complainants as to deceive the public and injure complainants. It is manifest that the extent of resemblance of the names used is not the sole criterion. A name quite similar may be so used as not to deceive or injure; a name quite dissimilar may be used in such manner as to deceive and injure."

Preliminary relief was refused, because it did not then appear with sufficient certainty that complainants' rights had been or would be materially invaded to justify this court in granting a preliminary injunction.

[1] It will be observed at once that the names "London Shop" and "Page of London" bear no resemblance as names, except such as arises by the use of the word "London" in each name. It should also be stated that the sign "Page of London," as used on the store of defendant, contains no details of form or arrangement in imitation of the signs used on the stores of complainants, and the word "London" is not made more conspicuous in any of the signs used by either party than the remaining words of the signs; nor is there any similarity of design in the small engraving used by defendant and complainants, respectively, on their stationery, and to mark their merchandise. Such infringement of complainants' rights as may exist is from the use of the word "London" in the manner already stated. Nor is there any evidence from which it can be properly determined that the trade-name adopted by defendant was

by him selected because of any possible resemblance it might bear to the trade-name used by complainants. The common desire of the parties to use the word "London" appears to arise from a belief that its use gives character to the business of a haberdasher, through the suggestion that the store is in some way connected with London, or is especially equipped with London goods. Neither the stores of complainants nor the store of defendant are in any sense London stores; and neither have substantial London connections. Their sole proprietors are residents of Atlantic City. They are, in fact, Atlantic City stores, but handle, in part, goods which have been imported from London. On well-established, equitable principles, it is manifest that to whatever extent complainants may seek to benefit from any suggestion which may be contained in their trade-name, to the effect that their stores are branches of a London store, this court can lend them no assistance.

[2] But, assuming that the name "London Shop," as used by complainants, is wholly free from any criticism of the nature suggested, I am unable to conclude that defendant has entered the field of unfair competition in the use of the name "Page of London." As already stated, there is no resemblance between the two names used by the respective parties, except such as arises from the common use of the word "London"; and the only danger of confusion from the use of the two names appears to me to arise from the possibility of a person observing the word "London" and paying little or no attention to the remaining part of either trade-name.

[3, 4] Complainants have received telephonic messages and mail relating to purchases made at defendant's store, and have received, by express and otherwise, goods which have been purchased at defendant's store, accompanied with requests for their exchange or a return of the purchase price. In one instance, a customer at one of the stores of complainants was sent to another store of complainants for a specific article, and the customer went to defendant's store by mistake. These occurrences disclose some confusion, which, it is urged, is to be attributed to a similarity of the two trade-names. It is quite possible that the confusion referred to has arisen from the use of the word "London" as a part of the trade-name of both contending parties; but such confusion is, in my judgment, to be more appropriately attributed to extreme carelessness and inattention upon the part of the customers who have made the specific errors referred to. Complainants have no property right to the exclusive use of the word "London" in connection with their business. They are only entitled to protection against unfair competition by defendant. They are

entitled to be protected against defendant passing his goods or business as complainants' goods or business; and the test is whether or not the public is likely to be deceived. Concrete instances of confusion, which can only be appropriately attributed to extreme carelessness or inattention on the part of customers, are clearly inadequate to establish a similitude which does not in fact exist. I am unable to believe that the name "Page of London," used in the manner in which it is being used by defendant, is operative to deceive or mislead any reasonable person by reason of its resemblance to the name "London Shop," or to improperly divert complainants' trade.

I will advise an order dismissing the bill.

CUSHWA et al. v. BURGESS AND COMMISSIONERS OF WILLIAMSPORT.

(Court of Appeals of Maryland. Jan. 11, 1912.)

1. DEDICATION (§ 18*)—PUBLIC SQUARE—ACTS CONSTITUTING.

A duly filed and recorded plat of land in lots, streets, and alleys, and a public square described as extending from a designated lot to other designated lots and bounded on the north by a designated street and on the south by the first line of the town, and the end of another designated street, made by commissioners appointed by Acts 1786, c. 11, to survey land to be erected into a town, followed by a recognition thereof by the owner who leased a lot described by number on the plat and as bounded on the public square, amounted to a dedication of the public square under the rule that, in order that there may be a dedication, it is not necessary that a municipal corporation be then in existence, and when it comes into existence, whether by incorporation or extending the corporate limits, the right to take advantage of the dedication will vest therein unless the dedication has been previously revoked.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

2. DEDICATION (§ 45*)—ACCEPTANCE—QUESTIONS FOR COURT AND JURY.

While the jury must pass on the facts of a dedication or acceptance, the court must determine what constitutes a dedication and an acceptance, and an instruction submitting the questions of dedication and acceptance to the jury is erroneous.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 88; Dec. Dig. § 45.*]

3. APPEAL AND ERROR (§ 215*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—OBJECTIONS.

Under Code art. 5, § 9, providing that no instruction shall be defective because of any assumption therein of any fact, or because a question of law is submitted unless an objection for such defect was taken at the trial, the error in an instruction submitting to the jury the questions of dedication and acceptance arising from the fact that the jury must determine facts, while the court must determine what constitutes dedication or acceptance, can-

not be corrected where no objection appears from the record to have been taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.*]

4. DEDICATION (§ 37*)—PUBLIC SQUARE—ACCEPTANCE—EVIDENCE.

A plat of a town authorized by the Legislature was recorded in 1787. The first charter of the town granted in 1823 contained no description of the limits of the town, but the limits and the streets and alleys and a public square were distinctly shown on the plat. There was evidence that the public square was used like a common as early as 1854. A roadway over the square from a street bounding it on one side to a street stopping at the square on another side had existed as long as the oldest witnesses could remember, and had been maintained by the town. The plat and evidence did not show that the square had been dedicated for any particular purpose. *Held*, to show an acceptance of the dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where plaintiff recovered a verdict for one cent, the court on defendant's appeal would not review the instructions on the measure of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

6. APPEAL AND ERROR (§§ 882, 1083*)—QUESTIONS REVIEWABLE—INVITED ERROR.

A party cannot complain of instructions requested by him nor of modifications therein lessening the burden of proof placed on him in the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610, 4052-4062; Dec. Dig. §§ 882, 1083.*]

7. DEDICATION (§ 39*)—ABANDONMENT—ESTOPPEL.

A plat of a town dedicated a square to the public without specifying the use. The town accepted the dedication. Individuals maintained buildings on the square, but there was nothing to show that the town had abandoned the square when those under whom the individuals claimed took possession or that they had any title to the part of the square occupied by the buildings subject to an easement in the public when they went into possession. A canal company, a railroad company, and a bridge company maintained their respective structures on the square, but there was nothing to show that they had not lawfully acquired the right so to do. The individuals, or those under whom they claimed, never had a deed to any part of the square, nor were they induced to expend money by the action of the town. *Held*, that the town was not estopped from suing the individuals for trespassing on the square.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. § 39.*]

8. ADVERSE POSSESSION (§ 8*)—LIMITATIONS AS AGAINST MUNICIPALITIES.

An unauthorized possession of a square in a town dedicated to the public cannot ripen into a title by prescription.

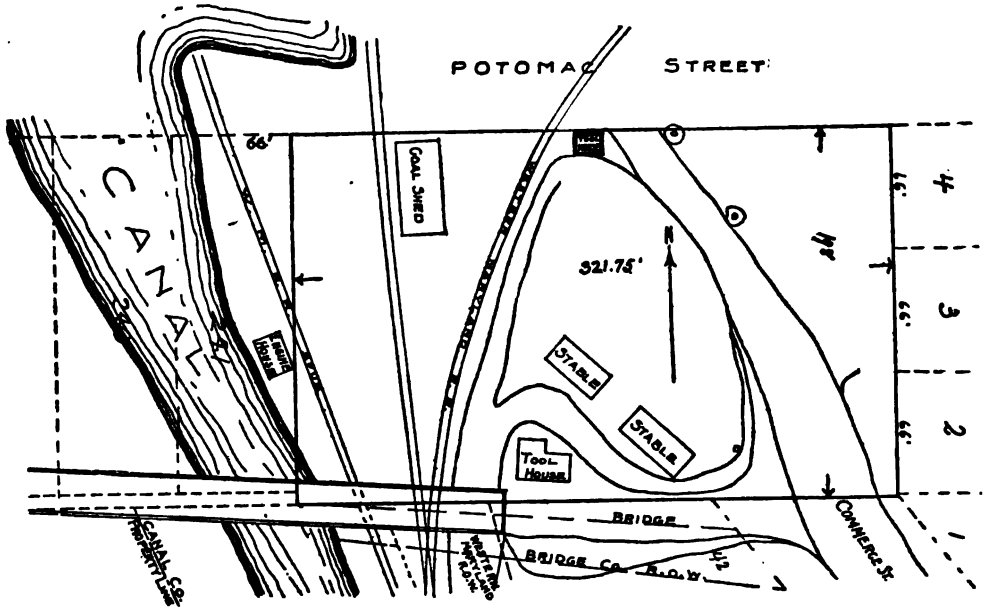
[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 14, 27, 43-57; Dec. Dig. § 8.*]

Appeal from Circuit Court, Washington County; N. L. Keedy and Robert R. Henderson, Judges.

Action by the Burgess and Commissioners of Williamsport against Victor Monroe Cushwa and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The following is a part of the plat:

ton county court, who was required to record the same among the land records of the county and to keep the original in his office. It was provided that a copy of the original, or the record thereof, should be conclusive



Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTERSON, URNER, and STOCKBRIDGE, JJ.

Chas. D. Wagaman and Wm. J. Witzembacher, for appellants. A. C. Strite and C. A. Little, for appellees.

BOYD, C. J. The burgess and commissioners of Williamsport sued V. Monroe Cushwa and others for trespassing on what is alleged to be a public square in that town. There are seven bills of exception in the record; the first was waived, the second, third, fourth, fifth, and sixth relate to rulings on the admissibility of evidence, and the seventh presents the rulings on the prayers. The plaintiff offered three prayers, the first and third of which were granted and the second rejected, and the defendants offered five, the third and fourth of which were granted with some modifications and the others were rejected. We will first consider the rulings on the prayers.

[1] By chapter 11 of the Acts of 1786, the Legislature of Maryland appointed five commissioners to survey a quantity of land not exceeding 150 acres contiguous to the mouth of Conococheague creek which empties into the Potomac river, who were directed to lay out the land into lots, streets, lanes, and alleys to be erected into a town to be called and known by the name of Williamsport, and to return a correct and accurate plat and certificate thereof to the clerk of Washing-

evidence of the bounds and lines of the lots of the said town and of the streets, lanes, and alleys thereof. On May 18, 1787, the commissioners filed a plat with explanatory notes of 82 acres of land so laid out by them; there being 241 lots and a number of streets and alleys.

There are four streets which run east and west and are 80 feet wide, three which run north and south and are 66 feet wide, and one called Commerce street which runs "S. 30 degrees east, or nearly so," and is 78 feet wide. There is also mentioned in the explanatory notes what is called Water street, and the notes state that it "runs N. and S. or nearly so," and is 87 feet and 9 inches wide. That is not named on the plat, but there is a space between lots 223 and 224 running from the north boundary of the town to Potomac street which was probably intended as Water street. There is also a space on the plat which is 321 feet and 9 inches from east to west, and about 198 feet from north to south. Lot No. 241 is on the west side of that space and fronts on Potomac street, and lots Nos. 2, 3, and 4 front on the space on the east side thereof. The explanatory notes thus speak of it: "From lot No. 241 to lots Nos. 2, 3 and 4 is 321 ft. & 9 inches, laid off for a public square, bounded by Potomac St. on the north and on the south by the first line of the town and the end of Commerce St." That public square is the subject of contro-

versy in this case. We will request the reporter to publish with the report of the case enough of the plat to show how that square is formed by the contiguous lots and streets, as that will make our description of it more intelligible, but it is sufficient to add here that the plat and explanatory notes on it show beyond question that, at the time Williamsport was laid out as a town, a public square which was well defined was provided for.

Within one year after the plat was recorded, to wit, on April 10, 1788, Otho Holland Williams, the owner of the land which had been so laid out, made a lease to Matthew Van Lear and William Van Lear in which he recited the act of 1786 and that the commissioners had surveyed and laid off parts of the tracts mentioned into lots, streets, lanes, and alleys, and had returned "a correct and accurate certificate and plat thereof to the clerk of Washington county court agreeable to the direction of the said act, as by the land records of the said county reference being thereto had will more fully appear." By it he leased to them "all that lot or portion of ground in the town of Williamsport surveyed and laid off by the commissioners aforesaid by the authority in them vested by the act of assembly above recited, known and distinguished on the plat of said town by No. 4, lying and being on the southeast corner of Potomac street and the public square, being a corner lot and bounding 66 feet on the public square and 96 feet on Potomac street." That lease required the lessees to erect on the lot before the 1st day of May, 1792, "a house of brick or stone frame or hewn logs at least 20 feet by 26 feet," and the indications are that the house then built is still there and now known as part of the Miller property.

Without deeming it necessary to cite authorities to support the statement or now refer to other evidence on the subject, we can have no doubt that there was a dedication of this public square which was well defined and sufficiently described. In order that there be a dedication, it is not necessary that a municipal corporation be then in existence, and when it comes into existence, whether by incorporation or extending the corporate limits, the right to take advantage of the dedication on behalf of the public will vest therein if the dedication have not been previously revoked. 8 Dillon on Mun. Corp. (5th Ed.) § 1086. It becomes immaterial, therefore, to discuss the question whether the act of 1786 created a municipal corporation or whether Williamsport first became such by chapter 125 of the Acts of 1823, when the first regular charter was granted.

We will presently consider the question whether there was an acceptance by the public and the appellee, but, assuming for the present that there was in order that the

meaning of the prayers of the respective parties may be better understood, we will here add that the testimony shows that a stable, shed, and perhaps other small buildings were erected upon the square by parties under whom the appellants claim 50 or more years ago, and that they are still maintained by the defendants, and they and those under whom they claim have also made other uses of parts of this square for many years. The Chesapeake & Ohio Canal Company has occupied a small corner of it since the canal was built, there are several tracks of the Western Maryland Railroad Company which have been on it since 1873, and more recently a part of it has been occupied by the bridge of the Washington & Berkeley Bridge Company.

[2, 3] The first prayer of the plaintiff which was granted instructed the jury that, if they found that the town of Williamsport was laid out under the provisions of chapter 11 of the Acts of 1786, a plat was made with the descriptions thereto attached, and the plat, description, and certificate of commissioners were recorded, and that in said plat a piece of land was laid off as and for a public square for the use of the public, "and that the same was described and the dimensions thereof set forth in the description and explanation of said plat, and that the same was dedicated to the use of the public and accepted by the same," and further find that the defendants erected and maintained and continue to maintain buildings thereon for their own private use, and used and continue to use a part of said public square for the storage of coal, then the plaintiff was entitled to recover even though the jurors found that such user by the defendants continued for more than 20 years, provided they further found that the plaintiff had not abandoned the same prior to or during the period of such user.

It will be observed that that prayer submitted the questions of dedication and acceptance to the jury. It was for that reason technically erroneous. It is true that there are authorities which state the proposition broadly that whether there has been a dedication or acceptance is a question for the jury, but we understand the law of this state to be that, while the jury passes upon the facts involved in the question whether there was a dedication or acceptance, it is for the court to determine what constitutes such dedication or acceptance. In *Maenner v. Carroll*, 46 Md. 225, the court through Judge Alvey said: "The court was correct in rejecting the sixth prayer of the plaintiff, not only for the reason just stated, but because that prayer failed to define what would constitute a legal dedication of a way to public use. The jury were not the tribunal to determine that question. They were competent to find the existence of facts to fulfill the definition, but not to determine

the definition itself." In *Kennedy v. Cumberland*, 85 Md. 514, 9 Atl. 234, 57 Am. Rep. 346, Judge Miller said: "The court below in its rulings upon the prayers, instructed the jury what facts it was necessary for them to find in order to entitle the plaintiffs to recover. In other words, the court treated the question of acceptance of the street by the city as a question of law, and in this we find no error. This point has not hitherto been directly presented to this court, but the ruling is sustained by our decisions in numerous analogous cases which it is unnecessary to cite." Then, after referring to *Folsom v. Town of Underhill*, 36 Vt. 580, where it was held that if the facts were undisputed the acceptance vel non of a street by a city is a question of law, in speaking of cases where the facts are disputed, the opinion went on to say: "The court in such cases leaves the finding of the facts to the jury with appropriate instructions as to their legal effect according as the jury may find them to be. And there is good reason why this rule should be applied in cases like the present, for, if the question of acceptance or adoption vel non should be left broadly to the finding of the jury, it would follow that the liability of a county or municipality would be left in uncertainty, depending upon the varying verdicts of different juries upon the same state of facts, instead of being, as it should be, settled and fixed by the law as declared by the courts." See, also, 13 Cyc. 485, 486; 9 Am. & Eng. Ency. of Law, 52, 53.

But, while that is the law of this state, the appellant cannot now complain of the error in the prayer because section 9 of article 5 of the Code says: "No instruction actually given shall be deemed to be defective by reason of any assumption therein of any fact by the said court, or because of a question of law having been thereby submitted to the jury, unless it appears from the record that an objection thereto for such defect was taken at the trial." No objection does appear from the record to have been made because a question of law was submitted to the jury, and hence that error cannot be corrected by us, although, owing to the conclusion we have reached as to the fact of dedication and acceptance, it is perhaps immaterial. There was, however, a special exception to that prayer on the ground that there was no evidence "legally sufficient to show that there was any acceptance of the offer to dedicate the square as laid out on behalf of the public," and the defendants' first and second prayers asked the court to say that there was no evidence legally sufficient to entitle the plaintiff to recover; the first referring to the pleadings, and the second not doing so. It becomes necessary, therefore, for us to determine whether there was legally sufficient evidence to show an acceptance.

[4] We have reached the conclusion that that must be determined in the affirmative. It is true that the evidence tends to show that very little use has been made by the public of this square outside of the roadway over it, but, as we have seen, the plat of the town authorized by the Legislature was put on record in 1787, and the first charter of the town was granted in 1823 when that plat was on record. There is no description of the limits of the town in the act of 1823, but those limits and the streets, alleys, and this public square were distinctly shown on the plat. In *Kennedy v. Cumberland*, 85 Md. 522, 9 Atl. 236, 57 Am. Rep. 346, in speaking of an amendment to the charter as affecting Shriver's addition to Cumberland, the court said: "If the amended charter had for the first time, brought the land so platted within the city limits, and it had been accepted by the city, a different question would have been presented. In that case there would have been some ground for contending that the acceptance of the amended charter operated as an acceptance or adoption of the streets so laid out and dedicated to the public by the owners." It would seem that when the Legislature had previously authorized a plat to be made for a town, and with that plat on record had incorporated the town, there would be still stronger ground for such contention, and, in the absence of some positive act on the part of the municipality declining to accept the streets, alleys, and public square laid out on the plat and dedicated to the public (if, indeed, it could do so without the consent of the Legislature), it might well be presumed that it had accepted them without any further facts being shown.

But the testimony of some of the oldest residents of Williamsport shows acts, the effect of which it would be difficult to escape from. Mr. Melown, who was 87 years of age, testified that he had known this square all his life, and described its bounds in a way very similar to that given on the plat. He said that "it was used like a commons in 1854; that the boatmen would run their boats in the basin and stand their mules there; they would run into port, unhook from the boats, put their troughs on the square, and tied their horses there." He also said: "There was much traffic by wagons to Williamsport and to the warehouse; that the wagons would generally come down Potomac street and return by Commerce street to Salisbury so as to avoid the steep hill on Potomac, and do it yet; that there was a great trade with wagons before the railroad came; that the traffic on Potomac street and Commerce street was about equally divided; that it passed from Potomac street along the roadway on the square into Commerce street; that the corporation maintained this roadway and threw mud and slate upon it." Another witness who was 78 years of age

said: "That before buildings were there the square was a public thoroughfare; anybody could use it as they pleased; that he saw horses, mules, and anything but stables put on there until of late years; some wagons put on there; some people on there." Other witnesses testified to the same effect, and it was shown that the corporation had planted out a row of trees on the east side, two of which are still standing.

Of course it was impossible to obtain witnesses whose recollections went back to the date of the filing of the plat or of the first charter, and it would be difficult to prove the circumstances under which the stable and shed claimed by the defendants were built, as well as difficult, if not impossible, to explain just what occurred when the canal was built in 1833 or 1834. But the uncontradicted evidence is that there has been a roadway over the square from Commerce street to Potomac street as long as the oldest witnesses can remember. That has been maintained, drained, and cared for by the appellee. There was nothing on the plat or in the evidence to show that the square was dedicated for any particular purpose, but the plat shows enough to make it certain that it was expected and intended that the square could be used to pass over it. Commerce street, according to the plat and the explanatory notes, stopped at the square, Potomac street bounded it on the north, and the space which we have described above as probably being Water street ends at Potomac street above the northwest corner of the square, while Commerce street ends at the southeast corner. It could not therefore be contended that when the square was laid out it was not intended to have a roadway or roadways over it, but the location of them and other public user of the square were apparently left to the discretion of the town. The appellee certainly accepted so much of the square as has been occupied by the roadway as long as the oldest witnesses could remember, and there can be no presumption that it only accepted the part. So far as the record discloses, the appellee and the public made such uses of it as they saw proper, and, while the testimony does not show much use of any other than the part occupied by the roadway, there is sufficient to raise the presumption that the dedication of all the square was accepted.

This is not like *Kennedy v. Cumberland* where the court said that, because the city accepted some streets, it did not follow that all on the plat were accepted. If a municipality actually only use a third or a half of the width of a street, it could hardly be contended that it had only accepted such third or half. See 3 Dillon on Mun. Cor. (5th Ed.) § 1088. This roadway runs diagonally across the square and apparently was used as was most convenient to the public. So, without referring to other testimony on

this branch of the case, we think there was legally sufficient evidence of the acceptance, and hence the special exception to the plaintiff's first prayer was properly overruled, and the defendants' first and second prayers were properly rejected; the theory of both sides in the lower court being that that was a question for the jury.

[5] As the plaintiff only received a verdict for one cent, it is not necessary to refer to its third prayer which related to the measure of damages.

[6] By the proviso in the plaintiff's first prayer and the defendants' third and fourth prayers, the court left the question of abandonment to the jury, and the defendants cannot complain of the court doing what they asked it to do. The modification of the defendants' third and fourth prayers did not injure them as it lessened the burden they assumed in those prayers.

[7, 8] The defendants' fifth prayer sought to have the jury instructed that, if they found the facts therein mentioned, "then the jury is instructed that the plaintiff had abandoned said portion of said square and is estopped from asserting any claim thereto, and the verdict of the jury should be for the defendants." In other words, the defendants asked the court to say that there was an equitable estoppel which precluded recovery under the principles announced in *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489. It is said in that case that: "Whilst an encroachment on a highway is conclusively settled in Maryland to be a public nuisance which can never grow by presumption into a private right (*P. W. & B. R. Co. v. State*, 20 Md. 157; *N. C. Ry. Co. v. Mayor, etc., Balto.*, 21 Md. 93; *Ulman v. Chas. St. Av. Co.*, 83 Md. 130 [34 Atl. 366]), yet it may be true and in perfect harmony and accord with that doctrine that cases concerning public streets can arise of such a character, and founded upon an actual and notorious abandonment of the highway by the public, that justice requires that an equitable estoppel shall be asserted even against the public in favor of individuals."

But in that case the appellant had acquired the interest in the property subject to an easement in the public to have a road over part of it, and the court said: "There is no evidence that this road was ever laid out by the municipal authorities, or that it was ever accepted by them or kept in repair at the public expense." It was also said that the easement had been abandoned, and "that the title of the appellant to the road does not depend on prescription as against the public, but upon his deeds and the fact of an abandonment of the public easement whereby the rights of the public over the road were extinguished." The abandonment by the public of the easement had induced innocent parties to expend money on the property. The court said: "If ever there

was a case where the doctrines of equitable estoppel ought to prevail against the public, it certainly is the case at bar, and we accordingly hold, not that the appellant has acquired by prescription a right to that part of Lanvale road between his two lots, but that having title thereto under his deeds subject to an easement in the public and the easement having been abandoned, so that the public are equitably estopped to reclaim it, his title to the parcels of the road claimed by him is merchantable."

By reference to that opinion it will be seen that there is a manifest distinction between that case and the one under consideration. There is no pretense here that the defendants or those under whom they claim ever had a deed for any part of this square from the original owner or any one claiming under him. They were not induced to expend money on the property by the action of the appellee, but they in effect claim by prescription under the name of equitable estoppel. In other words they contend that what they and those under whom they claim did, together with what the canal company, the railroad company, and the bridge company did, is conclusive evidence of an abandonment, and, there being such an abandonment, the appellee is equitably estopped. There is certainly no legally sufficient evidence that the appellee had abandoned the property when those under whom they claim took possession, or that those persons had any title to the part of the square in controversy, subject to an easement in the public, when they went into possession, and, if the appellants have any title now, it is because the unauthorized possession of those under whom they claim has ripened into a title by prescription, which in this state cannot be as against a municipal corporation.

For aught that appears in the record, the canal company, may have condemned what it has, the railroad company may have legally acquired its right to possession by condemnation or in some other authorized way, and the bridge company may have been authorized by the appellee to take possession of what it has. There is some testimony from which it might be inferred that the railroad company and the bridge company did negotiate with the appellee, and furthermore that Mr. Victor Cushwa, under whom the appellants immediately claim, was a party to the negotiations. There is nothing to show that the canal company did not lawfully acquire the right to possession. The references to those companies, under the circumstances, made the prayer technically bad, as the jury could not have known from the record by what authority they went into possession. There are some other technical defects in the prayer, but, regardless of them, we do not think this is a case for the application of the doctrine of an equitable es-

toppel. The jury in fact found that there was no abandonment, and it could not have found for the plaintiff unless it had.

We will not discuss the rulings on the exceptions to the testimony, but will only add that we see no reversible error in them. Such being our conclusion on the several exceptions, we must affirm the judgment.

Judgment affirmed, the appellants to pay the costs.

GILLET v. SHAW.

(Court of Appeals of Maryland. Feb. 28, 1912.)

1. INSANE PERSONS (§ 5*)—CONTRACTS—VALUITY.

One adjudged a lunatic has no capacity during the continuance of the lunacy to contract, and may not appoint an agent.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 12, 13; Dec. Dig. § 5.*]

2. INSANE PERSONS (§ 80*)—TORTS OF THIRD PERSONS—LIABILITY.

A person adjudged a lunatic is not liable in person or property for the tort of an employé of the guardian in negligently operating an automobile purchased by the guardian for the benefit of the lunatic as a part of the medical treatment prescribed by a physician, in charge of the lunatic, not present at the time and not directing the employé operating the machine while going about the business of the establishment of the physician.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 142; Dec. Dig. § 80.*]

Appeal from Circuit Court, Howard County; Jas. R. Brashears, Judge.

Action by Jessie B. Gillet against Francis Shaw, Jr. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, THOMAS, PATTISON, and STOCKBRIDGE, JJ.

John R. M. Staum and W. W. Parker, for appellant. Edward M. Hammond and Robert Biggs, for appellee.

BRISCOE, J. This case presents an interesting legal question and one of more than ordinary importance. The precise question is now for the first time before this court, and it is conceded that the cases on the subject in other jurisdictions are exceedingly few. The material facts upon which it is raised are practically undisputed, and the legal question is this: Is a lunatic liable for the torts of an employé of his guardian or committee, committed out of his presence and without the authority of the lunatic? The defendant in the case was adjudicated a lunatic on the 6th day of August, 1908, in the probate court of Middlesex county, Mass., and Francis Shaw, Sr., his father, was duly appointed his guardian or committee, and charged with the care and custody of his person, his real and personal property. He was brought to Maryland in November, 1909, and placed in charge of Dr. Henry J. Berke-

ley, of Baltimore City, a specialist upon nervous diseases and mental troubles. Dr. Berkeley located the patient on the Morrison place, known as "Grovemont," near Ilchester, Howard county, Md., and under the supervision of a trained nurse, and three male attendants. Prior to coming to Maryland, he had been confined in an institution near the city of Boston, and, although improved by the treatment there, at no time in the years 1910 or 1911 was he capable of regulating his own movements or his property, but had to have nurses and attendants to look after him.

On the 31st of May, 1910, the plaintiff brought this suit in the circuit court for Howard county against the defendant, the lunatic, to recover damages for personal injuries received by her on the 27th of May, 1910, while driving a horse and buggy upon a public highway near Ilchester, in that county, by reason of the negligence of an alleged servant or employé (in this case a chauffeur) of the defendant, in operating and running an automobile upon the same highway, in a direction opposite to that in which the plaintiff was driving. At the trial of the case in the court below, upon the conclusion of the evidence upon the part of both plaintiff and defendant, the court rejected the plaintiff's prayers and granted a prayer upon the part of the defendant that, upon the pleadings and evidence, there was no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant. From a judgment upon the verdict so entered, the plaintiff has appealed.

Ordinarily, in negligence cases, like the one now before us, there are two prominent questions presented for the consideration of the court, and they are: First, whether the negligence is such as to permit or entitle the plaintiff to recover at all; and, secondly, whether the negligence was such as to render the defendant legally liable, to respond in damages, in a judgment against him. In the case at bar, it will only be necessary for us to consider the second proposition, namely, the legal liability of the defendant, because we are of opinion, upon the special facts of this case, even assuming the negligence of the chauffeur in charge of the automobile at the time of the accident, it was not the negligence of the defendant, and, this being so, he cannot be held personally liable, nor can his estate or property be made liable therefor.

The undisputed facts of the case, upon which this decision must rest, are these: The defendant is an adjudicated lunatic and was so, at the time of the accident, that he was unable to manage his property, regulate his own movements, or direct those of others. He was located on the Morrison place, in Howard county, in charge of Dr. Berkeley, and a home was established there for his benefit. The automobile was purchased by Dr. Berkeley and paid for by the guardian

of the lunatic, and was maintained for his benefit, as a part of the medical treatment recommended. The chauffeur in charge of the automobile at the time of the accident was employed by the guardian and not by the lunatic, and he testified that, on the morning when he was running the automobile from Grovemont to Ellicott City, he was going about the business of the establishment and was engaged in the business of the place. Dr. Berkeley testified that the automobile was purchased, the chauffeur was employed under the instructions and by the directions of Francis Shaw, Sr., the guardian, and that he (the guardian) paid all the bills contracted by him that were necessary to maintain the establishment for the benefit of the lunatic. It further appears that neither the chauffeur nor the automobile was at the time of the accident under the direction, control, authority, or in view of the lunatic, and that the alleged negligent act was not committed by the lunatic himself or under his immediate view or by his direction or by his express authority.

The contention of the plaintiff, in answer to the defense of insanity, set up on behalf of the defendant, as stated in his brief, "is not that the defendant *per se* is liable for the injuries inflicted and damages incurred by the use of the automobile, but that his estate is responsible for whatever loss and damage the use of his estate has brought upon innocent third persons." In other words, it is urged that the estate of the defendant, even though he be a lunatic, is liable for the injuries caused by the use of the property by the committee and the chauffeur.

[1] According to the established law in this state, the acts of lunatics and infants are treated as analogous, and the contract of a person adjudged to be insane cannot be enforced against him. *Chew v. Bank*, 14 Md. 299; *Flach v. Gottschalk Co.*, 88 Md. 369, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *Key v. Davis*, 1 Md. 32. In *Cross v. Kent*, 32 Md. 581, in an action of trespass, for damages against an insane person who had not been adjudged a lunatic and had no guardian, for setting fire to and burning a barn, it was held that a lunatic or an insane person, though not punishable criminally, is liable to a civil action for any tort he may commit. Judge Miller, in delivering the opinion of the court in that case, said the distinction between the liability of a lunatic or insane person in civil actions for torts committed by him and in criminal prosecutions is well defined, and it has always been held, and upon sound reason, that though not punishable criminally, he is liable to a civil action for any tort he may commit. 1 Chitty's Pl. 76; 3 Bacon, Abr. 536; *William v. Hays*, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 154, 42 Am. St. Rep. 743, and cases there cited. The general doctrine is stated in *Sherman & Redfield on Negligence*, § 57, to

be that infants and persons of unsound mind are liable for injuries caused by their tortious negligence, and so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary because otherwise there would be no redress for injuries committed by such persons. While the law as thus stated may be true as to torts committed by the lunatic himself, it can have no application to a case like this, where the tort was not committed by the lunatic himself, or by his direction, and it is difficult to see upon what principle of law or sound legal reason that either the lunatic or his property can be made liable for the negligence or wrongs of an employé or servant of his guardian.

It is well settled that an adjudged lunatic has no capacity to contract and cannot appoint an agent, so long as his lunacy continues. *Chew v. Bank*, 14 Md. 299; *Greenwood v. Greenwood*, 28 Md. 386; *Flach v. Gottschalk Co.*, 88 Md. 369, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *Story on Agency*, § 6, p. 5; 31 Cyc. 1206; *Mechem on Agency*, § 47. In 22 Cyc. 620, the law is thus stated as supported by authority: It has been laid down that, in order to hold an infant liable for a tort, the tortious act must be committed by the infant himself or under his immediate view or by his discretion or authority. For as he cannot create an agency or appoint a servant, and therefore cannot delegate powers to another, he cannot guarantee or insure the fidelity, care, or skill of such other. *Story on Agency*, § 6; 16 A. & E. Ency. of Law, 308. In 31 Cyc. 1206, it is said: "One who is non compos mentis is naturally incapable of appointing an agent; being unable to comprehend business, he is equally wanting in discretion to select an agent to do such business. Accordingly, a lunatic is no more capable of constituting an agent than of binding himself by contract." The doctrine asserted by these authorities is fully supported by a number of cases. *Pearl v. McDowell*, 26 Ky. 658, 20 Am. Dec. 199; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560. In *Rooney v. People's Trust Co.*, 61 Misc. Rep. 159, 114 N. Y. Supp. 612, it was held that the estate of a lunatic could not be held liable for the torts of one who is not his agent, in the legal sense. And to the same effect are the cases of *Ward v. Rogers*, 51 Misc. Rep. 299, 100 N. Y. Supp. 1058; *Reams v. Taylor*, 31 Utah, 288, 87 Pac. 1089, 120 Am. St. Rep. 930, 11 Ann. Cas. 51; *Robbins v. Mount*, 33 How. Prac. (N. Y.) 24. The cases relied upon by the appellant are unlike this, and are mostly cases where the negligent act was committed by the lunatic himself, or where the cause of action arose before the lunacy of the defendant, and be-

fore the appointment of the guardian or committee, and are not controlling here.

[2] In this case the tort was not committed by the lunatic, or under his immediate view, or by his direction or authority. The chauffeur of the automobile was the servant and employé of the guardian, and not the agent of the lunatic, at least not in the legal sense, so as to bind the lunatic, either personally, or to render his property liable, for his personal torts. We therefore hold, upon both reason and the great weight of authority, that the defendant cannot be held liable in this case: First, because the tort was not committed by him personally or in his presence or by his direction; secondly, because not being capable of appointing an agent, he is not personally liable for the acts of one claimed to be his agent, and not being personally liable, neither his property nor estate can be held liable in damages therefor; thirdly, because the tort in this case was not the tort of the lunatic, but the tort of the chauffeur, who was not his agent, but the employé of the guardian; and, fourthly, because the tort of a servant or employé of a guardian of a lunatic cannot bind the lunatic either personally or render his property liable, under the special facts of this case.

For these reasons, the court below committed no error in withdrawing the case from the jury, and the judgment will be affirmed.

Judgment affirmed, with costs.

NORTHERN CENT. RY. CO. v. STATE, to Use of WILSON et al.

(Court of Appeals of Maryland. Feb. 28, 1912.)

1. MASTER AND SERVANT (§ 113*)—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE.

Decedent, a freight brakeman, while riding on the side of a car, was struck by a platform projecting from a signal tower and killed. The tower was located eight feet and one inch from the track, and the platform, which was between the first and second stories of the tower, was four feet wide, running across the tower front and projecting five feet ten inches from the face of the tower. The platform did not extend far enough from the tower to overlap the edges of cars passing in front thereof, even making liberal allowance for difference in level; and the rules required persons on the train, including the brakeman, to look out for signals from the tower as trains approached and passed it. The platform had been in use since 1895; and decedent had passed it in safety at least 25 days in a month between June 6, 1907, and June 6, 1910. *Held*, that the location of the tower platform was not negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 213, 224-227; Dec. Dig. § 113.*]

2. MASTER AND SERVANT (§ 243*)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Decedent was negligent, as a matter of law, in failing to notice the platform as he approached a tower, in violation of his duty to observe signals for his own safety and that of his train; the evidence being undisputed that at the time of the accident he was facing the rear of the train, with his back to the platform

and tower, though he had an unobstructed view of the platform for over 100 yards from the time the train left a water tank till it reached the tower.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 882, 759-775; Dec. Dig. § 243.]

Appeal from Circuit Court, Harford County; N. Charles Burke, Judge.

Action by the State of Maryland, to the use of Fanny Wilson and others, against the Northern Central Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

The following are plaintiffs' prayers and the defendant's first, second, third, fourth, sixth, and ninth prayers referred to in the opinion:

Plaintiffs' first prayer: "The court instructs the jury that, if they find from the evidence in this case that the defendant operated a railroad in part through Baltimore county, in the state of Maryland, and at or near Phoenix station, one of its stations in said county and state, on the east side of its railroad tracks at this point, maintained a signal tower as part of its railroad structure and for railroad purposes, and upon the west side of said tower a platform, and if the jury further find that Albert T. Wilson, the husband of the equitable plaintiff, Fanny Wilson, and the father of the equitable plaintiffs, Velma Wilson, Viola Wilson, and Venia Wilson, was, on June 6, 1910, in the employ of said defendant as brakeman, and while engaged in the line of his employment was upon a box or freight car, attached to an engine, the property of the said defendant, proceeding north on a north-bound trip from Baltimore city, and further find that his body, as said car passed said platform, came in contact with the same in consequence of the dangerous and unsafe position of said platform, if the jury find the same was dangerous and unsafe, and in consequence of said dangerous and unsafe position of said platform the said Albert T. Wilson received injuries which directly resulted in his death, and if the jury further find that the deceased was ignorant of the dangerous and unsafe position of said platform, if they find the same was dangerous and unsafe, and could not, by the use of ordinary care and prudence on his part, have known the same, and shall further find that at the time of the said injury the deceased was using ordinary care and caution on his part, and shall further find that the equitable plaintiff, Fanny Wilson, was induced to accept the death benefit under the policy mentioned in the defendant's additional plea, amounting to \$500, and the disablement benefit of \$2, mentioned in said plea, by reason of the fraud or false representations of the defendant, and shall further find that the said equitable plaintiff, Fanny Wilson, was induced to sign the release offered in evidence by reason of the

fraud or false representations of the defendant, then their verdict must be for the plaintiff." (Granted.)

Plaintiffs' second prayer: "The court instructs the jury that, if they find their verdict for the plaintiff, they may, in estimating the damages to be allowed, consider what was the pecuniary loss which the said Fanny Wilson, widow, has sustained by reason of the negligent killing of her said husband, and may consider the reasonable probabilities of the continuance of the joint lives of the said Albert T. Wilson and Fanny Wilson but for said negligent killing of her husband, and may allow her such damages as in their judgment would compensate her for such pecuniary loss as she has sustained, and reasonably will sustain, by reason of said killing of her husband; and in estimating the damages which the said minor children, Velma Wilson, Viola Wilson, and Venia Wilson, have each sustained, and will each sustain, they may consider what pecuniary loss they have each sustained by reason of the negligent killing of their father, the said Albert T. Wilson, the prospective damages to be estimated up to the respective majorities of each of said children; and that the jury shall by their verdict find and direct what shall be the share of the said widow, and what shall be the share of each of said minor children, of the amount of their verdict." (Granted.)

Defendant's first prayer: "The defendant prays the court to instruct the jury that, under the pleadings in this case and upon the undisputed evidence in this case, the death of Albert T. Wilson, complained of in this case, was not caused by any wrongful act, neglect, or default of the defendant which, if death had not ensued, would have entitled the said Albert T. Wilson to maintain an action and recover damages in respect thereof against the defendant; and therefore there can be no recovery in this action, and the verdict of the jury must be for the defendant." (Refused.)

Defendant's second prayer: "The defendant prays the court to instruct the jury that, under the pleadings in this case, there is no evidence legally sufficient from which they can find that the death of Albert T. Wilson, complained of in this case, was caused solely by any wrongful act, neglect, or default on the part of the defendant, without any negligence on the part of the said Albert T. Wilson directly contributing thereto; and therefore the verdict of the jury must be for the defendant." (Refused.)

Defendant's third prayer: "The defendant prays the court to instruct the jury that, under the pleadings in this case, there is no evidence in this case legally sufficient from which they can find that the death of Albert T. Wilson, complained of in this case, was caused by any wrongful act, neglect, or de-

fault of the defendant which, if death had not ensued, would have entitled the said Albert T. Wilson to maintain an action and recover damages in respect thereof against the defendant; and therefore there can be no recovery in this action, and the verdict of the jury must be for the defendant." (Refused.)

Defendant's fourth prayer: "The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiffs to recover in this action; and the verdict of the jury must be for the defendant." (Refused.)

Defendant's sixth prayer: "The defendant prays the court to instruct the jury, as matter of law, under the pleadings in this case, that the only obligation upon the defendant to its employes engaged in running trains over its road, in the erection and maintenance of the platform on its signal tower, mentioned in evidence, was to erect and maintain it so that the employes of said defendant, in the discharge of their duties, could pass under or by said platform in safety by the use of ordinary care and prudence, and that there is no evidence in this case legally sufficient from which the jury can find that said platform was so negligently erected and maintained that the said employes could not pass by or under it in safety, in the discharge of their duties, by the use of ordinary care and prudence on their part; and therefore the verdict of the jury must be for the defendant." (Refused.)

Defendant's ninth prayer: "The defendant prays the court to instruct the jury, under the pleadings in this case, as matter of law, that since, by the undisputed evidence in this case, the deceased, Albert T. Wilson, the husband and father of the equitable plaintiffs, respectively, was employed by the defendant as brakeman, and had passed the platform supporting the signal pole on the defendant's tower at Phoenix, mentioned in the evidence, as such brakeman as many as 25 times a month from June 4, 1907, to June 6, 1910, on the defendant's trains, and was required by the rules of the defendant, for whom he was brakeman, to look at the signal on the signal pole on said platform every time he passed said tower, and since, by the undisputed evidence, said platform was open and obvious to any one on defendant's road approaching said tower from the south from any point within a distance of 800 feet, measuring from said tower southward, the law presumes that said Albert T. Wilson knew that said platform was on said tower, and imputes to him and presumes knowledge on his part of all risks and dangers to be encountered by him in the performance of his duties for the defendant resulting from the existence of said platform on said tower; and, since there is no evidence in this case that the defendant was requested to remove said platform by the deceased, or any one

else, prior to the accident complained of in this case, the deceased assumed all risks and dangers attending the presence of said platform, while he was in the employ of the defendant performing his duties; and therefore there can be no recovery in this action, and the verdict of the jury must be for the defendant." (Refused.)

Argued before BOYD, C. J., and BRISCOE, PEARCE, and THOMAS, JJ.

Shirley Carter, for appellant. Edward H. Burke, for appellees.

BRISCOE, J. The record in this case contains two bills of exceptions, one to review the rulings of the court below on the prayers, and the other to consider its rulings on the admissibility of evidence.

At the trial of the case, the court below granted the plaintiffs' two prayers, overruled the defendant's special exceptions to those prayers, and refused to grant the defendant's nine prayers.

The defendant's first, second, third, fourth, sixth, and ninth prayers were demurrers to the evidence, and, in substance, asked the court to instruct the jury that, as matter of law, there was no evidence legally sufficient, under the pleadings, to entitle the plaintiffs to recover; and therefore the verdict must be for the defendant.

The suit was brought in the circuit court for Baltimore county by the plaintiffs against the defendant to recover damages for the death of Albert T. Wilson, on June 7, 1910. The husband and father of the equitable plaintiffs, while in the employ of the appellant corporation and engaged, at the time of the accident, as brakeman on a freight car, attached to an engine of the defendant on a north-bound train from Baltimore city to Harrisburg, Pa., and caused by the alleged negligence of the defendant.

The declaration in substance avers that the defendant corporation, at the time of the commission of the injuries complained of, was operating a railroad in part through Baltimore county, in the state of Maryland, and Albert T. Wilson, the husband and father of the equitable plaintiffs, was employed by it as brakeman; and then and there, at the time of the commission of the wrongs complained of, it became the duty of the defendant corporation to provide a reasonably safe place for him to perform his duties as a brakeman; that the defendant negligently and carelessly failed and omitted to provide for him a reasonably safe place in which to perform his duties, in that the defendant corporation negligently and carelessly permitted a platform constructed on a certain signal tower, used by the defendant corporation for railroad purposes and located upon the east side of its railroad tracks at or near Phoenix station, in Baltimore county, this state, one of the stations of the defendant corporation, to be and extend so far over

and near the tracks as to strike him, and thereby inflict and cause to be inflicted upon him such injuries and wounds as to cause his death; that at the time he was struck by said platform he was upon a certain box car or freight car, attached to an engine, the property of the defendant corporation, running north on a north-bound trip from Baltimore city, and was, in being upon the car, engaged in the performance of his duties as a brakeman, and was using all due care and caution on his part; and that his death was due to the carelessness, negligence, and default of the defendant corporation, and without any want of care on his part.

The bill of particulars filed in the case states that the immediate cause of Wilson's death was a platform constructed on the side of the signal tower at Phoenix, Baltimore county, Md., with which platform he came in contact while engaged in the performance of his duties as brakeman, and while using due care and caution on his part. The liability of the defendant corporation arises out of its negligent failure to provide for him a reasonably safe place in which to perform his duties as a brakeman.

The case was removed to the circuit court for Harford county, and after trial resulted in a verdict for the plaintiffs, and, from the judgment entered thereon, this appeal has been taken.

[1] As we are of opinion, after a very careful consideration of the record now before us, that there was error in the rulings of the court in granting the plaintiffs' prayers, and in rejecting the defendant's first, second, third, fourth, sixth, and ninth prayers, which withdrew the case from the consideration of the jury, and as these prayers (which will be set out by the reporter) present the important propositions upon which the ultimate decision of the case must turn, the remaining questions raised on the record become unimportant, and will not be considered by us.

The accident, which resulted in the death of Wilson, happened about 11:05 a. m. on the morning of June 6, 1910, at and near Phoenix station, in Baltimore county, one of the regular stations of the appellant corporation on its railroad between Baltimore city and Harrisburg, Pa. The railroad, at the point where the accident occurred, runs north and south, and the deceased, at the time he was struck, was upon a box or freight car, attached to an engine running north on the north-bound main track from Baltimore. At Phoenix, east of the main tracks, is a passenger station, a freight house, and platform, and the station agent's dwelling. A public road, running east and west, crosses the main tracks a little north of the passenger station. At the north of the public road, and east of the main tracks, the appellant, some time prior to 1893, erected, just north of Phoenix station, a signal tower and plat-

form. The tower was a wooden building two stories in height, and from the tower to the east rail of the north-bound track was eight feet and one inch. The platform was between the first and second stories of the tower, and was four feet wide, running north and south across the front of the tower, and projected five feet ten inches from the face of the tower.

The testimony on the part of the plaintiffs shows that on the morning of the accident the deceased was seen, as the freight train approached the tower, "on the first or second steps from the top of a ladder, on the north end of a freight or box car, which was used in ascending or descending from the top of the car." He was on the ladder, supposed to be going up and looking back to the rear end of the car, when his head came in contact with the platform on the signal tower, and he was knocked on the top of the car, and afterwards fell to the ground. The train was running at an estimated speed of about eight to twelve miles an hour.

The plaintiffs' witness Weller testified that Wilson was a brakeman on the train, and had worked under the witness as such from June 6, 1907, until the date of accident on June 6, 1910, a period of three years, and had passed the platform and tower during that time, with the witness on the trains, going up and coming down, at least 25 days in each month; that the platform was on the tower when it was erected, and witness had never known any one to be struck by it; nor did he know it was close enough to hit any one on the train. He further testified that by the rules of the company persons on the train, including brakeman, fireman, and conductor, were required to look for the signals from the tower while the trains approached and passed it. "According to the rules, they are looking out for their own safety in that case."

The testimony of the carpenter Dayhoff was to the effect that, both from the measurements made by him the day of the accident and by the measurements made to cars standing in a train on the track in front of the tower some days before the trial of this case, the platform did not extend far enough from the tower to overlap the edge of cars on the track in front of the tower, even making liberal allowance for the slight difference in the level of the front of the tower on the day of the accident and the day the measurements were made with the cars actually on the track.

While there was testimony tending to show that the front of the tower had settled three inches in the first two or three years after it was built, and there were two wooden brackets or beams, which projected six inches from the north and south edges of the platform and towards the track, which had been placed there for ornamental purposes, yet the undisputed evidence is that

there had been no change in the position of the platform and tower during the time Wilson was in the employ of the company, and that the platform did not so overlap the passing cars as it could not be passed in safety by employes on the trains by the exercise of ordinary care and prudence. The platform had been in use since the year 1893, and the deceased had passed it in safety at least 25 days in each month in going south and north over the defendant's road, while performing his duties as brakeman. The platform, also, was open and obvious, and was plainly visible to any one approaching the tower on a north-bound freight train for a distance of over 200 yards. The deceased had ample space on the car to stand or sit without coming in contact with the platform; and no negligence can be imputed to the company, even if it be assumed that the platform was not high enough to allow a person to pass under it while standing on top of the car, or while occupying the position of the deceased on the car at the time of the accident, as testified to by the plaintiffs' witnesses.

We think, without reviewing the authorities at length, that the cases of *B. & O. R. Co. v. Stricker*, 51 Md. 47, 34 Am. Rep. 291, *Yates v. McCullough*, 69 Md. 370, 16 Atl. 280, *Abbott v. B. & O. R. Co.*, 75 Md. 152, 23 Atl. 310, 32 Am. St. Rep. 372, *State, Use of Hamelin, v. Malster*, 57 Md. 287, *Wood v. Heiges*, 83 Md. 268, 34 Atl. 872, *Egner v. Railway Co.*, 98 Md. 397, 56 Atl. 789, and the more recent cases of *Moret v. Car Works Co.*, 99 Md. 472, 58 Atl. 447, and *Tkac v. Md. Steel Co.*, 101 Md. 179, 60 Atl. 618, *Gans Salvage Co. v. Byrnes*, 102 Md. 247, 62 Atl. 155, 1 L. R. A. (N. S.) 272, *Winter v. United Ry.*, 115 Md. 72, 80 Atl. 651, are applicable here, and conclusive against the right of the plaintiffs to recover in this case.

In *Stricker's Case*, supra, Judge Bartol, in delivering the opinion of this court, said: "To entitle the appellee to maintain this suit, it was necessary to prove that the company had been guilty of negligence which directly caused the injury (that is to say, that in the relation which existed between the appellee and the company the latter had failed or neglected to perform some duty towards the appellee which was devolved upon it by law); and, secondly, it must appear that the appellee was not guilty of any negligence on his part, or any want of reasonable prudence and caution to avoid the accident. "First. As to the alleged negligence on the part of the company. In what did this consist? It was said it was negligent in constructing the bridge so low that a conductor or brakeman could not pass under it in safety on top of a house car, where his duty required him sometimes to be. But there is no evidence to support this position; on the contrary, all the proof shows that

the employes of the company, and the appellee among them, every day passed under the bridge safely by observing the simple and easy precaution of stooping or sitting down while passing under the bridge. No negligence can be imputed to the company, because the struts of the bridge were not high enough to allow a person to pass under them standing upright on the top of the cars. *Baylor v. Railroad Co.*, 40 N. J. Law, 23 [29 Am. Rep. 208]. It was not required of the appellee to stand on his feet while passing the bridge. He was in that position, according to his own statement, because his back was turned towards the bridge. 'He did not think of it, and did not know he was near it;' but he knew it was there; it was in full view only a few moments before, when he started his train from a point only 200 or 300 yards distant. Nothing is better settled than that 'the implied contract between the employer and employe is that the latter take upon himself all the natural risks and perils incident to the service.' *Moran's Case*, 44 Md. 292. As expressed by Cockburn, C. J., in *Clarke v. Holmes*, 7 H. & N. 943: 'When a servant enters upon an employment, he accepts the service subject to the risks incidental to it.'

We have thus quoted at length from *Stricker's Case*, because the facts of that case are almost identical with the facts of the case at bar; and the principles of law announced in that case are not only applicable here, but have been approved and applied in similar and later cases decided by our courts.

In the case now before us, we are of opinion there was a failure of evidence to prove such negligence on the part of the defendant or its agents, as alleged in the pleadings, to entitle the plaintiffs to recover; and there was a legal insufficiency of evidence to show that the death of Wilson was caused by the failure of the appellant to discharge any of its legal duties towards him.

[2] On the contrary, the evidence shows that the deceased directly contributed to the accident which caused his death by his own negligence and want of care in failing to notice the platform as he approached the tower, and in violation of a duty which required him to observe the signals on the tower for his own safety and that of his train. The evidence is undisputed that at the time of the accident he was facing the rear of the train, looking south, with his back to the platform and tower, although he had an unobstructed view of the platform of over 200 yards from the time the train left the water tank until it reached the tower. Whether he was standing on the ladder at the end of the car, as testified to by the plaintiffs' witnesses, or was walking on the top of the box car, as stated by some of the defendant's witnesses, at the time of the accident,

it is immaterial, because in either position he was clearly guilty of such contributory negligence, under the facts of this case, as to bar a recovery. As this conclusion disposes of the case, it will not be necessary for us to consider the other questions raised on the record.

For the error in granting the plaintiffs' prayers and in rejecting the defendant's prayers, which sought to withdraw the case from the consideration of the jury, the judgment will be reversed, and, as it is apparent the appellees cannot recover, a new trial will not be awarded.

Judgment reversed, without awarding a new trial, with costs.

J. P. MORGAN & CO. v. HALL & LYON CO.
(Supreme Court of Rhode Island. June 11, 1912.)

APPEAL AND ERROR (§ 1154*)—AMENDMENT—INCREASE OF AD DAMNUM.

A motion by plaintiff, made in the Supreme Court after decision by it, sustaining his exceptions and giving defendant an opportunity to show cause why judgment should not be entered for plaintiff, for leave to increase its ad damnum, on the ground that the aggregate amount of the judgment and interest will exceed the amount originally demanded, will not be entertained on the hearing to show cause; but the cause will be remitted to the superior court, with directions to enter judgment for plaintiff for an amount not exceeding the ad damnum.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4497; Dec. Dig. § 1154.*]

Action by J. P. Morgan & Co. against the Hall & Lyon Company. Rule on defendant to show cause why judgment should not be entered for plaintiffs after their exceptions were sustained (83 Atl. 113). Cause remitted, with directions.

Dexter B. Potter and Edward A. Stockwell, both of Providence, for plaintiffs. C. M. Van Slyck and Frederick A. Jones, both of Providence, for defendant.

PER CURIAM. The court having rendered its decision, sustaining the plaintiffs' exceptions, an opportunity was given to the defendant to appear and show cause why judgment for the plaintiffs in the sum of \$845.98, with interest, should not be entered.

The defendant appeared before the court on June 3, 1912, and presented its arguments against such entry of judgment, and the plaintiffs were also heard in reply thereto. Upon the consideration of the arguments thus presented, we do not find any reason for changing or modifying the conclusions already expressed in the opinion of the court.

The plaintiffs, at the hearing, moved for leave to increase its ad damnum, for the reason that the aggregate amount of the interest and judgment would exceed the

amount for which it had originally brought suit. We do not think that such a motion should be entertained at this late stage of the proceeding, when the case is before us upon exceptions; and the same is therefore denied.

The case is remitted to the superior court, with direction to enter judgment for the plaintiffs in the sum of \$845.98, together with so much of the interest, which may be due the plaintiffs, which, added to the principal sum of \$845.98, shall not exceed the amount of the ad damnum.

MCQUILLAN v. MCQUILLAN.

(Supreme Court of Rhode Island. June 11, 1912.)

1. TRIAL (§ 350*)—SPECIAL ISSUES—SUBMISSION TO JURY.

The statute authorizing the submission of special issues to be settled by the justice presiding at the trial to the jury only authorizes the submission of a material issue involving some disputed fact in such a manner as to be readily comprehended by the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

2. TROVER AND CONVERSION (§ 40*)—INSURANCE POLICIES—OWNERSHIP—EVIDENCE.

In trover for the conversion of certain insurance policies, evidence held to warrant a finding that the policies belonged to plaintiff.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Trover by Rose McQuillan against Patrick H. McQuillan. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Peter C. Cannon, of Providence, for plaintiff. Frank L. Hanley, of Providence, for defendant.

PER CURIAM. The plaintiff brings an action on the case for trover and conversion and seeks thereby to recover damages for the conversion of certain goods and chattels, including two insurance policies on the life of the mother, Catherine McQuillan. Suit was originally brought in the district court where a jury trial was claimed. Subsequently a trial in the superior court resulted in a verdict for the plaintiff. The defendant's motion for a new trial was denied, and the case now comes to this court on the defendant's exceptions.

The plaintiff and defendant are brother and sister and children of Catherine McQuillan on whose life the policies were issued. It does not appear from the transcript of testimony that the plaintiff laid much stress upon the conversion of the several articles other than the policies of insurance. The conversion of the household goods is not referred to in the defendant's

brief, and the jury apparently did not consider that part of the case in arriving at a verdict which simply covers the amount due on the policies in question. We may therefore eliminate the household goods in the further consideration of the case.

The plaintiff had lived with her mother for a period of some 20 years and down to the time of the latter's death in October, 1910. The plaintiff's earnings were largely devoted to the support and maintenance of the household. The defendant had not been a member of his mother's family for some 19 years and had not contributed anything for the support thereof. In the spring of 1896 the plaintiff insured her mother's life in the Metropolitan Life Insurance Company on two policies for the sum of \$248, which, upon the death of the insured, with the added bonus, amounted to a total of \$272.90. On the original application for the insurance the plaintiff was named as beneficiary, and she retained possession of the policies and premium receipt books from the time they were issued in March, 1896, until a few days prior to her mother's death in October, 1910, when she missed them from her trunk in which they were kept. The plaintiff paid the premiums during the life of the policies. After her mother's death the policies were presented to the company by the defendant for payment. There being two claimants, the insurance company offered to make payment by a check to their joint order, but the defendant refused to give up the policies.

The defendant claims that these policies came to him through his wife to whom they were intrusted by his mother for delivery to him, with instructions that he collect the money due upon them and from the proceeds pay her funeral expenses. In this claim the defendant is supported by his wife, also named Catherine McQuillan. The defendant at the trial took 19 exceptions (having erroneously numbered his last exception as 20). The seventh and thirteenth were stricken out and not allowed by the trial judge. Numbers 3, 5, 12, and 16 are waived by the defendant in his brief. Of the remainder, 4, 6, 8, 9, 10, 11, 14, 15, and 17 relate to rulings admitting or rejecting testimony. Upon examination of these we do not find sufficient merit in any of them to warrant individual or special consideration, and they are overruled. The eighteenth exception relates to the denial of certain requests to charges numbered 2, 3, and 4. We do not find any error in the denial of these requests, and the exception thereto is overruled. The nineteenth exception (numbered as twentieth) is to the refusal of the trial

judge to submit to the jury certain special findings proposed by the defendant, and numbered from 1 to 4, both inclusive.

[1] It is the evident intention of the statute to give to either party the right to submit to the jury such certain and specific questions, based upon the issues in the case, as such party may desire. This right in its exercise must be subject to some regulation. As the statute says, "Such issue shall be settled by the justice presiding at the trial." If the special question submitted is one which involves some issue in the case and is in proper form and in a form to be readily comprehended by the jury, we think that it would be the duty of the presiding justice to submit it to their consideration. If on the other hand the special question was not based upon an issue in the case, or was simply frivolous or unimportant, or involved some undisputed fact, or was so carelessly drawn that it would unnecessarily confuse the jury, it would become the duty of the court to require such changes in or wholly disallow the proposed question as the circumstances might require. The first and second special questions do not seem to cover any material issue in the case.

[2] The primary and controlling question in this case is the ownership of the policies, and that question is not determined by the act of Catherine McQuillan in placing them in the possession of her son nor by her directions to him as to the disposition of the proceeds. There was evidence showing that the plaintiff caused these policies to be issued; that she was the beneficiary named therein; that she paid the premiums thereon; and that she retained the possession of the policies and receipt books until within a few days of her mother's death when they, in some manner unknown to her, disappeared from the trunk in which she kept them. There is no testimony that the plaintiff parted with these policies voluntarily. There is ample testimony upon which the jury might find that the policies belonged to the plaintiff. The special questions 1 and 2 do not cover any material issue and were therefore properly rejected by the trial court. The third and fourth special questions seem to be based upon undisputed facts and were for that reason properly rejected.

The case presents questions of fact upon which the jury has founded its verdict, and the same has been approved by the justice presiding through his refusal to grant a new trial.

All of the defendant's exceptions are overruled, and the case is remitted to the superior court with direction to enter judgment on the verdict.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LYNCH v. LYNCH.

(Supreme Court of Rhode Island. June 11, 1912.)

ABATEMENT AND REVIVAL (§ 69*)—ANNULMENT OF MARRIAGE—DEATH OF PARTY—EFFECT.

The death of petitioner, suing for the annulment of her marriage to respondent, pending a hearing to show cause why the case should not be remitted to the superior court for judgment annulling the marriage, renders an order for entry of a decision in accordance with the opinion sustaining exceptions to the dismissal of the petition impossible, and the papers in the case will be remitted to the superior court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 349-354; Dec. Dig. § 69.*]

On motion to show cause why decision should not be rendered for petitioner after her exceptions were sustained. 83 Atl. 83. Papers remitted.

Page & Cushing, of Providence, for petitioner. Cassius L. Kneeland, of Providence, for respondent.

PER CURIAM. At the hearing given for the respondent to show cause why said case should not be remitted to the superior court, with direction to forthwith enter a decision in favor of the petitioner, granting her petition and annulling the marriage between her and the respondent, the death of the petitioner was suggested by the respondent. The death of the petitioner renders an order for the entry of a decision in accordance with the opinion impossible.

The papers in the cause are remitted to the superior court.

CANFIELD et al. v. BARNES et al.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

WILLS (§ 166*)—PROBATE—SUFFICIENCY OF EVIDENCE.

Where a man, 63 years old when he died, made his will in favor of his second wife more than a year before his death and 6 years after the second marriage, executing it in his own privacy, and retaining it in his exclusive control to within a few days of his death, he being a man of unusual intelligence and superior judgment, who, though he drank liquor as a habit, was not under its influence when the will was made, and who had lived happily with his second wife, and she had not attempted to influence him against his children by his first wife, a verdict against the will on an issue devisavit vel non where undue influence is alleged will be set aside, where evidence of a meretricious relation between testator and the second wife during his first wife's lifetime was admitted, and given an undue weight in the charge to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

Appeal from Court of Common Pleas, Allegheny County.

Issue devisavit vel non between Laura E. Canfield and others and Emma J. Barnes and others to determine the validity of the will of Elmore A. Barnes, who died January 17, 1900, a resident of the city of Pittsburgh. From a judgment for plaintiffs, defendants appeal. Reversed, and issue directed to be set aside.

The contestants claimed that the will was the result of undue influence exercised upon the testator by his second wife, Emma J. Barnes. The facts are stated in the opinion of the Supreme Court. Verdict and judgment for plaintiffs. Defendants appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John C. Bane, for appellants. R. T. M. McCready and J. M. Stoner, for appellees.

STEWART, J. This was an issue devisavit vel non, in which the ground of contest was alleged undue influence. The only possible explanation of the verdict condemning the will in question is to be found in the great mass of irrelevant testimony that the jury were called upon to consider, the effect of which must have been, if not to divert their minds from the one issue they were trying to at least influence them in resolving it by considerations improperly introduced into the case; for we do not hesitate to say, after a careful review of every one of the eleven hundred pages of testimony, that there is absolutely nothing in this record upon which this verdict can be justified. The issue was granted at the instance of the testator's children by a first wife who are aggrieved at the disposition made by testator of his estate.

The testator was 63 years of age when he died. This will in question was made more than a year before his death; the codicil attached, some four months before. The will had been prepared by counsel from memoranda submitted by the testator, and was afterwards executed by the testator in his business office, and attested by his own chosen witnesses. The codicil, by which certain changes were made in the will, affecting only one of the appellees, was prepared by the clerk of the counsel who had written the will, and was executed in like manner as the will. Outward constraint in the preparation and execution of the will or codicil there was none, and none is pretended. Both were executed in the freedom of testator's own privacy, and both remained in his exclusive control and custody to within a few days of his death. The testamentary capacity of this man, acting free from control, is admitted; but even without the admission it is made apparent by the testimony that he was a person of unusual intelligence and superior business judgment. The learned trial judge in his charge has this to say of him: "I

think we all agree that at one time in the life of Mr. Barnes, if not at all times, he was a bright, intelligent, strong, vigorous man mentally and physically." The qualification here made is in view of one of the contentions on the part of the plaintiffs; that is, that through excessive drink in his later years the testator's will had become enfeebled, and his power of resisting importunity correspondingly lessened. This inquiry was pursued at great length, unnecessary ground being covered because the main purpose of the inquiry was lost from sight. The question whether he was a man of intemperate habits was given undue prominence. It not being alleged that at the time of the execution of the will he was under the influence of drink, the testimony with respect to his habit of drink was admissible only as it went to show, as a result of the alleged habit, that he had so far deteriorated in mental force that it was in the power of designing persons to make him adopt their will as his own. Many witnesses were called who testified to having seen him at different times under the influence of liquor. Some testified to prolonged spells of intoxication; some to a constant habit of drink; none, however, that the habit, however constant and long-continued, had disqualified him from attending to his business affairs, giving them careful consideration and exercising in connection therewith his usual intelligent judgment. More than this, not one of them testified to a single circumstance which could be made the basis of even a conjecture that his power of self-assertion, which admittedly all his life long had been a prominent characteristic, had in the slightest degree abated. Not a single act of yielding to attempted persuasion of others, of subordinating his views to those of others, or of imprudence in the management of his estate was shown. Out of this mass of testimony on this branch of the case, nothing making for the contention of the plaintiffs can be derived except the academic statement of a physician, who at one time had attended testator in a brief illness, to the effect that a victim of chronic alcoholism has, generally speaking, "less will power, generally a lack of responsibility, sense of responsibility, is more or less lost or carried away by alcohol." A fuller reference to this feature of the case is unnecessary in view of what we have to say with respect to the main question at issue—the alleged undue influence.

The proponent of the will was the widow to whom testator had given in her own right by far the greater part of his estate. The inequality created by the will is apparent, the discrimination being against these plaintiffs, children of testator's first wife, and the only children testator left surviving. The inequality extends as well to the shares given the children, some are given more than others. It is the contention of the plaintiffs

that the will in question was procured by undue influence exercised upon testator's mind by the proponent and her sister, who resided in testator's family, and to whom he had given a legacy of \$1,000. The intervention of no other party is even suggested, so we have to consider the conduct of these two alone. First, let us observe what affirmatively appears in the evidence. The testator, in what may justly be regarded as unseemly haste following upon the death of his first wife, married the proponent. This, together with the fact that proponent occupied a humbler station in life, having previously been an employé in the laundry owned and operated by the testator, gave offense to the plaintiffs, and resulted in estrangement between them and their father, which continued more or less marked until testator's death, except in the case of one of the daughters, Mrs. McCardell. None of the children resided with their father at the time of this second marriage; each having a home of his or her own. That this second marriage, apart from the estrangement of his children, contributed to the comfort and happiness in a marked degree of the testator abundantly appears, not only by his own frequent declarations to this effect, but by his attachment to his re-established home and his domestic life therein. That he entertained for this wife a most affectionate regard cannot be questioned. Neither can it be questioned that she made him a kind and considerate wife. During the seven years that this marital relation continued, the peace of it was never disturbed. All the evidence on the subject indicates that the parties were living in mutual confidence and affection, which continued to the end. So much for what affirmatively appears. If now we turn to the evidence introduced by the plaintiffs for the purpose of showing undue influence exerted by the defendants, not only does the utter barrenness of it become apparent, but the conclusion becomes irresistible that the condemnation of this will by the jury was the product of prejudice aroused by wholly irrelevant testimony affecting the character of the proponent, not during the continuance of the marital relation with the testator, but preceding it. Before further reference to this evidence, let us say that not a single act of interference of either defendant in connection with the making of the will was shown. Not only was no importunity or entreaty to prefer the widow shown, but it does not appear that even a request on part of either of defendants that testator should make a will was ever made. Further still, the will was made a year before testator's death, and it does not appear that proponent knew of its existence, certainly not of its contents, until shortly before testator's death. Whether she knew it then was a matter in dispute. The record will be searched in vain for any evi-

dence which would warrant an inference that proponent had ever attempted to prejudice testator against his children that is at all credible. A declaration alleged to have been made at a family dinner at the home of Mrs. McCardell by Miss Younkin, one of the defendants, in presence of all the guests, including the testator, to the effect that testator's children ought not to receive any part of his estate, and assented to by the proponent, is the nearest approach to direct evidence on this point. Apart from the fact that it was denied by both defendants that any such conversation occurred, it passes belief that, if defendants were actually conspiring to influence the testator to make a will discriminating against his children, they were openly avowing their sentiments in the presence of those to be prejudiced thereby, and particularly when it is manifest that such conduct could in no conceivable way further their designs. Conceding that the conversation occurred as related by the witness, it is, if not the only evidence, certainly the nearest approach to substantial evidence on which the theory of undue influence arises. How ineffectual it was, if intended to influence the testator's mind, appears from the testimony of this same witness who says that her father told her as many as 50 times after his marriage to the proponent and repeated it as late as August, 1908, that he would do with his estate as he pleased, and that no one should know the contents of his will until it was opened. Not a single remark reflecting upon any of these children in a way calculated to prejudice them in the estimation of the testator, notwithstanding their refusal to recognize her as their father's wife, is traced to the proponent. With this exhibit of the evidence, the inquiry is natural: Upon what was the case made to turn in the court below? As we read the charge the jury were called upon to consider and pass upon three questions of fact. One of these we have already considered, the extent to which testator was addicted to drink, about which there was much conflicting testimony, but which, upon the plaintiff's own showing, was wholly inadequate for the purpose for which it was offered. The next was whether the proponent had knowledge of the existence of the will and its contents before testator's death, a question of no consequence whatever in connection with the main issue except as associated with other evidence from which undue influence could be derived. In itself, such fact could establish nothing here in issue, but nevertheless it was made one of the vital issues in the case: the jury being told that "it went to the root of the question itself." The instructions in regard to this unrelated matter covers more than five pages of the judge's charge. The proponent had testified that the first knowledge she had of the existence of a will was derived about two weeks before

she and her husband left their home to go to the sanatorium where the latter died. This was in December, 1908. She testified that testator then told her that he had made a will, and that it was safe in the house. She further testified that she did not see the will until her return home after testator's death. Evidence was introduced to show acts and statements made by the proponent inconsistent with her testimony with respect to these matters. One witness testified that during testator's last illness proponent on her return from a visit to her home, upon entering her husband's sick room, produced a paper from a business envelope, threw it on testator's bed and said to him, "I brought your will," and the testator replied, "Put it in the trunk"; that later, when one of the daughters came to visit testator, proponent took the will from the trunk, and remarked that nobody should see it. Another witness testified that a day or so following testator's death, in reply to a question, proponent said that she did not know whether there was a will or not. All of this testimony was flatly contradicted by proponent. Had ground here been laid for any inference of undue influence on the part of the proponent, the relevancy of this inquiry could be well understood; but, without evidence in the remotest degree involving the proponent, it is impossible to see how the determination of the question of proponent's truthfulness with respect to the matter inquired of could in any way affect the issue being tried. And yet the view taken by the court is thus expressed in his instructions to the jury: "But, if you find that she is not stating the truth as to her knowledge of the contents of the will, that is a much more serious matter, and one that ought to influence you in rendering your verdict."

The remaining question to which the jury's attention was directed was one not only without relevancy, but one well calculated to divert the minds of the jury from the true and only issue. Our only reason for referring to it—and the same consideration has governed in the discussion of the other questions—is that some explanation may appear for what we are compelled to regard as an unwarranted verdict. We have referred to the unseemly haste with which the testator, following the death of his first wife, hastened into married relations with the proponent. Had the evidence touching the relations of the parties stopped with this one circumstance, while its pertinency is not apparent, its admission might still have been justified, but it went far beyond, and, because it exceeded all reasonable limits, it should not have been admitted. The purpose of the added evidence was to show that before his marriage with the proponent, and during the lifetime of his first wife, and during the lifetime of proponent's first

husband, the testator had maintained meretricious relations with the proponent. We shall not attempt a review or recital of the evidence which was relied on to establish this contention. It is sufficient to remark that it was wholly circumstantial, and against it the proponent could do nothing but enter her sworn denial. Whether the charge be true or false, what had it to do with the issue being tried? Seven years before his death the testator had married this woman. During all that time he not only acknowledged her as his wife, but gave unmistakable evidence of his confidence in her faithfulness and his affectionate regard for her, while she, in turn, so far as the evidence shows, merited by her conduct his kindest consideration. To permit an inquiry into what occurred between these parties at a period antedating the marriage into which both voluntarily and deliberately entered, and which, so long as it continued, was marked by mutual regard and affection, under pretext of showing that one exercised undue influence over the other in the making of a will seven years thereafter, is to disregard the plainest rules of evidence, and allow widest opportunity for prejudice to overcome judgment and reason in the determination of such issues. If the facts were as alleged by the plaintiffs, the moral guilt incurred brought its own condemnation upon the parties with its own appropriate penalty; and violated law, had it been appealed to, stood ready to pronounce its condemnation with its appropriate penalty; but neither in morals nor law can warrant be found for penalizing such misdoings by denying to the parties years after they have entered into lawful marital relations the right to say who shall succeed upon their death to the assets they leave behind. Such right is denied to those lacking mental capacity, and those deprived of freedom of action, but disregard of moral standards at a time seven years removed from the testamentary act is no test of either condition. In referring to this evidence the court in its charge said: "It is contended on part of plaintiffs, who were children of Mrs. Barnes the first wife, that the relations of Mr. Barnes and the defendant were prior to the death of the first Mrs. Barnes illicit and meretricious. This is denied by Mrs. Barnes. Whether the allegation be a fact or not it does not determine this case. It is an element to be considered in the case with all the other evidence in the case," etc. It is impossible to escape the conclusion that in the submission of this question to the jury is to be found the true explanation of the verdict condemning the will. But our decision of the case rests, not on the views here expressed with respect to the manner of its submission, but on the broader ground that there was nothing in the case calling

for submission, and that binding instructions for the defendants should have been given. "A court has a higher duty to perform than merely to answer points of law! It is its duty to see that the law is faithfully administered. Such administration requires that a man's will, the most solemn instrument he can execute, shall not be set aside without any sufficient evidence to impeach it. There is no redress here for an erroneous or improper verdict. But where a case is submitted to a jury, upon clearly insufficient evidence, such as no court ought to sustain a verdict upon, it is our plain duty to reverse." This was said by this court in *Cauffman v. Long*, 82 Pa. 72. It is quite as appropriate here.

The first assignment of error is the refusal of the court to so instruct in accordance with defendant's first point. This assignment is sustained; the judgment is reversed, and the issue directed to be set aside; costs to be paid by appellees.

FORNO et al. v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Feb. 5. 1912.)

RAILROADS (§ 348*)—OPERATION—ACCIDENTS AT CROSSINGS—EVIDENCE.

Where the evidence shows that plaintiff, on a dark night, approached a railroad where there were three tracks, with an engine on the far track making a noise, that he stopped, looked, and listened before going on the first track, that his wife preceded him safely over this track, that the plaintiff, carrying a child, was struck as soon as he stepped upon the track by the tender of an engine, which was moving backward without light or signal, that the place in question was a permissive crossing, about 340 feet from a public crossing, as to the availability of which the evidence was conflicting, a verdict for plaintiff will be sustained.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1133-1150; Dec. Dig. § 343.*]

Appeal from Court of Common Pleas, Washington County.

Action of trespass for personal injuries by Mary Forno, a minor, by Charles Forno, her next friend, and by Charles Forno in his own right, against the Pennsylvania Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

The facts are stated in the opinion of the Supreme Court. Verdict and judgment for Charles Forno for \$5,000, and for Mary Forno for \$4,000. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. W. Irwin and Jas. A. Wiley, for appellant. Carl E. Gibson, Chas. G. McIlvain, and W. K. Vance, for appellees.

POTTER, J. In this action, Charles Forno sought to recover damages for personal in-

juries sustained by him through the alleged negligence of the defendant company. The plaintiff at the same time, as father and next friend, brought another action in behalf of his infant daughter, Mary Forno, against this defendant to recover damages for personal injuries sustained by her through the same alleged negligence. The cases were tried together, and appeals from the judgments have been argued together, and are to be disposed of in this opinion.

It appears from the evidence that the defendant railroad company has, at Shire Oaks, Washington county, two main tracks and a siding running along the western side of the Monongahela river. At the point in question, there is a strip of ground, some 60 or 70 feet in width, between the railroad tracks and the river, upon which, in July, 1909, was erected a dwelling house owned by the defendant and occupied by one Dominic Censore. On the opposite side of the railroad, and running parallel with it, is a public highway. From this road, at a point about 340 feet north of the Censore house, another public road extends eastwardly at right angles, crossing the railroad tracks and running to the river bank. There was considerable evidence tending to show that a safe pathway extended along the eastern side of the tracks from the house to the public crossing. There was also evidence upon the part of the plaintiff tending to show that this means of access to the public crossing was not available.

On the evening of July 17, 1909, the plaintiff, Charles Forno, with his wife and two children, was at the Censore house. At about half past 9 o'clock, they left for their home, which was on the opposite side of the railroad. The night was dark, and plaintiff carried a pit lamp, which was lighted. The party started to walk directly across the railroad tracks. The husband and wife both testify that before stepping upon the first track they stopped and looked and listened; but neither saw nor heard an approaching train or locomotive. There was a coal train standing upon the third track, and its engine was making a noise. The wife was in advance, and the husband, with a child in his arms, followed; and as he stepped upon the track he was immediately struck by the tender of a passing locomotive, which was at the time running backwards at a speed of about six miles an hour. The engine was brought to a stop very quickly, within a distance of about 40 feet, and the plaintiff was found between the rails, and under the engine. He lost an arm as a result of the accident, and was otherwise injured; and the child was so injured that it was necessary to amputate the right foot and the left leg at the thigh.

The specific act of negligence with which the defendant company was charged was in running the engine and tender backward at the time and place in question, without giv-

ing an alarm or signal, and without having a light on the end of the tender. At the trial, requests for binding instructions in favor of the defendant were refused, and the cases were submitted to the jury, who found a verdict in favor of the plaintiff in each case. The defendant has appealed, and in the first assignment of error its counsel complain of a portion of the charge which in effect, it is urged, permitted the jury to say whether or not the plaintiff was justified in crossing the tracks directly in front of the house, even though they found from the evidence that there was a plain, safe path leading along the tracks from the house to the public crossing.

We have considered with great care the portion of the charge assigned for error; but we are unable to see that the inference suggested by counsel for appellant is fairly to be drawn from the language of the court. It is apparent that the learned trial judge had a proper understanding of the law; and that he submitted his conceptions to the jury with care and exactness. The respective contentions of both parties as to the facts were impartially presented. The jury were told that, as a general rule, one hurt on a railroad track, other than at a public crossing, cannot recover damages for injuries sustained from a train properly operated in the ordinary way; that an exception to this rule arises where persons are led to cross the tracks through a necessity brought about by the railroad, or where they do so with its express or implied permission. In the language of the court below, the law upon this point was thus summed up: "The general rule, as we have told you, is that the railroad company has the right to the exclusive use of its tracks; but the case is altered when, by permission of the company, persons cross its tracks at a given point, not a public crossing. In such cases, the comfort and safety of those permitted to cross the track of the railroad are involved; and those employes of the railroad who operate its trains must exercise care under the circumstances as they exist in such a case." This was followed by stating, in substance, the claim of plaintiff that the renting of the house by the defendant company gave rise to a right in the tenant to cross the tracks at that point as a way of necessity; but this statement of plaintiff's claim was balanced by the immediate presentation of defendant's reply to that contention, in which it said, in substance, that there was no such necessity in this case, because a convenient and safe pathway existed, leading along the side of the railroad from the house to the public crossing, which plaintiff might easily have taken. In like manner, the attention of the jury was directed to the evidence of the crossing of the tracks at the point in question; and they were told that they must find whether such use of the crossing had continued long enough to fairly justify an inference that it

was permitted by the railroad. The court said in this connection: "It will be for you to say, taking all the evidence that has been produced here on both sides, whether or not, in front of this house, there was a permissive crossing, either a permissive crossing by reason of the necessity that was put upon the tenants of that house by the railroad company itself when they rented it, or by their use for the length of time they had been in there, to such an extent as to notify the railroad company that they were using that crossing there, so that it could be fairly inferred that they consented to their using it, or whether there was a path led up to it, and away from it." Further on the jury were instructed that, if they did not find from the evidence that the railroad had granted a permissive crossing, the plaintiff would be a trespasser at that point; and if he was a trespasser the railroad company owed him no duty. Doubtless it would have been better if, in connection with the reference to defendant's contention that a safe path extended along the railroad from the house to the crossing, the jury had been told directly and positively that, if they found from the evidence there was such a path, the failure of plaintiff to use it, and the taking, merely for his own convenience, of a shorter way across the tracks, was contributory negligence, which in itself would prevent a recovery. But the affirmance of the fifth point for charge presented by counsel for appellant did give squarely just such an instruction; and under the circumstances, and considering the whole scope and contents of the charge, we do not feel that the court below can fairly be charged with reversible error in the manner in which it presented to the jury the matter which is made the subject of the first assignment of error.

After full consideration of the evidence bearing upon the contributory negligence of the plaintiff, we have concluded that this question was, under the peculiar circumstances of the case, properly left to the determination of the jury. According to plaintiff's own testimony, a single step from the side of the track placed him directly in front of the tender of the locomotive which ran over him. Under ordinary circumstances, it is vain for a man to say that he looked or listened who walks directly in front of a moving locomotive. An injury so received is due to his own gross carelessness. *Penna. Railroad v. Bell*, 122 Pa. 58, 15 Atl. 561. If this accident had occurred just as it did, in daylight, the court must have, as a matter of law, pronounced the plaintiff guilty of contributory negligence. But the evidence showed that the night was dark, and that an engine standing near by was blowing off steam and making a noise. There was evidence upon the part of plaintiff which, if believed by the jury, tended to show that the engine which struck plaintiff came along

quietly, running backward, without a light upon the tender to indicate its approach. This evidence brings the case within the lines of the decision in *Davidson v. Railway Co.*, 171 Pa. 522, 33 Atl. 86, where the cases in which the existence of contributory negligence has been held to be a question of law are distinguished from those in which it has been held to be a question of fact. The same case was before this court again in 179 Pa. 227, 36 Atl. 291, and it was there said: "We are not disposed to relax the rule that requires a traveler, when approaching a railroad crossing to stop, look, and listen, nor to depart from the long roll of cases in which we have held that one who goes in front of a moving train which he has ample opportunity to see, and hear, and avoid, must ordinarily be held guilty of contributory negligence as matter of law; but when the facts are not clear and simple, and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision." Another case illustrating the application of this principle is *Muscarro v. Railroad Co.*, 192 Pa. 8, 43 Atl. 527.

In the present case, we find no substantial error in the manner in which the rather complicated questions involved were submitted to the jury. The assignments of error are overruled, and the judgments at No. 72, October term, 1911, and at No. 73, October term, 1911, are affirmed.

CITY IMPROVEMENT CO. v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

MUNICIPAL CORPORATIONS (§ 655*)—STREETS—ALTERATIONS.

A city has no power by locating and relocating ordinances to locate what purports to be a new street 60 feet wide, which in fact merely widens an existing street 40 feet wide and an alley connecting therewith 20 feet wide, but must, if it thinks proper to widen the street and alley, do so in the manner prescribed by the statutes relating to the widening of streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 655.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by the City Improvement Company for an injunction against the City of Pittsburgh. From a decree for plaintiff, defendant appeals. Affirmed.

The facts are stated in the opinion of the Supreme Court.

The court entered the following decree:

"And now, to wit, this 23d day of September, 1911, this cause came on to be further heard, at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged, and decreed as follows:

"(1) That the ordinance of the city of

Pittsburgh entitled, 'An ordinance locating Hamilton avenue, from Frankstown avenue to Fifth avenue,' approved July 7, 1891, a copy of which is attached to the bill of complaint, is ultra vires, void, and of no effect.

"(2) That the ordinance of the city of Pittsburgh entitled, 'An ordinance relocating Hamilton avenue, from a point 229.60 feet westwardly from Lambert street to Penn avenue,' approved July 1, 1903, a copy of which is attached to the bill of complaint, is ultra vires, void, and of no effect.

"(3) That the said ordinances of July 7, 1891, locating Hamilton avenue, and of July 1, 1903, relocating Hamilton avenue, create a cloud upon the plaintiff's title to the premises described in the bill of complaint, and that the same be removed therefrom.

"(4) That the proper authorities of the city of Pittsburgh note upon the ordinance books, and upon the pages containing said ordinances of July 7, 1891, and July 1, 1903, and upon the indices and records referring thereto, and upon the maps and plans of said city, referring thereto, the words, 'Canceled by the decree of the court of common pleas No. 3 of Allegheny county, Pennsylvania, at No. 496 February term, 1911.'

"(5) That the defendant pay the costs of this proceeding."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

C. Elmer Bown, C. A. O'Brien, and C. K. Robinson, for appellant. A. M. Thompson and Gordon & Smith, for appellee.

MESTREZAT, J. The facts of this case are not in dispute, and have been found and stated by the learned court below.

In 1891 the city of Pittsburgh enacted an ordinance locating Hamilton avenue from Frankstown avenue to Fifth avenue. The street thus located began at a point on Fifth avenue directly opposite the end of a street called Hamilton avenue, then opened on the ground and used by the public. The street provided for by the ordinance extended in substantially the same direction for a distance of 2,800 feet. In this distance, as stated in the appellant's history of the case, it passes through six plans of lots, crosses ten existing streets or alleys, and embraces within its limits two streets and an alley already opened and used in certain plans, involving the widening of one of these streets and the alley. The length of the street and alley is about 825 feet. In 1895 an ordinance was passed authorizing the opening and widening of Hamilton avenue from Fifth avenue to Frankstown avenue. Viewers were appointed to assess the damages and benefits, but, before the completion of the proceedings, the city repealed the ordinance. In 1903 an ordinance was passed relocating Hamilton avenue from a point a short distance east of its intersection with Berlin

street to Penn avenue, thus making the latter, and not Frankstown avenue, the western terminus of Hamilton avenue. This change or relocation of the street increased its length about 800 feet. The relocation of the street crosses the plaintiff's property. In February, 1905, an ordinance was passed authorizing the opening and widening of Hamilton avenue from Fifth avenue to Penn avenue in accordance with the locating and relocating ordinances. Again viewers were appointed to assess the damages and benefits, but, before the proceedings were concluded, the city, in November, 1905, enacted an ordinance repealing the opening and widening ordinance. The city has enacted no further legislation affecting Hamilton avenue. The street as relocated passes through the plaintiff company's property, and it has filed this bill praying for a decree that the locating and relocating ordinances create a cloud upon the plaintiff's title to the premises described in the bill of complaint, and that said ordinances are ultra vires, void, and of no effect. The prayer of the bill was granted by the court below, and the city has taken this appeal.

The learned chancellor in disposing of the case held that it was ruled by *Hawkins v. Pittsburg*, 220 Pa. 7, 69 Atl. 283. In that case it was held, as stated in the syllabus, that an ordinance of the city of Pittsburgh purporting to relocate an established alley, but having in fact the effect of widening the alley, is invalid; and that the city has no power to relocate a street, and, if it intends to widen a street, it must pursue the course prescribed by the statute. The learned counsel for the appellant strenuously contend that there is a radical distinction between this and the *Hawkins* Case. In the latter case the city attempted to widen Virgin alley which was about 500 feet long and had been opened and used for many years, and the appellant contends that it differs from the present case, in that "the contemplated improvement related solely to Virgin alley, and was not undertaken in connection with the widening or locating of any other thoroughfare, and the relocating ordinance was a manifest attempt on the part of the city to widen the street and to postpone its liability for the damage occasioned thereby." It is true, as suggested by the appellant, that the improvement was confined to Virgin alley and did not extend to any other thoroughfare, but the ordinance was not declared void upon that ground, but for the reason that its purpose and effect was to widen Virgin alley which could not be done by a proceeding to relocate it; and that, if the city desired to widen one of its streets, it must do so in a proper proceeding instituted for the purpose. It is said in the opinion (220 Pa. 13, 69 Atl. 285): "Its council cannot escape the provisions of the statute or ignore the course of procedure directed by

the statute by simply declaring in the ordinance a purpose other than the facts disclosed. The facts must determine what method the city shall pursue to accomplish its purpose, and, those facts requiring it to proceed in the manner provided in certain legislation, the provisions of the legislation will determine the course of procedure."

The proceeding in the case in hand was to locate Hamilton avenue and relocate the western end of it. The ordinances dealt with the subject as a new street and as though the avenue was located on ground not occupied by other streets or alleys. They ignored the conceded fact that within the lines of the avenue as located there were an existing public street and a public alley. The street and the alley connect and are about 700 or 800 feet in length. The street is 40 feet wide and the alley 20 feet. The ordinances provide that Hamilton avenue shall be located 60 feet wide, thereby widening the street 10 feet and the alley 40 feet. The avenue was located 20 years ago, and many years prior to and during that time the street and the alley within its limits were opened, existing, and traveled public thoroughfares. The facts of this case bring it clearly within *Hawkins v. Pittsburg*, supra, and the learned court below was right in declaring the locating and relocating ordinances void.

We are not inclined to disagree with the learned counsel for appellant as to what the law should be in such cases. It may be, as they suggest, that it would be better to permit such improvements to be made as a whole and not piecemeal; but it must be remembered that the authority of a city over its streets comes from the Legislature, and that, when it undertakes an improvement of this character, it must be able to point to the necessary statutory power authorizing it. The Legislature, as yet, has not thought proper to permit a city to widen its streets by a proceeding instituted for the purpose of locating or relocating them, and it is not the function of the court to supply what the legislative branch of the government has withheld. If, therefore, the city desires to exercise the power which it invokes in the present case, it must obtain it from the Legislature.

The locating or relocating ordinances must be construed as one ordinance to locate Hamilton avenue from Fifth avenue to Penn avenue. The two ordinances locate but a single avenue between the termini, and that avenue passes over the plaintiff's premises. In the subsequent ordinances for opening and widening the avenue, the city has treated the two locating ordinances as one proceeding to establish one street. The relocating ordinance was in effect an amendment of the original ordinance to the extent of changing a part of the original route of the street.

It simply superseded the original ordinance in the location of the western end of the avenue. The two ordinances must be read together as locating a single street. The plaintiff, therefore, as a property owner through which the avenue was located, may attack the validity of either or both ordinances.

The important and controlling question in the case is determined by the decision in *Hawkins v. Pittsburg*, supra, and further discussion is therefore unnecessary.

The decree is affirmed.

In re WILKINSBURG BOROUGH SCHOOL DIST. et al.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

BANKRUPTCY (§ 211*)—STATE AND FEDERAL COURTS—JURISDICTION—INTEREST IN PROPERTY.

Where a contractor is adjudicated a bankrupt, and the owner of a building paid into the court money due the contractor, and in proceedings to distribute the fund questions of law and fact arise among different claimants as to the constitutionality of the Pennsylvania mechanic's lien act (Act June 4, 1901 [P. L. 431], as amended by Act April 22, 1903 [P. L. 255]), the court should pass on the various questions of law before turning over the fund to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy. Cent. Dig. §§ 821, 823; Dec. Dig. § 211.*]

Appeal from Court of Common Pleas, Allegheny County.

In the matter of the application of the School District of Wilkesburg Borough. From an order directing money to be paid over to the trustee in bankruptcy of P. W. Finn, the school district and the American Bridge Company appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

James E. Hindman and Reed, Smith, Shaw & Beal, for appellants. George H. Rankin, for appellee.

POTTER, J. A dispute arose between P. W. Finn, contractor, and the American Bridge Company, subcontractor, for the erection of a high school building in Wilkesburg, as to the right to a sum of money due upon an estimate. Upon petition of the school district, the money was paid into court. On September 2, 1910, the Commonwealth Trust Company of Pittsburgh, which had been appointed trustee for Finn, who had been adjudicated a bankrupt, filed a petition praying that the fund in court should be paid over to it as such trustee. Answers were filed by the school district and the subcontractor, the American Bridge Company, each claiming the money in court; the former as a fund for the completion of the contract, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the latter under the provisions of the Mechanic's Lien Act June 4, 1901 (section 6, P. L. 431), as amended by Act April 22, 1903 (P. L. 255). On January 21, 1911, the school district filed a petition averring the unconstitutionality of these acts of assembly, and prayed that the money paid into court should be returned to it to be used for the completion of work occasioned by the default of Finn in the completion of his contract. Answers were filed by both the trustee in bankruptcy and the subcontractor affirming the constitutionality of the provisions of the mechanic's lien act in question, and denying the right of the school district to the money.

The case was heard as upon the petitions and answers. The court below refused to pass upon the questions raised as to the constitutionality of the acts of assembly or upon the merits of the respective claims, and ordered the fund to be turned over to the trustee in bankruptcy, and relegated to the bankruptcy court the determination of the whole matter. Both the Wilkinsburg School District and the American Bridge Company have appealed and assign for error the order directing payment of the fund in court to the Commonwealth Trust Company, trustee in bankruptcy of P. W. Finn. Both appeals were argued together, and appellants have filed a joint paper book.

The questions involved, as stated by appellants, are whether the court below should not have passed upon the constitutionality of the sixth section of the Mechanic's Lien Act, which was raised by the pleadings, and should not have adjudicated the other questions relating to the distribution of the fund in court. The United States Bankrupt Law (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 8431]), by section 23b, provided: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant." Under this section, the Supreme Court of the United States held in *Bardes v. Bank*, 178 U. S. 524, 536, 20 Sup. Ct. 1000, 1005 (44 L. Ed. 1175), opinion by Mr. Justice Gray, that "the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy" was not "brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy." By Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp.

St. Supp. 1911, p. 1499), the above section was amended and the words, "except suits for the recovery of property under section 60, subdivision b, and section 67, subdivision e," were added. These subdivisions referred to relate to matters which do not apply to the present case. It would seem therefore that the Supreme Court held that the federal courts were without jurisdiction to determine questions in controversy between the trustee in bankruptcy and other claimants of such a fund as that now in court. But the act of 1903 also amended section 60b, section 67e, and section 70c, by adding to each of them the words, "for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." In *Frank v. Vollkommer*, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. Ed. 911, Mr. Chief Justice Fuller thus comments: "The amendment (of 1903) gave the bankruptcy court concurrent, and not exclusive, jurisdiction." In *Pickens v. Roy*, 187 U. S. 177, 180, 23 Sup. Ct. 78, 79 (47 L. Ed. 128), the chief justice said that, where a proceeding involving the ownership of property claimed to belong to the bankrupt was already pending in the state court, "it was the right and duty of that court to proceed to final decree notwithstanding adjudication; the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with."

In the present case the rule to pay the money into court was not taken until after the adjudication in bankruptcy, but the order was made before the appointment of the trustee and with notice to the receiver, the same corporation which was afterwards appointed trustee. No answer to the rule was filed by the receiver.

Under the rulings of the Supreme Court of the United States, above quoted, we think it is clear that the court below had jurisdiction to pass upon the rights of the various claimants to the fund, including that of the trustee in bankruptcy. It was therefore the duty of the court below to decide the questions of law and fact raised by the petitions and answers, and the order made without considering those questions upon their merits was erroneous. Especially was it the duty of the court to decide the questions raised as to the constitutionality of provisions of the mechanic's lien acts of 1901 and 1903. The courts of Pennsylvania are the proper tribunals in which to determine the validity of statutes of our state alleged to offend against the state Constitution.

The assignment of error is sustained, and the judgment is reversed.

COMMONWEALTH v. ANDREWS.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CRIMINAL LAW (§ 783*)—TRIAL—INSTRUCTIONS—EFFECT OF EVIDENCE.

Where the main but not the only purpose of defendant's evidence in a murder trial is to establish an alibi, it is error in the charge to confine the effect of the evidence to that one purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.*]

2. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS—ALIBI.

Where the evidence against the prisoner on a trial for murder is purely circumstantial, it is error to charge in such a way as to give the jury to understand that they are to scrutinize more closely the evidence showing absence of defendant from the scene of the murder than that offered to show his presence, on the ground that the former was open to the suspicion that it was the product of subornation and perjury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1743, 1752, 1768, 1770; Dec. Dig. §§ 763, 764,* Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

3. CRIMINAL LAW (§ 572*)—EVIDENCE—WEIGHT AND SUFFICIENCY—ALIBI.

The measure of proof required to establish an alibi is simply that it shall be satisfactory; it not being necessary that it be beyond doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1263, 1289-1291; Dec. Dig. § 572.*]

4. CRIMINAL LAW (§ 572*)—EVIDENCE—WEIGHT AND SUFFICIENCY—ALIBI.

Proof of an alibi is as much a traverse of the crime as any other defense, and proof tending to establish it, though not clear, may, with the other facts of the case, raise doubt enough to produce an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1263, 1289-1291; Dec. Dig. § 572.*]

5. CRIMINAL LAW (§ 823*)—TRIAL—INSTRUCTIONS—RULES AS TO EVIDENCE.

Where, on a trial for murder, 20 or more witnesses testify as to defendant's good character, a charge that some 20 witnesses were called upon the part of defendant to testify to his general good character as a peaceable and law-abiding citizen, is inadequate and is not cured by a further instruction affirming points offered by defendant and stating that the evidence of his character is to be considered with other evidence in the case, and if all combined creates a reasonable doubt, defendant is entitled to acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

6. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

On a trial for murder, where the alleged motive was defendant's desire to prevent deceased from testifying in an inquiry as to a charge of embezzlement against defendant, it was only necessary to show that the defendant was so charged, that the investigation was proceeding, that decedent had been requested and was expected to testify, and that his testimony if given would have inculpated defend-

ant; and it was error to investigate the question of his actual guilt of embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

7. CRIMINAL LAW (§ 789*)—TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

The trial judge is under the duty in every murder trial of explaining to the jury the meaning of reasonable doubt, and of charging that the juror ought not to condemn unless he is so convinced by the evidence that he would venture to act upon the conviction in matters of the highest concern and importance to his own interest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

Appeal from Court of Oyer and Terminer, Warren County.

John M. Andrews was convicted of murder in the first degree, and appeals. Reversed, and venire facias de novo awarded.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

D. U. Arld and James Scarlet, for appellant. Frank J. Lyons, Dist. Atty., and T. C. Cochran, Asst. Dist. Atty., for the Commonwealth.

STEWART, J. The defendant stands convicted of murder in the first degree. The evidence on which his conviction rested was purely circumstantial, a matter of no significance, if it carried conviction to the minds of the jury of the defendant's guilt beyond reasonable doubt. This is all that is required of any evidence, whether direct or circumstantial. And yet, in view of what we shall have to say as to the instructions given by the court to the jury, it has a distinct place in the discussion. The evidence discloses these facts: Emile Amann, whose death is charged to the defendant, was a resident of Warren borough. For a number of years he had been an employé of the Warren Water Company, in charge of the company's outside work, such as the laying of pipes, setting of hydrants, etc. The defendant had been superintendent of the company during the period of Amann's employment, excepting that his withdrawal from the services of the company occurred the 25th of March, 1910, whereas Amann continued in its employ some three weeks thereafter. Amann met his death on the night of January 27, 1911, at a time when neither was an employé of the company. On the evening of the day last mentioned, Amann, about 8 o'clock or a few minutes thereafter, hired a horse and buggy for the purpose of going to the reservoir of the Water Company on what was called Bunker Hill, about one-half mile distant, stating that he would return in 35 minutes. He was afterwards seen driving through one of the public streets in the direction of the reservoir. About 11 o'clock of the same night the horse, unat-

tached to the buggy, with the harness unbroken, returned to the livery stable where he belonged. The following morning the lifeless body of Amann was found on the reservoir hill, prone on the ground, face downward, with three bullet wounds in the head, either one of which, according to the expert testimony, was sufficient to have caused instant death. This circumstance, with others no less significant, excluded all suspicion of suicide, leaving but the one conclusion, that a felonious homicide had been committed. The evidence relied upon to establish the defendant's guilt in connection therewith was to this effect: It was shown that Amann had started from the livery stable in the buggy some minutes after 8 o'clock, not later than 8:15. The time is important to observe. A witness—we are now referring to the evidence for the commonwealth—testified that at 8:10 he saw him drive up the street toward the reservoir; another, that he saw him drive up the same street at a point one-half block from the starting place at 8:10; another, that he saw him stop on his way in front of defendant's house, saw defendant, in response to a whistle given by Amann, come out of the house, get in the buggy with Amann, that both then proceeded on their way, and that at 8:15 they were at the foot of the hill which had to be turned in order to reach the reservoir; still another testified that, after hearing shots fired in the direction of the hill, he saw the defendant coming rapidly down the hill from the field where the body was found, stop under an electric light, examine his clothes, and then run down the street. The testimony seemed to be concurrent that the time when the pistol shots were heard was 8:30. Other evidence claimed to be incriminatory was adduced, but calls for no special reference at this time, since, disassociated from the matter of time when shots were fired and the time when defendant was claimed to have been seen at certain points on the way leading to the place where the crime was committed, its insufficiency to establish guilt must be conceded. To meet the case of the commonwealth, defendant called a number of witnesses with a view to showing that he could not have been the actor in the tragedy, for the reason that at 8:30, when it occurred, he was too remote from the scene, and, further, to discredit and contradict the commonwealth's witnesses. Two of defendant's witnesses say that they saw him, one as late as 8:15, the other, as late as 8:20, at the post office in Warren, one-half mile away; another, that at 8:45 he conversed with the defendant, who was then in his home, over the telephone; that following that conversation he went to the defendant's house, where he remained in conversation with him until 10 o'clock, and that there was nothing unusual in his appearance or manner. Other witnesses testified in his behalf to facts and

circumstances which, it is claimed, show such marked inaccuracy in statements made by some of the commonwealth's witnesses, one in particular, whose testimony was most important, as to make it unreliable. We have thus called attention to the conflict of testimony in the case, not as a circumstance which impeaches the finding of the jury, for notwithstanding such conflict, and regardless of how other minds might be impressed thereby, if the jury, under proper instructions as to the law, were convinced beyond reasonable doubt of defendant's guilt, the verdict should remain undisturbed. Our only purpose in introducing it here is to show that because of this state of the evidence, and its circumstantial character, the instructions given the jury were inadequate, and in some important matters so inadequate as to be positively erroneous.

[1] Unquestionably the main purpose of the evidence adduced by the defendant was to establish an alibi. Equally certain it is, however, that this was not its only purpose; and if the effect of that evidence was confined by the court to the one purpose alone, such restriction was unfair to the defendant and erroneous.

[2] The only reference to this feature of the case in the charge of the court was at its close, and is in these words: "The defendant relies upon evidence in the nature of an alibi; that is to say, that he was at another place at the time the crime was committed. * * * This defense, when satisfactorily made out, necessarily overturns the strongest circumstantial evidence and is sometimes the only defense to an innocent man. But in every case where the defense of alibi is made it should be very closely scrutinized for the reason so forcibly expressed by an eminent judge. It is a defense often attempted by contrivance, subornation, or perjury, and the proof therefore offered to sustain it is to be subjected to a rigid scrutiny, because, without attempting to contest or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it, and this defense is equally available if satisfactorily established to avoid the force of positive as of circumstantial evidence." This instruction is very largely, if not entirely, an excerpt from the charge of Chief Justice Shaw in the celebrated case of Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. To say this, is to concede its correctness in the connection in which it was employed by that eminent jurist. But had the learned trial judge in this case looked further into that case, he would have found that this instruction followed upon an instruction laying down a no less exacting rule to be applied in determining the effect of accusing evidence in cases where circumstances are relied upon to convict. For instance, after reviewing the evidence of the common-

wealth in his charge, he adds: "I will conclude what I have to say on this subject by a reference to a few obvious and well-established rules, suggested by experience, to be applied to the reception and effect of circumstantial evidence. The first is that the several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact has to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue. Under this rule, every circumstance relied upon as material is to be brought to the test of strict proof; and great care is to be taken in guarding against feigned and pretended circumstances, which may be designedly contrived and arranged, so as to create or divert suspicion and prevent the discovery of the truth." Had like instruction with this been given in the present case with respect to the circumstantial evidence adduced against defendant, the court's employment of the words of Chief Justice Shaw, with respect to evidence adduced to establish an alibi, would have been entirely appropriate and fair; but in the absence of such instruction, the natural understanding of the jury would be that the direction required them to scrutinize more closely the evidence offered to show absence of the defendant from the scene of the murder when perpetrated, than that offered to show his presence at the time, for the reason that the former was open to the suspicion that it was the product of subornation and perjury, while the latter was not. Could any instruction have been more unfair and prejudicial? Again, the instruction afforded the jury no standard by which they were to measure the sufficiency of the evidence offered to establish the alibi. The defendant had a right, even though no request was made for the instruction, to have the jury fully advised as to the difference between the burden resting upon the commonwealth to establish guilt, and that resting on the defendant with respect to the alibi set up. How are we to know that the jury did not reject the defendant's alibi because the evidence supporting it did not measure to the high degree which excluded all reasonable doubt? If they did, it was a most serious mistake into which they fell because they were not instructed to avoid it; if they did not, their avoidance of the mistake was not due to any warning they had received from the court.

[3] The measure of proof, when the sufficiency of evidence offered to establish an alibi is the question, is simply that it shall be satisfactory. "That measure is simply proof which is satisfactory—such as flows fairly from a preponderance of the evidence. It need not be beyond doubt. Where the evidence raises a balancing question, and the mind is brought to determine its preponder-

ance, there may be a doubt still existing in the mind, yet the actual weight may be with the prisoner; and this proof should be considered satisfactory." *Meyers v. Commonwealth*, 83 Pa. 131.

[4] And yet again, it was error, hardly less serious, to treat the evidence tending to show alibi as though it was without relevancy if it failed in this one purpose. The charge does not in express terms so limit it, but a general relevancy in the testimony is not even suggested, and the inference likely to be drawn by the jury would be that it was to be considered only in the one connection. "Proof of an alibi is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with other facts of the case, raise doubt enough to produce an acquittal." *Turner v. Commonwealth*, 86 Pa. 54, 27 Am. Rep. 683. As a fair illustration of what is here meant, there may inhere in such testimony that which, being considered, might lessen the confidence which the jury otherwise might have in the correctness of the testimony of some opposing witness to a most important, perhaps controlling, circumstance, and leave them in doubt as to its occurrence, or as to the time and place where it occurred, if at all. Or, as here stated, it may be that this evidence being included and submitted to the jury for their consideration, because of its inclusion, upon a review of the whole case, the jury would not be left free of reasonable doubt as to the guilt of the accused. The considerations we have discussed properly fall within the scope of the twenty-first assignment of error, and that assignment is sustained.

[5] There remain 41 assignments. A discussion of each of these is wholly impracticable. A number of them indicate distinct error, but whether reversible or not we need not decide, since reversal follows upon what we have already said. Inasmuch, however, as the case must again be tried, we shall indicate briefly those particulars in which the court erred to greater or less extent. First, remembering the case against the accused rested wholly on circumstantial evidence, what was said by the court in *Commonwealth v. Cleary*, 135 Pa. 64, 19 Atl. 1017, 8 L. R. A. 301, touching the effect of evidence of the good reputation of the accused in such cases, may here be appropriately cited: "Evidence of good character is always admissible for the defendant in a criminal case; it is to be weighed and considered in connection with the other evidence in the cause—it may of itself, in some instances, create the reasonable doubt which would entitle the accused to an acquittal. The rule itself is not merely merciful. It is both reasonable and just. There may be cases in which, owing to the peculiar circumstances in which a man is placed, evidence of good character

may be all he can offer in answer to a charge of crime. Of what avail is a good character, which a man may have been a lifetime acquiring, if it is to benefit him nothing in his hour of peril?" In the present case 20 or more witnesses testified to the good character of the accused. The contrary was not asserted. The only reference to this testimony in the general charge is as follows: "Some 20 witnesses were called upon the part of the defendant to testify to the general good character of the defendant as a peaceable, law-abiding citizen." Not a word appears in the general charge as to the legal effect of such evidence, or as to how it was to be considered and applied. From the manner in which it was thus treated by the trial judge, with not a single reference to it than that above quoted, the jury might well have inferred that in the judgment of the court it called for no consideration. The attention of the court was directed to it in three of the submitted points, each framed out of language used by this court in some particular decision. The ruling therein was as follows: "These points are affirmed, in connection with which we say, as a general proposition, that the evidence of this character is to be considered with the other evidence in the case, and if all the evidence combined creates a reasonable doubt, the defendant is entitled to acquittal. That is, it is to be weighed and considered in connection with all the evidence in the case." This answer, like the points, was framed in language adopted by this court. *Commonwealth v. Cleary*, 135 Pa. 64, 19 Atl. 1017, 8 L. R. A. 301—a sufficient authority for its legal correctness, but no authority for its sufficiency under the circumstances of this case. The instruction of the court in regard to this matter we cannot but regard as not only inadequate in that it failed to convey to the jury a proper understanding as to how they should apply the evidence, but because it must have minimized its importance in the estimation of the jury.

[6] The trial occupied more than two weeks. Less than one would most likely have been sufficient but for the fact that a wholly collateral inquiry was entered upon, which, aside from prolonging the trial unduly, may have had the more serious result of diverting the minds of the jury from the one issue before them. It is competent in every criminal case to introduce evidence to show motive in the accused. The motive charged here was the desire of the accused to prevent Amann from appearing and testifying in an inquiry which had been instituted by those interested with respect to the accused's accounts as superintendent of the Water Company. In connection with this inquiry the charge had been made that the accused had embezzled the funds of the company by means of fraudulent statements and accounts. Amann's testimony had been re-

quested by those who were investigating the matter. The theory of the commonwealth was that Amann, because of his position with the company during the time covered by the investigation, had knowledge of facts which would incriminate the accused, and that to prevent his testifying against him the accused took his life. Whatever went in support of this theory was relevant, and therefore competent, testimony. Whether the accused, however, had actually been guilty of the embezzlement charged was an inquiry wholly outside. It was proper enough to show that those pursuing the investigation had made the charge against him; that the investigation was still proceeding; that Amann had been requested and was expected to testify; that his testimony, if given, would have inculpated the accused; but there the inquiry should have ceased. Instead, however, it proceeded until it became an inquiry as to the guilt or innocence of the accused with respect to the charge that had been made. To this end maps, plans, plats, and measurements showing different extensions of the pipe system of the company were introduced, and accounts in connection therewith, from all of which it was sought to derive an inference of defendant's guilt. The relevancy of this sort of testimony was more than doubtful, and besides must have tended to divert the attention of the jury from the real issue; and not only so, but a conclusion of defendant's guilt with respect to it would most likely be followed by a prejudice to which the defendant could not rightfully be exposed.

[7] The failure of the court to explain to the jury what they were to understand by a reasonable doubt calls for remark. We are quite aware that in some jurisdictions it is held that this is unnecessary, because the expression is itself well calculated to convey to the juror a correct idea of what is expected of him, and that any effort at elucidation tends to misleading refinements. The reason given for this conclusion is to our mind unsatisfactory. Our own experience leads to the belief that, except as instructed by the court, the ordinary juror falls in proper comprehension of what is implied in the term, or at least is apt to so fall. Helpful elucidation of the term has been so frequently accomplished, as our text-books and reports show, that the danger of misleading in the attempt to elucidate is easily avoided. What is to prevent a trial judge from instructing, in the language of Mr. Starkie, that the juror ought not to condemn unless he is so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest? Here we have a concise statement of what is implied in the term which brings it clearly to the comprehension of any ordinary mind, and this, or at least its equivalent, expressed in various

ways in adjudicated cases, should be made the matter of instruction in every murder trial.

We have adverted to those features of the charge which we regard as fairly open to criticism only that the errors indicated may be avoided on the next trial. Having thus expressed our views as to the case, and since a new trial must follow, we do not feel called upon to discuss the numerous assignments unrelated to what we have remarked upon.

For the reasons given, the judgment is reversed, and a venire de novo is awarded.

LEITCH v. DIAMOND NAT. BANK OF PITTSBURGH et al.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. GIFTS (§ 19*)—INTER VIVOS—DELIVERY—SUFFICIENCY.

Where a donor uses clear and unambiguous language showing a clear intent to make a gift, and a belief on his part that he has done all that is necessary to complete it, the act of delivery, if slight and ambiguous, will be aided thereby, though an actual delivery is not dispensed with, but the gift may be valid where it would be deemed invalid if the acts of delivery were uncertain or ambiguous, particularly in case of a gift from a husband to a wife.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 34, 38; Dec. Dig. § 19.*]

2. HUSBAND AND WIFE (§ 49½*)—GIFT INTER VIVOS—DELIVERY—SUFFICIENCY.

Where a husband took a box in a safe deposit vault separate from two other boxes in which he kept his own securities, designated it as his wife's box, declaring that he was going to give her all his negotiable bonds, and put them in the box he had so taken, and placed certain securities in the box at that time, giving her a key, and she had access subsequently both alone and with her husband, and he produced a list of bonds which he said belonged to her, and they both made wills, known to each other, clearly indicating that they both regarded the bonds as hers, the gift will be sustained.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.*]

3. EVIDENCE (§ 313*)—DELIVERY OF GIFT.

The delivery of a gift may be proved by the declarations of the donor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1166, 1167; Dec. Dig. § 313.*; Gifts, Cent. Dig. § 96.]

4. HUSBAND AND WIFE (§ 49½*)—GIFT INTER VIVOS—DELIVERY—SUBSEQUENT ACTS OF DONOR.

Where a husband has placed bonds in a safe deposit vault which he has rented for his wife, and has declared that he has given her the bonds, the fact that subsequently, with her permission, he has access to the box to sell and reinvest the bonds for the purpose of placing therein additional bonds, is not inconsistent with her ownership of the contents of the box.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249-255; Dec. Dig. § 49½.*]

5. WITNESSES (§ 199*)—COMPETENCY—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

An attorney at law is a competent witness as to what occurred when a husband originally

deposited bonds in a safe deposit vault rented by him for his wife, where the relation of attorney and client did not then subsist between the husband and the witness, and, where he was thereafter employed as counsel for both husband and wife, he may testify as to conversations which took place in the presence of both.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749-751, 766, 767; Dec. Dig. § 199.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Robert A. Leitch, executor of the estate of Isabella Arnold, against the Diamond National Bank of Pittsburgh and others. From a decree for plaintiff, defendants appeal. Affirmed.

This was a bill in equity filed by Robert H. Leitch, executor of the estate of Isabella Arnold, deceased, against the Diamond National Bank of Pittsburgh, Pa., Robert J. Cleland, William C. Cleland, Thomas A. Cleland, James T. Arnold, and Robert J. Cleland, attorney in fact for James T. Arnold. The purpose of the bill was to obtain possession of certain bonds which at the time of the death of Mrs. Arnold were in the safe deposit vaults of the bank. It was alleged that these bonds were the property of Isabella Arnold, having been given to her by her husband, James T. Arnold. The material facts as found by the trial judge are as follows:

James T. Arnold and Isabella Arnold were husband and wife. They resided in Allegheny City, and in 1906 he was 81 years of age and she was 68. They had no children, and the husband's next of kin were three nephews, Robert J., William C., and Thomas A. Cleland. James T. Arnold was a man of wealth, which was made up of bonds, stocks, other securities, and real estate, while his wife prior to May, 1906, had practically no property. He had three safe deposit boxes in the Diamond National Bank of Pittsburgh, numbered 125, 158, and 159, in which he kept his various securities and title papers. Previous to May 1906, his wife had joint access with him to box 159. In May, 1906, Mr. Arnold called at the office of Robert H. Leitch, a young lawyer, whose mother had been his lifelong friend, but who had previously rendered no legal services to either himself or his wife, and requested Mr. Leitch to accompany him to the bank. They went into the vault, where Mr. Arnold unlocked the three boxes, removed therefrom a part of the contents, which he placed on the table. He then told Mr. Leitch that he was going to give Mrs. Arnold all his negotiable bonds, and would put them in a box which he then and there designated as hers. He then took certain securities from box 159, in which he said some of the bonds were, and threw them into box 158. In June, 1906, he said that he had placed all his negotiable bonds in Mrs. Arnold's box.

158, and that they were hers. In July, 1906, he requested Mr. Leitch to call at his house to prepare a will for Mrs. Arnold, whereby she was to dispose of the bonds he had given to her to various charitable institutions, and at the same time to draw a will for him. Mr. Leitch called as requested, and Mrs. Arnold, in the presence of her husband and with a view to making her will, said that he had given her bonds then amounting to \$110,000, and that he would give her other bonds that he would thereafter buy from time to time. Mrs. Arnold showed a list of charities showing specific bequests intended, which amounted to \$90,000, with a balance of \$20,000 to be given to the Woman's Board, and providing for payment of the collateral inheritance tax. At the same time Mr. Arnold produced a list of securities and said that the items marked "B" were the bonds owned by Mrs. Arnold, and that the unchecked items on the list were stocks and memoranda that he wanted in his will. It was suggested by Mrs. Arnold and agreed to by Mr. Arnold, after some slight protest, that, owing to his kindness in giving her the bonds and as a mark of gratitude, he should receive the interest on them during his life, and should have the right to enter her box, examine the bonds, and cut off the coupons. He accepted the gift of the income and thereafter took and used the same up to the time of his wife's death. At the same time Mr. Arnold, in the presence of his wife, directed Mr. Leitch to prepare deeds for the conveyance of his real estate to the three Clelands, his nephews and next of kin, and a will by which he would dispose of his stocks and other securities. The deeds were prepared and executed. Mrs. Arnold subsequently stated to Mr. Leitch in the presence of her husband that he had set apart a box for her; that all the bonds he had given her from time to time were in that box; that she had keys for all the boxes just as he had, which were in a desk which she pointed out; and that she could go to the boxes whenever she desired. Mr. Leitch suggested that she place all her bonds in a box in her own name, but she declined to do this because she had given her husband back the income for life, and she wanted him to go to the bank, see the bonds and remove the coupons, as he had done before.

On July 19, 1906, both Mr. and Mrs. Arnold executed wills drawn up in accordance with their previous instructions. The wills bore the same date, and were executed simultaneously. Both were read and examined by them, and each knew the contents of the other's. Mr. Arnold witnessed his wife's will and she witnessed his. Mr. Leitch and the three Clelands were executors of the husband's will and Mr. Leitch alone of the wife's. By Mrs. Arnold's will her husband was to receive while he lived all the interest and income from "all my

money and bonds of which I may die possessed," and the principal was given to religious and charitable institutions, two of the legacies of \$10,000, each being subject to life estates in persons named. The specific legacies given in the will amounted to \$90,000. Mr. Arnold's will contained the following clause: "Having in other ways made full and ample provision for my beloved wife, Isabella Arnold, by turning over to her absolutely a certain portion of my property, I do not by this will give her anything more, as her acceptance of said portion of my property was and is to be taken as a full release of her dower rights under this will." He made specific bequests, aggregating \$50,000, to various persons and institutions, and gave the residue of his estate to his three nephews. Mr. Arnold afterwards stated to several witnesses that he had given bonds to his wife, and that bonds which he subsequently bought were for his wife.

On January 4, 1906, Mr. Arnold executed papers constituting Robert J. Cleland his attorney in fact, and, in effect, transferring all his securities to the three Clelands, retaining, however, a life interest in himself. On the same day he added a codicil to his will, by which he gave his wife all his estate, except the real estate which he had conveyed to the Clelands, and named her as executrix. On May 18, 1909, he executed a further power of attorney to Robert J. Cleland. On May 27, 1909, Mrs. Arnold executed another will to the same effect as the former one, except that she now made specific bequests to religious and charitable institutions, amounting to \$196,000. Her husband took no part in the preparation of the latter will, and there is no evidence that he had any knowledge of its contents or execution. Mr. Leitch was again named as executor. Between July, 1906, and January, 1908, Mr. Arnold purchased \$30,000 worth of bonds, which were placed in box 158. He gave Mrs. Arnold in May, 1906, keys for each of the boxes, retaining duplicate keys for himself. At the time of Mrs. Arnold's death, November, 1910, there were in box 158 bonds aggregating in value \$203,500. On December 30, 1909, on application of Robert J. Cleland, James T. Arnold was adjudged by reason of age and mental and physical infirmities to be incapable of managing his affairs, and Cleland was appointed his guardian.

The trial judge also found that when Leitch went to the bank with Mr. Arnold in May, 1906, he was neither employed as counsel by him, nor was he acting as his counsel. The relation of counsel did not begin until about July, 1906, and he then became counsel at the same time for both Mr. and Mrs. Arnold, concerning the same subject-matter in which both were equally interested. His testimony relates throughout either

to what took place in the presence of both Mr. and Mrs. Arnold, or to matters in which they were mutually concerned and about which he was employed by both. He represented no opposing interests, while acting for both clients, but was employed to put in legal form certain matters about which they were mutually agreed.

The court below held that there was a valid executed gift of the bonds in box 158 by James T. Arnold to his wife, and the defendants were enjoined from selling, transferring, or delivering any of the bonds to any person other than plaintiff or from interfering with plaintiff's possession of the same.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

D. T. Watson and Wm. M. Hall, for appellants. W. B. Rodgers, for appellee.

POTTER, J. Forty-five assignments of error are here filed, but they actually raise but three questions: First, whether there was a gift of bonds by James T. Arnold to his wife, perfected by delivery; second, whether Robert H. Leitch, upon whose testimony plaintiff's case largely depended, was a competent witness; and, third, whether evidence of declarations by James T. Arnold that he had given the bonds to his wife, or was purchasing them for her, was admissible. The learned judge of the court below made full and complete findings of fact, and stated clearly his conclusions of law, and determined, upon all the facts and circumstances of this case, that there was a gift *inter vivos* of the bonds in question, made by James T. Arnold to his wife, Isabella.

[1] After a careful consideration of the arguments of counsel, and a close examination of the evidence, and of the law applicable to the issue raised, we see no sufficient reason to differ with the conclusion reached by the trial judge. His opinion shows that he had clearly in mind the essential elements of a valid gift *inter vivos*, and we are not convinced that he erred in the application of those principles to the facts which he found were established by the testimony in this case. Counsel for appellants contend strongly that the evidence does not show that there was an actual delivery of the bonds. But in determining this question the situation of the subject of the gift and its nature must be considered.

[2] A controlling principle is thus stated: "If the language used by the donor is clear and unambiguous, showing a clear intent to make the gift and a belief on his part that he had done all that was necessary to complete it, then the act of delivery, if slight and ambiguous, will be aided thereby, not, however, dispensing with an actual delivery; but rendering the gift valid where it

would be deemed invalid if the acts of delivery were uncertain or ambiguous." Thornton on Gifts, § 148. The parties here were husband and wife living harmoniously and taken up with matters of mutual interest; and that must be kept in mind. The writer just quoted very properly says: "The relation of husband and wife is so close, and their every day life is so blended, that it is often difficult to tell when the husband has perfected a gift to his wife by delivery. * * * The law takes cognizance of these relationships, of the daily contact of such a donor and donee, of the blending, as it were, of their daily walks and acts, and will construe an act to amount to a delivery where it often would not if the donor and donee were not members of the same family. The law does not dispense with an actual or constructive delivery, but it accepts the acts of the donor, if a clear intent to give is shown, as amounting to a delivery, when it would not do so if the donor and donee occupied separate habitations and were not members of the same family." Thornton on Gifts, § 169. This principle is recognized in our Pennsylvania cases. Thus in Herr's Appeal, 5 Watts & S. 494, where a husband placed coin in a chest or trunk, and stated that it was for his wife, and that it was his wife's, it was held that there was a gift of the coin to the wife. In that case the husband had access to the chest, and there was no manual delivery of the coin by the husband to the wife. He merely put it in the chest, and said it was hers. Practically the same thing was done in the present case, except that here the box in which the bonds were placed was in the vaults of a bank, and not in the house where the parties made their home. It will be noted that Herr's Appeal is authority for the admission of evidence of the husband's declarations, as it holds that both subsequent declarations and acts of the donor (the husband) were evidence of the gift. To the same effect was the decision in Wise's Estate, 182 Pa. 168, 171, 37 Atl. 936, where Mr. Justice Mitchell said: "Three other witnesses testified to decedent's repeated declarations, about the time of the gift, that all his property was to be his wife's. * * * These declarations would not, of course, establish a gift, but they are confirmatory of the intent with which the actual delivery of the securities testified to by the other witnesses was made. The evidence as a whole was sufficient, if believed, to sustain the claim of a gift. The auditor and the judge below believed it; and we have not been convinced that they were in error in so doing."

These cases, which we follow, dispose of the objection raised upon behalf of appellants to the admissibility of evidence of declarations by Mr. Arnold, the husband, that he had given the bonds to his wife, or was

purchasing them for her. Such evidence was clearly admissible. Herr's Appeal was closely followed in Crawford's Appeal, 61 Pa. 52, 56, 100 Am. Dec. 609, where Mr. Justice Agnew, dwelling upon another phase of the decision, said, in referring to Herr's Appeal: "There the subject of the gift was money unaccompanied with any declaration amounting to a trust. The money was kept in a lower or false bottom of a trunk to which the husband had access at all times, and to which he often went without the presence of his wife. The money continued just as much within his actual dominion as if it had been kept by him in another place. There was no evidence of actual delivery or passing over of the money, as the gift was inferred from the declarations of the husband that the money was his wife's, his keeping it in the lower division of the trunk, apart from his other money, his adding to it from time to time and taking none away, and his wife's carrying the keys. There was no formal delivery, no counting of the money, no specific sum stated by him; indeed, the sum was not known except as a probable or supposed amount, so that the case in fact rested directly on the declarations of the husband, and the setting aside that much money apart from his own; while his actual access and control over it, and the legal unity of person, made the possession as much his own as his wife's." The facts of the present case bring it within the principle of the decision just cited. There is evidence here that Mr. Arnold obtained an additional box in the safe deposit vault, and designated it as his wife's box, saying that he was going to give to Mrs. Arnold all his negotiable bonds, and would put them in this box No. 158; that he placed certain securities in the box at the time; that he gave her a key to it, and provided that she should have access to it whenever she wished; that she did have such access to the box thereafter, coming to the bank at times for that purpose in company with Mr. Arnold, and sometimes alone; that Mrs. Arnold said in the presence of her husband that he had given her all his bonds, and that she was to get any thereafter purchased by him; that Mr. Arnold produced a list of bonds, which he said belonged to his wife; that his own will and that of Mrs. Arnold were then prepared in accordance with instructions, and in his own will he declared that he had turned over to Mrs. Arnold a certain portion of his property, which she had accepted, and that Mr. Arnold read his wife's will and witnessed its execution, in which will she bequeathed a large estate, when at the time she had nothing to bequeath unless she was then owner of the bonds. There was also evidence that from time to time thereafter Mr. Arnold placed other bonds which he purchased, in the same box, and that nothing but such bonds were placed therein, he having two other boxes in the same vault, in

which he kept his own securities and valuable papers. Under the principle of Herr's Appeal, as cited above from Crawford's Appeal, all this was evidence from which the fact of delivery of the bonds could be found. In Crawford's Appeal a husband placed upon his books, to the credit of his wife, the sum of \$3,000, and credited interest thereon from time to time. It was held that the facts of the transaction amounted to evidence of an executed gift.

[3] In cases of this character it is not necessary that any eyewitness should be produced as to the fact of delivery. Words of the donor indicating that he had renounced ownership are sufficient. Judge Penrose puts this clearly in Malone's Estate, 8 Wkly. Notes Cas. 179, 182, where he says: "With regard to the proof of actual delivery, it is not necessary that the witnesses shall have seen it take place. The bonds, or the notes, or the policy may have been at the time already in the custody of the donee, and in such case words indicating that the donor renounces all ownership would undoubtedly be sufficient." He further says that: "The delivery may be proved by the declarations of the donor, just as the gift itself may be; and when the donor declares that he had given at a previous time, and that the donee had then become the owner, it is implied that delivery, and indeed every other formality necessary to create a gift, had taken place. The law always presumes knowledge of its requirements."

In the present case, without going into details of the testimony, we may say that there are five witnesses, Mrs. Campbell, Mr. R. H. Leitch, Mr. Clark, Mr. Jenkins, and Mr. Phillips, whose testimony as to the acts and declarations of Mr. Arnold constitute ample justification, we think, for the findings of fact by the learned trial judge, and, upon those findings, his conclusion of law that they make out all the essentials of an executed gift is warranted. This conclusion is further buttressed by the language of the wills already referred to, which were executed simultaneously by Mr. and Mrs. Arnold. In the will of Mr. Arnold he speaks of having turned over to his wife absolutely a certain portion of his property, and for that reason gives her nothing in that will. In the will of Mrs. Arnold she gave to her husband the income of her bonds for life, and after his death directed that the principal of her estate should be devoted to benevolent purposes. The evidence shows that Mrs. Arnold had little estate of her own, and therefore these references in the wills to property of Mrs. Arnold would be without meaning or significance, except upon the theory that the bonds had been given to her, and were subject to her disposal in her will.

It appears from the evidence that each knew and approved of the contents of the other's will. The trial judge was impressed

by this fact, for he says: "These two wills, with the testimony of witnesses as to the declarations of the husband, and those of his wife made in his presence, before, at the time of, and after the execution of these wills, force the mind to the conclusion that he had made a gift of his bonds to his wife, and that she had accepted them as her share of his estate."

[4] If the bonds became the property of the wife, as and when they were placed in the safe deposit box for her by her husband, then all that he did with them thereafter, as disclosed by the evidence, was not inconsistent with such ownership by the wife. His access to the box and to the bonds was with her permission, and for purposes stated by her and consistent with her ownership. She was at liberty to give the coupons to her husband and to allow him or any other person to make sale of the bonds for her in case of necessity and to reinvest the funds in other securities. This is what seems to have been done. That she should have relied upon her husband for these services was entirely natural.

Counsel for appellants cite the decisions in *Clapper v. Frederick*, 199 Pa. 609, 49 Atl. 218, and *Ashman's Estate*, 223 Pa. 543, 72 Atl. 899, as sustaining their contention that there was no valid gift here. But in neither case was the alleged gift from husband to wife. In *Clapper v. Frederick* the evidence showed merely an intention to give. There was no testimony at all showing delivery. In *Ashman's Estate* the alleged donor stated in writing that he gave certain bonds to his son, but added that they were "not to be used until after my death." The decision was based on the express grounds (223 Pa. 550, 72 Atl. 902) that the retention of control over the bonds was inconsistent with the claim of an executed gift, and that the writing showed only a testamentary gift which was revoked by a subsequent will.

[5] Counsel for appellants question the competency of R. H. Leitch as a witness, on the ground that he was counsel for James T. Arnold. But the evidence shows, and the court below finds as a fact, that at the time Mr. Leitch went with Mr. Arnold to the bank, and when the bonds were transferred in his presence to box 158, the relation of attorney and client did not subsist between them. Afterwards he was employed as counsel for both Mr. and Mrs. Arnold, and the transactions about which he testified were their joint business and the conversations took place in the presence of both. Under these circumstances he was a competent witness. *Goodwin Gas Stove & Meter Company's Appeal*, 117 Pa. 514, 12 Atl. 736, 2 Am. St. Rep. 696; *Selp's Estate*, 163 Pa. 423, 30 Atl. 226, 43 Am. St. Rep. 803; *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 815.

The assignments of error are dismissed, and the decree of the court below is affirmed.

ERDNER v. ERDNER.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. STATUTES (§ 107*)—SUBJECTS AND TITLES —ONE OR MORE SUBJECTS.

Act April 27, 1909 (P. L. 182), entitled, "An act to amend the act of 1907 by permitting husband and wife to testify, and providing for the method of service of process," amending act of May 23, 1907 (P. L. 227), is not invalid as containing more than one subject in its title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

2. PROCESS (§ 105*)—SERVICE — PUBLICATION — STATUTORY PROVISIONS.

Act May 3, 1909 (P. L. 424), requiring the publication of legal advertisements in legal journals, is not applicable to a notice to a non-resident defendant in an equity case, required by act April 6, 1859 (P. L. 387), where the court has made a special order directing in what newspaper the notice should be published.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 132; Dec. Dig. § 105.*]

3. HUSBAND AND WIFE (§ 294*)—FAILURE TO SUPPORT WIFE—EQUITABLE RELIEF.

In a proceeding by a wife for equitable relief against the estate of her husband who has deserted her, as authorized by Acts May 23, 1907 (P. L. 227), and April 27, 1909 (P. L. 182), if service has been made on the husband by publication only, a court of equity cannot enter a decree appointing a receiver and directing him to take all of the property and sell or mortgage enough for the benefit of creditors and the support and maintenance of the wife; the court itself being bound to determine what amount shall be suitable and what property shall be sold for the maintenance of the wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 294.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Emma Erdner against John W. Erdner. From a decree for plaintiff, defendant appeals. Reversed.

Rule to set aside a service under which was entered the following decree: "And now, to wit, November 7, 1910, this cause coming up for argument, it is ordered that George C. Erdner be appointed receiver of the estate of John W. Erdner, to take charge of all property of defendant and preserve assets for benefit of creditors and for support and maintenance of wife of said John W. Erdner and with power to sell or mortgage sufficient of such estate for those purposes, and with further power to bring and defend all suits or actions at law that may be necessary to that end, and the creditors of the said John W. Erdner are hereby restrained from proceeding in any way against the property of said John W. Erdner, without the consent of the court."

Shafer J., filed the following opinion:

"The proceeding is under the act of May 23, 1907, as amended by the act of April 27, 1909, in relation to husband and wife and the remedies of married women in cases of desertion and nonsupport. While this ac-

tion was brought before the passage of the act of 1909, publication was had after that act, as therein directed, according to the method provided in the act of April 6, 1859 (P. L. 387). The bill of petition alleges a desertion before the passage of the act, the domicile of the wife in Allegheny county, and that the husband had absented himself from the commonwealth, and prays for the seizure and sale of certain real estate in the county of Allegheny alleged to belong to the defendant, as may be necessary for the maintenance of the plaintiff. The defendant appeared d. b. e. and obtained a rule to show cause why the order authorizing service by publication should not be vacated and such service set aside.

[1] "The defendant claims that the acts of 1907 and 1909, above mentioned, do not authorize a service by publication, and that if they do they are unconstitutional. The act of 1909 is said to be unconstitutional because it is alleged that the title contains more than one subject; the title being: 'An act to amend the act of 1907, by permitting husband and wife to testify, and providing for the method of service of process.' We are unable to see how this constitutes two subjects. The object of the act is to establish a proceeding for seizure of the property of husbands who desert their wives and making it available for the support of the wife, and the provision as to who may testify and as to the mode of service are both germane to the general subject and a mere detail of it, and could not well be put in two different acts.

"It was alleged that the act is *ex post facto*; the alleged desertion having taken place in 1905. This is not, we apprehend, a question which can be discussed upon the application of one who appears *de bene esse*. We are now concerned only with the validity of a service upon him. Whether the circumstances are such as will make the act applicable to him or not can only be discussed when the subject-matter of the bill comes before the court.

"It is further alleged, and this is the principal matter in question, that the proceeding is not of such a character as to authorize the commonwealth to proceed against him without an actual service, and that a service by publication is therefore null. The argument of the defendant is based upon the view that the proceeding is an attempt to collect a debt, or to enforce the rights of a creditor or at least of a quasi creditor. We agree with the defendant that no personal decree could be entered against him on the proceeding provided by these acts, and, if they attempt to authorize any such proceeding, they would be to that extent unconstitutional and void. But we do not understand that the act undertakes to do any such thing. All it provides for is that in case a wife is domiciled in this commonwealth and

has been deserted by her husband, and the husband has, within the jurisdiction of the court, property real or personal which can be applied to her support, this may be done by adopting the proceeding provided for by the act. The duty of the husband to support his wife does not depend upon contract, but results from the status of the parties. It would be strange indeed were the commonwealth unable to seize by appropriate proceedings the property left behind by a deserting husband and use it for the maintenance of the wife. The subject-matter of the proceeding is not a personal right of action of the wife against the husband, but is the status of the wife and the property itself, and, as these are within the jurisdiction of the court, the case falls within the terms of the act of 1859, the constitutionality of which as to service by publication under the circumstances provided for in it has not been questioned.

[2] "It is also objected to the service that no publication was made in the Pittsburgh Legal Journal as required by the act of May 3, 1909 (P. L. 424). That act provided that all notices required by law to be published shall be put in a legal newspaper 'unless dispensed with by special order of court.' The order for the publication of this case directs in what newspaper the publication shall be made without any mention of the Pittsburgh Legal Journal. The act of 1859 provides that the publication shall be made in such one or more newspapers 'as such court shall by special order direct.' We are of the opinion that an order of this kind, especially one made under an act requiring a special order, amounts to a dispensation from publication in a legal journal. Being of opinion, therefore, that the service is good, the rule is discharged."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

George H. Quail, for appellant. Edmond Englert, for appellee.

MOSCHZISKER, J. This is an appeal from an order discharging a rule to set aside the service by publication of a bill in equity filed under the act of May 23, 1907 (P. L. 227), as amended by the act of April 27, 1909 (P. L. 182). The appellee states in its brief that any objection to the plaintiff's appeal upon the ground that it might be viewed as from an interlocutory order, and all other such possible objections, are waived "for the purpose of settling the property rights involved." The opinion of Judge Shaffer in the court below disposes of the several questions discussed therein so satisfactorily that it is unnecessary to treat of them here. But we feel that the service was insufficient to support the decree entered.

[3] There are two sections in the act of 1909; the first provides: "That if any man

shall separate himself from his wife without reasonable cause, and being of sufficient ability, shall neglect or refuse to provide suitable maintenance for his said wife, such wife * * * is hereby empowered to bring her action * * * in equity against such husband for maintenance * * * and the said court shall have power to entertain a bill in equity in such action, and shall make and enforce such orders and decrees as the equities of the case demand; and * * * the husband and wife shall be fully competent as witnesses." The second section provides: "Whenever such husband shall absent himself from the commonwealth, proceedings may be had against any property, real or personal, of said husband, necessary for the suitable maintenance of said wife, and the court may direct a seizure and sale, or mortgage, of sufficient of such estate as will provide the necessary funds for such maintenance; and service upon the defendant shall be made in the manner provided in the act of * * * sixth of April, 1859." The act of April 6, 1859 (P. L. 387), provides "that in any proceeding in equity concerning goods, chattels, lands, etc., situate or being within the jurisdiction of such court * * *" or "where the court have acquired jurisdiction of the subject-matter in controversy by the service of its process on one or more of the principal defendants" that personal service may be made outside of the jurisdiction of the court wherever the defendant may be found, and "that whenever it shall appear to the satisfaction of such court" that the defendant cannot be found "so as to be personally served," the court may make an order for service by publication, and upon the expiration of the time fixed in the order, "proceed as fully and effectually as if such process had been served within the jurisdiction of such court."

The acts above referred to contemplate two situations; one a proceeding against the person, and the other a proceeding in rem. In the former power is given "to make and enforce such orders and decrees as the equities of the case demand"; but in the latter the court is only authorized to "direct a seizure and sale, or mortgage, of sufficient of such estate as will provide the necessary funds" for the "suitable maintenance" of the wife. In the first, personal service is intended and enlarged powers are given to the court; while in the last service only by publication is contemplated and the powers thereunder are limited. This same idea is to be found in the earlier Acts of Assembly to compel support where warrants for the arrest of the person and warrants for the seizure of goods are both provided for (see 1 Stewart's Purden's Dig. [13th Ed.] p. 1217 et seq.); and in Guardians of the Poor v. Picard, 1 Serg. & R. 239, construing these earlier acts, we held that the delegation by

the judges of the power and duty of determining the amount of a husband's property to be taken for the maintenance of his wife and family was not conformable to either the words or the spirit of the law. Here the decree expressly declares that the receiver is "to take charge of all property of defendant and preserve the assets for the benefit of creditors;" it authorizes him "to sell or mortgage sufficient of such assets" for the "benefit of creditors" and the "support and maintenance of the wife," and contains an order restraining all creditors from proceeding against the defendant or his property. Under the service in this case the court had power to direct a sale or mortgage of so much of defendant's estate as might be necessary for the maintenance of the plaintiff, but before so doing it should first have determined what amount would be suitable, and next what property of the defendant should be taken for that purpose, then it could have decreed a sale or mortgage accordingly. Since the property affected was within the jurisdiction, service by publication was sufficient, and we cannot say that the notice was lacking in any essential detail; but the court had no power to delegate to the receiver the duty of deciding the amount that would be necessary or suitable for the maintenance of the wife, or of determining the property to be sold or mortgaged for that purpose; nor could it make this special statutory remedy given to a wife a substitute for a bankruptcy or insolvency proceeding for the benefit of creditors.

The fifth assignment of error which goes to the final decree is sustained, and the others will not be passed upon; the decree is set aside, the costs to be paid by the appellant's estate.

DUNSHEE et al. v. DUNSHEE et al.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CONVERSION (§ 16*)—PARTITION (§ 21*)—PROVISIONS OF WILL—CONSTRUCTION.

A provision in a will that the executors may sell testator's real estate and make deeds to the purchasers, or divide the whole, or what remains, between his heirs, does not create any absolute necessity for a sale to carry out the provisions of the will, nor take away the right of any devisee to partition; the direction that the indebtedness of one of testator's sons be charged against his share being enforceable through the process of partition.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 38, 40, 42, 43; *Dec. Dig.* § 16;* *Partition*, Cent. Dig. § 72; *Dec. Dig.* § 21.*]

2. CONVERSION (§ 16*)—PROVISIONS OF WILL—CONSTRUCTION.

A provision in a will, directing the balance of the estate to be divided into seven shares, one of which shall go to each of testator's children, and further directing that the executors may sell real estate and make deeds to the purchaser, or divide the whole, or what remains, between the heirs, does not disclose an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

intent to blend real and personal estate, so as to create a fund to be bequeathed as money.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 38-40, 42, 43; Dec. Dig. § 16.*]

3. PARTITION (§ 83*)—ACTIONS FOR PARTITION—RELIEF.

Where a testator devises his real estate to his children, and charges indebtedness of a son to his share, it is the duty of the court, before decreeing partition, to ascertain the amount of the indebtedness to be charged against such share.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 228, 229; Dec. Dig. § 83.*]

4. APPEAL AND ERROR (§ 1144*)—DISPOSITION OF CAUSE—REMAND TO TRIAL COURT.

In a suit for partition, where the trial court does not determine the amount of indebtedness to be charged against the share of one of the parties, and an appeal is taken, the appellate court will not attempt to ascertain the indebtedness, though all parties join in a request therefor, but will affirm the decree of partition and remit the record to the lower court, to determine the amount of the indebtedness and embody the result in the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4479; Dec. Dig. § 1144.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by Johnston F. Dunshee and others against Margaret L. Dunshee and others for partition. From a decree for plaintiffs, defendant William A. Dunshee appeals. Modified.

The material portion of testator's will was as follows:

"First. I give my entire estate to my wife during her life.

"Second. At her death I give to my son M. P., the sum of five thousand dollars, to my daughters, Margaret L. and Edith each ten thousand dollars, and the balance of my estate to be divided into seven shares, one of which shall go to each of my children.

"In distributing my estate any indebtedness from any of my children to me, shall be first deducted from their shares, and in this, any debt due by me on account of indorsements for Duquesne Tube Works shall be charged against my son Wm. A., because those indorsements were at his instance. In case either my said son Wm. A. or my son Johnston F. shall die before me the shares which they would otherwise be entitled to shall remain in the estate and go to my remaining children.

"Third. My executors shall sell my real estate and make deeds to the purchasers or divide the whole or what remains after this between my heirs."

The provisions of the codicil are stated in the opinion of the Supreme Court.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

Geo. L. Roberts, for appellant. John G. Frazer and Reed, Smith, Shaw & Beal, for appellees.

POTTER, J. The bill in this case prayed for partition of the real estate of William Dunshee, who died on March 5, 1905, having by his will given his entire estate to his wife for life, and directed that, after the payment of certain pecuniary legacies, the balance of his estate should be divided among his children. He also directed that in distributing his estate any indebtedness from any of his children to him should be deducted from their shares, and that any debt due by him on account of indorsements for Duquesne Tube Works should be charged against his son, William A. Dunshee. He further provided, "My executors may sell my real estate and make deeds to the purchasers or divide the whole or what remains after this between my heirs." By a codicil, the testator fixed the amount of the indebtedness of William A. Dunshee to him at \$38,716.59, and directed that this amount, with interest, should be charged against him, and that he should not participate in the estate, unless that amount be paid by him, or his share of the estate should exceed that sum. Whatever might be realized out of the sale of 196 shares of the stock of the Monongahela Natural Gas Company, or, if not sold, its value, was to be allowed as a credit. In a second codicil to his will, testator repeated the instruction as to any indebtedness of his children, and especially of William A. Dunshee, and recited that he had sold the Monongahela Natural Gas stock for \$13,900, and directed that credit should be given to William A. for that amount.

An answer to this bill was filed by William A. Dunshee, in which he denied that the court had jurisdiction to entertain the bill, on the ground that the real estate of testator had, by the terms of his will, been converted into personalty for purposes of distribution. He also denied the averments of the bill as to the amount of his indebtedness to the estate. The court below held that there was no conversion, and that the questions raised by the answer as to the amount of respondent's indebtedness to his father could only be determined upon final distribution, and directed that a decree for partition be drawn. Exceptions were filed on behalf of William A. Dunshee to the findings of fact and conclusions of law, these exceptions were overruled, and a decree was entered awarding partition, and appointing a master to make such partition. From that decree, this appeal was taken.

[1] Admittedly, there is no positive direction to sell. The will says: "My executors may sell my real estate." A direction to the executor to make division of the estate does not take away the right to demand partition. See Carter's Estate, 225 Pa. 355, 74 Atl. 240, and the cases there cited. Nor does it appear here that there is any absolute necessity for the executors to

sell, in order to carry out the provisions of the will. The bill shows, and the answer admits, that the executors have filed their final account of the personal estate; that the debts and legacies have been paid; and that a balance is left for distribution among the residuary legatees. It is also admitted that none of the legatees, except appellant, are indebted to the estate of testator. If the provisions of the will as to charging the indebtedness of appellant against his share of the estate can be carried out through the process of partition, there will be no need for a sale by the executors. That this may be done appears to be settled by our decisions. In *Allegheny National Bank's Appeal*, 99 Pa. 148, 151, there was a provision in the will similar to that in the present case. The testator directed "that in the payment of the distributive share of my daughter Ann Eliza, \$1,000 shall be deducted for the lot already conveyed to her, and also any amount of money that I may pay, on account of indorsement or otherwise, or that my executors may have to pay after my decease." At the time of his death, the testator was an indorser upon a note of the legatee's husband, for \$1,000. In partition by bill in equity, this sum was charged upon the purpart of the legatee as owelty in partition. Mr. Justice Mercur said that the decree was "in an unusual form, and rather irregular," but added: "It does, however, appear on the facts found by the auditor, that the decree was equitable between all the parties. * * * Full effect must then be given to the claim of the appellants as one of the owelty." In the case of *Armstrong v. Walker*, 150 Pa. 585, 25 Atl. 53, it was held that indebtedness to the estate by executors, who were also devisees, which arose out of waste of the personal estate, might be charged, in a suit in equity for partition, against their shares of the real estate; and, where the liability exceeded the value of such shares, they would take nothing under the partition decree. In *Trickett on Partition in Pennsylvania*, 366, it is said: "When partition in equity of land of a decedent is sought, account will be taken of advancements made to one or more of the heirs or devisees, as when the partition is in the orphans' court. * * * If the land or a purpart is allotted to the devisee or heir advanced, the sum advanced may be included in the owelty with which it is charged." It seems clear, therefore, that the indebtedness of appellant, whatever it may prove to be, may be charged in the same manner as the owelty against the purpart allotted to him. The act of July 7, 1885 (P. L. 257), § 2, provides expressly for charging owelty against purparts allotted by the final decree.

[2] In this case, we do not see in the will anything to indicate that the testator intended that his real and personal estate should be so blended as to create a fund to be be-

queathed entirely as money. Rather does it appear that the real and personal property were to be dealt with separately. Discretionary power to sell was given to the executors; but, subject to its exercise, testator apparently intended the real estate to be divided as such. The direction that the whole of the real estate, or what remains after possible sales by the executors, shall be divided among his heirs seems to be opposed to the idea of the real estate being blended with the personalty, and the total divided into shares.

[3] We agree with the conclusion of the court below that there was no conversion, and that the complainants were entitled to partition. As to the indebtedness of appellant to the estate of his father, two questions are raised: (1) That the testator, his father, through inadvertence, failed to give appellant credit for the sum of \$10,786.76 to which he was entitled, as shown by his father's own account; and (2) that appellant is entitled to credit for more than was allowed him by his father, as the proceeds of the sale of the Gas Company stock, as directed in the second codicil of the will. The court below did not pass upon these questions, but held that, if it could determine them at all, it could only do so upon the final distribution; and, further, that these matters could not affect the rights of the other devisees to have their shares of the land set apart to them in severalty. In *Lincoln v. Africa*, 228 Pa. 546, 548, 77 Atl. 918, 919, this court indicated the proper practice to be pursued in partition proceedings. Mr. Justice Moschzleser said: "In partition proceedings in equity, if the case is not sent to a referee under rule 69, the equity rules require that the court, and not a master, shall find all the relevant facts concerning the properties involved and the interests of the various parties, and that an adjudication shall be filed in the usual form, containing these findings and the conclusions of law thereon, with a decree for partition. *Palethorp v. Palethorp* [184 Pa. 585, 39 Atl. 489], supra. The proper procedure is shown in *Palethorp v. Palethorp*, 194 Pa. 408 [45 Atl. 322]. Since the adoption of the new rules, the master merely executed the decree of the court after the rights of the parties have been judicially determined. Before a master may be appointed to make partition, the court must ascertain the interests and titles of the parties, and enter a decree that partition be made. The decree of partition must rest upon the findings and conclusions of the court; after such an adjudication, and only thereafter, the case may be sent to a master. Equity Rule 60; Act of July 7, 1885, P. L. 257, § 2." Under the method of procedure thus pointed out, the court below should have ascertained the interests and titles of the parties, and should have fixed the amount of appellant's indebtedness to

the estate, before entering the decree for partition.

[4] We note that the appellees join with the appellant in requesting that the questions relating to appellant's indebtedness be decided by this court on the present appeal. But, if we were to attempt to decide these questions without any previous consideration of them by the court below, we would "assume the duties of the court of first instance." *Jones v. Weir*, 213 Pa. 135, 62 Atl. 643. Mr. Justice Sterrett said, in *Shaw v. Allegheny*, 115 Pa. 46, 52, 7 Atl. 770, 771: "According to the theory of our system of jurisprudence, the parties litigant, as well as the appellate court, are entitled, in every case, to a full consideration and deliberate judgment of the court below." In the present case, the court below should proceed to determine and fix the amount of the indebtedness to be charged against the interest of William A. Dunshee, under the will of William Dunshee, deceased, and embody the result of its findings in its decree for partition.

To the extent made necessary by this requirement, the decree of the court below is modified, and the record is remitted with a procedendo.

DONOVAN et al. v. WOODWORTH.

(Supreme Court of Pennsylvania. Jan. 2, 1912.)

WILLS (§ 614*)—CONSTRUCTION — ESTATES CONVEYED—LIFE ESTATE.

Where land is devised to testator's daughter to have and to hold for her natural life, and at her death to vest in her child or children, if any should survive her, and in the event of her death without child or children, then over to testator's sons, the daughter takes a life estate only.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

Appeal from Court of Common Pleas, Allegheny County.

Case stated between Margaret Marion Donovan and another and A. M. Woodworth to determine title to real estate. From a judgment for defendant, plaintiffs appeal. Affirmed.

Swearingen, P. J., filed the following opinion:

"The plaintiffs, Margaret Marion Donovan and Charles H. Donovan, her husband, agreed in writing to convey * * * land unto A. M. Woodworth, the defendant, in fee, by deed of general warranty, for the consideration of \$10,000. The defendant declined to accept the conveyance and to pay the purchase money for the reason, as he alleged, that Mrs. Donovan has only a life estate in said land. Mrs. Donovan alleged that she owns it in fee. Thereupon the par-

ties filed this case stated, in which they agreed that, if the court be of the opinion Mrs. Donovan has a fee-simple title, judgment should be entered in favor of the plaintiffs; but, if not, then judgment should be entered in favor of the defendant.

"Mrs. Donovan derived her title from her father, George E. Bullock, who died seised of the land March 10, 1902, testate. His will was dated January 5, 1900, and was duly probated. * * * The testator left to survive him a widow, Harriet E. Bullock, two sons, Jesse Edson Bullock and Harry Corydon Bullock, and one daughter, Margaret Marion Bullock, one of the plaintiffs, who on January 23, 1904, was intermarried with Charles H. Donovan, the other plaintiff. The item of said will upon which this controversy turns is as follows: 'Fourth. I give, devise and bequeath unto my daughter, Margaret Marion Bullock, with its buildings, and appurtenances, all the land situated on Main and Sullivan street in Canton borough, which I purchased of Mix and Hooper, Abner Doty and William Crooks, to have and to hold for the term of her natural life, and at her death to vest in her child or children, if any such survive her, and in the event of her death without child or children surviving her, the said land shall vest in my sons Jesse Edson and Howard Corydon, share and share alike, to them and their heirs forever, the child or children of each, should either or both of my said sons not survive my daughter Margaret Marion, to take the same share that my son or sons would take if living, this devise being subject to the payment of a portion of the income of the said land to my wife, Harriet E. Bullock, as hereinafter provided.'

"The plaintiffs contend that the life estate given to Mrs. Donovan in the first part of the above item became a fee tail (now enlarging to a fee simple under our statutes) by virtue of the rule in *Shelley's Case*, for the reason that the words of the devise in remainder are to be construed as equivalent to 'the heirs of the body' of the testator's daughter, and are therefore words of limitation of the estate of freehold given to her. The defendant contends that the words of the devise in remainder are to be construed as words of purchase, and that therefore the rule in *Shelley's Case* is not applicable.

"Nothing is better settled than that the rule in *Shelley's Case* cannot be used in the interpretation of a will. The rule can only be invoked after the meaning of the language used has been ascertained and the intent of the testator determined. If, then, it is found that the testator intended the remaindermen to take directly from him and thus to form a root from which a new line of descent is to spring, the devisees in remainder are to be regarded as purchasers,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and the rule in Shelley's Case has no application. If, on the other hand, it is found that the testator intended the remaindermen to take by and through the first taker, either as heirs of the body, or as heirs generally, and the first taker to be the root from which the line of descent is to spring, then the rule does apply and the life estate or other freehold of the first taker is enlarged into a fee simple or a fee tail, as the case may be. *Kemp v. Reinhard*, 228 Pa. 143, 77 Atl. 436, 29 L. R. A. (N. S.) 958. We must therefore ascertain the intention of this testator from the will itself and from the admitted circumstances. What was the intention of the testator with respect to this real estate? It is evident that he intended to give his daughter but a life estate, for he has so stated by apt words. Did he also intend her to be the root from which a new line of descent was to spring? After giving her the land for life, he then declared, 'And at her death to vest in her child or children, if any such survive her.' The word 'vest' is not the ordinary word used in the gift of land. Anciently it meant to put a party in possession by the ceremony of investiture. Now, however, it ordinarily means the clothing of a party with an immediately fixed right of present or future possession of land. So that the testator clearly meant, by the language used, that the child or children of his daughter, if any survived her, should have the right to possession of said land immediately upon her demise, and, as we think, their title was to be a fee because the subsequent devise over was only to be effective in case no child or children survived Margaret Marion Bullock. The words 'child or children' are words of purchase, according to the well-considered authorities, and they are not words of inheritance. So that, when the testator directed this land to go to 'the child or children' of his daughter, the legal meaning of the words used was that they should take as purchasers. This legal meaning of the words must be adopted, unless it clearly appears that, by these words, he intended 'the heirs of her body'; for it cannot be that by these words he meant her 'heirs generally.' There is nothing in the item of the will under consideration to indicate that by the words 'child or children' the testator meant 'the heirs of the body' of his daughter. The expressions are not identical; the latter is much the more comprehensive term. In the clause of said item following the testator provided that, if his daughter should die 'without child or children surviving her, the said land shall vest in my sons, * * * share and share alike, to them and their heirs forever.' By this he constituted a new and a different line of descent, not dependent upon the failure of heirs of her body, but dependent upon failure of 'child or children'—some only of the possible heirs of her body—to survive

her. He did not mention her 'grandchildren' or other descendants, nor did he do so in any other part of his will. In our opinion, no expressions in the fourth item can be found which indicate that the testator intended the words 'child or children' to have any other than their accepted legal meaning. We must therefore hold that the intention of the testator, as expressed in the fourth item of his will, was that the 'child or children' of his daughter were to take directly from him and not by and through their mother as heirs of her body. Therefore they should take as purchasers, and the rule in Shelley's Case has no application. * * *

"Being of opinion that, under the will of George E. Bullock, deceased, Margaret Marion Donovan (née Bullock) took but a life estate in the land in question, judgment must be entered for the defendant. * * *"

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. A. and James Balph, for appellants.
O. P. Robertson, for appellee.

MOSCHZISKER, J. Margaret Marion Donovan took but a life estate in the land in question. The part of the will essential to a determination of the questions involved in this appeal is quoted in the opinion of the common pleas published in connection herewith. The language employed throughout the whole instrument indicates that the testator understood the legal significance of the terms "heirs" and "children" and appreciated the difference in meaning between the two, for wherever there was a clear intention to pass an absolute estate he made use of the word "heirs" or the words "in fee." In the very item in question, the language used in connection with the devise over to his sons is "to them and their heirs forever." After giving the property to his daughter "to have and to hold for the term of her natural life," he adds: "And at her death to vest in her child or children, if any such survive her." This must be taken to mean child or children living at the time of her death, and not to contemplate an indefinite failure of issue. *Smith v. Piper*, 231 Pa. 378, 88 Atl. 877, and we feel that the word "vest" was used in the sense in which it is construed by the court below, and not as the equivalent of "descend to." We conclude that the testator intended his said grandchildren to take from him and not through their mother.

The two cases chiefly depended upon by the appellants are distinguishable from the present one. In the first of these, *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, the devise was to a daughter "for life only, remainder after her death to her child or children in fee, but if my daughter at the time of her death has neither husband, child or children, she may also dispose of her share or part of said

real estate as she sees proper;" and we held that it was plain that the testator intended "the remainder to go to the general or lineal heirs of the first taker." In the other case, *Pifer v. Locke*, 205 Pa. 616, 55 Atl. 790, the devise was, "I will and devise to my daughter H. the house and lot * * * for and during her natural life, and at her death I devise and bequeath the same unto her children or issue in fee simple." This also plainly indicated the lineal heirs of the first taker.

The opinion of the learned court below amply vindicates its decision. The assignment of error is overruled, and the judgment is affirmed.

BERGDOLL v. A. G. SPALDING & BROS., Inc.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

LANDLORD AND TENANT (§ 108*)—FORFEITURE OF LEASE—DEMAND FOR RENT.

In the absence of a provision in a written lease fixing the place for payment of rent, the landlord must, before he can take advantage of a forfeiture clause, demand the rent upon the demised premises, though there has grown up a practice by which the tenant has paid rent elsewhere.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 333-335; Dec. Dig. § 108.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Louis J. Bergdoll, to use, against A. G. Spalding & Brothers, Incorporated. From an order making absolute rules to open and strike off judgment, plaintiff appeals. Affirmed.

The following opinion was filed by Ferguson, J., in the court below:

"There are two rules in this case, one to open judgment, and one to strike off judgment. We are of the opinion the rule to strike off the judgment should be made absolute. We can do this only when the record shows a defect that invalidates the judgment, and such a defect appears in this case. The judgment was entered by amicable action provided for under the terms of a written lease. The lease itself provides no place at which the rent is payable, and the forfeiture clause gives to the landlord the right to file the amicable action and confess judgment in ejectment if the rent be at any time in arrear and unpaid. The specific breach averred in the action is the failure to pay the rent due from the 1st day of April, 1911, until the 21st day of that month, to the plaintiff at premises 4910 Wynnefield avenue. The lease provides for the payment of the rent monthly on the 15th day of the month, and certain letters which passed between the parties are attached to the amicable action to show a change in the terms of the lease.

Upon inspection of these letters it would appear that the tenant was requested upon a change of ownership to pay the rent to the plaintiff at 4910 Wynnefield avenue, Philadelphia; that the defendant, upon receipt of such request, wrote a letter to the plaintiff inclosing the check for the rent then due and expressing a willingness to pay the rent thereafter on the 1st of the month instead of the 15th, to which the plaintiff replied that such an agreement would be acceptable.

"When the written lease does not provide a place at which the rent is payable, it is the duty of the landlord, before he can take advantage of a forfeiture clause, to make a demand for the rent upon the demised premises, and this is so even though there had grown up between the parties a practice in which the tenant sought the landlord, paid the rent to him elsewhere. *Rea v. Eagle Transfer Co.*, 201 Pa. 273, 50 Atl. 764, 88 Am. St. Rep. 809. There was no allegation or averment in the amicable action in this case of any demand upon the land for the payment of the rent before the forfeiture was invoked. It is argued, however, that because of the letters which passed between the parties that a place was fixed for the payment of the rent. These letters are not a part of the lease, and as we read them they appear to be nothing more than mere expression of willingness on the part of the tenant to pay the rent at the certain time and place, and on the part of the landlord to receive it. They do not constitute a contract, nor can they be said to be binding upon either party.

"The evidence appearing in the depositions appears to us ample to justify the court in opening the judgment, but we do not think it necessary to leave the matter open for further determination when the record itself shows no right to a judgment.

"The rule to strike off the judgment is therefore made absolute."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

David J. Myers and Arno P. Mowitz, for appellant. John G. Johnson and James Wilson Bayard, for appellee.

PER CURIAM. The order of the court of common pleas is affirmed on the opinion of Judge Ferguson.

In re WRIGHT'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

LIFE ESTATES (§ 17*)—IMPROVEMENTS—LIABILITY OF TENANT FOR LIFE.

Where a trustee is authorized by the orphans' court to expend out of the principal a sum sufficient to improve dilapidated and untenable realty so as to avoid an inevitable sale to prevent the real estate from becoming a charge upon the life tenant, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

decree, with the consent of the life tenant, authorizes the trustee to set apart one-third of the net income from the improved property to reimburse the principal of the trust estate, and as a result of the improvements the property is saved and doubles in value, the life tenant is entitled, after nearly a third of the expenditure has been reimbursed, to have the decree modified to relieve him from further application of one-third of the income to reimbursement of the principal.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. § 17.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of John Wright, deceased. From a decree dismissing a petition to modify a prior decree of the Orphans' Court, S. Megargee Wright appeals. Reversed and remanded, with directions.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frederick B. Vogel and Henry K. Fox, for appellant. A. H. Wintersteen, for appellee.

MOSCHZISKER, J. In 1895 John Wright died testate, leaving to survive him one son, Samuel Megargee Wright. He devised his residuary estate to his executor, the Girard Trust Company, "in trust to collect and receive the rents and income of the real estate and the interest and dividends of the personal estate, and after deducting all expenses incident to the execution of the trust to pay the same in quarterly yearly payments to my son Samuel Megargee Wright for and during the full end and term of his natural life, in such way and manner that the same shall not be subject to or liable for his debts, contracts or engagements in any way whatever"; upon his son's death to pay unto the latter's wife, Heloise C. Wright, if surviving, an annuity during widowhood of \$3,000, then to pay for the support, maintenance, and education of the testator's grandchildren an annual sum not exceeding \$2,000 for each, and ultimately to convey the corpus to such grandchildren as should be living at the son's death and to the issue, per stirpes, of any then deceased. At the time of his decease the testator was seised of an undivided one-third interest in certain real estate in the city of Philadelphia which passed to the Girard Company as trustee of the residuary estate. These properties were in such a dilapidated condition that they were untenable, and the trustee petitioned the orphans' court for leave to join with the other owners in erecting new buildings at an expenditure out of the trust estate of not more than \$17,500. The life tenant and his wife filed answers and agreed that from time to time one-third of the annual income from the real estate in question should be retained by the trustee to reimburse the principal fund for the expenditure thus to be incurred; and the

court decreed that "the said trustee shall set aside in each and every year a sum equal to one-third of the net income derived from the property to be improved, so as to create a fund for the purpose of reimbursing the principal of the said trust estate for the expenditures hereby authorized to be incurred for the said improvement." The trustee expended a total of \$16,736, and down to May 9, 1910, had retained \$6,355.24, income to reimburse the principal. In May, 1910, Samuel Megargee Wright petitioned the orphans' court to modify its decree so that no further income should be retained, and that he be paid the money theretofore withheld. The petitioner urged that the property had greatly increased in value, and the trustee admitted this fact in its answer. The petition was referred to a master, who reported that its prayers should be refused on the ground that the application was premature, because it was impossible to determine "at this time what value the improvements will have when the life estate expires." The court below confirmed the report of the master and dismissed the petition. The life tenant has appealed.

Ordinarily the cost of permanent improvements of the character of those in this case would be paid from principal and not out of income; but arrangements for the mutual benefit of all concerned, such as here decreed, whereby the income bears the burden, are not unusual in this state. But it is always within the power of the court, where the interests of third parties do not intervene, to reconsider its decrees and to control and modify such arrangements according to changed circumstances, as justice and equity may require.

The evidence clearly shows that the property has doubled in value since and with the improvements, and that it has been changed from unrentable real estate into a large revenue producer. While the orphans' court adopted the findings of its master, who attributed the first gain entirely to the increase in the value of the land, we agree with the dissenting opinion filed by Judge Lamorcelle of the court below to the effect that the testimony does not support that view. This large increase in value took place subsequent to the improvement, and the testimony is that, had the property not been improved, it would have been necessary to sell it in 1895 to prevent its becoming a charge upon the life tenant, who was the primary object of the testator's bounty, for the benefit of the remaindermen; furthermore, the other owners in common desired to change the property into a revenue producer, and had the arrangements for the financing of the improvement not been entered into at that time, it is probable that a sale in partition would have been forced upon the trustee. The improvement enabled the trustee to hold the land and to gain the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

great increase in value which has taken place, for the benefit of the remaindermen as well as of the life tenant; and the time has arrived when no further contribution should be taken from income. A careful review of this whole record convinces us that, while the \$6,355.24 retained by the trustee need not now be refunded out of the principal of the estate, justice and equity require that the life tenant be granted relief to the extent indicated. We are not called upon, and it would serve no useful purpose, to consider the other points urged before us by the appellant but not raised in the court below.

The assignment of error is sustained, and the record is remitted to the orphans' court, with directions to modify its decree in accordance with the view here expressed; the costs of this appeal to be paid out of the income of the estate.

In re ROWAN'S ESTATE.

Appeal of HARPER.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. WILLS (§ 302*)—PROBATE—ISSUE DEVISAVIT VEL NON.

Where five witnesses positively identify the signature to a will as that of testatrix and state that the entire will is in her handwriting, including interlineations and additions, and only one testifies that she thinks the handwriting does not look like that of testatrix, an issue devisavit vel non is properly refused.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. § 302.*]

2. WILLS (§ 107*)—REQUISITES AND VALIDITY—INTERLINEATIONS.

That the testatrix, in her own handwriting, adds interlineations to her will to identify two of the devisees by their married names and adds the abbreviation "Jr." to the name of the executor, does not avoid the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 245-248; Dec. Dig. § 107.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Emma A. Rowan, deceased. From a decree refusing an issue devisavit vel non on appeal from the register of wills, Sarah Harper appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frederick Beyer, for appellant. Joseph P. McCullen and Harry Green, for appellees.

POTTER, J. [1, 2] The appellant in this case alleges that the orphans' court erred in refusing to grant an issue devisavit vel non, to determine whether the writing admitted to probate is in fact the will of Emma A. Rowan, deceased. We are not impressed with the merit of this contention. The action of the court below seems to be abundantly justified by the undisputed facts

which appear in the record. Five witnesses positively identified the signature to the will as being that of the decedent, Emma A. Rowan, and they testified that the entire will was in her handwriting, including the interlineations and additions. Opposed to this positive testimony was nothing except the opinion of one witness, the appellant, who thought the handwriting did not look like that of Emma A. Rowan. Evidence of this character, as against the positive identification of the handwriting, was not sufficient to justify the granting of an issue; and it was properly refused. The interlineations were not in the nature of alterations to the will. They tended only to further identify two of the devisees, by adding their married names, and the addition of the abbreviation "Jr." to the name of the executor was of the same character. The orphans' court was undoubtedly right in holding that these changes, made after the execution of the will, did not avoid it.

The assignments of error are overruled, and the decree of the court below is affirmed.

GESSLER et al. v. GRAHAM.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

CONTRACTS (§ 295*)—ACTIONS—INSTRUCTIONS.

In an action on a written contract for the erection of a monument, the defense being that the granite used was not the kind stipulated, and that there were substantial defects in material and workmanship, an instruction that plaintiffs were bound to furnish the kind of granite specified, or they could not recover, and that, if they furnished the kind specified, and the workmanship, though not perfect, substantially complied with the contract, plaintiffs might recover the contract price, less an abatement for minor defects, was proper.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353-1356, 1362; Dec. Dig. § 295.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of assumpsit by John M. Gessler and another, copartners trading as John M. Gessler's Sons, against Emma P. Graham. From a judgment for plaintiffs for \$1,615, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Avery D. Harrington and Edgar J. Pershing, for appellant. Clifton Maloney, for appellees.

PER CURIAM. This action was on a written contract for the erection of a monument in a cemetery. The defense was that the granite used was not the kind stipulated for, and that there were substantial defects in materials and workmanship. The instruction by the learned trial judge was that the plaintiffs were bound to furnish the kind of

granite they agreed to furnish, and that if they failed to do this, or failed to substantially comply with the contract in any respect, they could not recover; that if the granite used was the kind stipulated for, but the workmanship was not perfect, but substantially complied with the contract, the plaintiff might recover the contract price, less an abatement or allowance for minor defects. With this instruction the defendant had no just ground of complaint. The questions at the trial were purely those of fact, and we find no error in the manner in which they were submitted to the jury.

The judgment is affirmed.

POKRAS v. PENNSYLVANIA SALT MFG. CO.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

NEGLIGENCE (§ 134*)—ACTIONS—EVIDENCE.

A verdict and judgment for defendant, in an action for personal injuries to a boy six years old, will be sustained, where the overwhelming weight of the testimony shows that the boy approached defendant's wagon from behind, climbed on the side between the wheels and, in attempting to get off, placed his foot between the spokes of a hind wheel, and that this action resulted in his fall and injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 287-270, 272, 273; Dec. Dig. § 134.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass for personal injuries by Hyman Pokras, by his father and next friend, Philip Pokras, and the latter in his own right, against the Pennsylvania Salt Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John C. Gilpin, Bernard Pockrass, and Graham & Gillilan, for appellant. William Findlay Brown, for appellee.

PER CURIAM. The burden of the appellant's complaint is that there was a failure by the court to adequately present to the jury the plaintiff's testimony, and that undue prominence was given to the testimony for the defendant. The boy who was injured was six years of age, and in his action, and that of his father combined with it, a recovery was sought on the ground that he had started to cross a street 30 feet in front of the defendant's team, and through the negligence of the driver was knocked down by the horses and run over by the wheels of the truck. The defense was that the boy had approached the truck from behind it, had climbed on the side between the wheels, and, in attempting to get off, had placed his foot between the spokes of a hind wheel.

The learned trial judge was evidently of opinion that the weight of the testimony was overwhelmingly with the defendant. We are of the same opinion. He carefully submitted both sides of the controversy, and called attention to the testimony in support of each. We find no error in the charge. The caution to the jury in the following words: "Every jurymen ought to take pride in trying to get what is just between the parties; that is what you ought to try to do in this case. That is all that either a jurymen or a judge ought to have in view in the trial of a case"—was called for by the circumstances of the case, and was eminently proper.

The judgment is affirmed.

COMMONWEALTH v. DE MASI.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW—SCOPE AND EXTENT.

Where the murder of which a prisoner was convicted was committed in the perpetration of a robbery, there is no question as to the degree of the crime, and the duty imposed on the Supreme Court by Act Feb. 15, 1870 (P. L. 15), is limited to ascertaining whether there was competent evidence at the trial which, if believed, would sustain a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2986-2998, 3036, 3067-3071; Dec. Dig. § 1134.*]

2. CRIMINAL LAW (§ 510*)—EVIDENCE—TESTIMONY OF ACCOMPLICE—WEIGHT AND SUFFICIENCY.

There may be a conviction on the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.*]

3. WITNESSES (§ 306*)—EXAMINATION—PRIVILEGE OF WITNESS—PERSONS ENTITLED TO CLAIM.

A witness' right to refuse to testify on the ground that his testimony may incriminate him is personal to himself, and cannot be asserted by the person against whom the witness is called as where an accomplice testifies against the prisoner on an indictment for murder.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058-1060; Dec. Dig. § 306.*]

4. WITNESSES (§ 392*)—IMPEACHMENT—STATEMENTS INCONSISTENT WITH TESTIMONY.

A prisoner on trial for murder, who has assigned in his testimony in chief a reason for leaving the place of the homicide on the morning following it, may be cross-examined as to a letter in which were statements inconsistent with the reason assigned for leaving the city, though the person to whom he dictated the letter had not followed his directions strictly, where the prisoner knew what the letter contained and had adopted it as written and made it his own.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.*]

Appeal from Court of Oyer and Terminer, Philadelphia County.

Sabatino De Masi was convicted of murder of the first degree, and appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles J. Roney, Jr., and E. B. Rockwell, for appellant. William A. Gray, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., for the Commonwealth.

FELL, C. J. [1] The murder of which the prisoner was convicted was committed in the perpetration of a robbery. There is therefore no question as to the degree of the crime. The duty imposed upon us by the act of February 15, 1870 (P. L. 15), is limited to ascertaining whether there was competent evidence at the trial, which if believed by the jury would sustain a verdict of guilty. *Grant v. Commonwealth*, 71 Pa. 495; *Commonwealth v. Morrison*, 193 Pa. 613, 44 Atl. 913; *Commonwealth v. Danz*, 211 Pa. 507, 60 Atl. 1070.

The facts developed by the commonwealth were that a masked man entered a saloon late at night, and, after demanding money of the barkeeper, shot and killed him. Two other men who were in the saloon were shot, one fatally. No one who saw the shooting was able to identify the prisoner. The testimony directly connecting him with it was that of an accomplice to whom he expressed his intention to enter the saloon and rob the bartender and to whom he said when he came out of the saloon that he had shot two men and had got \$30. This testimony was corroborated by proof that the witness and the prisoner were together during the day, that they had visited the saloon together two or three times a few hours before, and were close to it a short time before the shooting. The corroboration extended to every important fact testified to by the witness except the prisoner's expression of an intention to rob and his admission that he had shot the deceased. The testimony of the witness was submitted to the jury with great care by the learned trial judge in a charge to which no exception was taken.

[2] There is no rule of law in this state that forbids a conviction on the uncorroborated testimony of an accomplice. *Ettinger v. Commonwealth*, 98 Pa. 338; *Cox v. Commonwealth*, 125 Pa. 94, 17 Atl. 227. The duty to examine such testimony with care, and to accept and act upon it only when convinced of its truthfulness, was pointed out in the charge.

[3] The assignment based on the overruling of the objection to the calling of the accomplice as a witness for the commonwealth, before counsel for the prisoner who was also counsel for the witness had had an opportunity to confer with the witness, cannot be sustained. The witness had been tried and convicted and was under sentence, but his appeal had not been heard. It was his

right to be advised of his privilege not to testify, and it was the duty of the court to inform him of this right. This duty was fully performed, and the witness after being informed of his privilege and told that his testimony might be used against him expressed his willingness and desire to testify. The right of a witness to refuse to testify on the ground that his testimony may incriminate him is a right personal to him alone. The person against whom the witness is called has no rights in relation to the matter.

[4] The remaining assignment is without merit. The prisoner in his testimony in chief had assigned a reason for leaving Philadelphia on the morning following the murder. On cross-examination he was questioned in relation to a letter he had sent to his uncle in which there were statements inconsistent with the reason he had assigned for leaving the city. The letter had been written at his dictation and, while his directions had not been strictly followed, he knew what the letter contained and had adopted it as written and made it his own.

The assignments of error are overruled and the judgment is affirmed with direction that the record be remitted for the purpose of execution.

EHLERS v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

MUNICIPAL CORPORATIONS (§ 399*)—PUBLIC IMPROVEMENTS—DAMAGES—WAIVER OF RIGHT TO.

Where, after a tenant on the line of a proposed street improvement has voluntarily removed from premises without notice from an agent authorized by the municipality, the city subsequently tears down the buildings on the leased premises, it is not liable in damages to the tenant for the loss of his tenancy.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 958-961; Dec. Dig. § 399.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Julius C. Ehlers against the City of Philadelphia. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frederick H. Warner, for appellant. Percy C. Feger, Edgar Dudley Faries, Asst. City Sol., and Michael J. Ryan, City Sol., for appellee.

MOSCHZISKER, J. The refusal to take off the nonsuit entered in this case is amply sustained by the following excerpts from the opinion of the learned trial judge:

"By an ordinance approved October 13, 1906, the city of Philadelphia directed the opening of the thoroughfare known as the

Parkway northwestward from Logan square to Spring Garden street and provided that notice should be given to the owners of the strip of land thus appropriated that at the expiration of three months that highway would be opened through their property. The Parkway has since been actually opened in that part of its course. At the time of the passage of this ordinance, Julius C. Ehlers was the occupant of property known as No. 2211 Noble street in which he carried on a laundry business. The building was owned by Seafried Bros. On April 1, 1902, by a written lease now lost it had been let by its owners for the term of three years from that date to Julius C. Ehlers and William C. Chryst, copartners, trading as the Mechanics' Laundry, at a rental of \$20 per month; the lessees paying the water rent and the cost of repairs. The lease provided that it should continue in force from year to year until one of the parties thereto should have notified the other six months prior to the end of the current year that the tenancy would then be terminated. Ehlers and Chryst held over after the expiration of their original term of three years, and on October 1, 1906, dissolved their partnership. The lease, with the machinery that the firm had installed in the premises demised, was orally assigned to Ehlers who continued to carry on the laundry business there, and who thereafter was recognized by Seafried Bros. as their tenant under the written lease they had given to his firm. Neither landlords nor tenant ever signified to the other an intention that Ehler's occupancy of the property should cease on March 31, 1907."

"On October 15, 1906, a written notice signed by the chief of the city's bureau of highways and directed to Charles and Albert Seafried, informing them that at the expiration of three months from that date the Parkway would be opened through and over the ground owned by them, was left for them at No. 2211 Noble street. No such notice was given to Ehlers either by the city or by his landlords. On April 1, 1907, however, the plaintiff moved from the Noble street building taking his machinery with him. This he did because he had been requested to do so by a party whose name he cannot give and whose connection with and authority to act for the city is not shown, but who seems to have been concerned in the tearing down of the adjacent house."

"We see in these facts no reason to disturb the judgment of nonsuit entered by the trial judge. It is true that the building No.

2211 Noble street has been torn down by the city and a public highway constructed over the land on which it stood, but all this was done after he voluntarily vacated the property on April 1, 1907. If, as he claims, Ehlers had the right under his lease to occupy that property for another year, that right must be regarded as abandoned when he moved out or surrendered to the city which had acquired title to the fee by deed from the lessors. If the plaintiff chose to cease paying rent and remove from his holding, the city's action in entering upon it was not a taking in respect of which he is entitled to compensation. One cannot be deprived of what he has abandoned of his own free will."

"It is urged that the plaintiff's removal from the building on Noble street was not a voluntary one but to say this is to ignore the facts. The notice from the bureau of surveys of the intended opening of the Parkway was intended for Seafried Bros. No such notice was given by that bureau to Ehlers, nor was he ever notified to quit by his landlords as was the case in *Uhler v. Cowen*, 192 Pa. 443, 44 Atl. 42; *Id.*, 199 Pa. 316, 49 Atl. 77. The only demand that plaintiff move from the building occupied by him came from some unknown person who, so far as was made to appear, had no authority on behalf of the city to threaten, as it is said he did, that unless Ehlers left it the house would be torn down on top of his machinery. This was not sufficient notice under the act of April 21, 1855, § 7, P. L. 266 (*Purdon's Dig.* [13th Ed.] 2948), and, if there was nothing more, any interference by the city with Ehler's possession would, on proper application to the court, have been restrained by injunction. *Large v. Philadelphia*, 35 Pa. 231, note. There can be no doubt that the plaintiff acted precipitately and moved before he was obliged to do so. Had he displayed less nervousness and waited for matters to take their due course, he might have been able to retain possession for the full period for which he says he was entitled to it. Be that, however, as it may, the city found the Noble street property abandoned and tore it down. As its abandonment was not attributable to any demand on its part, it cannot be said to have deprived Ehlers of his interest therein, and it therefore is under no liability to him."

A discussion of the first assignment of error is not necessary to the decision of this case, both assignments are overruled, and the judgment is affirmed.

WOODWARD et al. v. CONGDON et al.
(Supreme Court of Rhode Island. June 11, 1912.)

1. WILLS (§ 858*)—VOID AND LAPSED LEGACIES—RESIDUARY PROVISION.

At common law as recognized in this state, lapsed or void bequests fall in the residue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173–2183; Dec. Dig. § 858.*]

2. WILLS (§ 858*)—LAPSED LEGACIES — RESIDUARY PROVISIONS—STATUTE.

Gen. Laws 1909, c. 254, § 7, provides that a devise of real estate which fails by reason of the death of the devisee before the testator without issue shall be included in the residuary devise, and that, if a residuary "devisee or legatee" die before the testator without issue, the other residuary devisees or legatees shall take the share of the decedent. Testatrix by will gave a specific pecuniary legacy to each of two cousins and also gave to each of them a specific legacy of personal property and made them residuary legatees and devisees. One of the legatees died prior to the testatrix without issue. *Held*, that on his death the legacies to him which lapsed passed into the residue and not to the next of kin.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173–2183; Dec. Dig. § 858.*]

3. WILLS (§ 863*)—RESIDUARY PROVISIONS—DEATH OF CODEVISEE—RIGHTS OF SURVIVING CODEVISEE.

Such surviving residuary devisee on his survival of the testatrix became entitled to the residue thus augmented.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. § 863.*]

4. WILLS (§ 439*)—CONSTRUCTION — INTENTION OF TESTATOR.

A will should be so interpreted as to carry out the testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

5. TENANCY IN COMMON (§ 1*)—NATURE OF ESTATE—SURVIVORSHIP.

There is no right of survivorship between tenants in common.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

6. WILLS (§ 863*)—LAPSED LEGACIES—RESIDUARY PROVISIONS—TENANTS IN COMMON.

Such statute changes the rule against survivorship between tenants in common so far as such rule prevents residuary devisees or legatees from succeeding to the interests of codevisees or colegatees of the residue who die without issue before testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. § 863.*]

7. WILLS (§ 449*) — CONSTRUCTION — CONSTRUCTION TO AVOID PARTIAL INTESACY.

A will is to be so construed as to avoid partial intestacy if such construction is natural and reasonable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

8. WILLS (§ 863*)—LAPSED RESIDUARY BEQUEST—SURVIVING RESIDUARY LEGATEES.

Where one of two residuary legatees who had also received specific bequests died a week after the execution of the will, and though testatrix lived for nine years thereafter she made no change in the will, it cannot be said that it appears by the will that testatrix did not intend the lapsed portion of the residue to go to the surviving residuary legatees within the meaning of Gen. Laws 1909, c.

254, § 7, providing for survivorship as between residuary devisees and legatees unless a contrary intent on the part of testator appears in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2187; Dec. Dig. § 863.*]

Case Certified from Superior Court, Newport County; Christopher M. Lee, Judge.

Angela D. Woodward and others appeal to the superior court from a decree of the probate court of Newport county, allowing the account of Thomas B. Congdon, as administrator c. t. a. of Emily E. Hurd, deceased, which account showed the payment of the entire residuary estate to T. Amory De Blois, one of the defendants. Certified from superior court of Newport county on agreed statement of facts. Decree of probate court affirmed, and papers remitted to superior court.

Burdick & MacLeod, of Newport (Lowndes Calhoun, of the Georgia Bar, of counsel), for appellants. Sheffield, Levy & Harvey, of Newport, for appellees.

PARKHURST, J. This case was certified to this court by the superior court of Newport county on an agreed statement of facts. It is an appeal to the superior court of Newport county from a decree of the probate court of Newport entered June, 1911, allowing the account of the appellee Thomas B. Congdon as administrator c. t. a. of the estate of Emily E. Hurd, deceased, which account shows the payment of the entire residuary estate to T. Amory De Blois, one of the appellees.

The facts, so far as they are material to the issues, are these: The will of Emily E. Hurd, which was executed December 6, 1900, provided among other things as follows: "(4) To my said cousins, N. James De Blois and T. Amory De Blois I give and bequeath the sum of \$2,500 each. * * * (15) Subject to the possession, use and enjoyment of all the articles hereinafter named by said E. Linzee Cunningham during his natural life, and after his death only, I give and bequeath the same as follows, namely: All the silver plate of every description inherited by me from my dear mother (it has the initial 'D' engraved upon it) to said Emily J. De Blois. All the furniture in said house inherited from my said mother consisting of the furniture in my drawer and in the guest chamber and all the bric-a-brac therein contained to said Emily J. De Blois. All rugs, carpets, linen, blankets and bedding, all china, glass, bric-a-brac and ornamental furniture, not otherwise herein specifically bequeathed and all wines and cigars to said N. James De Blois and T. Amory De Blois. (16) All the rest, residue and remainder of my estate of whatsoever kind and wheresoever situate of which I may die seized and possessed or to which I may then be entitled, I give, devise and bequeath to my

cousins, said N. James De Blois and T. Amory De Blois."

In addition to the above, the agreed statement establishes the following facts: (1) The death of testatrix, June 3, 1909, and the probate of her will. (2) The death of N. James De Blois intestate and without issue December 13, 1900, devisee and residuary legatee and devisee with T. Amory De Blois (they together under the terms of the will being entitled to the residuum). (3) The death of E. Linzee Cunningham January 29, 1905. (4) The death of Emily J. De Blois February 2, 1907. (5) The next of kin of testatrix, including among others, these appellants.

The questions arising upon the facts are these: Upon the death of N. James De Blois without issue, prior to the death of testatrix, (1) Did the legacies to him which lapsed pass into the residue or go to the next of kin of the testatrix? (2) Did the entire residue, together with the lapsed legacies as part thereof, pass to the surviving residuary legatee T. Amory De Blois, or did only one-half of the residue pass to him, and the other half with the lapsed legacies pass to the next of kin of the testatrix? The probate court decided in accordance with the appellees' contention that the legacies which lapsed as to N. James De Blois passed into the residue, and that the entire residue thus augmented passed to the surviving residuary legatee. The appellants contend, however (1) that a specific bequest to a legatee who predeceases the testator does not fall into the residue, if the specific legatee is also one of the residuary legatees, but descends to testatrix's next of kin as intestate property; (2) that it appears from the will of Emily E. Hurd that she did not intend the lapsed portion of the residue given to N. James De Blois to enlarge the portion thereof given to the surviving residuary legatee.

[1] All the parties admit that it is unquestionably the rule at common law, as applied in this country, that lapsed or void bequests fall into the residue. And this has been recognized as the rule in Rhode Island in the case of *Peckham v. Newton*, 15 R. I. 321, 324, 4 Atl. 758, and also in *Re Will of Isaac Reynolds*, 20 R. I. 429, 431, 39 Atl. 896, and *Nickerson v. Bragg*, 21 R. I. 296, 298, 43 Atl. 439. But the appellants contend further that there is an exception to that rule which is well recognized and which controls the case now before the court, namely, that, when the bequest is to a legatee who is also one of the residuary legatees, the bequest lapses and goes to the testator's next of kin and not to the surviving residuary legatee; that it is not logical to say that a gift to one lapsing shall go as a part of the residue to him not living, or, in other words, to allow a residuary legatee to take when dead a legacy lapsed by reason of his own death; that the surviving residuary legatee does not take the deceased residuary legatee's share of the resi-

due directly by the terms of the will, but, if he takes such share of the residue at all, it is by virtue of his survivorship as provided by our statute, and that the statute gives the surviving legatee only "the share of such residuary legatee so dying"; and that the "share of such residuary legatee so dying" does not include a specific bequest to him which lapses by his own death and which could not come to him dead and therefore could not become a part of his "share."

And the appellants in support of this contention cite certain cases, to wit, the case of *Craighead v. Given*, 10 Serg. & R. (Pa.) 351. In that case there was a gift to seven legatees and the residue was to the same seven. One of the legatees died before the testator. The court said at page 354 of 10 Serg. & R.: "To bequeath to Eliza Semple a portion of a residue happening in consequence of her own death is a construction which can never be supported"—and held that the bequest to Eliza Semple, who predeceased the testator, went to the testator's next of kin and not to the other six residuary legatees. In *Dorsey v. Dodson*, 203 Ill. 32, at page 37, 67 N. E. 395, at page 397, the court said: "Where legacies are given to several legatees, and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them"—and quoted with approval the language used in *Craighead v. Given*, supra. In accord with these two cases is *Crawford v. Cemetery Association*, 218 Ill. 409, 75 N. E. 998. In *Silcox v. Nelson*, 24 Ga. 84, the court says: "When the residuum is given in distinct parcels as in this case, or to several as tenants in common, it is to be inferred that the testator did not intend that lapsed legacies should fall into the residuum, but it is to be presumed in such cases that he had expressed all that each residuary legatee should take." But an examination of these cases shows that no such statute as has existed in Rhode Island since 1896 (nor any statute on the subject) was in contemplation of the courts which rendered these decisions.

The statute of this state relating to the matters here in question is found in Gen. Laws 1896, c. 203, § 7, now Gen. Laws 1909, c. 254, § 7, p. 882, and was in force at the time of the execution of the will (December 6, 1900).

[2, 3] The statute provides as follows: "Sec. 7. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator without leaving issue of such devisee living at the time of the testator's decease, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will;

and if a residuary devisee or legatee die before the testator without leaving issue living at the time of the testator's decease, and there be other residuary devisees or legatees named in such will in the same residuary clause, such other residuary devisees or legatees named in said clause, whether a class or not, shall take at the testator's decease the share of such residuary devisee or legatee so dying in like proportions as their shares bear one to another as expressed in said will under said residuary clause."

It will be noted that the first clause of the above-quoted section refers in terms only to lapsed "devises" of real estate and makes no reference to lapsed legacies of personal property. But as the obvious intent of this statute was to prevent intestacy, where it was manifest that the testator did not intend to die intestate as to any portion of his estate, it was not necessary that the statute should refer to lapsed legacies because, under the rule of the common law as adopted in this state as above shown, it was already the law that lapsed or void legacies of personal property should fall into the residue, and so it was only necessary to provide for the similar disposition of lapsed devises of real estate so as to prevent intestacy as to them.

It is manifest therefore that when N. James De Blois died intestate and without issue December 13, 1900, both the specific pecuniary legacy to him under the fourth clause, and the other specific legacy of certain tangible personal property bequeathed to him under the fifteenth clause of the will above quoted, fell into the residue for the benefit of such person, if any, as should be ultimately entitled thereto; and that, as T. Amory De Blois survived the testatrix, he became entitled to the residue thus augmented. The ratio decidendi of the cases above cited on behalf of the appellants which hold to a contrary rule is that, "where a testator gives specific legacies to several legatees and gives the residue to them as tenants in common, if each one receives his share of the residue over and above the specific legacies he receives exactly what the testator intended to give him. Having given to each specific sums and a specific share of the excess over the total of such sums, the proportion of those who live is not to be enlarged by a lapsed legacy. It is not to be inferred that the testator intended that a lapsed legacy to one should fall into the residue so that the survivors should receive a different and increased portion of the testator's estate."

[4] In other words, this rule was intended to so interpret the will as to carry out the testator's intention in accord with the general rule of interpretation of wills. See *Dorsey v. Dodson*, 203 Ill. 32, 37, 38, 67 N. E. 395; *Crawford v. Cemetery Ass'n*, 218 Ill. 399, 409, 75 N. E. 998; *Silcox v. Nelson*, 24 Ga. 84; *Lombard v. Boyden*, 5 Allen (Mass.) 249, 251.

[5, 6] A similar rule has, prior to the adoption of the statute, been applied in this state with regard to shares under a residuary clause devising and bequeathing both real and personal estate to several children of the testator by name, as tenants in common in equal shares, holding that, where one of the residuary devisees died without issue in the lifetime of the testator, the part of the real estate devised to such deceased child lapsed, and being a part of the residue could not fall into the residue so as to enhance the shares of the other residuary devisees, but would go as intestate estate to the heirs at law. *Church v. Church*, 15 R. I. 138, 23 Atl. 302. See, also, *Sohler, Adm'r, v. Inches*, 12 Gray (Mass.) 385, 387; *Lombard v. Boyden*, 5 Allen (Mass.) 249, 251. The whole theory of these cases is based upon the legal effect of the tenancy in common which negatives the idea of any right of survivorship as between the tenants.

As we construe the statute above quoted, it was intended to prevent, in the second part thereof, the further application of this rule so as to prevent intestacy in the case of a lapsed residuary devise or bequest, and to effectually provide for survivorship where any residuary devisee or legatee remains at the testator's death to take the estate. We are well satisfied that the said statute is effectual to do away with both the aforementioned rules regarding lapsed devises and legacies, and when the testator, as in this case, leaves estate in such a manner that a lapse may occur, without any ultimate disposition of such legacies or devises as may become lapsed other than that contained in a general residuary clause, the testator must be deemed to have executed the will with regard to the provisions of the statute above quoted and to have intended that such provisions should operate in case a specific devise or bequest became inoperative for any reason. *Missionary Society v. Pell*, 14 R. I. 456.

[7] And this construction of the will is in accord with the general rule to so construe a will as to avoid partial intestacy, if such construction is natural and reasonable. *Staples v. De Wolf*, 8 R. I. 74; *Pell v. Mercer*, 14 R. I. 412, 427; *Smith v. Greene*, 19 R. I. 558, 560, 35 Atl. 148; *Fiske v. Fiske*, 26 R. I. 509, 512, 59 Atl. 740.

[8] The second contention of the appellants is that it appears by the will that the testatrix did not intend the lapsed portions of the residue given to N. James De Blois to enlarge the portion given to the surviving residuary legatee. We find no expressions in the will to indicate that the testatrix had in mind a possible lapse of the portion of the residuary bequest to N. James De Blois. It is to be noted that, while he is mentioned as a devisee and legatee in the third, fourth, fifteenth, and sixteenth clauses of the will in conjunction with his brother, he died December 13, 1900, one week after the will

was executed December 6, 1900, and that the testatrix lived until June 3, 1909. As the testatrix is to be deemed to have executed her will in view of the statute above quoted which provides for survivorship as between the residuary legatees, it is to be presumed that, if she had not intended T. Amory De Blois to take under the statute his brother's portion of the residuary bequest, such brother having died so shortly after the date of the will, she would have made other provision for the disposal of that portion of the estate. It is quite evident that T. Amory De Blois was a special object of her bounty equally with his deceased brother, and that it was in accord with her intention that he should take the portion which his brother would have taken had he survived. We cannot suppose that she had in mind any such rules of law with regard to lapsed legacies as are contended for by the appellants which, as we have shown, were done away with by the provisions of our statute, or that she intended for any such reasons to leave any portion of her estate to be distributed as intestate property.

For these reasons our decision is that the decree of the probate court of the city of Newport appealed from, whereby the account of Thomas B. Congdon, administrator with the will annexed of the estate of Emily E. Hurd, was allowed and recorded, was in accordance with law and should be affirmed. The papers in the case will be sent back to the superior court for the county of Newport with our decision indorsed thereon in accordance with this opinion.

MURAD v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Rhode Island. June 11, 1912.)

1. NEW TRIAL (§ 21*)—GROUNDS—ERRORS OF LAW.

Under Gen. Laws 1909, c. 298, § 12, providing that a motion for a new trial may be made for any reason for which a new trial is usually granted at common law other than errors of law occurring at the trial, grounds of a motion for a new trial that the action of the court in granting defendant's motion for nonsuit was against the evidence was against law, and was contrary to the law and the evidence and the weight of the evidence, were improper, as they constituted "errors of law occurring at the trial."

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 30-33; Dec. Dig. § 21.*]

2. APPEAL AND ERROR (§ 345*)—TIME FOR TAKING—MOTION FOR NEW TRIAL.

Gen. Laws 1909, c. 298, § 17, provides that a party desiring to prosecute a bill of exceptions shall within seven days after verdict or notice of decision, but, if a motion for a new trial has been made, within seven days after notice of the decision on the motion, file with the clerk of the superior court notice of his intent to prosecute such bill. *Held* that, where a motion for a new trial when filed was on the ground of newly discovered evidence, such motion was valid, and the fact that plaintiff did not afterward support the motion on

that ground by affidavits did not render the motion void ab initio, so as to affect the validity of notice of his intention to prosecute a bill of exceptions filed within seven days after denial of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

Action by John Murad against the New York, New Haven & Hartford Railroad Company. Plaintiff, having been nonsuited, applied for a new trial, which having been denied, he brought exceptions. On motion to dismiss plaintiff's bill of exceptions. Denied.

James A. Williams, of Providence, for plaintiff. Joseph C. Sweeney and Philip T. Gleason, both of Providence, for defendant.

JOHNSON, J. This is an action of trespass on the case for negligence, brought by John Murad against the New York, New Haven & Hartford Railroad Company to recover damages for personal injuries. The case was tried in the superior court before Mr. Justice Brown and a jury in June, 1911, and on the 28th of that month, upon the defendant's motion, the plaintiff was nonsuited. On July 5, 1911, the plaintiff filed a motion for new trial on the following grounds:

"First. That the decision, ruling, and action of Mr. Justice Brown in granting a motion for a nonsuit was against the evidence.

"Second. That the decision, ruling, and action of Mr. Justice Brown in granting said motion for a nonsuit was against the law.

"Third. That the decision, ruling, and action of Mr. Justice Brown in granting said motion for a nonsuit was contrary to the law and the evidence and the weight of the evidence.

"Fourth. That said plaintiff has discovered new and material evidence since the trial of said case, and since the decision, ruling, and action of Mr. Justice Brown in granting said motion for a nonsuit, said new and material evidence not being known to said plaintiff before and at time of the trial of said cause; and which could not have been discovered by the plaintiff prior to or during the trial of said cause, even by due diligence. Said new and material evidence is of such character as to entitle said plaintiff to a new trial of said case."

On December 5, 1911, this motion was denied by Mr. Justice Brown. From the date of the filing of this motion up to the date of its denial no affidavits of newly discovered evidence were filed by the plaintiff in support of the fourth ground. Upon December 12, 1911, the plaintiff filed his notice of intention to prosecute a bill of exceptions, and the time for filing bill of exceptions and transcript of evidence was fixed as January 20, 1912.

On January 20, 1912, the plaintiff filed the

transcript of evidence and the following bill of exceptions:

"And now comes the plaintiff in the above-entitled case, and represents that said case was tried before Mr. Justice Brown and a jury on June 26, 27, and 28, 1911; that, upon the conclusion of said plaintiff's testimony and upon said defendant's motion, Mr. Justice Brown adjudged that the plaintiff be nonsuited; that within seven days of said decision, ruling, and action of Mr. Justice Brown said plaintiff duly filed his motion for a new trial in accordance with the statute in that behalf made and provided; and that within the time fixed by Mr. Justice Brown for the filing of exceptions, transcript of evidence, etc., conformably to the statute in that behalf made and provided, said plaintiff now comes and prefers this his bill of exceptions, and for grounds of exceptions alleges:

"First. That Mr. Justice Brown erred in granting said defendant's motion for a nonsuit, to which said plaintiff duly excepted.

"Second. That Mr. Justice Brown's decision, ruling, and action granting said defendant's motion for a nonsuit was contrary to the law, to which the plaintiff duly excepted.

"Third. That Mr. Justice Brown's decision, ruling, and action granting said motion for a nonsuit was against the evidence and the weight thereof, to which the plaintiff duly excepted.

"And the plaintiff alleges that for all of said reasons his exceptions should be sustained, and that a new trial should be granted to him."

This bill of exceptions was allowed by Mr. Justice Brown on January 27, 1912. And on February 29, 1912, the defendant filed in this court a motion to dismiss said bill of exceptions. Upon that motion the case is now before the court.

[1] The first three grounds of the motion for a new trial are clearly not valid grounds for a motion for a new trial under section 12, c. 298, Gen. Laws 1909, as they are for "errors of law occurring at the trial."

[2] The defendant contends that no affidavits having been filed the plaintiff's motion for a new trial on the fourth ground, that of newly discovered evidence, was never perfected; that the filing of such affidavits was absolutely necessary to make said motion valid or effective. Section 17, c. 298, Gen. Laws 1909, prescribes as the initial step in the prosecution of a bill of exceptions to this court that the party desiring to prosecute such bill shall "within seven days after verdict or notice of decision, but if a motion for a new trial has been made then within seven days after notice of decision thereon . . . file in the office of the clerk of the superior court notice of his intention to prosecute a bill of exceptions to the Supreme

Court." In *Sullivan v. White*, 34 R. I. 61, 82 Atl. 724, speaking of this section, the court says: "The intent of this provision is that, if a motion for a new trial be filed in a case by either party thereto, then either party wishing to prosecute a bill of exceptions shall file said notice of intention after decision upon the motion for new trial, and within seven days thereafter." And again: "From a consideration of all the provisions of chapter 298, Gen. Laws 1909, for prosecuting bills of exceptions to this court, we are of the opinion that the procedure, intended by the statute, is that appellate proceedings from the superior court to this court shall not be taken by piecemeal, that bills of exceptions shall not be in order for filing in the superior court and for certification to this court until after all matters arising in the cause in the superior court have been determined; in case a motion for new trial is made by either party, not until after the decision on that motion has been given by the superior court." As the motion for a new trial when filed was upon the ground of newly discovered evidence, said motion was valid. The fact that the plaintiff did not afterwards support the motion upon that ground by affidavits does not render the motion invalid ab initio. The plaintiff's notice of his intention to prosecute his bill of exceptions was filed within seven days after the denial of his motion for a new trial. Therefore, under said section 17, c. 298, Gen. Laws 1909, his notice of intention to prosecute his bill of exceptions was filed at the proper time. The defendant's motion to dismiss the plaintiff's bill of exceptions is denied.

SOWTER v. SEEKONK LACE CO.

(Supreme Court of Rhode Island. June 10, 1912.)

1. CORPORATIONS (§ 291*)—CORPORATE POWERS — COVENANT AS TO MEMBERSHIP OF BOARD OF DIRECTORS.

A corporation's covenant under seal that the other party to an agreement should be a member of its board of directors during the term of the agreement was ultra vires and void, since the corporation's board of directors was without power to bind the corporation and its stockholders as to the membership of the board of directors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1250-1254; Dec. Dig. § 291.*]

2. PLEADING (§ 204*)—DEMURRER—PLEADING GOOD IN PART.

A declaration in covenant against a corporation which alleged the breach of its agreement in a particular as to which it was ultra vires, and also another breach of the agreement which constituted a good cause of action, to which no objection was made, was not demurrable, since the allegation as to the ultra vires covenant in the agreement should be treated as surplusage.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

3. COVENANTS (§ 114*)—ACTION FOR BREACH—PLEADING.

A count in an action of covenant against a corporation alleged that before the making of an agreement under seal recited in a previous count that plaintiff should serve as defendant's general manager for four years and should be a member of its board of directors during that time, and should be credited with a certain percentage of its net earnings in payment for stock, plaintiff had acted for certain named persons as their agent in the establishment of the corporate business, that in consideration for such service the persons named promised to organize the corporation and that the corporation would compensate him for the services rendered previous to its formation, that the corporation organized thereafter in consideration of such services assumed the obligation to pay plaintiff therefor, but breached such agreement. *Held* that, while the count was objectionable on the ground that the agreement under seal, set out in the preceding count, contained no reference to the services performed by plaintiff for the persons named prior to such agreement, and on the ground that the agreement contained no covenant on the part of the defendant corporation to compensate the plaintiff for such services, such matters and the irrelevant recital of the agreement between plaintiff and the other persons named and plaintiff's performance of services for them were surplusage, and that, disregarding it, the count alleged a good cause of action and therefore was not demurrable on the ground that defendant's refusal to compensate plaintiff for services rendered prior to the agreement under seal was no breach of the covenant set forth in the count.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 189-202, 263; Dec. Dig. § 114.*]

4. PLEADING (§ 22*)—REDUNDANCY.

A count not varying substantially from a preceding count is open to the objection of redundancy.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 45; Dec. Dig. § 22.*]

5. PLEADING (§ 192*)—DEMURRER — REDUNDANCY.

Where each of two counts, substantially the same, states a good cause of action, the objection of redundancy cannot be reached by demurrer, since it would be unjust to dismiss plaintiff from court because he has stated the same good cause of action in two distinct counts.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 408-427; Dec. Dig. § 192.*]

6. PLEADING (§ 11*)—ALLEGATIONS—MATTERS OF EVIDENCE.

Evidence must not be pleaded.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 31; Dec. Dig. § 11.*]

7. MASTER AND SERVANT (§ 39*)—PLEADING—SPECIAL DAMAGES.

A count in an action against a corporation for damages for breach of its covenant to employ plaintiff, which alleges that by reason of his entering into its service he refused and lost a great many opportunities for entering the service of others at remunerative compensation, is good on demurrer, since it specifies the nature of his special damages; it not being necessary to set forth the names of witnesses or the evidence to establish such special damages.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 45, 46; Dec. Dig. § 39.*]

8. ACTION (§ 41*)—JOINDER OF DIFFERENT CAUSES.

In an action of covenant the plaintiff may join in his declaration all the different causes

of action he has against the defendant which can be prosecuted under that form of action, whether they arise from separate matters or are different statements of causes of action arising out of the same transaction.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. § 41.*]

9. ACTION (§ 44*)—JOINDER—COVENANT—ASSUMPSIT.

Under Gen. Laws 1909, c. 283, § 26, which provides that when plaintiff is in doubt he may bring either covenant, debt, or assumpsit, join therein counts in the others, and that defendant in all cases shall plead to the several counts according to the practice at common law, and that judgment may be entered under which plaintiff may be entitled to recover, a count in assumpsit may be joined with a count in an action of covenant without stating the nature of plaintiff's doubt whether his action should be in covenant or assumpsit or whether he has such doubt.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 378-547; Dec. Dig. § 44.*]

Vincent, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by William D. Sowter against the Seekonk Lace Company. Demurrers to declaration sustained, and plaintiff excepts. Exceptions sustained and case remanded to the superior court with instruction to overrule the demurrer to the declaration as a whole and the demurrers to the several counts thereof and for further proceedings.

Richard W. Jennings and William A. Morgan, both of Providence, for plaintiff. Waterman & Greenlaw and Charles E. Tilley, all of Providence, for defendant.

SWEETLAND, J. This case is before us upon the plaintiff's exceptions to the ruling of a justice of the superior court sustaining the defendant's demurrer to the declaration and to the several counts thereof.

The form of action as stated in the writ is covenant. The declaration contains three counts. In the first count the plaintiff alleges that he entered into an agreement with the defendant which was sealed with their respective seals; that this sealed instrument provided among other things that the plaintiff should serve the defendant faithfully as general manager and superintendent of its business for the term of four years from and after January 1, 1910; that the plaintiff should be a member of the board of directors of the defendant company during said term; that the defendant company should erect and equip a mill suitable for its business and furnish sufficient capital for its operation; that the defendant should pay the plaintiff \$35 each week during said term; and further that the defendant should credit a certain percentage of its net earnings upon the account of the plaintiff in payment for certain shares of the capital stock of the defendant, which were to be issued to the

plaintiff; the declaration further alleges that the plaintiff kept and performed all the covenants in said agreement to be by him performed, but that the defendant has not performed its covenants under said agreement, and, among other things, that the defendant, before the end of said term of four years, has forced the plaintiff to leave its service and has removed him from and out of its board of directors.

[1] The defendant demurs to this count on the ground that said alleged agreement under seal is ultra vires so far as it relates to the covenant of the defendant that the plaintiff should be a member of the board of directors of the defendant during the term of the agreement, and that said agreement in this particular is void and of no binding effect. We are of the opinion that the defendant's criticism of the agreement in this regard is justified. Said covenant in the particular named is without effect. The board of directors of the defendant in authorizing the said agreement was without power to bind the corporation and the stockholders as to the membership of the board of directors.

[2] The allegation of this breach of the agreement by the defendant, however, does not render the count demurrable. It should be treated as surplusage and does not vitiate the count. The count alleges another breach of the agreement which constitutes a good cause of action, and to which no objection has been made. The defect complained of, therefore, cannot be reached by demurrer.

[3] The second count of the declaration alleges, among other things, that the plaintiff was skilled in the manufacture of laces and like goods; that previous to the making of said agreement under seal, recited in the first count, he entered into the service of certain persons, in the second count named, as their agent in making preparation for the establishment of the business of lace-making in the city of Pawtucket; that in consideration of his said services the persons named in said count promised the plaintiff that they would organize a corporation for carrying on said business, and that said corporation would compensate him for all services rendered as aforesaid previous to the formation of said corporation; that said persons with the assistance of the plaintiff procured the organization of the defendant corporation; that after its organization "the defendant then and there in consideration of the services so rendered by the plaintiff as aforesaid, and in consideration that the plaintiff would enter into its service as its general manager and superintendent, assumed upon itself the obligation to pay the plaintiff for his aforesaid services;" and that the plaintiff and defendant entered into said sealed agreement. The second count further alleges that the plaintiff has kept and performed all his covenants contained in said agreement, but that the defendant

has refused to keep its covenants in said agreement contained; that it has forced the plaintiff to leave its service, has removed him from its board of directors, and has "refused to compensate him for his said services rendered as aforesaid prior to the said entering into said agreement under seal as aforesaid."

The defendant has demurred to the second count on the grounds, among others, that the defendant's refusal to compensate the plaintiff for his services rendered prior to entering into said agreement under seal was no breach of the covenant set forth in the count, and that the covenant of the defendant that the plaintiff should be a member of the board of directors of the defendant company during the term named in the agreement was ultra vires. This count as well as the first count is open to the second objection named, and the first objection is also well founded. The agreement under seal set out in said count contains no reference to the services performed by the plaintiff, for the persons named, prior to the sealed agreement, and said agreement under seal contains no covenant on the part of the defendant to compensate the plaintiff for the performance of any such services. However, as we have said above with reference to the demurrer to the first count, such matter is mere surplusage, as is also the irrelevant recital of the agreement between the plaintiff and the third persons named in said count and the performance of service by the plaintiff for said persons. The count is not thereby rendered demurrable. Disregarding all these immaterial matters contained in the second count, there still remains the allegation of a good cause of action to which no objection has been made. The second count, therefore, is not demurrable on any of the grounds stated by the defendant.

[4, 5] Relieved of its irrelevant matter, the second count does not vary substantially, if at all, from the first count. It is therefore open to the objection of redundancy, but the defendant has not demurred to it on that ground, nor can that objection be reached by demurrer, for, if the second count is redundant, the first is equally so, and it would be unjust to dismiss a plaintiff from court because he has stated the same good cause of action in two distinct counts. Since the parties are now advised as to the effect of these counts in respect to the matters above considered, we see no embarrassment to the defendant if they both remain in the declaration. If, however, it is thought desirable to clear the record, this cannot be done by demurrer but in another form of procedure addressed to the discretion of the superior court.

[6, 7] In the third count of the declaration the plaintiff alleges, among other things, that he entered into the service of the defendant and performed certain work for the defendant at its request, from which employment

he was later unreasonably discharged; and "that by reason of his entering into said services * * * he refused and lost a great many opportunities for entering into the service of other persons at highly remunerative compensation." The defendant has demurred to this count on the ground that "it does not appear in and by said count what opportunities for entering into the service of other persons the plaintiff refused and lost, and it does not appear who those persons were and what the remuneration would have been."

This does not set out a valid ground of demurrer. It is an elementary rule of procedure at law that evidence shall not be pleaded. If, as the defendant urges, the allegation in question is one of special damage, the requirement of correct pleading is that the plaintiff shall specifically state the nature of his special damage, but it does not require him to set forth in his declaration the names of his witnesses or the evidence by which he hopes to establish such special damage. Furthermore the plaintiff has alleged in this count other elements of damage, and whether or not he is mistaken as to the item of damage in question, or if he has failed to allege it properly, nevertheless his action will not be defeated thereby.

[8] In addition to the foregoing demurrers to the several counts of the declaration, the defendant has demurred to the whole declaration on the ground that "it appears in and by said declaration that the plaintiff had no reason to doubt whether his action should be in covenant or assumpsit, and the plaintiff has joined in one action counts in covenant and assumpsit."

The form of the plaintiff's action being covenant, the common law, unchanged in this regard by any statute of this state, permits him to join in his declaration all the different causes of action which he has against the defendant which can be prosecuted under this form of action. 1 Ency. Pl. & Pr. 164, and notes. This being an undisputed common-law rule of pleading, there can be no question as to the right of the plaintiff, so far as relates to the matter now under consideration, to place the first two counts in his declaration, since they each set out a cause of action arising from the breach of the covenants of a sealed instrument. This can hardly be disputed whatever may be said in regard to the third count. It does not matter whether the first two counts set out causes of action arising from separate and independent matters or are variant statements of causes of action arising out of the same transaction, and the plaintiff might have joined counts for other causes of action which he had against the defendant, provided such causes were recoverable in this form of action. The defendant's demurrer to the whole declaration, therefore, cannot be regarded as an objection to the

first two counts but must have been directed against the presence in the declaration of the third count.

[9] The third count is in the general form of a count in assumpsit. It does not appear to be intended as the statement of a claim arising under the sealed agreement recited in the first two counts, and, as far as the question of pleading is concerned, it is founded upon an entirely independent cause of action arising out of a different matter. As far as appears, it may in some manner be connected with some other specialty, or it may arise on some writing as to which the plaintiff is uncertain whether or not it should be treated as a specialty. Hence the presence of the first two counts in the declaration may be disregarded in considering this demurrer. Being counts in covenant, they are properly in a declaration in an action of covenant. The question raised by this demurrer is, Had the plaintiff a right to place the third count in his declaration in an action in form covenant?

The plaintiff relies upon section 26, c. 283, Gen. Laws 1909. This section is as follows: "When a plaintiff has reason to doubt whether his action should be in covenant, debt, or assumpsit, he may bring either action and may join therein counts in covenant, debt, and assumpsit, or any of them, and when he has reason to doubt whether the action should be trespass or trespass on the case, he may bring either action and join therein counts in trespass and trespass on the case, or either of them, and the defendant in all such cases shall plead to the several counts according to the practice at common law, and judgment may be entered upon the counts under which the plaintiff may be entitled to recover."

This court has considered that section in *Adams v. Lorraine Mfg. Co.*, 29 R. I. 335, 71 Atl. 180, in regard to actions of trespass and trespass on the case, concerning which actions the section makes provision similar to that regarding the actions of covenant, debt, and assumpsit. In *Adams v. Lorraine Mfg. Co.*, supra, the plaintiff commenced his action by a writ setting out an action on the case. The declaration contained but a single count and that in trespass. The declaration did not state the basis of the plaintiff's doubt whether his action should be trespass on the case or trespass, or that he had such doubt. This court sustained the action of the superior court in overruling a demurrer to that declaration, which demurrer was based on the ground of a variance between the writ and the declaration.

The case at bar, in regard to this question of pleading, is identical with *Adams v. Lorraine Co.*, and is governed by it. As we have seen, the first two counts, being in covenant, are entirely outside of this consideration. The action is covenant, and the third count is drawn in the form of a count in assump-

sit without stating the nature of the plaintiff's doubt whether his action, in regard to the matters set out in that count, should be covenant or assumpsit, or whether he has such doubt, and he has not joined any other count in covenant based upon the same matter. If *Adams v. Lorraine Mfg. Co.* is not to be overruled, this third count must be sustained. There is no provision in the statute that the doubt in the plaintiff's mind, which induces him to avail himself of the statute in question, shall be a doubt which appears to the defendant to be a reasonable one. Neither the statute nor this court in its consideration of the above-cited case under the statute have required plaintiffs to set out in pleading the nature of their doubt. Unless he shall be compelled to disclose it in his declaration, we know of no proceeding by which a plaintiff can be required to submit the nature of his doubt to the court that the court may pass upon either its existence or its reasonableness. There are not many circumstances in which the intelligent pleader would be in doubt whether his action should be covenant or assumpsit, though such circumstances may be conceived, and the statute contemplates that they may exist. This plaintiff by his action must be held to claim that such circumstances do in fact exist in his case, and, in the matter now under consideration, his conclusion is controlling.

In its application to practice the court in *Adams v. Lorraine Co.* said of this statute that its clear intention "is to do away with the distinction between actions of trespass and trespass on the case, so far as the adequacy of the writ to support counts in either trespass or trespass on the case is concerned." This interpretation of the statute imposes no hardship on the defendant. It is in the line of the liberal changes in common law pleading which are being introduced in states still adhering generally to that form of pleading. Under the section the defendant may plead to each of the several counts according to the practice at common law, and judgment will be entered only upon the counts under which the plaintiff may be entitled to recover.

All the plaintiff's exceptions to the rulings of the superior court are sustained, and the case is remitted to the superior court with direction to overrule the demurrer to the declaration as a whole and the demurrers to the several counts thereof, and to take further proceedings.

VINCENT, J., dissents.

SAUTHOF v. AMERICAN CENT. INS. CO.
(Supreme Court of Rhode Island. June 11, 1912.)

INSURANCE (§ 574*)—POLICY—CONSTRUCTION—APPRAISEMENT.

A statutory fire policy declared that the insurer should not be liable beyond the actual

cash value of the property at the time of loss or damage, and provided for an appraisement in case of disagreement. It also declared that it should be optional with the insurer to take all or any part of the articles damaged at such ascertained value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality. A separate clause provided that the insured should give immediate notice of any loss in writing to the company separating the damaged and undamaged personal property, stating the quantity and cost of each article and the amount claimed thereon, and within 60 days after the fire render a verified statement showing the cash value of each item and the amount of loss thereon. *Held*, that a report of appraisers giving the sound value of and the loss on various articles of personal property in the aggregate, but not itemized, was not a sufficient compliance with the policy, and was therefore void.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.*]

Johnson, J., dissenting.

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by George W. Sauthof against the American Central Insurance Company. From a judgment of nonsuit, plaintiff brings exceptions. Overruled.

Cook & Brownell, of Providence, for plaintiff. C. M. Van Slyck and Frederick A. Jones, both of Providence, for defendant.

VINCENT, J. This is an action brought under a policy of insurance issued by the defendant company to the plaintiff, whereby the defendant contracted to insure the plaintiff against all direct loss or damage by fire upon certain personal property in said policy mentioned. The property enumerated in said policy having been damaged by fire, the plaintiff, within 60 days thereafter, delivered to the defendant company his duly authenticated proof of claim, embodying an itemized list of the damaged articles to each of which several items were appended certain figures indicating both the sound value and the loss or damage. This estimate of the plaintiff not proving satisfactory to the defendant company, the latter claimed an appraisal in accordance with its rights under the policy. Each of the parties having appointed an appraiser and the two so chosen having selected an umpire, they proceeded to discharge their duties, and later made a report of their doings to the plaintiff and to the defendant company. This report fixed the sound value of the damaged property at \$1,000 and the loss thereon at \$756.29. This report made by the appraisers, as aforesaid, gave the sound value and the loss in the aggregate, and did not show the sound value of and loss upon each particular article.

At the trial of the case the plaintiff offered in evidence the report of the appraisers, above mentioned. The defendant objected to its admission on the ground that the award of appraisers, appointed in accordance with the provisions of the policy, should contain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an itemized list of the property, and that the appraisers should state separately the sound value of and the loss upon each item. The objection of the defendant was sustained by the trial court, and the plaintiff excepted. At the close of the plaintiff's testimony, no award having been introduced in evidence, a motion to nonsuit the plaintiff was granted, and to the granting of this motion the plaintiff also excepted. Other exceptions taken by the plaintiff during the course of the trial are not considered by the plaintiff in his brief, and must be considered as waived. Upon the two exceptions above mentioned the case is now before this court. The provisions of the policy necessary to the consideration of the question presented are as follows: "(1) The company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value. * * * Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company, to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality. * * * (2) If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, * * * separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire * * * shall render a statement to this company signed and sworn to by the insured, stating * * * the cash value of each item thereof and the amount of loss thereon."

The plaintiff contends that it is not necessary that the report of the appraisers should contain an itemized list of the several articles damaged, together with the sound value of and the loss upon each article, but that the aggregate loss as given by the appraisers in the present case is a sufficient compliance with the terms of the contract. The plaintiff in support of his position cites the case of the Continental Ins. Co. v. Garrett, 125 Fed. 589, 60 C. C. A. 395, but we do not think that this case deals with the particular question raised in the case at bar. In that suit the subject of insurance was a dwelling house, and constituted but a single item upon which it was competent for the appraisers to fix the sound value and the amount of the

loss. The appraisers, however, omitted to ascertain the sound value, and only found the amount of the loss. Upon that point the court said: "The submission required the appraisers to determine two things, and two things only, for the submission was only for the purpose of determining the amount of loss, and no other defense open to the insurer was submitted. The policy itself required that the appraisers should state separately sound value and damage. * * * Sound value is the cash value, making an allowance for depreciation due to use, etc., at and immediately preceding the time of the fire. This definition is plainly implied by the paragraph from the submission set out above. The award is therefore not in accordance with the submission, because the sound value has not been estimated or appraised." This, however, being a suit in equity, the court, having obtained jurisdiction for the purpose of setting aside the award, which had been pleaded in bar to the pending suit at law upon the policy, retained the case and determined the loss and damage.

The plaintiff has also cited authority to the effect that courts approach the interpretation of a statute with the presumption that words and phrases therein are used in their familiar and usual sense, without any forced, subtle, or technical consideration to limit or extend their meaning (26 A. & E. Enc. of Law, p. 605, § 5); that all legislation interfering with the right of the individual, whether he be a natural person or a corporation, to enter into contracts or to exercise his preferences as to the person with whom he shall do business, should receive strict construction; that it is a well-established rule of construction that statutes in derogation of the common law are to be strictly construed, and hence, while a statute which is plainly inconsistent with the common law will prevail, yet statutes are not presumed to make any alteration in the common law, further or otherwise than the clear import of the statutory language necessarily required (26 A. & E. Enc. of Law, p. 662); that strict construction as applied to statutes means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words, and to bring them within the prohibition or penalty of such statutes, that it does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so constructed which does not clearly come within the meaning of the language used. 26 A. & E. Enc. of Law, § 7, page 657. While we do not disapprove of or question these propositions of law, we do think that they are not applicable to the particular matter under consideration. The general rule of law is that the cardinal purpose

or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. They are to be brought into harmony, if possible, and so considered that no clause, sentence, or word shall be void, superfluous, or insignificant. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute. If, upon examination, the general meaning and object of the statute should be found inconsistent with the literal import of any particular clause or section, such clause or section must, if possible, be construed according to that purpose. *Sutherland on Statutory Construction*, §§ 240, 241.

We cannot agree with the contention of the plaintiff regarding the construction of the statute in question. It is expressly provided in the policy that the company shall, at its own option, have the right to take all or any part of the articles damaged at the appraised value. If this court should hold that the report of the appraisers was a substantial compliance with the terms of the contract, the effect would be to completely abrogate that other provision of the contract which gives to the defendant the right to take all or any part of the articles at the appraised value. An itemized appraisal is therefore absolutely necessary to the exercise of certain rights and privileges which are expressly given to the defendant under the contract.

For these reasons, we think that the statute in question must be construed, if possible, so as to give effect to all parts thereof, and that any other construction would be unwarrantable. We are, therefore, of the opinion that the report of the appraisers giving the sound value of and the loss upon the property in the aggregate was not a sufficient compliance with the statute and therefore void, and that the nonsuit was properly granted by the superior court.

The plaintiff's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the nonsuit.

JOHNSON, J. (dissenting). The award made by the appraisers was as follows:

"Award.

"To the parties in interest:

"We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value and the loss and damage to be as follows:

	Sound value	Loss
1st item household furniture &c.	1000	756.29
Total sound value and loss	1000	756.29

"Witness our hands this 21st day of September, 1909.

"Edwin Draper,

"Chas. A. Cooley, Appraisers."

The exceptions are: "First. Exception to the ruling of the court denying the introduction of a certain written award of appraisers, as appears from pages 48-61 of said transcript; the said exception to the ruling of said court being noted on page 61. Second. Exception to the decision of the court granting the defendant's motion for a nonsuit, on the ground that the evidence was not sufficient to sustain the second count of plaintiff's declaration in said case, as appears on page 82 of said transcript, and which fully appears from said transcript of testimony, which said transcript of testimony contains all the testimony taken during the trial of said case." The award should have been admitted in evidence.

In *Early v. Providence & Washington Ins. Co.*, 31 R. I. 225, 230, 76 Atl. 753, 755 (140 Am. St. Rep. 750), the court, speaking of the attempt of the plaintiff in that case to impeach the award by showing (1) that the value of certain goods, and the plaintiff's loss thereon, were not considered in ascertaining the amount of the award because of an erroneous decision by the appraisers that certain goods were not covered by the policy, and (2) by showing that the umpire and the appraisers chosen by the defendant were not competent and disinterested, said: "The general rule is that this cannot be done in an action at law in jurisdictions where the distinction between law and equity is still maintained. *Georgia Home Ins. Co. v. Kline Co.*, 114 Ala. 366 [21 South. 958]; *Kaplan v. Niagara Fire Ins. Co.*, 73 N. J. Law, 780, 65 Atl. 188; *Robertson et al. v. Scottish Union & Nat. Ins. Co.* [C. C.] 68 Fed. 173; *Levin v. Northwestern Nat. Ins. Co.* [C. C.] 146 Fed. 76. Thus in *Georgia Home Ins. Co. v. Kline & Co.*, supra, the plaintiff brought an action under a fire insurance policy containing the same arbitration agreement, with a few minor verbal changes, found in the Rhode Island standard form. The defendant pleaded an award, to which the plaintiff replied that the arbitrators wrongfully refused to consider a large amount of goods covered by the policy. And it was held, in sustaining the defendant's demurrer to the reply, that the award could not be contradicted in a court of law, because (114 Ala. 372, 21 South. 960) 'the submission, on its face, submitted and carried before the arbitrators the matter of the entire loss, and the award shows they passed upon, and adjudicated, the entire loss.' In *Kaplan v. Niagara Fire Ins. Co.*, supra, where it appeared, in an action on a fire policy containing an arbitration agreement identical in all ways with the clauses in the Rhode Island form, that an award had been made, it was held that evidence introduced for the purpose of showing that the appraisers omitted to take into account certain articles alleged to have been covered by the policy and destroyed was properly excluded, because (73 N. J. Law, 789, 65 Atl.

191) 'their award cannot be impeached at law for erroneous judgment upon facts, nor can it be for the omission of items of account which are within the terms of the submission.' *Robertson et al. v. Scottish Union & Nat. Ins. Co.*, supra, was an action on a fire policy containing the arbitration clauses quoted above, in which an award had been made. And it was held that the plaintiff could not prove that the loss sustained was greater than the amount found by the appraisers, nor that the appraiser selected by the insurer and the umpire were not competent and not disinterested, because, where the distinction between law and equity still prevails, an award cannot be attacked in an action at law for misconduct of the appraisers, and that, therefore (68 Fed. 175), 'in this forum [law side of the court] the award is binding on the parties, and no recovery can be had in this action beyond the amount therein ascertained.' So, also, in *Levin v. Northwestern Nat. Ins. Co.*, supra, it was held that the defendant's motion to strike out the plaintiff's reply, setting up fraud on the part of the appraisers appointed under an arbitration clause identical with the Rhode Island form, should be granted, because, where the distinction between law and equity is still preserved, the award cannot be impeached in a court of law for misconduct of the arbitrators. These cases seem conclusive of the case at bar. In this case, as in them, the plaintiff avers that an award has been made which on its face determines the entire liability of the defendant under the policy; and in this case, as in them, the plaintiff seeks to recover, in an action at law, a sum greater than that awarded, and to impeach the award because of alleged misconduct on the part of the appraisers in excluding certain items while estimating the loss, and because of incompetency. This, as the above authorities show, he cannot do in this form of action."

That case is decisive of the case now before us. The award cannot be impeached in a court of law any more successfully by the defendant than by the plaintiff. The court certainly cannot accomplish the invalidation of the award any more effectively by declaring it invalid when offered in evidence, and excluding it, than by passing upon it and declaring it invalid when in evidence. The plaintiff having complied with the provisions of the policy in regard to an appraisal and the appraisal having been made, the loss became payable by the terms of the policy "sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." If the defendant desired to impeach the award, it could have brought its suit in equity to do so upon any grounds it wished to urge. Not having done this, it cannot accomplish its

purpose in a court of law, but must abide by the award.

The plaintiff's exceptions should be sustained.

CADWELL v. CONNECTICUT CO.
(Supreme Court of Errors of Connecticut.
June 13, 1912.)

Concurring opinion.

For majority opinion, see 83 Atl. 215.

WHEELER, J. (concurring). The complaint alleges the defendant's unlawful entry upon the plaintiff's land; the demurrer admits this. While we take judicial notice of the legislative authority of the defendant to operate an electric railway for the carriage of persons and property, we cannot take judicial notice of the authority of the defendant to locate its tracks on West Main street in front of the plaintiff's premises. Before we can know this, the facts surrounding the location and the defendant's compliance with the statutory prerequisites must appear of record. "But the construction of any kind of railway in a highway, the soil of which belongs in fee to the adjoining proprietors, is a trespass upon their land unless it has been duly authorized by law." *Canastola Knife Co. v. Newington Tramway Co.* et al., 69 Conn. 146, 160, 36 Atl. 1107, 1111.

Since the decision of this question is fatal to the demurrer, it is in my opinion unnecessary to discuss or decide the question of additional servitude. A subject of such importance ought not to be disposed of without fullest argument upon issues joined raising the question definitely and necessarily. I cannot but regard the opinion upon this subject as obiter. The question of additional servitude was no more material to the proper decision of the *Canastola Knife Co.* Case than is that question material to the proper decision of this case. But we have in other cases approved the doctrine of that case, and it must be accepted as settled. Inasmuch as the opinion in this case discusses and purports to decide the question of additional servitude in its relation to the facts of this case, I will briefly express my view.

The fundamental purpose of a street railway is the accommodation of street travel. It is a local convenience for local travel. "A street railway without a street to run on, and to serve and accommodate as it runs, would be an anomaly." Baldwin, J., in *Canastola Knife Co. v. Newington Tramway Co.* et al., supra. For this reason we have treated the street railway as an improved method of using the street. Counsel for the street railway in the *Canastola Knife Co.* Case well said: "In a word, the street railway is for the sole purpose of carrying on the kind of public travel for which the highway was made and the steam road is not." In the earlier days of the electric street railway it

was generally held that it was one for the transportation of passengers and not of goods. Elliott on Roads (1st Ed.) p. 457. At the beginning we did not contemplate a street railway operated as a common carrier of property nor anticipate the changes and development in its business, more and more approximating it in construction, as well as in operation, to the steam road.

We have held that: "The location of the steam road upon a highway imposes an additional burden upon the soil for which the owner of the fee is entitled to demand compensation." And that the location of an electric railway in a highway does not impose such servitude upon the soil of the owner of the fee of the highway unless "either the mode of construction or of operation be such as to make it a substantial impediment to public travel, or a proximate cause of special damage, of a new description to the owner of the soil." *Canastota Knife Co. v. Newington Tramway Co.*, supra. It may be that in view of our former decisions, whether the carriage of goods by a street railway is an additional servitude depends upon whether it is serving an ordinary highway use and must be determined in each case by its own facts. In the application of such a test there may well be left out of consideration the traffic of goods which is the mere incident of ordinary street car passenger traffic, included in which is the hand baggage of the passenger, the light package delivered occasionally from the car platform, the mail bag, and the newspaper bundle. Logically, under this test, the carrying of local freight and express which would otherwise be carried in vehicles over the highway may be justified as ordinary highway use. But in practice it will be found impracticable to deliver freight or express from door to door along a street without impairing the use of the street for a highway for the public and the adjoining owners.

No attempt to use a street railway for the general carriage of local freight or express has, so far as we are aware, ever been made in Connecticut. To do so would require additional and frequent switches and turnouts, convert the highway along its entire length into a freight yard, cause long stops to be made which would seriously inconvenience, if not destroy, passenger traffic, and congest the streets with vehicles loading or unloading goods. Local passenger travel with frequent service and a local freight or express service cannot be conducted on the same tracks. The operation of a street railway in this manner must necessarily produce annoyance and inconvenience alike to the owners of the fee of the highway as to the public. *Lewis on Eminent Domain* (3d Ed.) § 166.

It is difficult to conceive of a local traffic of this character which is not of necessity an additional servitude upon the highway. "There is no reason," as Lewis says, "why

the principle of the street railway cases should be extended to include a traffic so entirely different in its nature and involving such a different use of the street." *Lewis on Eminent Domain* (Ed. 1909) p. 166.

In every case where the specific facts are either alleged or proven, the conclusion whether these facts constitute an additional servitude is a question of law. This case does not confine its allegations to a general complaint of the carriage of goods, and hence this question was not necessary to adjudicate in this case. The complaint specifically alleges that the defendant has entered upon the plaintiff's land for the purpose of operating its railway over the highway of which the plaintiff has the fee "as a common carrier of property by means of cars which are solely designed for and which carry property exclusively and which do not stop as they run to take on and discharge said property and have a station in the town of Plainville and the town of New Britain at which they stop to take on and discharge said property." The demurrer thus admits that: (1) The cars carry property exclusively. (2) They do not stop between the termini named to take on and discharge property. (3) They have two stations in the places named where they take on and discharge property.

This traffic is not incident to the passenger traffic. It is not for the mere accommodation of its passengers. It is purely a commercial traffic. Local traffic along the route is not served, nor is this intended. The cars maintain a through freight or express traffic between the points named. The street railway thus serves the same purpose as the steam road between these points. Its cars are designed to carry property exclusively as do the steam road cars. It maintains freight stations at the termini named as does the steam road. It conveys property which formerly was conveyed by the steam road and in part by other vehicles. It diverts a part of the traffic of the steam road to the highway. It does not differ materially in its carriage of goods from the steam road save in degree and in that the one operates on its own private way and the other mainly on the public highway. Through freight or express traffic is the business of the commercial railroad as steam roads are called in the law. *Dillon on Mun. Corp.* §§ 1257, 1258. "If the interurban railroad carries freight as well as passengers, the analogy to the steam railroad is complete. Most of the freight so carried is such as would otherwise seek transportation on the steam railroad rather than in drays and wagons on the streets and highways." *Lewis on Eminent Domain*, § 166.

The diversion of this through freight or express business to this highway does not aid or facilitate traffic on the street, but adds to it, interferes with its ordinary use, and increases the burden upon the street.

The majority of the authorities support this position, among which are: *City of Aurora v. Elgin Tr. Co.*, 227 Ill. 485, 496, 81 N. E. 544; *Spalding v. M. & W. I. Ry. Co.*, 225 Ill. 585, 590, 80 N. E. 327; *Wilder v. Aurora, etc., T. Co.*, 216 Ill. 493, 528, 75 N. E. 194; *Diebold v. Kentucky Tr. Co.*, 117 Ky. 146, 149, 77 S. W. 674, 63 L. R. A. 637, 111 Am. St. Rep. 230, 4 Ann. Cas. 445; *Mass. Loan & Tr. Co. v. Hamilton*, 88 Fed. 588, 591, 32 C. C. A. 46; *Abbott v. Milwaukee, L. H. & Tr. Co.*, 126 Wis. 634, 637, 106 N. W. 523, 4 L. R. A. (N. S.) 202; *Younkin et al. v. M., L. H. & Tr. Co.*, 120 Wis. 477, 98 N. W. 215; *C. & N. W. R. Co. v. Milwaukee R. & K. El. R. Co.*, 95 Wis. 561, 571, 70 N. W. 678, 37 L. R. A. 586, 60 Am. St. Rep. 136; note to *Abbott v. M., L. H. & Tr. Co.*, 126 Wis. 634, 106 N. W. 523, 4 L. R. A. (N. S.) 202; *Schaaf et al. v. Railway Co. et al.*, 66 Ohio St. 215, 229, 64 N. E. 145.

Under these allegations of the complaint the plaintiff's land has been subjected to a servitude other than that incident to ordinary travel, and he is entitled to compensation therefor.

The demurrer should be overruled.

BRADLEY v. BRADLEY et al.

(Courts of Appeals of Maryland. Feb. 28, 1912.)

1. COURTS (§ 472*)—ORPHANS' COURT—JURISDICTION—WILLS—STATUTORY PROVISIONS.

Under Code, art. 93, § 331, which authorizes the orphans' court to take the probate of wills, and sections 836-339, 341, and 342, which provide how and when proof of wills shall be taken and clothe the orphans' court with authority to decide all objections to wills, and which declare that when the orphans' court decides against the probate of a will it shall not be received for probate in any other county, unless that decision is reversed on appeal, the jurisdiction of the orphans' court to take the probate of wills is exclusive.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1199-1224, 1247-1259; Dec. Dig. § 472.*]

2. WILLS (§§ 222, 253*)—JURISDICTION—PROBATE OF WILLS.

A court of equity has no power to determine whether a will shall be admitted to probate, or to revoke an order of the orphans' court, admitting a will to probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544, 589; Dec. Dig. §§ 222, 253.*]

3. INJUNCTION (§ 28*)—STAYING ACTION AT LAW—DETERMINATION OF ENTIRE CONTROVERSY.

Where a caveat was filed in the orphans' court after a will had been admitted to probate and letters testamentary granted, on the grounds that testator was not capable of making a will, and that it was procured by undue influence, a court of equity would not enjoin proceedings on the caveat, where, though the bill afforded a complete defense to the attack based on the testator's incapacity, it did not constitute a sufficient equitable defense to other objections charged by the caveat, since its

decree would not then determine the entire controversy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 62-65; Dec. Dig. § 28.*]

Appeal from Circuit Court, Montgomery County, in Equity; Hammond, Urner, and John C. Motter, Judges.

Bill by Jane B. Bradley against George C. Bradley and others. Bill dismissed, and complainant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, STOCKBRIDGE, and PATTISON, JJ.

Charles W. Prettyman and William L. Marbury, for appellant. Daniel W. Baker, for appellees.

THOMAS, J. The appeal in this case is from a decree of the circuit court for Montgomery county, sustaining a demurrer to and dismissing the bill of complaint of the appellant.

Henry Bradley, of Montgomery county, Md., died in January, 1911, leaving a large real and personal estate and a last will and testament and codicil, executed September 14, 1904, and September 15, 1910, by which he gave all his property and estate to his wife, the appellant, and appointed her executrix. The will, with the codicil, was admitted to probate in the orphans' court of said county on the 7th of February, 1911, and letters testamentary were granted to the appellant, who took possession of the estate.

In June, 1911, the appellees, a brother, sister, and two nephews of the deceased, filed in the orphans' court a caveat to said will, alleging, among other things, that the deceased, at the time of the execution of the will, was not of sound and disposing mind, etc. Thereupon the appellant brought this suit for the purpose of enjoining the prosecution of the caveat, and basing her right to the relief sought on the ground that the will was made in pursuance of an antenuptial agreement that has been fully performed by her; and that therefore, even if the deceased was of unsound mind at the time of the execution of the will, performance of the contract by her is, in equity, a bar to any proceeding to set aside the will.

The bill avers that in 1904 the appellant was solicited by the deceased to become his wife; that his solicitations continued through a number of months, and finally became so urgent that she "tentatively consented to marry him," but no day was fixed for the marriage; that, "in furtherance of his desire to marry" her, the deceased executed a paper "in the nature of an antenuptial agreement, by which he agreed and promised that, in the event of such marriage taking place," the appellant "should have, in lieu of other interests in his property growing out of said marriage, the sum of thirty thousand dollars" and the house and lot described in the agreement, a certified copy of which was fil-

ed with the bill; that on the 14th day of September, 1904, the deceased came to the residence of the appellant and exhibited to her said agreement, and also a paper purporting to be his last will and testament, duly executed by him, by which he devised and bequeathed to her all his property and estate, "conditioned upon a marriage taking place between them; that, being so induced by the provisions made for her by said agreement and said will, she thereupon agreed to marry him," and that she and the deceased were duly married that day, and continued to live as husband and wife until his death in January, 1911; that the agreement and will were delivered to her prior to the marriage; and that the agreement was afterwards recorded, and the will, from March, 1905, remained in her possession until it was filed in the orphans' court, except for a few days, when, at the request of the deceased, it was delivered to him, in order that he might consult his attorney as to the proper way to confirm it, and was returned to her with the codicil annexed.

The bill further avers that the appellant and the deceased, on the 14th of September, 1904, "entered into a binding contract and agreement, by which she, on her part, was to marry the" deceased, "and in that event he, on his part, was to deliver to her the said antenuptial settlement, and to leave unrevoked and in full force and effect the said last will and testament, duly executed on the same day, but prior to the hour of said marriage; that said contract on her part has been duly executed and performed by the marriage aforesaid, and that the contract and agreement entered into by the said Henry Bradley * * * has been executed and performed by the delivery and recording of the antenuptial contract, and by the execution and delivery of the said last will and testament, and the death of 'the deceased,' leaving said last will and testament unrevoked," etc.

After alleging the filing of the caveat, the bill then charges that the institution of the proceedings in the orphans' court is an attempt to commit a fraud upon the rights of the appellant, because the property devised and bequeathed to her was not a gift of the deceased by will, but was the performance by him of "a solemn and binding contract and agreement made and entered with [the appellant] in consideration of her marriage with him, which contract and agreement she, on her part, has fully performed"; that the orphans' court is without jurisdiction to determine the rights of the parties under said contract, and that she would not be able to assert her rights thereunder in said court; that it would be a fraud upon her to allow the proceedings under the caveat to continue, as she would thereby be deprived of the means of defending her rights, and be subjected to irreparable loss, etc.

By the antenuptial agreement referred to,

which is dated the 20th of May, 1904, was acknowledged August 18, 1904, and recorded March 14, 1905, the deceased, in consideration of the promise of the appellant to marry him, conveyed to her a house and lot in Rockville, Md., and covenanted to pay to her \$30,000. The will is dated September 14, 1904, and declares that it is irrevocable; and that it was made on condition that the appellant married the testator. The codicil, which was executed September 15, 1910, refers to the provisions of the agreement and of the will, and then ratifies and confirms them.

The petition or caveat of the appellees, a copy of which was filed with the bill, charges that the deceased was not capable of executing a valid will; "that neither said alleged will nor the said alleged codicil offered for probate constitutes the last will and testament" of the deceased, and that the same were procured by the undue influence of the appellant, and prays that the order admitting them to probate be revoked, and that issues be framed and sent to a court of law for trial.

[1, 2] It is apparent from this statement of the case as presented by the bill that the real question in the case is whether a court of equity will enjoin the prosecution of a caveat, on the ground that there is an equitable defense or answer to one of the charges against the will. Assuming, without deciding, that the bill makes out such a valid and binding obligation on the part of the deceased to devise and bequeath all his property to the appellant as a court of equity can enforce, that the averment that she fully performed her part of the contract is a sufficient answer to the charge that the deceased, at the time he made the alleged will, was of unsound mind, and that that defense cannot be availed of by the appellant in the orphans' court, it still does not follow that a court of equity would be justified in enjoining the further prosecution of said proceedings.

Section 316 of article 93 of the Code provides that "no will, testament or codicil shall be good and effectual for any purpose whatsoever, unless the person making the same be at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract;" and section 317 provides how a will shall be executed. Section 331 authorizes the "orphans' courts, and in their recess, the registers of wills in this state," to take the probate of wills; and sections 336, 337, 338, 339, 341, and 342 provide how and when proof of wills shall be taken, clothe the orphans' courts with power and authority to decide all objections to wills and codicils, and declare that when the orphans' court decides against the probate of a will it shall not be received for probate in any other county, unless that decision be reversed on appeal.

It is said in 16 Cyc. 100: "While the origi-

nal jurisdiction of equity over the administration of estates, where uninterfered with, has always been very extensive, nevertheless there are some matters which have always fallen within the exclusive jurisdiction of the common-law or ecclesiastical (probate) courts. Thus a court of equity, in the absence of statute, has no jurisdiction to admit a will to probate; nor can it avoid a will or set aside the probate thereof, even on the ground of fraud, mistake, or forgery. Such jurisdiction is vested exclusively in the probate courts." In the case of *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054, Mr. Justice Lamar quotes the statement of Mr. Justice Bradley, in the case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599, "that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of the probate court." In the case of *Johns v. Hodges*, 62 Md. 525, Judge Irving, referring to the orphans' court, says: "The creation of a court for a particular purpose, and the clothing it with all the powers necessary to its jurisdiction over the subject and the parties interested, without giving concurrent jurisdiction to any other tribunal, by the familiar maxim, '*Designatio unius, exclusio est alterius*,' would seem to exclude the jurisdiction of any other than the one specially authorized. Judge Story, in *Tompkins v. Tompkins*, 1 Story, 547-554 [Fed. Cas. No. 14,091], in discussing the like question arising under the law of Rhode Island, says the giving of jurisdiction to a tribunal to take the probate of will, notwithstanding no exclusive words were used in the statute, operated to make the jurisdiction of the authorized tribunal exclusive and its decisions conclusive on the question. Such decisions, he says, are of like nature with proceedings in rem, 'and necessarily conclusive of the matter in controversy for the common safety and repose of mankind.' The law of Massachusetts contains no exclusive words, yet the jurisdiction of courts of probate is held to be exclusive. 1 Story, 554 [Fed. Cas. No. 14,091], and *Osgood v. Breed*, 12 Mass. 525. In 2 Greenl. Ev. § 672, it is said that this is the generally accepted law in those states of the Union where courts of probate are established." See, also, 2 *Pomeroy's Equity*, § 913, and *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427, 2 L. R. A. 175.

We think it clear that the jurisdiction to take probate of wills conferred by the provisions of the Code upon the orphans' courts of this state is an exclusive jurisdiction; and that a court of equity has no power to deter-

mine whether a will shall be admitted to probate, or to revoke an order of the orphans' court, admitting a will to probate.

In this case, the will in question was admitted to probate and letters testamentary were granted by the orphans' court before the caveat was filed; and such action of the orphans' court cannot be reviewed or revoked by a court of equity. *McDaniel v. McDaniel*, 86 Md. 625, 39 Atl. 423; *Stanley v. Safe Deposit Co.*, 87 Md. 450, 40 Atl. 53.

The Code confers upon the orphans' courts ample authority to hear and determine caveats filed after a will has been admitted to probate, and to revoke letters previously granted; and the orphans' court of Montgomery county is clothed by statute with full power to determine the questions raised by the petition of the appellees, and to grant the relief prayed by them.

[3] Even if it be conceded that the averment of the bill that the appellant performed the contract relied on is a complete defense to the objection that the deceased was not capable of making a will, and that, where that is the only objection to a will, a court of equity should intervene, in order to give effect to such a defense, in the case at bar, there are other charges against the will to which the defense relied on is not a sufficient answer, which a court of equity is without jurisdiction to decide for the purpose of determining whether the will in question should be admitted to probate, or whether the order of the orphans' court, admitting it to probate, should be revoked, and which, if the injunction was granted, would remain undisposed of. It is said in 3 *Pomeroy's Equity*, § 1362, that the rule which authorizes the issuing of an injunction to stay an action at law, where the defendant has a purely equitable defense which a court of law cannot recognize and enforce, "assumes that the equitable questions contained in the defense extend to the entire cause, so that their decision determines the entire controversy." Here, in addition to the allegation that the deceased was of unsound mind, the petitioners rely upon the charge that the alleged will was procured by undue influence, which, as we have said, is not sufficiently met by the defense upon which the appellant relies as ground for an injunction.

Without expressing any opinion as to the right of the appellant to enforce the alleged contract of the deceased in a proper proceeding, we must, for the reasons stated, affirm the decree of the court below, refusing to grant the injunction asked for, and dismissing her bill of complaint.

Decree affirmed, with costs.

**PROCTOR et al. v. KEITH & PROCTOR
AMUSEMENT CO. et al.**

(Supreme Judicial Court of Maine. May 10, 1912.)

**CORPORATIONS (§ 629*)—DISSOLUTION—DIS-
POSITION OF PROPERTY—CONTRACT—CON-
STRUCTION.**

In June, 1906, plaintiff and defendant organized a corporation in which each held one-half the stock, and to which they assigned leases on theaters, under an agreement that on any dissolution "the theaters, including the personal property, good will, and business of each shall be retransferred to the party from whom they were respectively received by the corporation"; and any new theaters leased should be taken by the highest bidder. Plaintiff previously held a lease on the F. theater, expiring in 1912, subject to termination on one year's notice in case of a sale. In April, 1906, a corporation, whose control by defendant was concealed by him, purchased the theater and gave notice terminating the lease May 1, 1907. Plaintiff's assignment included his rights under this lease. In 1907 a new lease was given by defendant's company to the corporation first mentioned. *Held* that, on dissolution, it was not error to award a transfer of the lease on the F. theater to plaintiff under the clause of the contract above quoted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2478-2481; Dec. Dig. § 629.*]

Appeal from Supreme Judicial Court, York County, in Equity.

Bill by Frederick F. Proctor and another against the Keith & Proctor Amusement Company and others. From the decree, defendants appeal. Appeal dismissed. Decree affirmed.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, HALEY, and HANSON, JJ.

Verrill, Hale & Booth, of Portland, and William F. S. Hart, for plaintiffs. Libby, Robinson & Ives, of Portland, for defendants.

WHITEHOUSE, C. J. This is an appeal from a final decree entered by a single justice in a suit in equity brought by the plaintiffs, who were owners of one half of the stock of the defendant company, against the corporation and the defendants B. F. and A. Paul Keith, who were owners of the other half of the stock. It is alleged in the plaintiffs' bill dated December 30, 1910, that the defendant corporation, the Keith & Proctor Amusement Company, was organized in June, 1906, by Benjamin F. Keith and Frederick F. Proctor, for the purpose of combining and operating under corporate ownership for the common benefit of the stockholder, six theaters in New York and Jersey City, four of which, including the Fifth Avenue Theater, had prior to that time been operated by Mr. Proctor and two of them by Mr. Keith; that there had been gross and fraudulent mismanagement of the affairs of the corporation on the part of the defendants B. F. and A. Paul Keith, the president and treasurer of the company, respectively,

whereby its property was being wasted; that, by reason of the friction between the two equally divided factions of stockholders, it was impossible to continue the business of the corporation without great injury to the rights of one-half of the stockholders; and that, by reason of the premises, the purposes of the corporation could not be accomplished. They accordingly ask that the affairs of the corporation be wound up and the corporation dissolved.

The defendants filed an answer denying the charges of fraud and mismanagement on the part of Mr. Keith, but state that, "by reason of the differences of opinion that have existed between the two interests which are equally divided," they joined in the prayer for a dissolution of the corporation; and thereafter, under date of July 31, 1911, the parties entered into a stipulation whereby it was agreed that all of the theaters then under the corporate management should be restored to the party by whom they were respectively contributed except the Fifth Avenue Theater, the lease of which was to be renewed for five years from April 30, 1911. Thus all of the important questions raised by the bill and answer were adjusted except that relating to the disposition of the Fifth Avenue Theater. After hearing, a decree was entered by a single justice "that the lease of the Fifth Avenue Theater, which the defendant corporation now holds, and which runs for a term of five years from May 1, 1911, shall be assigned and delivered forthwith as of the date of this decree to the plaintiff Frederick F. Proctor, together with all the personal property appurtenant thereto." The defendants took an appeal from this decree.

Prior to the organization of the defendant corporation, Mr. Proctor and Mr. Keith had for many years been individually and separately engaged in the theatrical business; each having the ownership of one or more theaters and the management and control of several others by virtue of leasehold interests. The lease of the Fifth Avenue Theater, which Mr. Proctor held from the Gilsey estate when the defendant corporation was organized, did not by its terms expire until May 28, 1912, but it contained a provision that in the event of the sale of the property the landlord might terminate his tenancy by not less than one year's notice. The property was in fact sold April 25, 1906, to the International Amusement & Realty Company, which for convenience will be hereafter called the International Company, and notice was promptly given to Mr. Proctor of the cancellation of the lease, so that the term would expire May 1, 1907.

At that time this International Company was wholly under the control of Mr. Keith, but this fact appears to have been carefully concealed from Mr. Proctor; Mr. Keith be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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ing introduced to the attorney and one of the incorporators of the International Company under the assumed name of "Franklin."

Under these circumstances, in order to prevent the enormous expenditures resulting from the strenuous competition between the managers of vaudeville theaters, and in the belief that a renewal of the lease of the Fifth Avenue Theater could doubtless be secured by the loyal assistance of Mr. Keith, an agreement was entered into between Mr. Keith and Mr. Proctor under date of June 27, 1906, to take effect as of June 4th, for the consolidation under corporate management of the six theaters therein specified for the term of 10 years. The stipulations in that agreement specially involved in the consideration of the appeal now before the court are found in the following provisions:

"(1) A corporation shall be organized under the laws of the state of Maine with a capital of \$100,000 to which corporation of the party of the first part shall assign his lease of the Union Square Theater in the city of New York and shall lease his Bijou Theater in Jersey City, now being altered, and shall assign his lease from Herz Brothers to the premises adjoining the same; and the party of the second part shall likewise assign his leases of the 23rd Street and Fifth Avenue Theaters in the said borough of Manhattan and shall lease his 58th Street and 125th Street Theaters in said borough. The Jersey City, 58th Street and 125th Street Theaters shall each be leased for a term of ten years, and said leases of the Union Square, 23rd Street and Fifth Avenue Theaters and the said Herz lease shall be assigned at the rentals and on the conditions stated in such leases which rentals shall be paid and conditions performed by said corporation, and the assignment of the Fifth avenue lease shall be subject to the notice of cancellation served. * * *

"(17) With the theaters that are to be transferred to the corporation as herein provided shall be included all personal property appurtenant to said theaters belonging to the present proprietor.

"(18) At the expiration of this contract by limitation or otherwise, the parties hereto shall and will, as stockholders and directors, vote and consent that the theaters, including the personal property, good will and business of each, shall be re-transferred to the party from whom they were respectively received by said corporation, and that the board of directors then in office shall be appointed trustees in liquidation, provided, however, that if any vacancy shall exist in the board of directors it shall be filled by the election of such director or directors as the parties hereto entitled to nominate shall designate; and said declarations of trust shall so provide.

"(19) In the event that any new theaters shall be erected or leased or purchased under this agreement and the parties hereto shall

no longer desire to jointly own or operate the same after the termination of this agreement as herein provided, the parties hereto shall have the exclusive right to purchase such theater or theaters together with its and their good will, business and appurtenances, and they shall be sold respectively to such of the parties hereto as shall offer the highest price or sum therefor, unless the parties hereto shall at that time otherwise agree in writing."

In accordance with this agreement, the leases of the several theaters were assigned to the defendant corporation as of June 4, 1906. In the assignment by Mr. Proctor of the lease of the Fifth Avenue Theater is included all of the personal property in the theater belonging to Mr. Proctor. It is also expressly stated that it is subject to the notice terminating the lease on the 1st day of May, 1907, and it is described in the granting clause as "the lease of my Fifth Avenue Theater." Under date of March 28, 1907, a new lease was given by the International Company to the defendant corporation for the term of four years from May 1, 1907, terminating April 30, 1911, at a rental of \$51,000 per annum. This lease contained a covenant for a renewal lease at the same rent and on the same terms and conditions for a further period of five years from the 30th day of April, 1911, "provided the same tenant shall elect to take such renewal lease and shall notify the said landlord of his intention so to do, in writing on or before the first day of September, 1910."

Thereupon the defendant corporation was organized and commenced to transact business. At a meeting of the directors held July 12, 1906, it was voted to accept the offer of Mr. Keith to lease to the defendant corporation the theaters named in the agreement in consideration of 500 shares of the stock of the corporation, and the offer of Mr. Proctor to lease the Fifty-Eighth Street and One Hundred and Twenty-Fifth Street theaters to the corporation and to assign to it "the leases, good will and business of his 23rd Street and Fifth Avenue Theaters," and to receive in payment therefor 500 shares of the stock of the corporation, was accepted on motion of Mr. Keith.

It is unnecessary to dwell upon the history of the company's operations during the two or three years following its organization. There appear to have been some dissensions and differences of opinion in regard to the alterations and general management of the several theaters under the control of the company. These minor difficulties, however, are not of primary importance in this case, which was finally reduced to the sole question whether the existing lease of Fifth Avenue Theater should be assigned to Mr. Proctor under the agreement of June 27, 1906. But it is contended that the incidents which culminated in the com-

ment of this suit for a dissolution of the corporation, and especially the active and persistent efforts of Mr. Keith to prevent the renewal of the lease of the Fifth Avenue Theater which would expire April 30, 1911, have marked significance upon Mr. Keith's attitude and understanding at the time in regard to the restoration of that theater to Mr. Proctor in the event of a dissolution.

It has been seen that by a covenant in that lease the defendant corporation, of which Mr. Keith was president and one of the executive committee, was entitled to a renewal lease for five years from the International Company, which was owned and controlled by Mr. Keith, provided notice in writing of its election to take such renewal lease should be given by the defendant corporation to the International Company on or before the 1st day of September, 1910. The renewal of this lease had been the subject of discussion between the parties in the autumn of 1909, but, on account of the prolonged absence of Mr. Keith, his co-operation in giving the required notice in writing of an election to take such a renewal lease could not be obtained, and, before leaving for his summer residence, Mr. Proctor, acting as vice president and executive manager in the absence of Mr. Keith, sent such a notice in writing to the International Company under date of July 18, 1910. This notice appears to have been duly received by Mr. Keith as owner of the International Company, but it was not acknowledged until October 21, 1910, seven weeks after the time had expired for giving a renewal notice. In this reply a request is made for an extract from the records and by-laws showing that the notice was duly authorized. The next day Mr. Keith, as president of the defendant corporation, wrote a letter to the International Company owned by him interposing the technical objection that the notice received the day before was not a legal one because not authorized by the board of directors or the executive committee. October 31st he made the suggestion that the company must not be without a tenant, and November 17th he stated that the Fifth Avenue Theater might be put on the market to be leased to the highest bidder. It must be admitted that the correspondence between the parties in regard to a renewal of this lease, considered in relation to the fact that these two parties were equal stockholders and both officers of the defendant corporation, discloses a continual resort on the part of Mr. Keith to disingenuous endeavors to disguise his ownership of the International Company in the hope of creating a belief in the mind of Mr. Proctor that he was dealing with one occupying the position of a partner in business and not with a hostile competitor. It is claimed in behalf of the plaintiff Proctor and of the defendant cor-

poration that, in pursuing this course, Mr. Keith was endeavoring to take advantage of his position to deprive the corporation of its most valuable asset in order to obtain control of the Fifth Avenue Theater for his personal benefit; it being admitted that Mr. Keith was the sole owner of the International Company which was the lessor of that theater.

It is true that, after a complaint was entered in the New York court charging Mr. Keith with devising an unjust scheme to deprive the defendant corporation of its renewal lease, Mr. Keith was finally induced to enter into the stipulation hereinbefore mentioned agreeing to a renewal of the lease and to a dissolution of the corporation. But it is argued that Mr. Keith would never have resorted to such questionable methods to prevent a renewal of the lease unless he had then understood that, in the event of a dissolution of the defendant corporation, the Fifth Avenue Theater, with its existing lease for five years, yielding a total rental of \$255,000, would pass to Mr. Proctor under the terms of the agreement of June 27, 1906.

The respective contentions of the parties in regard to the proper interpretation of the express terms of this agreement of June 27th, and especially of the provisions of paragraph 18 hereinbefore quoted, will now be more critically examined and considered.

It has been seen that in paragraph 18 of that agreement it is provided that, in the event of a dissolution of the corporation, "the theaters, including the personal property, good will and business of each, shall be re-transferred and assigned to the party from whom they were respectively received by the corporation," and in paragraph 19 it is provided that, in case "any new theaters shall be erected or leased or purchased under this agreement, and the parties hereto shall no longer desire to jointly own or operate the same after the termination of this agreement, * * * they shall be sold respectively to such of the parties hereto as shall offer the highest price or sum therefor."

The question now before the court is whether the decree of the single justice that the present lease of Fifth Avenue Theater shall be "assigned and delivered" to Mr. Proctor is clearly wrong. It is not in controversy that in determining that question this court will be governed by the terms of the above agreement so far as they are applicable, either when considered by themselves or construed in the light of the circumstances, and, if there is nothing in the agreement controlling the disposition of the present Fifth Avenue lease, that the rule of the common law must apply and the lease be treated as a corporate asset to be disposed of for the benefit of all the stockholders.

It is contended in behalf of the defendants that, when the terms of paragraph 18 of

this agreement are brought into contact with the surrounding circumstances, a latent ambiguity is developed respecting the meaning to be ascribed to the word "theaters" in the clause "the theaters shall be retransferred," etc., and this ambiguity is removed by an examination of the extrinsic evidence in the case showing the surrounding circumstances, the situations and conduct of the parties at that time, and the practical construction subsequently given to the contract by the parties themselves. It is contended that, when the terms of the contract are thus examined and interpreted in the light of the subject-matter to which they relate, the word "theaters" in the clause mentioned must be deemed to have been employed to designate the leasehold interests which were transferred under the agreement and to be retransferred.

It has been seen that, by reason of the sale of the Fifth Avenue Theater to Mr. Keith's International Company, the lease of that theater, actually transferred by Mr. Proctor to the defendant corporation under the agreement in question, was terminated May 1, 1907, and that the renewal lease in controversy expiring April 30, 1916, was not the identical lease which was in fact transferred to the defendant corporation by Mr. Proctor. It is accordingly insisted in behalf of the defendants, first, that the disposition of that lease is not controlled by paragraph 18 of the agreement, and that it must be treated as a corporate asset; second, that if it is not to be treated as a corporate asset, but is held to be within the provisions of paragraph 18, it must be treated as a lease received by the corporation from Mr. Keith; and, third, that if Mr. Proctor's contention is sustained, and the Fifth Avenue Theater is found to be a "theater" assigned by him to the corporation, he is only entitled to have it retransferred to him for the term of the lease which he assigned, viz., for the term of 10 months and 21 days.

In the exhaustive argument of counsel for the defendants, no consideration appears to have been omitted which would have any legitimate tendency to support their contentions.

But the plaintiffs earnestly contend that in the clause in question relating to the retransfer of "theaters" the parties must be presumed to have intended what they have plainly expressed and that, since it is not allowable to "interpret" what has no need of interpretation, there is no reason for a construction of language which they claim is capable of only one meaning. They further insist that, if the clause can reasonably be considered ambiguous, the extrinsic evidence only serves to strengthen their claim that, in the contemplation of the parties, the word "theaters" was not synonymous with the word "leases" and was not employed to designate simply those leasehold interests existing at the date of the agreement June 27,

1906. They claim that when all of the evidence in the case is considered four propositions are satisfactorily established: First, that the Fifth Avenue Theater was received by the defendant corporation from Mr. Proctor within the meaning of paragraph 18 of the agreement by virtue of an assignment of his lease, and that he is now entitled to have it retransferred to him under the same agreement; second, that the Fifth Avenue is obviously not a "new" theater within the meaning of paragraph 19 of the agreement, and is not to be sold to the highest bidder under that provision; third, that this theater cannot be held to have been received from Mr. Keith simply because the existing renewal lease comes from the International Company, the stock of which is owned by him; and, fourth, that this provision of the agreement was manifestly intended by the parties to cover the disposition of all of the property put into the corporation including the Fifth Avenue Theater, as well as the Twenty-Third Street and Union Square Theaters, and that the Fifth Avenue Theater cannot now be held to be a corporate asset.

In the elaborate discussion of these propositions by the counsel, another complete analysis of the evidence is presented from the plaintiffs' point of view.

It may be true that the question presented for decision is not entirely free from difficulty and doubt, but, after a careful reading of the evidence and a patient study of the history of the case in the light of the luminous discussions of counsel, it is the opinion of the court that the decree of the single justice that the existing lease of Fifth Avenue Theater shall be assigned to Mr. Proctor is not shown to be clearly erroneous.

It cannot be doubted that, by virtue of the stipulations in this contract, the parties intended to provide, in the event of dissolution, for the disposition of all the theaters then under the management of the defendant corporation and, as far as practicable, to restore each to the position he occupied before the corporation was organized. In specifying in his letter to Mr. Keith the theaters claimed by him under the contract, Mr. Proctor mentions the Fifth Avenue, Twenty-Third Street, Fifty-Eighth Street, and One Hundred and Twenty-Fifth Street Theaters and concedes to Mr. Keith the Union Square and Jersey City Theaters; and in his reply Mr. Keith contests Mr. Proctor's claim only to the Fifth Avenue Theater. But it appears that the Fifth Avenue, Twenty-Third Street, and Union Square were all in the same class for the reason that the lease of each had expired after 1906 and a new lease given to the corporation. If it be held that the parties did not intend that the Fifth Avenue Theater should be retransferred to Mr. Proctor in dissolution of the corporation, the same construction applied to the Union Square and Twenty-Third Street Thea-

ters would have prevented the transfer of these theaters to Mr. Keith and Mr. Proctor, respectively, and thus one-half of the theaters would have remained undisposed of by the contract.

The conduct and declaration of the parties before the institution of this suit, with reference to the other two theaters, have important significance as to their understanding of the contract with respect to the Fifth Avenue. If Mr. Keith thus acquiesced in Mr. Proctor's view that the Union Square Theater should revert to Mr. Keith, and that the Twenty-Third Street Theater should revert to Mr. Proctor on dissolution, it is strong evidence that Mr. Keith understood that each theater should be restored to the one from whom the corporation received it, although the term of the lease then existing may have been extended by a subsequent lease or leases. It is not controverted by the defendants that, if the Fifth Avenue Theater was received by the corporation from Mr. Proctor, it should be retransferred to him for at least a term equal to that of his unexpired lease at the time the corporation was organized. But if the word "theaters" in paragraph 18 was intended to be synonymous with the word "leases" as claimed by the defendants, the logical conclusion would seem to be that, as the lease of this theater which the corporation received from Mr. Proctor had expired, there would be nothing to be restored to him. But the word "theaters," and not the word "leases," was employed to express the understanding of the parties.

It has been noticed that paragraph 17 of the agreement provides that the retransfer of the theater shall include the personal property, good will, and business of each, and it is worthy of mention that about two years before the corporation was organized Mr. Proctor expended \$7,000 for new chairs for the Fifth Avenue Theater, and that the assignment of his lease expressly included all personal property in the theater belonging to him. It does not seem probable that this personal property would have been included in the transfer, without any stipulation for its return, unless he had understood that the theater was to be retransferred to him together with his chairs.

Again, in Mr. Keith's efforts to refute the charge in the plaintiff's bill that he had so managed that the theaters which would revert to him were kept in good repair, while those which would revert to Mr. Proctor were not so maintained, he states in his affidavit that he had spent \$87,000 on the Proctor theaters, including the Fifth Avenue, thus indicating that he understood that the theater would revert to Mr. Proctor under the contract. Indeed, when the contract is considered with reference to the circumstances existing at the time it was made, it is not improbable that Mr. Keith intended to have

it so drawn that, in the event of an early dissolution of the corporation, Mr. Proctor would be obliged to take the Fifth Avenue Theater, since Mr. Keith would then receive a large rental for a theater, which in June, 1906, showed a loss of \$30,000, and in June, 1907, a loss of \$54,000.

But, a further discussion of the evidence in detail would be unprofitable. There was sufficient evidence to warrant the conclusion of the single justice that in the contract of June 27, 1906, the parties contemplated that each theater should be "retransferred and assigned" to the party from whom it was received, with the leasehold interest pertaining to it at the time of the dissolution of the corporation, and that the Fifth Avenue Theater was received from Mr. Proctor by the corporation within the meaning of the contract interpreted in the light of all the circumstances and the conduct of the parties.

The defendants' final suggestion that the decree from which this appeal was taken is inequitable should be considered, if at all, in the light of the fact that Mr. Keith will receive a rental of \$51,000 a year for this theater during the remaining four years; \$6,000 a year more than was received from the Gilsey estate.

The date fixed in the decree for the assignment of the existing lease to Mr. Proctor is sufficiently favorable to the defendants.

The certificate will therefore be: Appeal dismissed.

Decree below affirmed.

STATE v. IRELAND et al.

(Supreme Judicial Court of Maine. June 4, 1912.)

1. INDICTMENT AND INFORMATION (§ 11*)—INDICTMENT AS PART OF RECORDS.

An indictment duly found, returned, and filed becomes a part of the records of the court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 62-75; Dec. Dig. § 11.*]

2. COURTS (§ 113*)—RECORDS—JUDICIAL POWER.

At common law and independent of any statute, courts have inherent power to preserve and protect their own records and to substitute copies of lost records.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865, 866; Dec. Dig. § 113.*]

3. INDICTMENT AND INFORMATION (§ 14*)—LOST INDICTMENT—SUBSTITUTION.

Copy of a lost or mislaid indictment may be substituted by order of the trial court as soon as the loss is discovered and before the case is submitted to the jury, but omission to do so before conviction is not fatal; the substitution being properly made upon satisfactory evidence at a forthcoming nisi prius term.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 77-82; Dec. Dig. § 14.*]

Exceptions from Supreme Judicial Court, Aroostook County.

Luther J. Ireland and another were convicted of adultery, and bring exceptions. Exceptions overruled.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Perley C. Brown, Co. Atty., of Presque Isle, for the State. Powers & Archibald, of Houlton, for defendants.

CORNISH, J. An indictment for adultery was duly found and returned against the defendants by the grand jury at the April term, 1911, of the Supreme Judicial Court for Aroostook county and placed in the files of the court by the clerk. Upon this indictment the respondents were arraigned and severally pleaded not guilty. A jury was thereupon impaneled, the indictment was read to the jury, and the case proceeded to trial. At some later stage of the trial and before the case was finally submitted to the jury, it was discovered that the indictment had disappeared, whether it was mislaid or lost or accidentally destroyed or abstracted is not known. No copy was substituted. In the course of the charge the presiding justice instructed the jury, that, although the indictment had disappeared and could not be taken to the jury room with them, yet inasmuch as the respondents had been arraigned upon it and had pleaded to it, and it had been read to the jury in presenting the respondents for trial, he should permit them to retire and return a verdict in its absence.

The jury subsequently returned a verdict of guilty. Counsel for respondents before the verdict was taken seasonably objected to receiving any verdict in the absence of the indictment, and also moved the discharge of the respondents for the same reason. The presiding justice, however, received the verdict and subsequently pronounced sentence upon one of the respondents while the case against the other was continued for sentence. The case is before the court on the respondents' exceptions to these rulings.

This presents a question of novel impression in this state. What are the powers of the court in case an original indictment is missing from the files? Is it indispensable to the validity of a sentence that the indictment should be among the records at the time sentence is pronounced? This is an important question because the rights not only of the accused but of the public are affected by its answer.

[1, 2] It must of course be conceded that an indictment duly found by the grand jury, duly returned to court and filed by the clerk, becomes at once a part of the records of the court, and there must be and is an inherent power in the court to preserve and protect its own records. Shepley, J., in speaking of civil actions, and we see no reason why the words would not apply with equal force to criminal causes, said: "Every court of

record has power over its own records and proceedings to make them conform to its own sense of justice and truth so long as they remain incomplete and until final judgment has been entered." *Lothrop v. Page*, 28 Me. 119.

The record itself is but the outward evidence of a cause to which the jurisdiction of the court has attached. That jurisdiction cannot be taken away by the mere loss or abstraction of a part of the record. Rather the jurisdiction remains and the missing record should be supplied or substituted in such manner as the court itself may prescribe.

As the Supreme Court of Alabama said in *Bradford v. State*, 54 Ala. 230, where the indictment was lost after plea had been entered and the trial had begun: "Courts of record, independent of express legislation, have power to substitute any of the files or records which may be lost or destroyed. The power is a matter of necessity, whether the loss occurs while the cause is in fieri, before it has progressed to final judgment, or after such judgment has been rendered, and whether the loss is of the whole record or of papers which when it is finally made up will constitute a part of it."

This succinct statement of a fundamental principle we adopt as indispensable in the administration of criminal law. If the court does not possess the power to authorize the substitution of a lost indictment, the rights of the public are at the mercy not merely of accident but of design and the destruction of a courthouse with its contents by fire is equivalent to a jail delivery.

The decisions in other states are not in entire harmony, but it can safely be asserted that the overwhelming weight of authority has so solved the problem as to protect all the legal rights of the accused on the one hand and of the public on the other without allowing the accused to escape his deserts either through accident or artifice.

In some states statutes have been passed expressly conferring this power in criminal cases, as in *Arkansas*, *Miller v. State*, 40 Ark. 488; *Louisiana*, *State v. Heard*, 49 La. Ann. 375, 21 South. 632; *Oklahoma*, *Harmon v. Territory*, 9 Okl. 313, 60 Pac. 115; and in *Texas*, *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194.

In other states the court, while acknowledging the inherent common-law power, have construed statutes apparently originally designed to cover substitution in civil actions only to include criminal cases as well. See *State v. Gardner*, 13 Lea (Tenn.) 134, 49 Am. Rep. 660; *Roberson v. State*, 45 Fla. 94, 34 South. 294.

In many jurisdictions, however, the courts have assumed and exercised the power of substitution independent of any statute.

In *Ganaway v. State*, 22 Ala. 772, a majority of the court denied the power of the

trial court to substitute an indictment before arraignment and trial. But in the later case of *Bradford v. State*, 54 Ala. 230, the indictment was lost after arraignment and plea, and the substitution of a copy during the trial was permitted.

In the early case of *State v. Harrison*, 10 Yerg. (Tenn.) 542, it was held that a judge could not supply a lost indictment upon affidavits of others and independent of his own recollection, but this decision was overruled in the later case of *State v. Gardner*, 13 Lea (Tenn.) 134, 49 Am. Rep. 660, in which it was held that the substitution might be made upon affidavits independent of the recollection of the judge. In that case 10 indictments were stolen from the clerk's files after arrest but before trial.

Without quoting at length further from decisions in other states, suffice it to say that the inherent power of the court at common law has been accepted as authority for substitution in the following states:

In South Dakota, *State v. Circuit Ct.*, 20 S. D. 122, 104 N. W. 1048 (1905).

In Mississippi, *McGuire v. State*, 76 Miss. 504, 25 South. 495 (1899).

In West Virginia, *State v. Strayer*, 58 W. Va. 676, 52 S. E. 682 (1906), where the indictment was lost after verdict of guilty rendered.

In Pennsylvania, *Commonwealth v. Becker*, 14 Pa. Super. Ct. 430.

In Iowa, *State v. Rivers*, 58 Iowa, 102, 12 N. W. 117, 43 Am. Rep. 112; *State v. Stevisger*, 61 Iowa, 623, 16 N. W. 746; *State v. Shank*, 79 Iowa, 47, 44 N. W. 241 (1890).

In Indiana, *Buckner v. State*, 56 Ind. 208.

In Missouri, *State v. Simpson*, 67 Mo. 647; *State v. Paul*, 87 Mo. App. 47 (1900); and *State v. McCarver*, 194 Mo. 717, 92 S. W. 684 (1906).

The contrary view is held in *Bradshaw v. Commonwealth*, 57 Va. 507, 86 Am. Dec. 722, but it has not been generally followed, and the citations above given abundantly warrant the general doctrine laid down by text-writers that a copy may be substituted independent of an authorizing statute. 1 Bish. Crim. Proc. § 1400; 22 Cyc. p. 221; 10 Ency. Pl. & Pr. p. 417.

[3] But the respondents further contend that, even if a copy might have been substituted when the loss was discovered, none was in fact substituted and a verdict could not legally be rendered or sentence passed without either the original indictment or a copy on the files of the court. Why not? No legal or constitutional right of the respondents has been sacrificed or invaded.

The Constitution of Maine, art. 1, § 7, provides that, "No person shall be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury," with certain exceptions immaterial here. This provision has been fully complied

with. The indictment had been returned by the grand jury and to it the respondents had pleaded and placed themselves on trial as the docket entries prove, thus admitting its verity. Their next constitutional right was to the verdict of a jury duly impaneled and sworn which they had accepted as their tribunal. This right was fully given them.

It was a right that could not be taken from them by the mere loss or abstraction of a paper, and the state had the corresponding right that, notwithstanding such loss or abstraction, the case should proceed and a judgment of conviction or acquittal be rendered. These rights are too sacred to be impaired by the accidental loss or willful abstraction of papers during the trial, and the mere fact that the jury did not have the indictment with them in the jury room could not nullify all that had gone before. The issue had already been made up. The jury knew the nature of the offense charged and the parties involved. The presence or absence of the indictment itself could not aid or hinder them in reaching their verdict. It did not in this case. Such meritless technicalities should not be permitted to thwart the administration of criminal justice.

The remaining constitutional right vouchsafed to the accused is that they shall not be put twice in jeopardy for the same offense. This can be secured by substituting a copy for the original. Such copy can be readily prepared by the county attorney who drafted the original. The notes of the stenographer at the trial will furnish all necessary data as to place, time, and parties, so that no possible error can creep in. Such a copy duly certified by the county attorney as such can by order of court at the next term be placed on file in lieu of the original and the rights of the respondents be thereby safely guarded.

It would have been proper for the county attorney to ask for such substitution as soon as the loss was discovered, but the omission to do so at that time was not fatal. Substitution can be made by the court upon satisfactory evidence at the coming term, and the rights of the respondents on the one hand and of the public on the other be fully protected.

The rulings of the presiding justice being free from exceptionable error, the entry must be exceptions overruled.

FORD v. ERSKINE et al.

(Supreme Judicial Court of Maine. June 4, 1912.)

1. HIGHWAYS (§ 72*) — ALTERATION — PROCEEDINGS—VALIDITY.

Where, upon petition to the county commissioners for alteration of an alleged existing highway, the return of the commissioners contains no express adjudication that the alleged highway is a highway, and shows the al-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

teration by them of a town road, their record will be held void for want of jurisdiction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 239-252; Dec. Dig. § 72.*]

2. HIGHWAYS (§ 70*)—"LOCATION"—"ALTERATION."

"Location" of a highway and "alteration" of a highway do not amount to the same thing.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 234, 235, 238; Dec. Dig. § 70.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4219-4222; vol. 8, p. 7709; vol. 1, pp. 360-365.]

3. CERTIORARI (§ 69*)—DISPOSITION OF CAUSE.

Under Rev. St. c. 104, §§ 14, 15, on denial of a petition for certiorari, it is improper to affirm the record sought to be quashed; issuance of a writ being essential to any judgment affirming, modifying, or quashing the record.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185-194; Dec. Dig. § 69.*]

4. CERTIORARI (§ 56*)—RECORD—COLLATERAL ATTACK.

Where the record of certiorari proceedings fails wholly to show the grounds alleged therein for attack upon the record sought to be affected and the grounds for the denial of the writ, the petitioner is not estopped from collaterally attacking the record for want of jurisdiction.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 143, 144; Dec. Dig. § 56.*]

5. HIGHWAYS (§ 96*)—CONSTRUCTION OF ROAD—LIABILITY OF OFFICERS.

A county commissioner is not liable individually for trespass committed in the construction of a road across private lands under void proceedings, so far as he acted in an official capacity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313-317, 319-322; Dec. Dig. § 96.*]

6. HIGHWAYS (§ 96*)—CONSTRUCTION OF HIGHWAY—INDIVIDUAL LIABILITY.

The selectmen of a town and a contractor employed by them in constructing a road, who made it as an alteration of an existing highway by county commissioners, who were without jurisdiction, are liable in trespass.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313-317, 319-322; Dec. Dig. § 96.*]

7. MASTER AND SERVANT (§ 302*)—TRESPASS BY EMPLOYÉ—LIABILITY.

While it may be that one who, having mere knowledge of a contemplated trespass, allows the use of his personal property in effecting the same may be not liable for the trespass, one who directs his employé to aid in the doing of a specific act which proves to be a trespass is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225-1229; Dec. Dig. § 302.*]

Report from Supreme Judicial Court, Lincoln County.

Action by Sarah B. Ford against Samuel D. Erskine and others. On report. Judgment for plaintiff.

Trespass quare clausum fregit to recover damages for the construction of a road across the plaintiff's land. Plea, the general issue, with a brief statement, alleging that any acts done by the defendants on the plaintiff's land were done in the construc-

tion of an alteration of an existing highway laid out by the county commissioners of Lincoln county. The case was first submitted to the jury on the question of damages, which were assessed at \$270, and then was reported to the law court for determination, with the following stipulations: "If the plaintiff is entitled to recover, because there is no legal road at the place where the trespass is claimed to have been committed, judgment is to be awarded for the plaintiff for the sum of two hundred and seventy dollars (\$270.00); it being the amount fixed by the jury as damages. If the plaintiff is not entitled to recover as above, the court is to determine whether there is a trespass outside the location, and, if so, assess the damages therefor. If no liability, judgment shall be for the defendants. All objections to the testimony to be passed upon by the law court and the case to be determined upon that which is admissible."

Argued before WHITEHOUSE, C. J., and SAVAGE, KING, BIRD, HALEY, and HANSON, JJ.

Arthur S. Littlefield, of Rockland, for plaintiff. Tupper & Perkins, of Boothbay Harbor, for defendants.

BIRD, J. [1] This is an action of trespass quare clausum, whereby the plaintiff seeks the recovery of damages for the construction of a road across her land in the town of Jefferson. The defendants, pleading the general issue, by way of brief statement claim that any acts done by them upon plaintiff's land were done in the construction of an alteration of an existing highway laid out by the county commissioners of Lincoln county.

To establish their justification, the defendants offered the record of the county commissioners, from which it appears that the selectmen of Jefferson duly petitioned the county commissioners that a change be made in the highway leading from the North Whitefield road, commencing at a defined point, "said proposed change of location to extend in a course eastwardly and re-entering the highway, as now located," at another described point, and that after notice ordered and given, hearing had, and the continuances taken, as required by statute, at the September session, 1909, their proceedings were adjudged to be closed and their return ordered to be recorded. The return determines that common convenience and necessity require the alteration made as prayed for, and describes the road as laid out by them as "beginning * * * on the easterly side of the town road; * * * thence running [here follow various courses and distances] to an elm tree standing on the easterly side of the road, before mentioned."

Neither in the return nor other part of the record is there an express adjudication that the road, an alteration in which is

prayed for, is a highway or county road. Had the petition prayed for the location of a highway, the petition might show jurisdiction, as held by *Waldo v. Moore*, 33 Me. 511, 514. And where the prayer is for alteration of a highway, the taking of jurisdiction and the subsequent alteration of the highway, described by the commissioners, might warrant the presumption that the commissioners found as a jurisdictional fact the existence of the highway sought to be altered. See *Plummer v. Waterville*, 32 Me. 566, 568.

[2] But in the case at bar the return of the commissioners, with no express adjudication as to the existence of the alleged highway, shows that the alteration made was that of a town road; and, while the word "road" may include county roads, town roads, turnpikes, etc. (see *Windham v. Com'rs*, 26 Me. 406, 408), it can hardly be contended that "town road" can be construed to comprehend county road or highway. It appears, therefore, from inspection of the record, that the road which was altered was a town road, and not a county road, as alleged in the petition. The location of a county road and the alteration of a county road are not one and the same thing. *Commonwealth v. Cambridge*, 7 Mass. 158, 165; *Raymond v. County Com'rs*, 63 Me. 112, 114. And it cannot be contended that the way laid out in the return is the location of a new county road, especially in view of the fact that part of the old road, which it was attempted to change, is by the return of the commissioners attempted to be discontinued.

Being an inferior court, their jurisdiction depended entirely upon the existence of a highway, the validity of their acts upon their jurisdiction; hence, if a highway, their acts were valid; if not, invalid. *South Berwick v. County Com'rs*, 98 Me. 108, 111, 56 Atl. 623.

Without passing upon the admissibility of the evidence offered allunde the record to show that the road described in the petition was a town road and not a highway, the court feels that the conclusion above reached is in accordance with the fact.

The defendants, subject to the objection of the plaintiff, offered the following record:

"Sarah B. Ford, of Jefferson, County of Lincoln, Petitioner, *Certiorari v. County Commissioners of Lincoln County*, Defendants.

"The petition is dated September 22, A. D. 1909, and was legally served upon said defendants on the 24th day of September, A. D. 1909.

"This action was duly entered at the October term, A. D. 1909.

"The same is thence continued from term to term to the present April term, 1910, where, after hearing, the writ is denied and records adjudged good."

[3] The defendants claim that by this record the plaintiff, who was the petitioner named therein, is estopped to attack the rec-

ord of the county commissioners collaterally. We think the judgment of the court, found in the words "records adjudged good," was not warranted." The writ of certiorari was not granted, but was denied. In all the reported cases of this court arising upon certiorari, none is found where the court, on dismissing the petition, goes further, or makes any adjudication, as to the records attacked in the petition. That, in order that such adjudication be made, the writ must issue and the record attacked be before the court seems a fair inference from the provisions of R. S. c. 104, §§ 14, 15, and a conclusion warranted by *State v. Madison*, 59 Me. 538, 544, and *State v. Madison*, 63 Me. 546, 550. And see *Morrill v. Buker*, 92 Me. 389, 392, 42 Atl. 796.

[4] Did the denial of the writ of certiorari work an estoppel? The record of the certiorari proceedings fails absolutely to show the ground or grounds alleged by petitioner in application for the writ, or the answer of the respondents. The point in litigation is not apparent, nor the reasons for the denial of the writ. Without determining what would have been the effect if the lack of jurisdiction, which we have considered, had been set up as the ground for the issue of the writ, and so appeared by record, we are clearly of the opinion that the record of the proceedings upon the petition for certiorari, set out above, works no estoppel of the plaintiff. See *Brown v. County Com'rs*, 12 Metc. (Mass.) 208, 209. See, also, *Smith v. Boston*, 194 Mass. 31, 34, 79 N. E. 786.

[5] As to the liability of the defendants: One was a member of the board of county commissioners laying out the way. Whatever he did in his official capacity, upon the authority of *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318, does not make him liable; nor can his subsequent conversation with and letter to the selectmen be considered as an advising, instigation, or direction of the trespass.

[6] Two of the defendants are the selectmen of the town of Jefferson, who contracted for and superintended the building of the road, and another is the person who, under contract with the selectmen, constructed the road. As to their liability for damages, there can be no question. *Chase v. Cochran*, 102 Me. 431, 437, 67 Atl. 320.

[7] The remaining two defendants let their team and servant driver to the contractor, with full knowledge that they were to be employed in the construction of the road. While it may be that one who has merely knowledge of a contemplated trespass and allows the use of his personal property may not be liable for the trespass, one who directs his servant to aid in the doing of a specific act which proves to be a trespass is liable. *State v. Smith*, 78 Me. 260, 265, 267, 4 Atl. 412, 57 Am. Rep. 802.

Judgment will be entered for \$270 against all the defendants, except Carney.

KIDDER v. BOSTON & M. R. R. (two cases).
(Supreme Court of New Hampshire. Hillsborough. May 7, 1912.)

1. RAILROADS (§ 400*)—FRIGHTENING TEAM UPON HIGHWAY—SUBMISSION OF ISSUES—EVIDENCE.

Where, in an action for injuries from being thrown from a wagon upon a team becoming frightened on the highway by the blowing of a locomotive whistle, the appearances proven indicated that the whistle was blown without justifiable cause, the question of the existence of such cause was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

2. RAILROADS (§ 396*)—FRIGHTENING TEAM UPON HIGHWAY—PROOF.

In an action for injuries from being thrown from a wagon upon a team becoming frightened by the negligent blowing of a locomotive whistle, the plaintiff was not required to prove that the engineer could control the loudness of the blast; it being the engineer's duty to use reasonable care not to make an unreasonable noise, regardless of whether he could blow the whistle loud or soft.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. § 396.*]

Exceptions from Superior Court, Hillsborough County; Chamberlin, Judge.

Two suits, one by Clara A. Kidder and the other by Herbert M. Kidder, both against the Boston & Maine Railroad. From the granting of motions for nonsuits, plaintiffs except. Exceptions sustained.

Case for negligence. The two suits are by husband and wife to recover for her personal injuries, and were tried together by jury. At the close of the plaintiffs' evidence, the defendant moved for nonsuits. The parties agreed upon the amount of damages, and that there should be judgments for the plaintiffs if there was evidence of the defendant's fault. The motions for nonsuits were thereupon granted, and the plaintiffs excepted.

Taggart, Burroughs & Wyman, of Manchester, for plaintiffs. Branch & Branch, of Manchester, for defendant.

PEASLEE, J. These are suits to recover for injuries suffered by the wife by being thrown from a wagon while traveling upon a highway in Goffstown, near the defendant's right of way. The fault charged is the negligent blowing of a locomotive whistle, whereby the plaintiffs' horse became frightened, ran away, and so caused the injuries. The parties agree as to the law governing their rights and liabilities. It is a question solely of whether there was substantial evidence that it was unreasonable conduct to blow the whistle when and as it was blown upon this occasion. The only evidence upon the point is the wife's testimony. From this it could be found that, as she was driving in a westerly direction along the highway nearly parallel with the defendant's right of way, a freight train approach-

ed from the east, and, when some rods behind her, blew an unusually loud blast of the whistle. There was no whistling post at that point, and no one upon the track ahead of the train. Two objections to the sufficiency of this evidence are urged.

[1] It is said that there may have been justifiable cause for blowing the whistle. This is undoubtedly true; but it is also true that the appearances indicated there was no such cause, and this warranted the submission of the question to the jury.

[2] The other objection is that there is no evidence that the engineer could control the loudness of the blast. This does not help the defendant. If the engineer could blow loud or soft, if he blew knowing it might respond in either manner, or if the whistle was one which always gave a more than ordinarily loud sound, the important facts are not changed. In either case it was his duty to use reasonable care not to make an unreasonable noise.

Exceptions sustained. All concurred.

WHITE v. FERNALD-WOODWARD CO.
et al.

GERRISH v. WOODWARD et al.

(Supreme Court of New Hampshire. Coos. May 7, 1912.)

GARNISHMENT (§ 108*)—PRIORITIES.

An attachment by the debtors' individual creditors takes priority over one by his partnership creditors only where the attachment of the individual creditor is made before the property is appropriated to pay the partnership debt, and money held on trustee process is "appropriated" when it is paid by the trustee under an order of court for the use of plaintiff in an action in which it is attached; so that a decision that the partnership creditor was entitled to judgment, and ordering the trustee to pay the money garnished to a receiver to hold for the use of the partnership creditor or the individual creditor, as their right might appear, appropriated the money to pay the partnership claim.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 220-226; Dec. Dig. § 108.*]

Transferred from Superior Court, Coos County; Pike, Judge.

Foreign attachments by Paul White against the Fernald-Woodward Company and trustees and one by Gerrish, administrator, against Jason H. Woodward, and trustee. Case transferred without ruling from the superior court. Case discharged.

Foreign attachment. White brought suit against the Fernald-Woodward Company, a partnership of which one Woodward was a member, and summoned the Burbank Company and the Orient Insurance Company as trustees. The Burbank Company disclosed that they were indebted to Woodward upon a promissory note for \$8,000, but had given him an order on the Insurance Company for \$3,060.84, which was to be applied in payment of the note. The Insurance Company

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

disclosed that they had accepted the Burbank Company's order and owed Woodward \$3,060.84. Decker appeared as claimant of the money, and agreed with White that the court should appoint a receiver to collect it and hold it until the question as to whom it should be paid was determined. The court held that the funds belonged to White. *White v. Company*, 76 N. H. 83, 79 Atl. 641. After the opinion was filed, Decker brought suit against Woodward and summoned the receiver as trustee; and when White moved for judgment in his suit against the Fernald-Woodward Company, in accordance with the decision of the court, Decker again appeared as claimant of the funds. Decker is dead, and his suit against Woodward is prosecuted by his administrator. The question whether White's motion for judgment should be granted was transferred without a ruling.

Matthew J. Ryan, of Berlin, and Drew, Shurtleff & Morris, of Lancaster, for Decker. Libby & Coulombe, of Gorham, for White.

YOUNG, J. The rule which prefers an attachment of a person's property by his individual creditors over one made by his partnership creditors (*Jarvis v. Brooks*, 23 N. H. 136, 141) is subject to the limitation that the attachment of the individual creditors must be made before the property is appropriated to pay the partnership debt (*Bowker v. Smith*, 48 N. H. 111, 2 Am. Rep. 189). Money held on trustee process is "appropriated," within this rule, at the time the trustee pays it by order of court to or for the use of the plaintiff in the action in which it is attached. The court had decided that White was entitled to judgment, and ordered the trustee to pay the money to a receiver, to hold for the use of either White or Decker, as their right should appear, long before Decker attached it. The money, therefore, had been appropriated to pay White's claim when Decker attached it. Consequently he takes nothing by his attachment.

Case discharged. All concurred.

CITY OF PORTSMOUTH v. NEW HAMPSHIRE NAT. BANK.

(Supreme Court of New Hampshire. Rockingham. May 7, 1912.)

MUNICIPAL CORPORATIONS (§ 1026*)—OFFICERS—POWER TO SUE.

Where by resolution a city council directed the city solicitor to discontinue a suit brought in the name of the city and instructed the mayor to arrange for a dismissal and entry of judgment for defendants, and the court ordered the suit dismissed and entered judgment for defendants, the city solicitor cannot have the judgment reviewed on exceptions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2197; Dec. Dig. § 1026.*]

Exceptions from Superior Court, Rockingham County; Wallace, Judge.

Suit by the City of Portsmouth against the New Hampshire National Bank. Decree dismissing the bill, and the city solicitor excepted, and the case was transferred from the superior court on exceptions. Exceptions overruled.

By a resolution adopted December 14, 1911, the city council directed the city solicitor to discontinue the suit and instructed the mayor to arrange for a dismissal of the bill and an entry of judgment for the defendants. December 19th the mayor requested the court to dispose of the litigation in accordance with the resolution. The court thereupon ordered the bill dismissed and entered judgment for the defendants, and the city solicitor excepted.

Samuel W. Emery, Jr., of Portsmouth, City Sol., pro se. Edwin G. Eastman, of Exeter, and John W. Kelley and Calvin Page, both of Portsmouth, for defendant.

YOUNG, J. The city solicitor has no standing in this case for he is not acting for the city but in defiance of its wishes; that is, he is here, not for the purpose of doing what the city instructed him to do, but to prevent the city from doing it.

Exceptions overruled. All concurred.

BOARD OF EDUCATION OF RIVERTON BOROUGH v. TAIT et al.

(Court of Chancery of New Jersey. May 27, 1912.)

1. MECHANICS' LIENS (§ 196*)—PRIORITY OF PAYMENT.

Liens perfected by stop-notices, served under Mechanic's Lien Act (3 Comp. St. 1910, p. 3290) § 3, are payable in the order of priority of service of notice, and not pro rata.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 337-341; Dec. Dig. § 196.*]

2. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—LIENS—PRIORITY.

Orders made by the contractor of a public school building and filed with the board of education of the municipality, and claims under notices served pursuant to Municipal Liens' Act (3 Comp. St. 1910, p. 3315), were entitled to priority in payment from the public building fund over a claim under a stop-notice subsequently served pursuant to the Mechanic's Lien Act (3 Comp. St. 1910, p. 3290) § 3, especially where the stop-notice was not served until after the maturity date of the final payment under the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. § 373.*]

3. MECHANICS' LIENS (§ 121*)—STOP-NOTICE—TIME OF SERVICE.

Where a stop-notice under Mechanic's Lien Act (3 Comp. St. 1910, p. 3290) § 3, was not served until after the building was completed and accepted, and the architect's certificate given, nor until after the date upon which the final installment fell due according to the contract, it was not served until the maturity date of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the final payment, though the contractor had not complied with his contract obligation to furnish evidence that all bills had been paid before he demanded his final payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 164; Dec. Dig. § 121.*]

Bill of interpleader by the Board of Education of the Borough of Riverton, in the County of Burlington, against Peter Tait and others, to determine the priority of claims against a fund. On final hearing. Distribution ordered.

The present controversy is to determine the order in which certain claims against a fund shall be paid. The fund has been deposited with this court by the Board of Education of the Borough of Riverton under a bill of interpleader.

The fund in controversy is the last installment of a contract made by Peter Tait, as building contractor, with the Board of Education of the Borough of Riverton for the erection of a schoolhouse, and is, in amount, \$5,389.50. A copy of the contract was filed in the clerk's office of Burlington county. By the terms of the contract this installment became due December 31, 1910; the building having been completed and accepted on that date.

The several claims against the fund are as follows:

- | | |
|--|------------|
| (1) Claim of William D. Lynch for..... | \$1,000 00 |
| This claim is under a written order made by the contractor on the Board of Education in favor of Lynch. The order bears date September 7, 1910, and was filed with the Board September 16, 1910. | |
| (2) Claim of J. S. Collins & Sons for..... | 2,000 00 |
| This claim is under a written order made by the contractor on the Board of Education in favor of Collins & Sons. The order bears date September 9, 1910, and was filed with the Board September 15, 1910. | |
| (3) Claim of Keystone Fireproofing Company for | 360 00 |
| This claim is made by claimant as a materialman under the provisions of the act popularly called the Municipal Liens' Act (3 Comp. Stat. 3315). Notice of claim of lien was duly served November 26, 1910. | |
| (4) Claim of Chas. Stockholm Lumber Company for | 181 11 |
| This claim is similar to the preceding one. Notice of claim of lien was duly served December 7, 1910. | |
| (5) Claim of John F. Robinson & Son for | 907 12 |
| This claim is similar to the two preceding claims. Notice of claim of lien was duly served December 10, 1910. | |
| (6) Claim of Arthur McCarty for..... | 750 00 |
| This claim is under a stop-notice served March 20, 1911, pursuant to the provisions of section 3 of the Mechanic's Lien Act (Comp. Stat. 3294). | |

Total claims \$6,198 23

At the time the bill of interpleader was filed, each of the three claimants above named who had served notices pursuant to the Municipal Liens' Act (claimants above numbered 3, 4, and 5) had filed bills for the en-

forcement of their claims pursuant to the procedure specified in that act for that purpose and had fully complied with all of the requirements of that act.

Joseph L. Thomas, of Camden, for J. S. Collins & Son. Francis D. Weaver, of Camden, for Peter Tait. William T. Boyle, of Camden, for Keystone Fireproofing Co. Lewis Starr, of Camden, for Charles Stockholm Lumber Co. Francis J. Smith, of Camden, for John F. Robinson & Son. Joseph Beck Tyler, of Camden, for Arthur McCarty. M. Van Boos Kirk, of Philadelphia, Pa., for Pensauken Art & B. Co.

LEAMING, V. C. (after stating the facts as above). It will be observed that three classes of claims are here involved: (1) Claims under orders issued by the contractor on the owner; these are first in date of issuance and service. (2) Claims filed under the Municipal Liens' Act; these are second in date of service. (3) A claim under the stop-notice provisions of the Mechanic's Lien Act. This is last in date of service.

It is conceded by the three claimants who claim under the Municipal Liens' Act that the two claimants who hold orders are entitled to be paid from the fund before their claims can participate. This concession is in accordance with the decisions in *Somers Brick Co. v. Souder*, 70 N. J. Eq. 388, 394, 61 Atl. 840; *s. c.*, 71 N. J. Eq. 759, 762, 70 Atl. 158; and *Cope v. C. B. Walton Co.*, 77 N. J. Eq. 512, 517, 76 Atl. 1044. The ground of these decisions is that the Municipal Liens' Act confers no inchoate lien on the fund in favor of laborers or materialmen prior to the service of a notice of claim of lien pursuant to the act. An order by the contractor on the owner is therefore operative as an equitable assignment of the money due or to grow due under the contract to the amount specified in the order as against claims subsequently filed under the act.

[1, 2] It is also conceded by counsel representing the stop-notice claim under the Mechanic's Lien Act that the three claims under notices served pursuant to the Municipal Liens' Act are entitled to be paid from the fund before his stop-notice claim. He claims, however, that his stop-notice entitles him to payment from the fund before the two orders are paid. It is manifestly impossible to give the orders precedence over the municipal liens' claims and to give the latter claims precedence over the stop-notice claim, and at the same time give the stop-notice claim precedence over the orders. The concession referred to as made by the claimant under the stop-notice appears to be necessary. If it be conceded that the stop-notice provisions of the Mechanic's Lien Act can be enforced against public building contracts, it will be observed that in *Slingerland v. Blinn*, 56 N. J. Eq. 413, 415, 39 Atl. 712, it is held that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the fifth section of that act is operative to create an inchoate lien in favor of laborers and materialmen on the liability of the owner under the contract; but such inchoate lien as there defined is clearly operative, at most, as against advance payments by the owner or orders or assignments made by the contractor. It is not operative against stop-notices of the same class first served (*Bayonne v. Williams*, 59 N. J. Eq. 617, 43 Atl. 669), and there seems to be no foundation for a claim that it would be operative against a prior notice served under the provisions of the Municipal Liens' Act, for such prior notice under the act last named is effective to create a statutory lien as of its date of service, and it would seem that any lien arising from a subsequent stop-notice would necessarily be subject to the prior consummated statutory lien created by the prior notice. A distribution in full recognition of the rights of the three classes of claims would thus seem to be rendered impossible. A. would become entitled to payment before B., and B. before C., and C. before A.

I am not aware that our court of last resort has been called upon to determine whether the stop-notice provisions of the Mechanic's Lien Act are applicable to a contract for the construction of a public building, or whether, if so applicable, such provisions have been superseded and in effect repealed as to public building contracts by the subsequent enactment of the Municipal Liens' Act. In *Frank v. Freeholders of Hudson County*, 39 N. J. Law, 347, it was held by our Supreme Court that, while a public building could not be subjected to a lien for labor or materials supplied in its construction, the provisions of the third section of the Mechanic's Lien Act touching stop-notices were operative to afford the remedy there given, if the contract should be filed by the municipality pursuant to the provisions of the act. It must be conceded, however, that the dissenting opinion of Justice Dixon, filed in that case, measurably weakens the value of the case as a precedent, especially to one who finds it difficult to adopt the views expressed in the majority opinion. Subsequent to the decision in *Frank v. Freeholders*, supra, our Legislature passed the Municipal Liens' Act, and in *Arzonico v. Board of Education of West New York*, 75 N. J. Law, 21, 69 Atl. 450, our Supreme Court held that the latter act was not operative to repeal the remedy afforded by the third section of the Mechanic's Lien Act against public buildings. The opinion filed in that case is based upon the view that the continuation of the remedy afforded by the third section of the Mechanic's Lien Act against public building contracts is not inconsistent with the enjoyment of the remedies created by the later act. It has been herein already pointed out that in the present case the rights secured to the claimant under the provisions of the Mechanic's Lien Act, if enforced, are operative to render

it impossible to award to the claimants under the Municipal Liens' Act the rights bestowed upon them by the provisions of that act. This circumstance appropriately occasions the observation that *Arzonico v. Board of Education*, supra, did not determine that the stop-notice provisions of the Mechanic's Lien Act were not superseded by the Municipal Liens' Act in cases of public improvement in so far as it should be found that the provisions of the former act were in fact inconsistent with the rights conferred by the latter act. Additional force is given to this observation by reference to the original repealing clause of the Municipal Liens' Act; that clause expressly repealed all inconsistent former legislation, but exempted from the operation of its repealing clause any claim of lien that at that time existed against moneys due under municipal contracts, as did also the unconstitutional similar statute of the preceding year which it replaced.

But conceding, for present purposes, that the stop-notice provisions of the Mechanic's Lien Act were originally operative against public building contracts, and that the subsequent enactment of the Municipal Liens' Act was not operative to supersede or repeal such stop-notice provisions in their application to public building contracts, even though the rights arising under the stop-notices, if enforced, should be found operative to supersede or defeat the liens afforded by the Municipal Liens' Act, a circumstance yet exists in the present case which appears to give to the orders and municipal lien notices the right of priority of payment over the stop-notice. That circumstance is the fact that the stop-notice in this case was served after the maturity date of the final payment under the contract. It has been repeatedly held that the inchoate lien which the provisions of section 5 of the Mechanic's Lien Act imparts to stop-notices under that act extends only to the time the liability of the owner matures according to the terms of the contract. *Slingerland v. Binns*, 56 N. J. Eq. 413, 415, 39 Atl. 712; *Donnelly v. Johnes*, 58 N. J. Eq. 442, 445, 44 Atl. 180; *Flaherty v. Atlantic Lumber Co.*, 58 N. J. Eq. 467, 469, 44 Atl. 186; *Smith v. Dodge & Bliss Co.*, 59 N. J. Eq. 584, 585, 44 Atl. 639; *Person v. Herring*, 63 N. J. Law, 599, 603, 44 Atl. 753; *Taylor v. Reed*, 68 N. J. Law, 178, 52 Atl. 579; *Edge v. McClay*, 72 N. J. Eq. 216, 64 Atl. 969; *Keupler v. Elsele*, 83 Atl. 999 (decided at the present term of the Court of Errors and Appeals and not yet officially reported). It is contended, however, that the last clause of section 6 of the Mechanic's Lien Act, which clause was added by the revision of 1898 (Act June 14, 1898 [P. L. p. 540]), is operative to extend the inchoate lien of laborers and materialmen beyond the time the last payment matures, and thus afford a preference in favor of a stop-notice served after the maturity of an installment over an order of assignment given at an earlier date. That view is pre-

sented with great force in *Luce on Mechanics' Liens* (1910 Ed.) pp. 70-75; but to adopt that view at this time *Taylor v. Reed*, supra, *Edge v. McClay*, supra, and *Keulper v. Reeve*, supra—all decided since the adoption of the provisions of the statute referred to—must be overruled upon the assumption that section 6 of the Mechanic's Lien Act as amended was not considered because not discussed in the opinions filed. I cannot think it proper for this court to base so drastic an action upon that uncertain assumption.

But whatever may be the force of the provisions of section 6 of the Mechanic's Lien Act, as amended by the Revision of 1898, I am unable to reach the conclusion that the section can in any view be deemed effective to give such stop-notice precedence over a prior notice given by a materialman pursuant to the terms of the Municipal Liens' Act for material supplied to a public improvement. In 1909 the municipal improvement act was amended, and the final section as amended was made to read that "all acts and parts of acts inconsistent with the terms of this act are hereby repealed." Act April 19, 1909 (P. L. p. 264). It has been already pointed out that, to give the stop-notice here in question priority of payment over the prior orders, it must be also given priority of payment over the prior notices served under the Municipal Liens' Act, and thus wholly prevent any payment to the holders of the municipal lien notices. To give stop-notices that effect in this case is, therefore, to render the beneficial provisions of the Municipal Liens' Act ineffective so far as the claim under the stop-notice is concerned; any provision of the Mechanic's Lien Act so operative would, in my judgment, be clearly inconsistent with the provisions of the Municipal Liens' Act, and so far as inconsistent be repealed by the repealing clause of the latter act. As already suggested, this view is not in conflict with *Arzonico v. Board of Education* heretofore referred to. That decision arose on a demurrer to a declaration in an action against the owner, and the single question was whether the stop-notice provisions of the Mechanic's Lien Act were wholly repealed as to public improvements contracts by the provisions of the Municipal Liens' Act. No conflict of claims under the two acts existed in that case. The concluding words of the opinion expressed the extent of the decision as follows: "We find nothing in the remedy provided by the act of 1892 (Municipal Liens' Act) inconsistent with that given by the third section of the Mechanic's Lien law in cases like the present." The court was not in that case called upon to determine, and did not determine, whether any provision of the Mechanic's Lien Act which should be operative, if enforced, to defeat the beneficial operation of the Municipal Liens' Act, and which should be, to

that extent, inconsistent with the provisions of the later act, was repealed.

[3] It is also contended in behalf of the stop-notice claimant that the last installment was not due when the stop-notice was served because of a clause in the contract which obligated the contractor to furnish evidence that all bills had been paid before he could demand his final payment. The building was completed and accepted and the architect's certificate given January 31, 1910. The contract clearly treated the final installment as falling due at that time. The mere fact that the contractor could not enforce payment of the installment which then became due until he had supplied certain evidence cannot be regarded as postponing the due date of the contract. But whatever view might be taken as to the due date of the contract, the views above expressed touching the provisions of the Mechanic's Lien Act, in so far as they conflict with the provisions of the Municipal Liens' Act, are controlling.

I am also unable to adopt the views urged in behalf of the stop-notice claimant that a certain letter of recall written by the owner was operative to impair the rights of the holders of one of the orders, or that the other order was subject to a condition which destroyed its effect as an equitable assignment, *pro tanto*, of the fund.

I will advise an order directing distribution of the fund by payment of the orders as first in priority, and the notices under the Municipal Liens' Act in the order of their dates as second. These payments will exhaust the fund.

In re ESSEX COUNTY PARK COMMISSION.
(Court of Chancery of New Jersey. April 18, 1912.)

1. MUNICIPAL CORPORATIONS (§ 519*)—SPECIAL ASSESSMENTS—LIEN—TIME EFFECTIVE.

P. L. 1903, p. 392, § 1, provides that all assessments for improvements upon lands in towns incorporated under the act shall be payable in 10 annual installments; the first at or before the expiration of one month from confirmation of the assessment, and thereafter, at the expiration of each year from such confirmation, one installment shall be payable with interest from the date of confirmation, provided that the owner may pay the whole or any balance of the installments at one time. *Held*, that the assessments became liens at the time of confirmation of the assessments rather than at the date fixed for payment thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1220-1227; Dec. Dig. § 519.*]

2. EMINENT DOMAIN (§ 320*) — TIME OF TAKING.

Eminent Domain Act (P. L. 1900, p. 80) § 3, entitles owners and persons interested in lands to be condemned to notice of the proceedings, and requires a notice of lis pendens to be recorded in the clerk's office, in default whereof persons acquiring an interest in the property pending the proceedings will not be bound thereby. Section 6 requires the assessment of the amount to be paid by the con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

demning party to be made "as of the date of filing the petition and order thereon." Section 7 provides that, upon filing of the commissioners' report "and upon payment or tender of the amount awarded, the petitioner may enter and take possession of the land." Section 14 provides that, if possession be not taken before the finding by the jury, petitioner, upon payment as aforesaid or payment into court of the amount found due, may take possession. The Constitution provides that private property shall not be taken for public use without just compensation. Laws April 2, 1906 (P. L. p. 39), amending the eminent domain act, permits the proceedings to be abandoned within 20 days after filing the award or within 20 days after rendition of verdict. *Held* that, until payment or tender of compensation, the title to the condemned land, as between the owner and others than petitioner, remains in the owner, the land not being taken as of the date of the filing of the petition in the condemnation proceedings, and hence may be the subject of voluntary or involuntary liens against it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 851, 852; Dec. Dig. § 320.*]

3. MUNICIPAL CORPORATIONS (§ 519*)—SPECIAL ASSESSMENTS.

P. L. 1908, p. 524, § 41, provides for a report by the board of assessments as to assessments for benefits for public improvements by a city, showing the land benefited, amount assessed, and for confirmation of the report by the city council after hearing, and that after such confirmation the report and map, with a copy of the resolution confirming it, shall be delivered to the collector of taxes, "and the assessment so levied upon the lands specially benefited shall thereupon be due and payable and shall become liens upon the lands assessed as hereinafter provided." The section further directs that the assessment shall be payable in 10 equal installments, the first of which shall be payable 30 days after the confirmation of the assessment, and the others in one to nine years, respectively, after confirmation, and that each installment of such assessment shall be a first lien upon the land assessed from the date that the installment is due and payable as herein provided, and shall remain a lien until paid, notwithstanding any alienation thereof. *Held*, that the statutes gave the city a right to a lien upon the lands assessed for the whole assessment from the time of the delivery of the report to the collector of taxes, the lien to arise in the future for each of the 10 assessments at fixed intervals, and, since the right to future liens arising pending proceedings to condemn the land was cut off by payment of the money to the owner, it would be transferred to the money received by him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1220-1227; Dec. Dig. § 519.*]

Application by the Essex County Park Commission for leave to pay into court condemnation money awarded to Philip J. Bowers. On application of said Bowers for payment. Heard on petition and answers, affidavits, and stipulations. Judgment as stated.

Ralph E. Lum, of Newark (Lum, Tambllyn & Colyer, of counsel), for petitioner. Charles F. Kocher, of Newark, for Town of Bloomfield. Borden D. Whiting, of Newark, for City of East Orange.

EMERY, V. C. The Essex Park Commission by a petition filed on December 5, 1910,

under the eminent domain act of 1900 and its supplements, took by condemnation lands of Philip J. Bowers in Essex county located partly in the town of Bloomfield and partly in the city of East Orange. The lands taken bounded on a street called Cleveland terrace, and, previous to the filing of the park commission's petition for condemnation, the town of Bloomfield had, on Bowers' application, opened this street through his lands within its limits, and had also on like application constructed a sewer therein and laid down Telford pavement and constructed curbing and gutters thereon. The city of East Orange had also previous to the filing of the petition for condemnation improved the street by grading, paving, guttering, and curbing within its limits. Subsequent to the filing of the petition, assessments for benefits were made against the lands of Bowers, the assessment of \$2,431.75 for the improvement in East Orange being confirmed by the city council on February 14, 1911, and the several assessments for the Bloomfield improvements at later dates, viz., May 15, 1911, for street opening, \$55.87; sewer, \$207.36; curbing and guttering, \$318.72—altogether, \$581.95—and on June 7, 1911, for Telford pavement, \$607.49. On May 4, 1911, after the confirmation of the East Orange assessment but before the confirmation of any of the Bloomfield assessments, the award of the commissioners in the condemnation proceedings was filed awarding to Bowers \$23,264 for his land taken and damages. Bowers appealed from the award and was awarded by a jury on October 23, 1911, the sum of \$28,000 for land taken and damages. The park commission made no payment or tender of the money to Bowers, but on November 14th, more than 20 days after the verdict of the jury, applied to this court for leave to pay the amount of the award into court, and, after notice to Bowers and the municipalities, an order was made directing payment into court of the sum of \$6,000 sufficient to meet the alleged liens and the balance to be paid to Bowers. Bowers now applies for the payment to himself of the entire amount paid into court, claiming that the assessments are not liens upon or chargeable against the fund.

[1] Independent of the effect of the condemnation proceedings, the Bloomfield assessments became statutory liens on the property assessed on their confirmation by the town council. The statute relating to assessments in towns (P. L. 1903, p. 392, § 1), which makes them liens, is to be construed as fixing the time of confirmation rather than the date fixed for payment of the assessment as the date when they became liens.

For present purposes the rights of Bloomfield, if accruing on the latter dates, are as effective as if they accrued on May 15, 1911, the date of confirmation, inasmuch as both dates are subsequent to the award. The ex-

tent to which the statute relating to cities (P. L. 1908, § 41, pp. 523, 525) gives the city of East Orange a lien for assessments and the time when the lien arises is not so clear, and this question will be separately considered. For the present I assume that the assessment (or at least the first one-tenth installment thereof) became due and was a lien before the filing of the award of the commissioners May 4, 1911.

[2] The question in the case on the above facts and assumptions relates to the right under the eminent domain act of persons acquiring liens on the lands condemned or interests therein pending the condemnation proceedings to claim payment of the liens out of the purchase money. By the Eminent Domain Act (P. L. 1900, p. 80) § 3, owners, occupants, and persons interested in the lands are entitled to notice of the proceedings for condemnation, and a notice of *lis pendens* naming the parties interested and describing the land is to be recorded in the clerk's office of the county, "in default whereof persons acquiring an interest in the property pending the proceedings shall not be bound thereby." Such notice was filed in this case, and the municipalities, not having yet acquired a statutory lien on the lands or interest therein at the time of filing the petition, were not named as parties to the proceedings.

It is claimed on behalf of Bowers that under the eminent domain act his lands were "taken" as of the date of filing the petition, that his title to the lands was, upon the completion of the condemnation proceedings, divested as of that date, and that his right to the money, although it was not paid until the completion of the proceedings, took effect as of the date of the petition, and therefore his lands never became subject to the liens, and he is entitled to the compensation paid for them without payment of the assessments. This claim is based on the provision in the sixth section of the eminent domain act which requires the assessment of the amount to be paid by the condemning party for land and damages to be made "as of the date of filing the petition and order thereon." It is contended that this provision has also the effect as between the owner and those claiming under him, after the filing of the petition, of affecting the transfer of title to the land as made at the same time. But the subsequent provisions of the act indicate that the land is not to be considered as "taken" from the owner so as to deprive him of the ordinary rights and obligations of an owner of the property until payment or tender of the award or verdict for damages. Section 7 provides that, upon the filing of the commissioners' report and upon payment or tender of the amount awarded, the petitioner may enter and take possession of the land, and section 14 provides that, "if possession shall not have been taken before the finding by the jury, then the petitioner, upon payment as

aforsaid, or payment into the court of chancery of the amount found due by the jury, may enter upon and take possession of the lands." These statutory conditions, requiring payment as the condition precedent to "taking," assure the benefit of the constitutional provision that "private property shall not be taken for public use without just compensation." It may happen in some instances that the rule of evidence prescribed by the statute as to the time of the valuation may not give the owner his full constitutional rights and may perhaps not be the proper method of assessing his damages.

Previous to this special statutory rule fixing damages as of the date of the petition, the value of the premises taken was assessed in the law courts as of the date of the award of commissioners (*Trimmer v. Railroad Co.*, 55 N. J. Law, 46, 25 Atl. 932), and in equity courts as of the date of the entry (*Doremus v. Paterson*, 73 N. J. Eq. 474, 501, 69 Atl. 225 [*Stevens, V. C.*, 1907]). But this consideration as to the rule of evidence relating to damages and values is aside from the present inquiry which relates only to the time when, as between the owner and persons other than the petitioner, claiming under the owner *pendente lite* either voluntarily, or involuntarily, his right and title to the lands as lands has terminated.

By requiring notice of the petition to be given to all parties interested and the *lis pendens* to be filed and the further provision that, on failure to file *lis pendens*, persons acquiring an interest in the property pending the proceedings shall not be bound thereby, this proceeding is assimilated to the ordinary formal suit relating to lands and, pending the proceedings, the rights of the owner in the lands continue subject to his voluntary disposition by deed or mortgage, disposition by law on his death testate or intestate, and also to involuntary proceedings such as judgments, attachments, and the like. Taxes and assessments for municipal proceedings becoming liens on the land pending the proceedings stand in the same situation. In *re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549 (*Pitney, V. C.*, 1901). It appears by the record in this case that taxes assessed after the petition were directed to be paid as well as those assessed previously.

The condemnation proceedings, so far as relates to divesting title between the owner and persons other than the condemning party, are pending until the actual payment or tender of the compensation, and, as between them, his rights as owner of the lands continue up to the time when he becomes the owner of the money paid for them. This construction, or rather this application of the effect of the act in establishing judicial proceedings for condemnation with formal parties and *lis pendens* notices, gives the same effect as between the owner and others than the petitioner as is given in pending

suits of other kinds, and leaves the owner still clothed with full property rights subject only to the rights of the petitioner or suitor. And a further special reason exists for not depriving the owner pending the proceedings of such property right in the lands or freeing him from obligations to others. This reason is that, under the eminent domain act, the condemning party is not bound when the award is made to continue the proceedings and take the land, but under a supplement of April 2, 1906 (P. L. 99), may abandon the proceedings at any time within 20 days after the filing of the award, or, if the issue shall be tried by a jury, within 20 days after rendering of the verdict upon payment of the costs and expenses. If on the filing of the petition the owner's title to the lands is divested by the statute as is now claimed by the owner, then he can no longer convey, mortgage, or devise the lands pending the proceedings, and upon any abandonment the title must be revested in him. In the interim the title, as all titles, must vest somewhere, must be considered as in the condemning party without payment. It would be an anomalous condition of title if, pending the proceedings, the owner could not convey, mortgage, or devise the lands, and if, pending the proceedings, no judgment recovered against him bound his interest in the lands. The more logical as well as practical construction of the effect of the act upon the owner's title to the lands is that, pending the proceedings and up to the time of payment or tender, his title to the lands continues as between himself and others than the petitioner and is subject to liens voluntary or involuntary against him. The title being in the present instance divested by payment into court, the liens attach to the money in court. The Bloomfield assessments, being under the statute liens on the land before payment of the money, should be paid out of the fund.

[3] Second. As to the East Orange assessment: The "act concerning cities" (P. L. 1908, c. 250, pp. 486, etc.), under which the East Orange assessments were made, provides (section 41, p. 524) for a report by the board of assessments of the assessment for benefits, showing the lands benefited and the amount assessed as benefits, a confirmation of the report by the city council after a hearing thereon, and then provides that after such confirmation the report and map, with a copy of the resolution confirming the same, certified by the city clerk, shall be delivered to the collector of taxes "and the assessments so levied upon the lands specially benefited shall thereupon be due and payable and shall become liens upon the lands assessed as hereinafter provided." These were delivered to the collector on February 15, 1911, as appears by the amended answer of the city and stipulation of the parties. The subsequent provision thus referred to is the

same section (page 525) and directs that such assessment shall be payable in 10 equal installments; the first of which shall be due and payable at or before the expiration of 30 days after the confirmation of the assessments, and the others respectively in one, two, three, four, five, six, seven, eight, and nine years after the date of such confirmation, with further provisions relating to interest on the installments paid or unpaid. Then follows the provision as to the lien of the assessments: "Each installment of such assessment with the interest shall be a first lien upon the land assessed from and after the date when such installment of the assessment is due and payable as herein provided, and shall remain a first lien thereon until paid, notwithstanding any devise, descent, alienation, mortgage, or other incumbrance thereof, and shall be enforced and collected by sale of the land, as in case of taxes," etc.

Reading together these two clauses of this forty-first section relating to assessments, their effect is to give to the city, from the time of the delivery of the report, etc., to the collector, and thereupon—that is, at once—a right to a lien upon the lands assessed for the whole assessment; the lien to arise in the future for each one-tenth of the assessment and interest at fixed intervals. These future liens, moreover, are to be first liens from and after the dates fixed for the payments of the several installments unaffected by any devise, alienation, etc. This includes, I think, devises, alienations, etc., after the delivery to the collector and previous to the time fixed for the lien to arise as well as subsequent to this time. From the time of delivery to the collector, this right of the city to future liens on the lands is a right to an interest in the lands. This right in its inception may not be an existing lien on the lands in the technical sense of the word "lien" or within the meaning of a covenant against "liens" between grantor and grantee, but it is from its inception a right or interest in the lands in the nature of an incumbrance thereon. It is at once a subsisting right or incumbrance just as an inchoate estate in dower is held to be an incumbrance before the dower interest becomes consummated. *Carter v. Denman*, 23 N. J. Law, 260, 273 (Sup. Ct. 1852). This construction of the clauses of the section relating to the assessments gives full effect to all the provisions of both clauses and by a natural meaning and construction of the words used, and seems to be the only construction giving any effect to the part of the first clause which, after directing the delivery of the report to the collector, provides that the assessment so levied shall "thereupon * * * become liens upon the lands assessed as hereinafter provided."

On this ground it seems to me to be the construction which should be adopted, although it creates a right or interest relat-

ing to liens for assessments which differs from the usual statutory provisions. It is within the power of the Legislature to create such right, and the only question is whether the statute does this. I conclude that it does.

This right to future liens on the land existing in the city from the time of the delivery of the report to the collector arose pending the condemnation proceedings, and was therefore subject thereto and was cut off and destroyed when the condemnation was perfected by the payment of the money. And the right or interest of the city in the lands being thus cut off, its rights in the land existing at the time the title was divested are transferred to the compensation money which is paid for the fee-simple estate including all interests, and the city is entitled to be paid therefrom.

ZELLER v. TOWN OF GUTTENBERG et al.
(Supreme Court of New Jersey. June 19, 1911.)

(Syllabus by the Court.)

CERTIORARI (§ 45*)—FORM OF WRIT—PARTIES.

In certiorari to review municipal action, where others than the municipality are to be made parties as being interested in the legality of such action, their names should appear not in the body of the writ, but only on its indorsement.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 45.*]

Certiorari prosecuted by John Zeller to the Town of Guttenberg and others. On rule to show cause why certiorari should not be allowed. Order made as to framing of writ.

Argued February term, 1911, before GARRISON, PARKER, and VOORHEES, JJ.

Robert S. Hudspeeth, for prosecutor.

PARKER, J. The application is for the allowance of a writ of certiorari to bring up the resolution of the town council of the town of Guttenberg, in the county of Hudson, providing that the sum of \$300 be paid to each member of the town council and the mayor for services rendered. The amended charter of the town of Guttenberg (P. L. 1875, pp. 612-613) provides that the councilmen "shall serve without fee or reward except when on official duty by order of the board, when they may receive such compensation as may, by resolution, be directed."

It appears by the testimony taken under the rule that the five councilmen presented bills to the town for services rendered, claiming \$5 per meeting of the council for 41 meetings, \$205, and \$95 for various services, consisting of inspecting improvements, checking assessment lists, auditing books, etc. Conceding the legitimacy of these latter items under the provision just quoted, it seems quite plain that the charter was intended to forbid the payment by the town of any com-

pensation to the councilmen for attending meetings, and, to say the very least, their right to such compensation, in view of this language of the charter, is so doubtful as to justify, if not require, the allowance of a writ.

It is suggested that a writ would be futile at this time because the bills have been paid; but in *Fagan v. Hoboken*, 83 Atl. 772, June term, 1910, not yet officially reported, this suggestion was overruled, and we think properly, on the ground that, if the payment was unwarranted, the municipality might well be held entitled to bring suit and recover back the money. In *Loudenslager v. Atlantic City*, 80 N. J. Law, 658, 77 Atl. 1060, the money had been expended, but the resolution directing such expenditure was set aside on certiorari. Counsel may present a writ, to be directed to the town of Guttenberg as the custodian of the records to be brought up. *Davis v. Harrison*, 46 N. J. Law, 79; *Young v. Crane*, 67 N. J. Law, 453, 51 Atl. 482. The individual councilmen as interested in the result should be also parties defendant. *MacFall v. Dover*, 70 N. J. Law, 518, 57 Atl. 136. But their names should appear only in the entitling part of the writ; i. e., the indorsement. *Griscom v. Gilmore*, 15 N. J. Law, 475; *State v. Justice*, 24 N. J. Law, 413, 414; *Warford v. Smith*, 25 N. J. Law, 212; *State (Miller, Prosecutor) v. Stout*, 33 N. J. Law, 42; *State (Coar, Prosecutor) v. Jersey City*, 35 N. J. Law, 404, 405.

Let the writ be framed accordingly.

CARPENTER v. CENTRAL VERMONT RY. CO.

(Supreme Court of Vermont. Windham. May 20, 1912.)

1. VENUE (§ 70*)—CHANGE—APPLICATION.

On an application for a change of venue, the fact that defendant's petition was verified by the oath of its general manager, and that no counter affidavits were submitted, did not require the court to treat the facts stated therein as conclusive.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 122-126; Dec. Dig. § 70.*]

2. VENUE (§ 70*)—CHANGE—APPLICATION—AFFIDAVIT.

On an application by a railroad company for a change of venue, petitioner alleged on information and belief that certain newspapers had a wide circulation throughout the county; that they had created a prejudice against defendant; that certain litigation was pending with reference to the abolition of a grade crossing, in which the citizens had taken sides against defendant, and, when a railroad bill authorizing a competitor to parallel defendant's tracks was pending before the Legislature, public meetings were held at which marked hostility was shown toward defendant, and a special town meeting was afterwards held in which a previous appropriation voted by the town authorities to be used in the abolition of the crossing was revoked, etc.; also, that throughout the county there existed a prejudice against petitioner, well defined, general, and openly expressed. Held, that the news-

paper reports were no more than a statement indicating hostility on the part of the writers without indicating any effect on the readers and could not be accepted as reflecting the sentiment of the county, and the allegation that a well-defined prejudice against defendant existed being a mere expression of petitioner's conclusion, the court was not bound to find that defendant could not obtain a fair trial in the county, notwithstanding there were no opposing affidavits.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 122-126; Dec. Dig. § 70.*]

Action by L. M. Carpenter against the Central Vermont Railway Company. Petition to the Supreme Court for a writ of certiorari to review an order denying defendant's application for a change of venue. Writ denied.

See, also, 84 Vt. 538, 80 Atl. 657.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Clarke C. Fitts and Harold E. Whitney, for petitioner. Cudworth & Pierce and Gibson & Waterman, for respondent.

POWERS, J. We have here an action on the case, which is pending in the county court of Windham county, wherein the defendant seasonably preferred its petition to the presiding judge of that court, asking for a change of venue, because of a prejudice against it in that county. The prayer of that petition having been denied on hearing, the defendant has brought this petition for a writ of certiorari to bring up for review the record of the proceedings thereunder.

So far as need be stated, the allegations of the petition for a change of venue are to this effect: The pending suit is an action for the recovery of damages on account of personal injuries alleged to have been suffered by the plaintiff, while in the defendant's employ, through the latter's negligence. The defendant operates a railroad from New London, Conn., to Brattleboro, Vt. In September, 1910, the Public Service Commission ordered the defendant to abolish the grade crossing at Brattleboro—to which undertaking the town of Brattleboro had voted to appropriate a large sum of money. This order, the defendant promptly proceeded to carry into effect. At the last session of the Legislature, the Vermont Valley Railroad, which is operated by the Boston & Maine Railroad, sought the right to construct a line paralleling the tracks of the defendant from South Vernon to Brattleboro, and a bill was introduced providing for this. This project brought on an acute controversy between the two railroads, which came to involve the citizens of Brattleboro and the whole county, who on account of expected increased railroad facilities, benefits, and advantages, earnestly espoused the cause of the Vermont Valley Road. The two newspapers published in Brattleboro took an active part in the controversy, advocating the

cause of the Vermont Valley, and made it a leading feature of their successive issues. These papers are said to circulate in every town in the county and to reach practically every person therein qualified to serve as jurors in the county court, and have been a factor in creating a general prejudice against the defendant throughout the county. Certain issues of these papers are made a part of the petition by reference. While the railroad bill was pending before the Legislature, public meetings were held at Brattleboro, at which marked hostility toward the defendant was shown. A special town meeting was held in Brattleboro, at which the appropriation in aid of the abolition of the grade crossing was rescinded, and the town authorities began proceedings to have the order aforesaid revoked, which proceedings the defendant is contesting. Brattleboro is the natural business center of the county; from it emanate lines of public communication reaching practically every town and hamlet therein, and anything which affects the railroad situation in Brattleboro is of vital interest to the whole county, and citizens throughout the county participated in the general agitation which has been going on regarding these matters. The allegations close with the assertion that "throughout the county there exists a prejudice against your petitioner, well defined, general, and openly expressed." The petition is signed and sworn to by G. C. Jones, general manager. No formal answer was filed. Numerous exhibits and copies of records and proceedings were filed in support of the petition, and the plaintiff filed numerous newspaper exhibits. No testimony was filed or offered by either party. In disposing of the matters, the presiding judge said: "I am unable to find that there is reason to believe that said action cannot be impartially tried in the county of Windham, and the petition is dismissed. I do not consider the evidence sufficient to show such a feeling among the people of this county as to prevent a fair trial of the case by jury."

[1] The defendant insists that, inasmuch as no answer was filed and no counter affidavits submitted, the allegations of the petition, being verified by the oath of the defendant's general manager, should have been treated as conclusive of the facts thereby covered; and, since they cover all essential facts, there was no reason for the exercise of any discretion, and the petition should have been granted. In support of this proposition, the defendant cites *Mix v. Kepner*, 81 Mo. 93. There, the plaintiff filed a written application, verified by his oath, alleging that he believed that "the said defendant has an undue influence over the minds of the inhabitants of Henry county, and that the inhabitants of said Henry county are so prejudiced against plaintiff that he cannot have a fair trial in said Henry county." This motion

was filed under a statute which provides that the court shall be "satisfied" that the party could not have a fair trial in the county where the action is pending, and it was held that the application and verification, being in full compliance with the statute, made a *prima facie* case, and that the statute did not require that the court should be "satisfied" in any other manner. We cannot adopt this view. It makes it too easy to secure a change of the place of trial. Whether, in the circumstances here presented, the petition stood as anything more than a pleading, and whether the presiding judge was required to treat it as evidence at all, are questions not presented; for it appears that he did treat it as evidence.

[2] But, in any view, he was not obliged to adopt the inferences and opinions therein contained. He was to draw his own inferences and reach his own conclusions from the specific facts set forth. If we analyze the allegations, we find much that the presiding judge was not obliged to accept as true. If we separate the allegations of specific facts, like the pendency of the litigation over the grade crossing, the contest in the Legislature, the public meetings, the contents of the newspapers, etc., and assume that it was the duty of the judge to treat these as true, it does not dispose of the matter. The ultimate fact to be established was that there was reason to believe that the defendant could not obtain an impartial trial in Windham county. To show this, the petitioner alleges on information and belief that the newspapers have a very wide circulation throughout the county, and that they have created a prejudice against it. It cannot be claimed that the presiding judge was obliged to treat these allegations as sufficiently proved. They had no force as evidence, and could do no more than raise an issue. In this respect they were like similar allegations in a sworn answer in chancery. See *Wooley v. Chamberlin*, 24 Vt. 270. But if these allegations were to be taken as true, it would not help much. It is not claimed that the hostility to the defendant manifested in the various newspaper items should be taken as a *reflection* of the sentiment of the county; the assertion is that these papers were factors in *creating* a hostility toward the defendant. It must be admitted that these items which appeared from week to week indicated bitterness and hostility on the part of the writers; but the effect upon those who read them is a matter of pure speculation. In *Missouri v. Barton*, 8 Mo. App. 15, it was held that editorials in a newspaper circulating in the county where a prosecution was pending were not competent to establish such a prejudice as would prevent an impartial trial. Without further proof, the presiding judge was not obliged to treat these newspaper utterances of so much importance as is claimed for them.

The further allegation that there exists throughout the county a general and well-defined prejudice against the defendant is but an expression of the petitioner's conclusion; it is an inference which the defendant draws from the other facts stated. The presiding judge was not obliged to adopt it, but was at liberty to reject it for lack of evidence. The law of this whole subject is so fully covered in the recent case of *Willard v. Norcross*, 83 Vt. 268, 75 Atl. 269, that further comment is unnecessary. Upon a consideration of the whole case, we cannot say that the presiding judge failed to exercise according to law the discretion which the law vested in him.

Writ denied, with costs.

McARTHUR v. BLONDIN et al.
(Supreme Court of Vermont. Franklin.
May 20, 1912.)

APPEAL AND ERROR (§ 80*)—INTERLOCUTORY JUDGMENT.

A decree appointing a master to ascertain and report injunction damages and restraining the orators from delaying, hindering, or preventing defendants from taking and holding possession of the land in controversy, "until the further order of court," was interlocutory only, and unappealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

Appeal in Chancery, Franklin County; E. L. Waterman, Chancellor.

Bill by Evangeline McArthur against E. W. Blondin and another, and by Evangeline McArthur and others against Blondin and another. From an order appointing a master to assess injunction damages, Evangeline McArthur appeals. Dismissed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

H. P. Dee, for defendants. Nathan S. Post and C. G. Austin & Sons, for oratrix.

PER CURIAM. When this case was remanded (*Blondin v. McArthur et al.*, 84 Vt. 516, 80 Atl. 663), such proceedings were had in the court of chancery that a decree was entered appointing a master to ascertain and report the injunction damages, and restraining the orators from delaying, hindering, or preventing the defendants from taking and holding possession of the land and premises in question "until the further order of court." Without the defendants' knowledge, an appeal was allowed from this decree, which appeal the defendants moved to dismiss, but the motion was overruled.

It is admitted here that so much of the decree as relates to the appointment of a master is not final, but interlocutory merely, and it is apparent that the rest of it is equally so, for it does not touch the merits of the controversy, and is to be in force only "until further order" of the court.

So the decree is one from which no appeal lies, and this court, even on its own motion, will dismiss the appeal in such cases. *Abbott v. Sanders*, 83 Vt. 165, 74 Atl. 1058; *Taft v. Mossey*, 77 Vt. 165, 59 Atl. 166; *Nelson v. Brown*, 59 Vt. 600, 10 Atl. 72.

Appeal dismissed.

CUNNINGHAM et ux. v. BLANCHARD et al. (Supreme Court of Vermont. Battleboro. April 5, 1911. On Rehearing, May 6, 1912.)

1. FRAUDS, STATUTE OF (§ 152*)—PLEADING—NECESSITY.

An oral contract relating to land is enforceable as if in writing, if the statute of frauds is not pleaded.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 363; Dec. Dig. § 152.*]

2. SPECIFIC PERFORMANCE (§ 127*)—INCIDENTAL RELIEF.

Equity having jurisdiction of a suit for specific performance of an agreement to reduce to writing an oral contract to purchase land foreclosed, resell it, and divide the proceeds, it will retain jurisdiction for all purposes, including an accounting by defendants for the value of the land.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 406-411; Dec. Dig. § 127.*]

3. VENDOR AND PURCHASER (§ 55*)—DIVISIBLE CONTRACTS.

Orator and defendant agreed that defendant should purchase property mortgaged by orator, on which a decree of foreclosure had become absolute, and that orator should have the opportunity of repurchasing a part thereof called the "core" within a reasonable time; that the other land should be divided into lots and sold by their joint efforts, the first of the proceeds going to defendant to reimburse him for the amount paid over what he was to receive for the "core," and the balance to be equally divided between them. Orator did not offer to purchase the "core" within a reasonable time, and defendant sold it to another. *Held*, that the contract was divisible; the part relating to the option to purchase being distinct from that entitling orator to a part of the proceeds of the lots, so that orator could enforce his equitable rights as to the latter, though he had no rights under the option agreement.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 86; Dec. Dig. § 55.*]

4. EQUITY (§ 117*)—MISJOINDER OF PARTIES—WAIVER.

Where a bill shows on its face any misjoinder of parties, a defendant who did not demur on that ground, or raise the question in his answer, waived the objection.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 285-292; Dec. Dig. § 117.*]

5. ACCOUNT (§ 8*)—DEFENSES—FRAUD.

Orator and defendant agreed that defendant should purchase land formerly belonging to orator, on which a decree of foreclosure had become absolute, and that a part of it should be divided into lots and sold by their joint efforts, and the proceeds divided between them. *Held*, that the fact that orator fraudulently represented to defendant, to induce him to purchase the land, that he had customers for several of the lots, would not prevent him from obtaining an accounting for the proceeds of the lots; defendant not having rescinded nor offered to rescind the contract for fraud.

[Ed. Note.—For other cases, see *Account*, Cent. Dig. § 22; Dec. Dig. § 8.*]

On Rehearing.

6. APPEAL AND ERROR (§ 832*)—REHEARING. Pub. St. §§ 1313-1316, relating to rehearings in the Supreme Court, do not authorize a rehearing for the purpose of giving opportunity to present new questions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

7. APPEAL AND ERROR (§ 832*)—REHEARING—GROUNDS.

As a rule, failure to present a case fully on the original hearing is not ground for granting a rehearing in the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

8. APPEAL AND ERROR (§ 832*)—REHEARING—GROUNDS—MISTAKE OF LAW.

A rehearing may be had on appeal, if a material mistake of law is made in the decision on the original hearing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.*]

9. APPEAL AND ERROR (§ 835*)—ESTOPPEL TO ALLEGED ERROR.

Where, in a suit for an accounting for lots purchased under a contract for resale and division of the proceeds between the parties, defendant tacitly conceded on the original hearing in the Supreme Court that he must account if his objections to an accounting were not sustained, as they were not, and that the accounting would be as of the time of the hearing before the master, he cannot complain on rehearing that the value of the lots at the time of the commencement of the suit, and not at the time of hearing before the master, was adopted for the purposes of an accounting, where the lots have been increasing in value.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3241-3243; Dec. Dig. § 835.*]

Appeal in Chancery, Orleans County; E. L. Waterman, Chancellor.

Suit by John M. Cunningham and wife against J. F. Blanchard and others. From a decree dismissing the bill, orators appeal. Reversed and remanded for further proceedings, and a decree for orators.

This is a suit in equity against J. F. Blanchard, W. C. Perkins, and David G. Perkins to secure the orators' rights in certain real estate under an oral contract with defendant Blanchard.

The master finds the following:

The orators are husband and wife and lived on the premises in question, of which they were tenants of the entirety, and which consisted of about four acres of land on which were a large two-story dwelling house and ell, and a large barn. On September 10, 1907, there became absolute a decree in favor of the Orleans Trust Company, foreclosing the orators' rights in those premises, where they still lived. That decree on November 5, 1907, amounted to \$3,873. On September 30, 1907, the Orleans Trust Company informed the orators that, while not agreeing to do so, if before the 1st day of the following November the orators produced a customer who would pay said de-

cree, a conveyance would probably be made. There was no evidence that defendant Blanchard ever knew of that suggestion. Soon thereafter orator John, who throughout, with the knowledge and consent of his wife, acted for them both, had several talks with defendant Blanchard about the latter's purchasing the premises, which Blanchard thereupon carefully examined, and finally it was agreed between the orators and Blanchard that the latter should purchase the premises from the Orleans Trust Company at the amount of the decree; that a designated portion of the land should be surveyed into building lots; that a road should be constructed along a designated course to accommodate those lots; that, at the price of \$3,000 to be paid within a reasonable time, the orators should have the opportunity to purchase that portion of said premises called the "core," which was the portion whereon said buildings were located, and bounded by said lots and proposed road; that the barn and all were to be the property of Blanchard, with the right to remove the same; that orator John and Blanchard should use their joint efforts to sell said building lots; that the first money derived from such sales should be used to reimburse Blanchard for the amount he should have expended in excess of the \$3,000 he was to receive for the "core," the agreed amount of which reimbursement was \$900; and that the remainder of the money derived from such sales should be equally divided between the orators and Blanchard; and that this oral agreement should be reduced to writing.

In accordance with this agreement, Blanchard, on November 5, 1907, paid the Orleans Trust Company, \$3,873, the amount of said decree, and took a deed of said premises from it to himself; and soon thereafter he leased the "core" to the orators at a rental of \$5 per week, which was estimated to be the amount required to pay the interest on the \$3,000, for which the orators were to have the "core," the taxes and insurance on that property, and \$50 a year for repairs. This rental the orators continued to pay Blanchard until he sold the "core" to defendant W. C. Perkins, as hereinafter stated.

In May, 1908, orator John asked Blanchard to have said oral agreement reduced to writing that the orators might have evidence of their rights, which Blanchard refused to do, and refused to deal further with orator John, but said that he would convey the "core," to the orators at any time on payment of \$3,000, and this Blanchard was ready and willing to do during all the time that he held title to the "core." About this time defendant W. C. Perkins, under Blanchard's employment, went upon the premises and surveyed and plotted the building lots. The orators complained that the lots so laid out left the "core" smaller than was contemplated by said oral contract. The land so in dispute is a strip 16

rods long and two rods wide. Soon thereafter Blanchard moved the barn from the "core" onto one of the lots so laid out by Perkins, made it into a dwelling house, and caused the road that Perkins had laid out to serve the building lots to be worked.

On August 26, 1908, defendant W. C. Perkins, with full knowledge of the oral contract between the orators and Blanchard, and of the latter's refusal further to deal with orator John, took from Blanchard to himself a lease of the "core" for one year, with the option to purchase it for \$3,000; and, on September 11th following, he exercised that option and took a deed of the "core" from Blanchard to himself, with all the buildings thereon, except the barn, which had not then been moved; and, on February 9, 1909, he conveyed the "core" to his father, defendant David G. Perkins. The orators knew about the lease and deed from Blanchard to W. C. Perkins, and were satisfied therewith, but supposed that they had the same right to purchase from said Perkins that they formerly had to purchase from Blanchard under the terms of said oral contract; and, on September 1, 1908, the orators took from Perkins a written lease of the "core" for eight months, with the option to purchase it for \$3,000. In view of the settlement with the Perkinses, which is referred to in the opinion, further statement of their relation to the controversy is unnecessary. The other material facts are recited in the opinion.

The prayer of the bill is that the conveyances from defendant Blanchard to defendant W. C. Perkins, and from the latter to his father, "may be canceled and set aside as a fraud upon the rights of, and a cloud upon the title of, the orators; that defendant Blanchard be decreed to surrender up and convey to the orators the whole of said premises upon being paid the amount which he paid upon said decree of foreclosure, with interest to the date of said redemption, or, in default thereof, that said Blanchard be decreed to move his said dwelling house within the limits of the nine lots originally agreed to be laid out upon the rear of said estate; be ordered to account to the orators for the damage to the physical condition of said estate by the acts of said defendant herein complained of; and for the price of said building lots; and for such other relief as to the court shall seem meet, and for their costs."

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Herbert W. Blake, for orators. E. A. Cook and Williams & Dane, for defendant Blanchard.

ROWELL, C. J. It is said in the brief for the defendant Blanchard, who alone is defending, and not denied by the orators, that the orators have settled with the defendants

Perkins, to one of whom Blanchard sold the homestead, called the "core" of the property in question, and that they are not now parties to the case. We treat that as eliminating the "core," leaving only the matter of the building lots adjoining the "core," as to which the orators seek to make Blanchard account for their interest therein, if that be deemed more equitable than to make him reduce to writing the agreement of the parties found by the master concerning the whole property. [1] But the orators have nothing to gain in this suit by having that agreement reduced to writing, for, the statute of frauds not being set up as a defense, it is just as enforceable here as though it were in writing, if an accounting can be had, which the defendant says cannot be, because he says that whatever rights the orators might have had in respect of the division of the land into lots and the sale of them, had they been free from misrepresentation themselves, are rights enforceable at law in an action for their stated share of the "purchase price" of the lots. By the words "purchase price," as here used, we think is meant the cash value of the lots, as no other purchase price is ascertainable, none of the lots having been sold; but the master finds that at the time of the hearing in July, 1909, they were worth in the aggregate so much, which was 25 per cent. more than they were worth in November, 1907, when the defendant took his deed from the bank. [2] But as the bill was properly brought for the purpose, in part, of obtaining a specific performance of the contract to the extent of having it reduced to writing as agreed, the case will be retained for all other purposes.

[3] The defendant further says that the orators never had any equitable rights against him, and are entitled to no equitable relief, because he says that it was agreed between them that he should purchase the property of the bank at the amount of the decree, and that the orators should have an opportunity to purchase the "core" for \$3,000 within a reasonable time; that the land outside the "core" should be divided into lots, and that the orator John and the defendant should use their joint efforts to sell the lots, and that the first money derived therefrom should be used to reimburse the defendant for the amount paid out by him in excess of the \$3,000 he was to receive for the "core," the amount of which reimbursement was to be \$900, after which the balance of the money derived from such sales was to be equally divided between the orators and the defendant; that the defendant was ready and willing at all times while he held the title to convey the "core" to the orators at the agreed price, and that before the defendant conveyed the same to Perkins a reasonable time for the orators to buy it had elapsed, but that they neglected and refused to exercise their right in that behalf, and had full knowledge of the defendant's conveyance to

Perkins and were satisfied therewith. But there is nothing in all this that deprives the orators of their interest in the lots, nor releases the defendant from accounting to them therefor, for the agreement was divisible, the part relating to buying the "core" imposing no obligation upon the orators, as it was a mere option to buy that they could exercise or not, as they pleased, and was entirely separate and distinct from the part conferring rights upon them in respect of the lots.

The defendant also says that he was neither a necessary nor a proper party to any equitable claim the orators may have had against the defendants Perkins. But those defendants having been settled with and gone out of the case, the orators are now making no claim against them. [4] But if the defendant means an out-and-out misjoinder, it is too late for him to raise that question, for the bill on its face shows the misjoinder, if any there is, and, as he neither demurred for that cause nor raised the question in his answer, he must be taken to have waived the objection. *Passumpsic Savings Bank v. Buck*, 71 Vt. 190, 44 Atl. 93.

The defendant further says that the orators are entitled to no equitable relief against him, because he says that they themselves are not free from fraud in the transaction. This claim is based on the finding of the master that, while the negotiations were going on between him and the orators concerning his buying the property as aforesaid, the orator John represented to him that he had customers to whom he could sell several of the lots, the names of which he gave to the defendant, which representation the defendant relied upon, and which tended to induce him to make the purchase; that shortly after the defendant took his deed, he interviewed the persons whose names the said John had given to him, and found that none of them had any notion of buying, and that none of them would buy; and it is found by the master that John had no reason to believe that any of them would buy. [5] But this does not disentitle the orators, because, if for no other reason, the defendant has never rescinded nor offered to rescind the contract, and it is too late for him now to take anything by this objection. These are all the objections the defendant makes to the orators' demand upon him for compensation for their interest in the lots; and therefore we consider the case no further.

We note, however, that the bill is deficient in prayer, but no objection is made on that account. But the orators can, if they think best, apply below for leave to amend in this respect. They urge several of their exceptions to the master's report, but, in view of the position taken by the defendant, it is unnecessary to consider them.

Unfortunately, however, the master finds the value of the lots at the time of the hearing before him, whereas he should have

found their value at the time of the commencement of the suit, for it is fundamental that the rights of the parties are to be determined as of that date. *Hazen v. Lyndonville National Bank*, 70 Vt. 543, 555, 41 Atl. 1046, 67 Am. St. Rep. 680. The case, therefore, will have to go back to the master to find their value at that time.

Decree reversed, and cause remanded. Let there be a reference to the master to find and report the value of said lots at the time of the commencement of the suit, and, on the coming in of his report, let there be a decree that the defendant account to the orators by paying to them their just share of such value, with interest thereon from said time.

On Rehearing.

[6] The foregoing mandate having been sent down, the defendant brings the case back under sections 1313-1316 of the Public Statutes, and seeks a rehearing on all questions, regardless of whether they were presented on the former hearing or not. But it has been held under this statute, as it was before its passage, that a rehearing will not be granted in this court for the purpose of affording opportunity to present new questions. *Van Dyke v. Cole*, 81 Vt. 399, 70 Atl. 593, 1103.

[7] And it is a general rule that failure to present a case fully, or to give sufficient attention to the argument, on a former hearing, does not, in a court of last resort, afford ground for granting a rehearing. 18 Ency. Pl. & Pr. 11. It is said in *Whiting v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382, that, if parties do not take the trouble to call attention to the points on which they rely, they cannot reasonably expect the court to grant a rehearing for the purpose of considering them piecemeal.

[8] But if a material mistake of law is made in deciding questions raised, a rehearing may be had. Now it is true, as said in the opinion, that we considered all the objections the defendant made to the orators' demand upon him for compensation for their interest in the lots; and one of the objections was that in respect of the division of the land into lots, and the sale of them, the orators had a remedy at law for their share of the "purchase price," as the brief phrased it, which we took to mean cash value, as no "purchase price" was ascertainable, none of the lots having been sold, but which it is now claimed was used to indicate the prospective proceeds of the lots, conceding that the phrase was unfortunate to that intent. But, taking it to mean what is now claimed, it makes no difference, for the point was made as going only to the jurisdiction of equity, and that was held to be conferred for all purposes, because the bill was properly brought for the purpose, in part, of obtaining specific performance of the contract to the extent of compelling its reduction to writing as agreed.

Another objection was that the orators never had any equitable rights against the defendant, and were entitled to no equitable relief, because they neglected and refused to exercise their right to buy the "core." But this was answered by the fact that they were not bound to buy it, but could or not as they pleased, and therefore were not disentitled as to the rest of the contract by not buying it.

The only other objection to equitable relief was that the orators were guilty of fraud in falsely representing that they had customers to whom several of the lots could be sold. But it was held that this did not disentitle them, because, if for no other reason, the defendant never rescinded nor offered to rescind the contract. But the defendant now claims for the first time that he did virtually rescind it by his refusal further to deal with the orator John, because the orators had failed to furnish customers for the lots and to do anything about buying the "core." He admits that in order to rescind you must put the other party in statu quo, but he says that here that was done by his refusal, without more, because he received nothing of value from the orators, as they never had any equitable interest in the subject-matter of the contract, and consequently he had nothing to return, and so an offer to reinstate the orators was not necessary.

But the denial of equitable interest in the orators was not so broad as this before, but was, as we have seen, based wholly upon the neglect and refusal of the orators to exercise their right to buy the "core," and the fraudulent representations about their having customers to buy the lots, both of which claims were ruled against the defendant; so the result of our holding was that the orators had an equitable interest in the subject-matter of the contract, and were entitled to compensation therefor, the defendant not having rescinded the contract; and this was undoubtedly right as the case was then presented, and the case will not be opened for further discussion of the question.

But the defendant says that, if he is to account, he should not be made to account as of the time the suit was commenced, but as of the time the orators first acquired the right to an accounting by reason of some default of his, by which we understand is meant some time earlier than the commencement of the suit. But he indicates no special time earlier, and logically enough, for he now claims broadly that there is no time earlier nor later, and that he should not be made to account at all. But before, if he was to account at all, and we said he must, he did not object to accounting as of the time of the hearing before the master, and that seems to have been the time the parties had in mind for an accounting, for the value of the lots at the time of that hearing was found and reported. But we said that their

value should have been found as of the time the suit was commenced, because, on principle, the right of the parties were to be determined as of that time, citing *Hazen v. Lyndonville National Bank*, 70 Vt. 543, 555, 41 Atl. 1046, 67 Am. St. Rep. 680, as authority for the proposition.

[8] It is now claimed by the defendant that the doctrine of that case on this point is not applicable here, because there it seems to have been applied to prevent the frustration of rights after suit commenced. But if that is so, and we are inclined to think it is, it makes no difference here, for the defendant tacitly conceded before that he must account if his objections to accounting were not sustained, as they were not, and seemed to have in mind that the accounting would be as of the time the hearing was had before the master, and, not suggesting otherwise, he cannot well complain that the court took an earlier time, though for a wrong reason, which most likely benefited him, as the lots were increasing in value, according to the report.

Rehearing denied, petition dismissed, and cause remanded.

In re MURRAY'S ESTATE.

Appeal of MURRAY.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CONVERSION (§ 6*)—PROVISIONS OF WILL—EFFECT.

Where a testator by his will does not authorize the sale of real estate, does not blend the real estate and personalty in such a manner as to show clearly an intent to create a fund and bequeath it as money, and does not show an absolute necessity for the sale of the real estate, but after the probate of the will the land is sold under proceedings instituted under the Price Act of April 18, 1853 (P. L. 503), with the specific intent to bar contingent and vested remainders and executory devises, the fund created will be deemed real estate for the purposes of distribution.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 6-12, 16; Dec. Dig. § 6.*]

2. CONVERSION (§ 15*)—PROVISIONS OF WILL—EFFECT.

A provision in a will, directing the residue of testator's estate, real, personal and mixed, to be divided into three equal shares, which are separately given to trustees for the respective parties, does not so blend the realty and personalty as to convert the realty into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-39, 52; Dec. Dig. § 15.*]

3. CONVERSION (§ 16*)—PROVISIONS OF WILL—EFFECT.

A provision in a will, giving authority to trustees to make, from time to time, such investments or changes in the investments of the estate and money given to them in trust as may become necessary, or as they may deem advisable, does not convert the realty into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 38-40, 42, 43; Dec. Dig. § 16.*]

Appeal from Orphans' Court, Allegheny County.

In the matter of the Estate of Anthony S. Murray, Jr., a minor. From a decree dismissing exceptions to the adjudication, James D. Murray, guardian of James R. Murray, appeals. Reversed, and distribution directed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

James D. Murray and George C. Burgwin, for appellant. Harvey A. Miller, for appellee.

MESTREZAT, J. Mrs. Annie S. Murray died August 12, 1904, seised of certain real estate situate in the city of Pittsburgh. By her will, she devised one-third of the residue of her estate to her son, Anthony S. Murray, and her son-in-law, Edward A. Jackson, as trustees in trust to pay the income "to my son Anthony S. Murray for and during the term of his natural life and from and immediately after his death I give said residue of said share absolutely to such child or children as he may have living at the time of his death and the descendant or descendants of any deceased child or children then living," with the proviso that if her son, Anthony S. Murray, left no child or descendant living at the time of his death, then to go to her two daughters absolutely. The testatrix made like general provisions, as to the two remaining shares of the residue, for her two daughters and their descendants. She did not direct her real estate to be sold, and gave no express authority to her trustee to sell; but in the fifth paragraph of her will provided as follows: "I give to my said trustees and the survivor of them, the power to make, from time to time, such investments or changes in the investments of the estates and moneys herein given to them in trust as may become necessary or they or the survivor of them may deem advisable."

Anthony S. Murray, the trustee and life tenant of the undivided one-third of the estate, died on July 11, 1907, leaving to survive him a son, William N. Murray, by his first wife, and Anthony S. Murray, Jr., and James R. Murray, sons by his second wife, both minors, residents of the city of Baltimore, Md., residing with their mother, Eva Murray, his second wife. James D. Murray, Esq., of Pittsburgh, Pa., was appointed guardian of the minors.

After notice to all parties in interest, and to a trustee appointed to represent all contingent interests in posse, the surviving trustee was authorized by the orphans' court to sell the real estate therein described. The proceedings were taken under and in strict compliance with the act of April 18, 1853 (P. L. 503), known as the Price Act; and the necessary jurisdictional averments were set forth in the petition, as was also the

specific intent to bar contingent and vested remainders and executory devises. The proceeds of sale were distributed by the orphans' court, which decreed to the guardian of Anthony S. Murray, Jr., one-ninth thereof, which is included in the account of the guardian and now being distributed in this proceeding.

Anthony S. Murray, Jr., minor, died on May 27, 1910, intestate, unmarried and without issue, leaving to survive him his mother, Eva Murray, his brother of the full blood, James R. Murray, and his brother of the half blood, William N. Murray.

As stated by the learned judge of the orphans' court, if the fund now is of the nature of realty, the half-brother, William N. Murray, is excluded from the distribution; if personalty, under the laws of Maryland, the domicile of the minor, he shares in his half-brother's estate; if personalty, distributable under the laws of Pennsylvania, the distributee is his mother.

[1] The learned judge of the orphans' court filed an adjudication, holding that the fund in the hands of the guardian must be distributed as realty. He said, *inter alia*: "It was the trust estate as a whole, with all its limitations, including possible interests of persons unborn, that was before the court for sale; a divestiture of the interest and title of all parties interested, whether in being or in expectancy, could be, and was, brought about only by the proceedings under the act of 1853. * * * The proceeding being under the act of 1853, the provisions of the sixth and seventh sections fix the character of the fund, viz., the purchase money shall in all respects be substituted for the land sold, shall be held and applied as the estate sold had been held, the course of descent shall not be changed by reason of such sale, as respects persons who are not of competent ability to dispose of it. * * * The death of Anthony S. Murray, Sr., vested an absolute estate in a portion of the third of the residue, devised under the will of Annie S. Murray, in Anthony S. Murray, Jr. As land of this minor, it was sold under an act positively fixing the character of the proceeds; so it continued, and passed as such (Eckert's Estate, 5 Wkly. Notes Cas. 451), on his death during his minority, to those under the intestate law entitled thereto, 'for the purpose of preserving the inheritable quality of the estate.' Wentze's Appeal, 126 Pa. 541 [17 Atl. 875]."

To this adjudication, W. N. Murray, brother of the half blood of the decedent, filed exceptions, alleging that the court erred in finding that Mrs. Murray had left no directions and gave no authority in express terms to her trustees for the sale of the real estate; and, further, that the real estate having been sold before the death of Anthony S. Murray, Jr., the court should have held that the fund was personalty, and distribut-

ed it as such. In the opinion sustaining the exceptions, the learned court says: "It is now contended that by the terms of Mrs. Murray's will and the sales made for the purpose of carrying out its provisions conversion has in fact taken place." He sustained the exceptions on the ground that the Price Act, under which the sales were made, could not prevail against the will of the testatrix, if, by the terms thereof, or the exercise of the power contained therein, conversion had actually taken place.

It will be observed that the proceeds of the sale of real estate in the hands of the guardian and now being distributed were raised by a sale made by the trustee under the Price Act, and, as stated by the learned orphans' court judge, for the purpose of barring contingent and vested remainders and executory devises liable to open and let in after-born children, so as to give the purchaser an indefeasible title. By the express provisions of that act, the purchase money is substituted for the land sold, and is to be held and applied as real estate.

Aside from the fifth paragraph, did the will of Mrs. Murray work an equitable conversion of her residuary estate? As said by Chief Justice Sterrett, in *Darlington v. Darlington*, 160 Pa. 65, 70, 28 Atl. 503, 504: "To work a conversion of real estate into personalty, there must be either (a) a positive direction to sell, or (b) an absolute necessity to sell in order to execute the will, or (c) such a blending of realty and personalty by the testator, in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money." It is clear that there is no positive direction to sell contained in Mrs. Murray's will. It is equally certain, we think, that there is no absolute necessity to sell, in order to execute the instrument. After the direction to pay her debts and funeral expenses, and making certain specific bequests, she "gives and disposes" of her residuary estate in three equal parts or shares. She gives one of these shares to trustees in trust to receive and collect the income and pay the same to her son, Anthony S. Murray, during his natural life, and from and immediately thereafter she gives the share absolutely to his children. This is the share now being distributed. The other two shares were given to trustees for her two daughters and their descendants, with provisions similar to the gift to her son, Anthony. There is nothing in these provisions of the will that requires a sale in order to carry out the intention of the testator in the distribution of the residue of her estate. If, for instance, it was all real estate, the parties would hold it together; and either party could institute partition proceedings, as we have frequently held. If the property was personalty, they could divide it, or, if they desired, sell it as a whole.

If, as is a fact, the property was partly real and partly personal estate, the same disposition could be made of it by the parties. There was therefore no necessity to sell in order to execute the will.

[2] There is nothing to support the contention that there was such a blending of the realty and personalty as to clearly show that the testatrix intended to create a fund out of both real and personal estate, and to bequeath the same as money. There is not a single provision in the will which indicates an intention on the part of the testatrix to convert her real and personal property into money, and to divide it among the distributees as such. The property is given in the form in which it was at the time the will was executed. "All the rest and residue of my estate, real, personal and mixed, I direct to be divided into three equal parts or shares," is the language of the will. These "parts or shares" are separately given to trustees for the respective parties. There was certainly no intention on the part of the testatrix, as disclosed by this language, to dispose of the residue of her estate as money. On the contrary, it is an absolute disposition of the property in its existing form, and was to be taken and held as such by the beneficiaries. "The blending of real and personal estate by a testator in his will," says the court in Perot's Appeal, 102 Pa. 235, 258, "is not of much significance, unless it clearly appears that he intended thereby to create a fund raised out of both real and personal estate, and to bequeath said fund as money." Here the testatrix directed that the residue of her property, not the proceeds or money arising from the sale thereof, should be divided into three equal parts; and that the several parts be held by the trustees for the respective beneficiaries. Each of these three shares vested in the trustees for the respective beneficiaries thereof, and not the entire residue as a blended fund of realty and personalty to be held by the trustees as one fund. The testatrix did not devise her residuary estate to the trustees as a whole, but one-third thereof to the trustees of each of the beneficiaries, to whom each of the three parts were given.

[3] The power contained in the fifth paragraph of the will did not work an equitable conversion of the real estate. That is too plain, we think, for argument. The authority there conferred was simply for the purpose of administering the three trust estates.

The trustees were given authority "to make, from time to time, such investments or changes in the investments of the estate and moneys herein given to them in trust as may become necessary or they or the survivor of them may deem advisable." There is not even an intimation in this language that the trustees were empowered to sell the real estate as a whole, or the three interests therein separately, for the purpose of distribution. The language clearly indicates that the purpose was to enable the trustees to deal with the trust estates in the most advantageous way for the cestui que trust. None of the sales were made before the death of Anthony S. Murray, the life tenant. None of the sales were made by the trustees by virtue of the authority conferred in the fifth paragraph of the will. The sales were made by a trustee appointed by the orphans' court, and, as we have seen, under the provisions of the Price Act. His authority came from the orphans' court, and not from the will. These facts are clearly disclosed by the petitions presented to the court and by the court's decrees confirming the sales. They also appear by the account which the trustee filed. In discussing the Price Act and the effect of the sale of a minor's real estate under it, this court said, in Holmes' Appeal, 53 Pa. 339, 342: "The sale was not made for the purpose of raising money for him [the minor]. Before making the order, the court was satisfied that the change from land to money substituted for the land would be best for his interest; and it was that which moved the court to make the order. We must therefore hold that this change did not change the character in which the substitute is to pass to those entitled. It must pass as land."

Ramsey v. Ramsey, 226 Pa. 249, 75 Atl. 420, does not rule this case. The facts of that case clearly disclose an intention to convert the property and distribute it as money. The court said: "He [testator] blends the real estate with the personal, and divides the total into shares. In express terms, he makes the price of the home farm a part of that total, and directs that the price is to be deducted from the share of the party to whom it is given."

We are of opinion that the proceeds of sale of the realty retain their character as real estate, and should be awarded as such.

The decree is reversed, and distribution is directed to be made in accordance with the views set forth in this opinion.

In re RODGERS' CONTESTED ELECTION.

Appeal of ELWOOD.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. ELECTIONS (§ 126*)—PRIMARIES — STATUTORY PROVISIONS.

Under Primary Election Act Feb. 17, 1906 (P. L. 36), the only proper method of voting for persons whose names are not printed on the ballot is to insert their names in the blank spaces prepared therefor.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 126*)—PRIMARIES—BALLOTS —INDICATION OF CHOICE.

Where a sticker containing the name of a candidate not printed on the ballot is affixed in such a manner as to obliterate wholly or partly the name of an opposing candidate printed on the ballot, the vote for the office in question is illegal and void.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

3. ELECTIONS (§ 126*)—PRIMARIES—BALLOTS —INDICATION OF CHOICE.

Where a ballot is marked with two X's, one printed on a sticker attached to the ballot and the other made by pencil opposite the name printed on the ballot covered by the sticker, the intention of the voter is not shown with sufficient definiteness.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

In the matter of the contest of the election of John S. Rodgers to the City and County Committee of the Republican Party. From the judgment, C. G. Elwood appeals. Reversed, and record remitted, with directions.

The facts are stated in the opinion of the Supreme Court.

The appearance of ballot of the first class referred to in the opinion of the Supreme Court was as follows:

CITY AND COUNTY COMMITTEE. FOR CITY AND COUNTY COMMITTEE.

JOHN S. RODGERS.....☒ ☒

WARD EXECUTIVE COMMITTEE.

(Vote for Three)

George M. Harton.....	☐
Warren T. Kable.....	☐
John P. Kleman.....	☐
S. H. Lloyd.....	☒
William Murbach.....	☒
Charles H. West.....	☒

The form of ballot of the second class is sufficiently described in the opinion of the Supreme Court.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

George N. Chalfant, J. McF. Carpenter, and E. B. Vaill, for appellant. William K. Johnson, for appellee.

MOSCHZISKER, J. A primary election was held in the Tenth district of the Eleventh ward of the city of Pittsburgh on January 4, 1910, at which C. G. Elwood and John S. Rodgers were rival candidates for the city and county committee of the Republican party. The name of the former was printed upon the official ballot in the space designated for that purpose, while that of the latter was not upon the ballot; all of the votes cast for him being inserted either in writing or by stickers. The election board certified 78 votes for Rodgers and 73 for Elwood. Upon a petition alleging that stickers were improperly used upon certain of the ballots cast for Rodgers, a recount was had, and the commissioners decided that 57 of these ballots were illegally marked. On appeal the court below reversed the decision of the commissioners, held the ballots in question legal, and directed a certificate of election to be issued to Rodgers. The present appeals is from this decree.

There were two classes of ballots cast which the appellant contends should not have been counted for Rodgers, and in both printed stickers were used. The first of these stickers read thus: "For City and County Committee. John S. Rodgers. X"—the "X" being in print. All of the ballots in this class were also marked with a pencil "X" in the square printed to the right of the name of Elwood; the latter name being entirely covered by stickers pasted fast over it. The other class had stickers of the same sort attached at a like place, but not pasted fast over the entire name of Elwood; they were merely affixed to the right of the name, so as to obscure totally the official square opposite the same, but left partially free so that they might be raised and the name of Elwood made visible. In this latter class it was impossible, without tearing off the stickers, to ascertain whether or not there was a pencil cross in the official square thus covered.

The only directions in the Primary Election Act as to the manner in which tickets shall be marked are found in section 4, which prescribes the form of the ballot, as follows: "Make a (X) in the square to the right of each candidate for whom you wish to vote. If you desire to vote for a person whose name is not on the ballot, write or paste his name in the blank space provided for that purpose." Here the voters who cast the ballots in question did not adhere to the provisions of the act or the requirements of the law. They desired to vote for a person who was not on the official ballot, but instead of writing or pasting his name under the proper designation of the office to be filled in the space beneath the printed name of Elwood, they placed a sticker directly over that name; one class making the sticker fast so as entirely to obliterate the name

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Elwood, and the other making it fast so as to obliterate the square to the right thereof and to cover the name as before described. More than this, the stickers not only had the name of the candidate, the square and an "X" printed thereon, but also the designation of the office. We feel that under the doctrine of our decisions the votes in controversy were void and should not have been counted.

[1] Section 4 of the act of 1906 (P. L. 36) provides: "The voter may designate his choice, as is indicated by the instructions shown on the form of ballot above set forth." This, according to our cases, must be taken to mean that he cannot do it in some other and different way. In Lawlor's Contested Election, 180 Pa. 566, 570, 37 Atl. 92, 93, slips, such as those used in this case, containing the name of a candidate and the designation of an office, were pasted in the blank space for that purpose, and, although these slips in no wise obliterated or obscured the other names or printed matter upon the ballot, the court held that the vote could not be counted, saying: "The only prescribed mode of voting for persons whose names are not already on the ballot is by inserting their names in the blank spaces prepared therefor. * * * It is the name only that is to be thus inserted, not the title of the offices to be filled. The latter is already printed there and constitutes part of the ballot prepared for the use of voters." In McCowan's Appeal, 165 Pa. 233, 237, 30 Atl. 955, 956 (27 L. R. A. 234), where slips resembling a party column, with names, designations of offices, and directions how to vote, were pasted over such a column, the court held the ballot invalid and, *inter alia*, said: "The name or names, as the case may be, cannot be inserted anywhere, * * * but only in the appropriate blank spaces prepared therefor. * * * It may be done any appropriate way, such as by writing, * * * or by covering the proper blank space, in whole or in part, with a * * * sticker, securely attached to said space by adhesive paste or other suitable material, on which ticket or sticker is printed or written a name or names not already on the ballot. * * * In so far as the mode of voting is thus specifically prescribed by the act, all other modes are, by necessary implication, forbidden. * * * To hold, as we are virtually asked to do by appellants, that by virtue of the authority given the voter to insert, in the blank spaces provided therefor, names not already on the official ballot, he may so use a previously prepared slip ticket, given to him by an outside party, as entirely to cover the right-hand column of the official ballot, and thus effectually obliterate or conceal everything printed thereon, would not be construction, but judicial legislation of the worst type." In Redman's Appeal, 173 Pa. 59, 64, 33 Atl. 703, 704, some of the ballots were marked with an "X" in the square opposite the name

of a candidate, and the same name was inserted by the voter in the blank space provided for that purpose. The court said: "If the voter's first act in preparing his ballot was the 'insertion' of the name found in the blank space, he had no right whatever to afterwards attempt to vote by 'marking' for either of the candidates for justice of the peace whose names are printed in the left-hand column. On the other hand, if his first act in preparing his ballot was marking with a cross (X) as appears in the left-hand column, he had no right to afterwards 'insert' the name 'John S. Lowry' in the blank space. It was thus manifestly impossible for the election officers, or any one other than the voter himself, to determine which of the acts—that of 'marking' in the left-hand column or that of 'writing' the name 'John S. Lowry' in the blank space—was first in order of time, or whether the voter intended by both acts to vote for two persons or for only one and the same person, or, in brief, what may have been his purpose in doing what he is admitted to have done in preparing his ballot. When the election officers came to count the votes, it must have been quite evident to them, on inspection of the ballot in question, that the specific mode of voting prescribed by the act had been disregarded by the voter, and hence they were clearly right in refusing to count the votes for any one. It was plainly a vitiated, illegal ballot made so by the act of the voter himself. If such an utter departure from the positive requirements of the act was sanctioned or encouraged, either by election boards or courts, it would lead to the most serious consequences. Under the new ballot law, it is not enough that the intention of the voter may possibly be ascertained, or his irregular and equivocal acts explained by evidence *de hors* his ballot. The purpose of the Legislature, in prescribing the form of ballot and specifically directing how it shall be prepared and used by the voter, was to avoid all such inquiries and the consequences likely to result therefrom. It was intended that the ballot, when prepared by the voter and delivered to the proper election officer, should be *per se* self-explanatory. There is no good reason why it should not be so."

[2] It is true that none of the cases just reviewed was under the Primary Election Act, but cases arising under that statute are governed by the same principles as those under the general election law; in fact, the act of 1906 expressly provides: "Primaries shall be conducted in conformity with the laws governing the conduct of general elections, in so far as the same are not modified by the provisions of this act or are not inconsistent with its terms." Aside from the authorities, to allow a sticker with the designation of an office and a printed "X" upon it to be used, would go far to defeat the important provision of the Primary Law to the effect that "no elector shall be permitted

to receive any assistance in marking his ballot unless he shall first make an affidavit that he cannot read the names on the ballot, or that by reason of physical disability he is unable to mark his ballot," as it would render practicable the grossest kind of assistance outside of the booths. Furthermore, where the ballot is marked with two X's, one made by pencil opposite the name printed upon the ballot and the other printed upon the sticker pasted over such name, the real intention of the voter is not shown with sufficient definiteness to comply with the law. Lastly, to permit stickers to be pasted over names printed upon the official ballot would put it in the power of corrupt election officers easily to make changes upon the face of the ballot, after the votes had been cast, of a character which it would be almost impossible to discover by subsequent inspection.

[3] While it may be that the court in this instance correctly guessed the intention of the voter, yet the 57 mutilated ballots were not marked in accordance with the instructions contained in the act of assembly, and under the well-established doctrine in this state they should not have been counted; to permit the counting of such ballots would be a precedent fraught with grave dangers for the future. If the designation of the office had been eliminated and a one-line sticker employed, there was ample room for its use in the appropriate place directly under the name of Elwood, and the court below finds that this space was sufficient in which to write the name of Rodgers, or, with care, to paste the large two-line sticker which was used, without covering or interfering with other printed matter upon the ballot. Under the circumstances, the votes in question should have been declared illegal and not credited to any one.

The assignments of error are sustained, the decree is set aside, and the record is remitted, with directions to enter a final decree in accordance with the views above indicated.

MESTREZAT, J., dissents.

STILLEY v. PITTSBURGH-BUFFALO CO.
(Supreme Court of Pennsylvania. Jan. 2, 1912.)

1. MINES AND MINERALS (§ 55*)—GRANTS OF MINERAL RIGHTS—CONSTRUCTION.

A grant of all the coal underlying a tract of land, in the absence of express or implied waiver, imposes on the mineral estate the servitude of surface support, but the owner of the surface may waive the right of surface support by his deed or covenant.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 55*)—GRANTS OF MINERAL RIGHTS—CONSTRUCTION—"WAIVING ALL DAMAGES."

A deed conveying all the coal underlying land together with the free and uninterrupted

right of way into, upon, or under the land, so far as may be necessary in the mining and carrying away the coal, "hereby waiving all damages," includes within the waiver injuries resulting from mining and removing all the coal, and waives the grantor's right to surface support.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by John H. Stilley for an injunction against the Pittsburgh-Buffalo Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Haymaker, J., found the facts and conclusions of law as follows:

"First. The plaintiff is the owner in fee simple of all that certain tract of land situate in Jefferson township, Allegheny county, containing 95 acres, 80 perches, subject to the conveyance of the coal and mining rights by his predecessors in title. The said property being conveyed to the plaintiff by Jackson Stilley by deed dated April 1, 1895.

"Second. That all the land underlying the said tract of land, together with certain mining rights, was conveyed by Jackson Stilley, the plaintiff's predecessor in title, to J. J. Lawrence by deed dated January 18, 1883. The mining rights and privileges which accompanied the said conveyance and were made a part thereof, were as follows: 'Together with free and uninterrupted right of way into, upon, and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, and carrying away said coal; hereby waiving all damages arising therefrom. Together with the privilege of mining and removing through said premises other coal belonging to said party of the second part, his heirs or assigns, or which he or they or any of them may hereafter acquire.'

"Third. The defendant is the owner of 49.86 acres of the said coal conveyed by Jackson Stilley to J. J. Lawrence underlying the said land of the plaintiff. Said coal being conveyed to the defendant by a deed from the Pittsburgh Coal Company of Pennsylvania dated December 27, 1907, and in which the mining rights are as follows: 'Together with the free and uninterrupted right of way into, upon, and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, and carrying away said coal and without liability for damages arising therefrom. Together with the privilege of mining and removing through said premises other coal now or hereafter owned by the said grantee, its successors or assigns.'

"Fourth. The defendant has been for some time and now is mining and removing the said coal owned by it underlying the plaintiff's land, on which are situated plaintiff's dwelling house, barn, and other improve-

ments, and in so doing has been and now is removing the supports of the surface of plaintiff's land, thereby causing the surface to break and sink and the said dwelling house, barn, and other improvements thereon to be injured.

"Fifth. Defendant proposes and intends to continue mining and removing the said coal owned by it underlying plaintiff's land, and to continue removing the supports of the surface, by reason whereof it is reasonable and probable to expect that further injury will be done to the surface of plaintiff's land and the improvements thereon.

"Sixth. That the negligence complained of is not of the manner of mining and removing the said coal, but of the removal of the supports of the surface and the failure to support the surface, thereby causing the surface of plaintiff's land to break and sink and the improvements thereon to be injured.

"Seventh. The injuries sustained by plaintiff are permanent and continuing.

"Conclusions of Law.

"First. In the grant of all the coal only underlying a tract of land reserving the surface, the grantee owes the duty of surface support, unless the grantor by apt words or implication in the grant releases him from that obligation.

"Second. The right to surface support is an absolute one arising out of the ownership thereof, and, before it can be taken away, the burden is upon the owner of the coal to show that the surface owner has contracted himself out of that right by plain and explicit language, and it cannot be taken away by any language in the grant that does not plainly import such an intention on the part of the surface owner.

"Third. The following mining rights and privileges contained in the deed of conveyance from Jackson Stilley, the plaintiff's predecessor in title, to J. J. Lawrence—"Together with free and uninterrupted right of way into, upon, and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, and carrying away said coal; hereby waiving all damages arising therefrom. Together with the privilege of mining and removing through said premises other coal belonging to said party of the second part, his heirs or assigns, or which he or they or any of them may hereafter acquire"—constitute a valid release of the right of surface support, and the plaintiff is not entitled to the relief prayed for in his bill.

"Fifth. The plaintiff's bill should be and is hereby dismissed at his cost."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

J. C. Boyer and John A. Metz, for appellant. Stephen Stone and A. Wilson McCandless, for appellee.

ELKIN, J. [1] The rule of law upon which appellant relies is well settled in Pennsylvania, but difficulties frequently arise in applying it to the facts of a particular case. The rule is that in a grant of all the coal underlying a tract of land, in the absence of an express waiver, or the use of words from which the intention to waive clearly appears, there is imposed upon the mineral estate the servitude of surface support. In our state there has been no departure from this rule which has been recognized and asserted from *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385, to *Dignan v. Coal & Coke Company*, 222 Pa. 390, 71 Atl. 845, 128 Am. St. Rep. 812. While the common-law right of the owner of the soil to have the surface of his land supported by the underlying mineral estate conveyed to another party has always been recognized by our courts, it is equally true that the surface owner may and does waive this right by a grant of all the coal with the right to mine and remove it without liability for damage to the surface by so doing. Our cases relating to this question may very properly be divided into three classes: (1) Those relating to grants of coal without any mention of damages to the surface by mining and removing the same; (2) those relating to grants of coal coupled with mining rights and the waiver of damages resulting by reason of the proper exercise of the mining privileges; and (3) those cases in which the grant of the coal together with mining rights is followed either by an express waiver of damages to the surface resulting from the removal of the coal, or by words importing such a waiver.

In the first class of cases, the owner of the surface has the unquestioned right to recover damages for injuries to the surface occasioned by the removal of the coal. To this class belong *Jones v. Wagner*, supra; *Horner v. Watson*, 79 Pa. 242, 21 Am. Rep. 55; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Carlin v. Chappel*, 101 Pa. 348, 47 Am. Rep. 722; *Pringle v. Vesta Coal Co.*, 172 Pa. 438, 33 Atl. 690; *Weaver v. Coal Co.*, 216 Pa. 195, 65 Atl. 545; and *Berkey v. Coal Mining Co.*, 229 Pa. 417, 78 Atl. 1004. In this class of cases, there being no waiver of damages to the surface either express or implied, the surface owner is entitled to recover compensation for such injuries as he may have sustained by failure to properly support the surface. In the second class of cases there was a waiver of damages, but it was held that this waiver applied to the mining privileges granted and had no reference to the right of the owner to have his surface supported. In this class are included *Williams v. Hay*, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719, and *Dignan v. Coal & Coke Company*, supra. The third class of cases includes *Scranton v. Phillips*, 94 Pa. 15; *Madden v. Lehigh Valley Coal Co.*, 212 Pa. 63, 61 Atl. 559; *Miles v. Pennsylvania*

Coal Co., 217 Pa. 449, 66 Atl. 764, 10 Ann. Cas. 871; and Kellert v. Coal & Iron Company, 226 Pa. 27, 74 Atl. 789. In the cases last cited it was expressly held that the rule giving to the owner of the soil the right of surface support had no application in a case in which the parties had otherwise covenanted. Like any other right, the owner of the surface may waive the right of surface support by his deed or covenant. It is therefore just as well settled that a surface owner may part with his right of surface support by a covenant to do so as it is that the servitude of support is imposed upon the subjacent estate. The important question in cases of this character is whether the surface owner by express words or by necessary implication has waived the right of surface support. The intention of the parties must and should govern. It is true the intention must be gathered from the language used in the conveyance and not from evidence allunde.

[2] This brings us to a consideration of the exact question raised by this appeal. Did the grantor either by express language or by necessary implication waive the right of surface support? The deed conveyed all the coal underlying the tract in question. There was an entire severance and an absolute conveyance of all the coal. Following the conveyance of the coal there was a grant of mining rights and privileges in the following language: "Together with the free and uninterrupted right of way into, upon, and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, and carrying away said coal; hereby waiving all damages arising therefrom." The learned court below held that the intention of the parties, as gathered from the words of the grant, was to waive all damages arising from digging, mining, and carrying away the coal, including damages to the surface. The mining privileges granted were incident to the mining and removing of all the coal underlying the tract of land, and the covenant as to damages was in these words, "hereby waiving all damages arising therefrom." If this waiver referred to damages to the land arising from the removal of all the coal, the case at bar is squarely ruled by Kellert v. Coal & Iron Company, 226 Pa. 27, 74 Atl. 789. In that case the covenant was: "And the said parties of the first part

do hereby release all and every claim or claims for damages to the said land caused by operating or working of said mines in a proper manner."

The learned court below in discussing the waiver in that case used the following language: "The manifest object of the stipulations and release in the deed of the grantors was to secure to the grantee, without liability for damages on account of injury to the surface, that which had been purchased, namely, all the coal in the land, providing it was taken out in a proper manner. Without these stipulations and release the grantee could not remove any of the coal purchased, no matter how carefully and skillfully it might be done, if its presence in the ground were necessary to the support of the surface. * * * The grantors and grantee knew this, or are presumed to have known it, and it must be assumed that they made their contract with reference to the law applicable to such transactions." That case was put squarely upon the manifest intention of the parties gathered from the language of the waiver and the nature of the transaction. On appeal, this court affirmed the judgment on the opinion of the court below. The reason given by the lower court in that case was approved here, and judgment was accordingly entered. In that case as in this the waiver of damages related to the land not included in the grant of the coal. The waiver of damages in the present case is as broad and comprehensive as in the case just cited, and a reversal in the present case would in effect overrule that case. Both cases depend upon the intention of the parties relating to the waiver of damages, and we think the rule in one case governs in the other. In the present case we do not doubt that the words "waiving all damages" were intended to include such injuries to the land as resulted from mining and removing all the coal. The grantor conveyed all the coal and no doubt intended to release all damages occasioned by the removal of it. As we have hereinbefore pointed out, the release of damages in the present case related to the injuries resulting to the land by the removal of the coal, just as the waiver in the Kellert Case above cited had reference to the land there in question.

Decree affirmed at the cost of the appellant.

SULLIVAN v. McOSKER

(Supreme Court of New Jersey. June 18, 1912.)

PRISONS (§ 7*) — WARDEN — CIVIL SERVICE ACT—WARDEN OF COUNTY JAIL.

The warden of a county jail holds his position by appointment of the sheriff, and not under the government of the county, and is not within the Civil Service Law (P. L. 1908, p. 235), providing that employes of counties shall hold their employments until removed after hearing on charges, and he is subject to removal at the pleasure of the sheriff.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. §§ 6-9; Dec. Dig. § 7.*]

Quo warranto by Edmunda Wilson, Attorney General, on the relation of Patrick J. Sullivan, against John J. McOsker. Heard on demurrer to information. Demurrant entitled to judgment.

Argued February term, 1912, before GUMMERE, C. J., and GARRISON and SWAYZE, JJ.

Collins & Corbin, of Jersey City, for relator. Joseph M. Noonan, of Jersey City, for demurrant.

GUMMERE, C. J. Nicholas P. Wedin was elected sheriff of the county of Hudson on the 7th of November, 1911, and entered upon the performance of the duties of his office about a week later. His predecessor in office, James J. Kelly, had, during his term, appointed the relator, Patrick J. Sullivan, warden of the county jail. Sheriff Wedin, shortly after assuming office, removed and dismissed Sullivan from his position as warden of the county jail, without stating any reasons for such action, and without a hearing afforded to Sullivan, and appointed the defendant, McOsker, as warden. It is contended on behalf of the relator that his removal and dismissal from his position as warden, and the appointment of his successor, were in violation of section 2 of an act of the Legislature entitled "An act regulating the employment, tenure and discharge of certain officers and employes of this state, and of the various counties and municipalities thereof, and providing for a civil service commission, and defining its powers and duties," approved April 10, 1908 (P. L. p. 235). The section referred to provides that all officers, clerks, and employes in the employ of the state, or any municipality (including counties) adopting the act, shall continue to hold their offices or employments, and shall not be removed therefrom until they have been furnished with a written statement of the reasons for such action, and have been allowed a reasonable time in which to make written answer thereto.

The civil service act was adopted by the county of Hudson at the general election held in November, 1911. The question presented for decision is whether the warden

of a county jail is an officer or employe in the employ of the county, and so protected by the statute from removal except upon reasons stated, and after hearing afforded, in those counties which have adopted the civil service law.

In the case of Arbuckle v. Kelly, 78 N. J. Law, 94, 73 Atl. 510, the following situation was disclosed: On the 15th of August, 1908, Arbuckle was appointed by the then sheriff, John C. Kaiser, warden of the county jail of Hudson county. Upon the expiration of Kaiser's term, he was succeeded by Sheriff Kelly. Kelly failed to reappoint Arbuckle to his position as warden, and, as appears from the recital of facts hereinbefore set forth, appointed the relator, Sullivan, in his place. Arbuckle contended that this action upon the part of Sheriff Kelly was in violation of the provisions of an act entitled "An act regarding soldiers, sailors and marines honorably discharged from the United States service," approved March 27, 1907 (P. L. p. 37). That act provides that "no person now holding a position or office under the government of any county, city, town, township or other municipality of this state, or who may be appointed to any such position, whose term of office is not now fixed by law, * * * who is a soldier, sailor or marine who has served in any war of the United States, and has been honorably discharged from the United States service, shall be removed from such position or office except for good cause shown after a fair and impartial hearing." Arbuckle had served as a soldier in the Spanish-American War, and was honorably discharged from the federal service. The decision of the case turned upon the question whether he held a position or office under the government of the county of Hudson, the term of which was not fixed by law. This court, after pointing out that the sheriff at common law was the custodian of the common jail; that upon him rested the duty and the power of employing the keeper or keepers of such jail; that he was entitled to discharge such keepers, or any of them, at his pleasure; and that he was answerable for escapes which might occur while the jail was in the charge of such keepers—concluded that the warden of the common jail of Hudson county, being appointed by the sheriff, held his position under the sheriff and not under the government of the county. We further held that this relation between the sheriff and his appointee was not changed or affected by the salary act of 1905, which provided that the compensation of the warden of the county jail should thereafter be paid, not by the sheriff out of fees received by him, but out of the county treasury. The relation between the sheriff and the warden of the county jail as it existed at the time of the decision of the Arbuckle Case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—31

has not since been changed by any legislative enactment. This being so, the principle underlying the decision of the cited case controls that now under consideration; that is to say, the warden of the common jail of Hudson county, holding his position by the appointment of the sheriff, and not under the government of the county, is not protected by the civil service law from removal at the pleasure of the sheriff.

The demurrant is entitled to judgment.

RANDALL v. GRAY.

Matter of COMMISSIONS.

(Court of Chancery of New Jersey. Nov. 9, 1911. Additional Opinion May 15, 1912.)

1. WILLS (§ 693*)—POWER OF SALE—TITLE OF TRUSTEE.

Under a clause in a will empowering trustees to sell or rent any of testator's real estate when deemed by them to be most advantageous, and to invest the proceeds and pay legacies from the income, the trustees were, by implication, authorized to assume the legal title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.*]

2. TRUSTS (§ 162*)—TESTAMENTARY TRUST—TERMINATION.

An order made by the orphans' court under P. L. 1898, p. 769, § 146, discharging decedent "from the further duties of his office as executor," is properly treated as discharging him from the performance of trusts imposed upon the executor subject to an accounting to the substituted administrator, where it appears that he intended to apply for, and the court intended to grant, such discharge, and where the parties interested for several years treated the order as having that effect.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 212, 213; Dec. Dig. § 162.*]

3. EXECUTORS AND ADMINISTRATORS (§ 138*)—POWER OF SALE—EXERCISE—SUBSTITUTED ADMINISTRATORS.

Though an executor be entitled under a will to exercise a power of sale without judicial approval, a substituted administrator must procure the approval of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 568-575; Dec. Dig. § 138.*]

4. EXECUTORS AND ADMINISTRATORS (§ 339*)—POWER OF SALE—EXERCISE—HEARINGS.

On application to sell land under a testamentary power, parties interested have a right to be heard, either before the application is made or afterwards, when the court fixes a time to hear them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1417-1424; Dec. Dig. § 339.*]

5. EXECUTORS AND ADMINISTRATORS (§ 495*)—COMMISSIONS—RIGHT TO.

That the beneficiaries of an estate have instituted litigation against him, and have made unfair and unjust charges, does not entitle an administrator to commissions, where he has acted for several years under an agreement that commissions should not be allowed; the agreement being revocable only upon notice.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2088-2116; Dec. Dig. § 495.*]

6. EXECUTORS AND ADMINISTRATORS (§ 495*)—COMMISSION—RIGHT TO.

Even if two beneficiaries of an estate agreed to aid the administrator in managing the estate in consideration of his promise to charge no commissions, and failed to render assistance, the administrator cannot recover commissions without showing that he asked for the assistance and was refused, and that notice thereof was given to the parties interested.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2088-2116; Dec. Dig. § 495.*]

Bill by one Randall against one Gray. On application for an allowance of commission to an administrator and on a hearing on the bill and a cross-bill. Application denied. Decree directed.

Mr. Sackett, of Newark, for complainant. Mr. MacMahon, of Newark, for defendant Hopping.

EMERY, V. C. (orally). [1] This is a case that has been before me some time, from the time of the filing of the original bill in the latter part, I think, of December, 1909, asking an account against Mr. Gray as trustee. The claim of the complainant is based on the view that the discharge of Mr. Gray as executor under the will of Randall, by the order or decree of the orphans' court, did not discharge him as trustee under the will, and that, notwithstanding the order and what has been done since the order, Mr. Gray is still responsible as trustee under the will of George G. Randall, and should be called to account as such trustee. The situation is this: Mr. Randall died some time I think in 1889 or 1890, about that time, and by his will he appointed George R. Gray and George Duryea executors and trustees. He did not by his will give expressly to them any interest in his real estate, and whatever estate or interest they have, or either of them have or ever have had under the will, is by what is called "implication"; that is, by reason of such duties being imposed on them as executors or trustees that the legal estate must necessarily follow in order to carry out those duties. He directed by the second section of his will that a house, 134 Clinton avenue, should be sold or reserved for the use of two of his three children, Lillian and Edith. In that the executors have no estate whatever. Then he gave by the third section the income of the remaining portion of his estate, that would be all of it, he gave an income of a third to his daughter Lillian, a third to his son Frederick, and the remaining third to a daughter Edith until she arrived at 24. He then disposes of those interests after the death of those life tenants, giving Edith an absolute estate, and limiting over the other two-thirds. The eighth clause appointed Gray and Duryea executors and trustees in a single clause of the will, and authorized and empowered them "to sell any of my real es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tate, or rent, whenever in their judgment it shall be most advantageous to do so, and to invest the proceeds, and from the income to pay the legacies provided for." Under that clause of the will directing them to rent the real estate, they were authorized by implication to assume the legal title to the whole property until the daughter Edith became 24, and after that time they had by implication the legal title to the balance of the estate for the lives of the life tenants—the power to rent it during the life of the children Frederick and Lillian. While they did not have the estate fee, they had, however, the express power to sell, and therefore it is a case that very often occurs, where the legal title so far as not given expressly or by implication to the executors, goes to the heirs or devisees, subject to the power of sale. This power of sale was given to the executors and trustees, and on the sale they were directed to invest the money, so that they had trust duties to perform in reference to it. Mr. Gray and Mr. Duryea were executors for some years together, and then Mr. Duryea died in 1896. That left Mr. Gray the sole surviving executor and trustee, and also the person solely responsible.

[2] In 1901 he made an application to the orphans' court of Essex county to terminate his trusts under this will. I think it is clear, on reading the petition, that he intended to be discharged from the performance of any trusts that were imposed on the executor. This petition recites that "under the terms of the will the duties imposed on your petitioner as executor have become in the nature of a trust, which promises to endure for many years. Among the duties of the trust are the care and management of many parcels of real estate, necessitating personal supervision, repairs, and renting." And then it sets out the reasons he could not undertake further the discharge of those duties. But all those duties he set out were trust duties, not a single one of them was the duty of an executor, and in the duties that he sought to be relieved of, and in the reasons that he gave for being relieved of them he undoubtedly meant to be relieved of his duties as trustee. And on this petition, although the petition itself only asks that he may be discharged from his said office, whatever it was, whether it is executor with trust or executor without trust, he asks that he may be discharged from his office.

There was a statute in force at that time—the Orphans' Court Act of 1898, Revision, § 146—which gave power to an executor or trustee to apply for his discharge by a petition to the orphans' court. Previous to the passage of that statute or statutes from which that was taken, the only way in which a trustee could be discharged was by filing a bill in chancery, and anybody who was appointed trustee on showing good reasons had the right to be discharged upon set-

ting his account. This statute allowed the application to be made to the orphans' court, and they had the right to discharge him as trustee. And I think that as the petition applied for his discharge from his office, which was a trust, the court intended to act upon the petition and discharge him from his office as executor and from the duties of his office as executor, whether those were trust duties or not. It appears that at the time of that hearing three of the parties were not of age, but two of the children of Frederick Randall were adults and the other daughter, Lillian, was then about 20. The court made an order after hearing on the matter, and granted the application, and discharged him "from the further duties of his office as executor," except that of paying over and accounting for the moneys. The statute requires that, when a discharge is made, they must not discharge the executor or trustee from the duty of accounting, but that he must account, and the amount found due must be paid over to the person whom the court appoints to succeed and receive it. The court did then on the application of the children, of those who were able to act for themselves, appoint Mr. Hopping, who was a son-in-law, as substituted administrator with the will annexed, and directed that he give a bond of \$25,000. Mr. Gray was under no bond, having been appointed by the testator. Neither he nor Mr. Duryea was required to give bond. I cannot conceive that the court intended to discharge Mr. Gray solely from the duties which he had as naked executor independent of the trusts which were imposed on the executor under the will, or that there was any intention on the part of the court that, in discharging him as executor, they were not to discharge him from the duties as trustee which were imposed on the executor, because this took place: The court directed by a subsequent order that the money which Mr. Gray had in his hands as executor and which he held in trust should be paid over to some one else, the substituted trustee, on his giving security, and Mr. Gray paid them over. Now, the court did not intend, and could not have intended, to direct that he pay those moneys over to a substituted administrator and still be responsible for them as trustee, because such payment took the trust funds out of his hands. If Gray is responsible as trustee, and he alone must have the right to hold the money, and the court did not intend, when it directed that he must pay over to the substituted administrator this money in his hands as executor, which was held upon a trust, they did not intend that he should still be bound to carry out the trusts. So that, in acting on that order of discharge as executor, the court further directed the payment to the substituted administrator, and on the request of all the members of the family who were able to

give their assent (and I think by the guardians of those who were under age) Mr. Hopping, the son-in-law, was appointed. It was thought that the estate could be managed with less expense if he was appointed administrator in Mr. Gray's place, and it was intended by all those parties that he should then undertake the same duties with reference to the trusts and the management of the estate that Mr. Gray had, and they all requested the court to make this order of appointment, and that the bond be fixed at a certain amount which they thought would be satisfactory. That was done, and after that Mr. Hopping took absolute charge. Mr. Gray turned over this money held by him in trust, and from that time considered himself as absolutely relieved from responsibility. He did not take any further charge at all in relation to the management of the Randall estate.

[3] The executors under his will had the power to sell, but the power to sell which under the original will could have been exercised by Mr. Gray so long as he remained the surviving executor, without any approval by the court, became a power which in Mr. Hopping's hand as the substituted administrator he had no right to exercise without the approval of the court, because Mr. Randall had first selected the man on whose judgment he would rely for the sale of his property. Now, when another executor is substituted, the law provides that they shall not have the same absolute power or discretion to sell as the original executors. They cannot make a sale unless they first bring it to the court for its approval, and the court must be satisfied that it is right.

[4] On these applications to confirm sales, several of them were subsequently made to the different orphans' courts by Mr. Hopping, as if he had charge and power to sell, the power to sell being one which was connected with the power of receiving the money on trust, and the sale was only for the purpose of receiving it on trust. On all these applications to sell the parties who were interested have a right to be heard, either before the application is made to the court, or afterwards, when the court fixes a time to hear them. But in all these cases of sale by Mr. Hopping the members of the family who were of age, and the guardians of those under age, were consulted in reference to the sale before the confirmation by the court, and they joined in requests to approve the sales by Hopping. These requests were, in effect, requests from all these heirs that the money which was to come from the sales be given to Mr. Hopping. That course of proceeding has continued all the time until 1909, and all the heirs who were of age have joined in every application and request that Hopping be authorized to sell, and to receive the money, not as if Gray still had any authority to exercise over the sales or as if he was re-

sponsible for it at all, or as if he had anything to do with the money. The consequence is that up to some time in 1909 all the parties of age who had any interest and who were entitled to any notice applied to the court together to have Hopping authorized to sell the property and receive the money. Then in 1909 application was made, I think, by the present complainant, to Hopping to account. Divisions and disputes arose in reference to Hopping's management of the property, and Hopping was cited to account. He prepared an account in the orphans' court of all that he had done with the estate since 1901, since he received it from Gray, and then the bill is filed, in which for the first time the claim is made that Mr. Gray is still trustee, and should account now to this estate for everything that was delivered over to Hopping by the order of the court in 1901. It is claimed that they are entitled to that account from Mr. Gray, because the language of the order discharging him is such as to discharge him only as executor, and not discharge him as trustee. That is a pretty strict construction of that order. The order is that he be discharged from the further duties of his office as executor. Now, it is a fair question whether under that will the further duties of his office as executor did not include all his duties as trustee, because the executor was made a trustee. Suppose the testator had not said "trustee" in his will at all, but had directed that his executors should do so and so with his money. That would have created a trust, and the duties of the office as executor would have been a trust. So that there is a fair question as to whether under the terms of the order Mr. Gray is not discharged as trustee, but, be that as it may, the question now before the court is whether at this late day, six years after every one of the devisees or legatees interested has become of age, and ten years after all the persons interested in the estate, either personally or through their guardians, have acquiesced in the payment over of the entire funds of the estate to Mr. Hopping, and have got his security for their management, Mr. Gray should be held accountable for the trust property in equity as trustee from the time of his discharge as executor in 1901, and solely on the ground that by the order he was not expressly discharged as trustee. I do not think it would be equitable to do so, and, on the contrary, I think that the equitable thing to do on the whole proofs is to do just exactly what the court would have done had the matter been called to their attention when the order was made—that is, to advise a decree discharging him from his liability as trustee from the date of that order—except so far as relating to paying over the funds in his hands to the substituted executor. Of course, his accounts will have to be taken so far as necessary to show that, if it does not already appear. I

will advise such decree in reference to this branch of the case, and upon the cross-bill of Gray's administrator.

Additional Opinion.

[5] On further consideration of the evidence bearing upon the matter of the allowance of commissions to Mr. Hopping as substituted administrator of Mr. Gray, I reach the conclusion that commissions should not be allowed. The evidence establishes that Mr. Hopping was appointed in Mr. Gray's place as the result of a conference of the members of the testator's family interested, at which it was understood that by this appointment the estate would be relieved from the expense of commissions. The appointment of Mr. Hopping was consented to and accepted on this understanding, and the accountant is bound by it until revoked upon notice. Such notice was not given nor such revocation attempted until after the commencement of proceedings for accounting, and the right to charge commissions is now placed by Mr. Hopping himself mainly upon the ground that the complainants have instituted the litigation and have made unfair and unjust charges against him. Such action might justify refusal to act longer without compensation, but would not give the right to ignore the understanding which had been acted on for years in the management of the estate.

[6] At the time of the appointment, it seems to have been expected and perhaps agreed that Mr. Yearance, a son-in-law, and Frederick Randall, a son of the testator, would aid the administrator in the management of the estate.

The present claim of the administrator, that the aid and assistance to be given by these persons were in the nature of conditions made on the appointment, and that, by reason of their failure to assist him, he has the right to charge commissions, is not satisfactorily shown on the evidence. And, if this were proved, such conditions could not be made effective to give the right to the commissions unless the administrator makes further proof, first, that the administrator, who had as against them the legal right to the management, asked for their assistance and was refused; and, second, that the parties interested and who had acquiesced in the appointment, relying on the understanding that no commissions were to be charged, were notified that the conditions were not complied with and that the administrator would thereafter ask for commissions. Mr. Yearance lived for six years after the appointment and gave some aid in the management, as did also Frederick Randall. In the absence of any intimation that the original understanding as to commissions was no longer considered binding, the parties interested

in the estate were entitled to hold the administrator to its observance.

Commissions, therefore, cannot be allowed, but the administrator cannot be obliged against his will to continue to act without compensation, and may apply for his discharge on settlement of his account.

BAELDE v. SAN DOMINGO IMPROVEMENT CO.

(Supreme Court of New Jersey. June 21, 1912.)

1. DEPOSITIONS (§ 9*) — FOREIGN WITNESSES — MANNER OF TAKING.

The procuring of a deposition of a foreign witness either by a commission or on notice under 2 Gen. St. 1895, p. 1403 et seq., was a matter of right and not a matter resting in the discretion of the court.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 4; Dec. Dig. § 9.*]

2. DEPOSITIONS (§ 2*)—FOREIGN WITNESSES — MANNER OF TAKING—"DE BENE ESSE."

The power of the court to appoint, on the application of plaintiff residing in a foreign country, a commissioner to take his testimony *de bene esse* under P. L. 1900, pp. 375, 376, §§ 45, 46, authorizing the taking of the testimony of a witness or party *de bene esse* before a commissioner appointed by the court on notice, is not limited by P. L. 1902, p. 459, providing that where a material witness or a party is absent from the state the court in its discretion, on such terms as it may direct, may issue a commission, and the court appointing a commissioner to take the testimony of a party on notice may not impose terms; the phrase "*de bene esse*" meaning provisionally, referring to the right to offer the evidence depending on the absence of the witness at the time of trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7626-7627.]

3. DEPOSITIONS (§ 2*)—FOREIGN WITNESSES — MANNER OF TAKING.

P. L. 1900, p. 372, § 35, providing that no party shall be summoned in his own behalf *de bene esse* except on the written consent of the attorneys for all the parties, unless the court shall on notice order in his discretion the examination of such party, refers exclusively to depositions of witnesses within the state who are old, infirm, or about to remove from the state, and is inapplicable to foreign witnesses, and it does not conflict with section 46 authorizing the taking of the deposition of a party residing out of the state.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 2, 3; Dec. Dig. § 2.*]

Action by Eugene Baelde against the San Domingo Improvement Company. Application for the appointment of a commissioner to take the testimony *de bene esse* of plaintiff granted.

Argued before VOORHEES, J., not sitting in term.

A. R. Denman and Joseph Coult, Jr., for plaintiff. William P. McMichael and McCarter & English, for defendant.

VOORHEES, J. Notice in behalf of the plaintiff in the above action has been given to the defendant that application will be made to me for an order appointing a commissioner to take the evidence *de bene esse* of Eugene Baelde (the plaintiff in the action and alleged to be a material witness in his own behalf), who resides in the city of Brussels, in the kingdom of Belgium, and for the appointment of a commissioner to take such evidence.

The defendant at first resisted this application unless the court made the plaintiff stipulate to pay all the expenses of the defendant in taking testimony, including the traveling and other expenses of defendant's counsel in going to Brussels to examine the plaintiff. They at first insisted that the act of 1908, p. 277, authorized the imposition of such terms. That position, I understand, has now been abandoned, in view of the decision of this court in *Hite v. Dell*, 78 N. J. Law, 239, 73 Atl. 72.

The defendants now make their resistance upon the act of 1902, p. 459, insisting that this supplement applies to the whole evidence act and not to any particular section, and that it broadens the power of the court or judge to whom the application may be made, and enlarges the discretionary power in connection with sections 35, 36, 44, and 46 of the act of 1900, p. 372.

[1] Before the enactment of the present evidence statute of 1900, the law provided for depositions to be taken in two cases; the first of witnesses within the state, and with which we are not concerned here; secondly, of witnesses residing out of the state. The latter could be accomplished by two methods. Gen. Stat. 1403. The first method was by a commission awarded and issued by the court or the judge upon proof of the facts, "and on such terms as the court or judge may direct" to examine *de bene esse*. This required the approval of the interrogatories. The procedure is given in Gen. Stat. 1403, §§ 29 to 46, both inclusive. The forty-fourth section enacts "that the party requiring such examination of depositions shall be at the sole expense thereof, and shall not have any allowance for the same in the taxation of costs." Under this statute, where testimony was taken on a commission, the amounts paid to counsel and for the expense of the commission were disallowed in *Main v. Main*, 50 N. J. Eq. 712, 25 Atl. 372. The second method of taking the testimony of a foreign witness is sometimes called that of the "open commission." This first appears, I think, in the act of 1862, p. 225. It has been carried in the act apparently ever since, first as section 38 of the evidence act of 1874, amended in 1893 (Gen. Stat. 1410, § 66). This is now section 45 of the evidence act of 1900, p. 375. In 1908 a supplement (page 277) was passed providing that the party requiring the examination should, in the first instance, be at the sole expense,

which might be included in the taxed costs of the prevailing party if so ordered. This section, as above stated, was construed in *Hite v. Dell*, 78 N. J. Law, 239, 73 Atl. 72. I take it that the procuring of the deposition of a foreign witness, either by a commission or upon notice, was a matter of right and not a matter resting in the discretion of the court.

[2] Up to the passage of the act of 1900, however, no provision was made for the taking of the evidence of a party to an action. Such right was incorporated in the forty-sixth section of the act of 1900; the latter part of which reads as follows: "It being the intention of this section to give to the parties to actions, who reside out of the state, the same privilege to have their depositions taken out of the state as to other witnesses in such actions, residing out of the state." It is clear that thereby parties and witnesses are put upon the same footing, and the privilege to a party is to be measured by the privilege theretofore accorded to a witness. It will be noticed that the forty-sixth section applies to a nonresident.

In 1902 a supplement to the evidence act was passed (1902, p. 459) which provides that if a material witness or a party be absent from the state, whether the residence of such witness or party be within or without the state, it shall be lawful for a court, in its discretion on such terms as the court or judge may direct, to award and issue, under the seal of the court, a commission.

Construing this statute to apply to either residents or nonresidents of this state who are absent from the state at the time his testimony is sought (although that view may be somewhat doubtful, as there seemed to be no reason for the passage of this act except that the former act was confined to nonresident parties and witnesses; the latter clause of the act reading, "In the same manner, and with the same force and effect, as in case of a material witness who resides out of the state," confirming that doubt), yet it will not benefit the defendant here, for the supplement is limited to the issue of a "commission" as distinguished from depositions to be taken upon notice merely. The application under consideration is for the naming of a commissioner before whom the deposition can be taken upon notice. So I take it the act of 1902 is not effective to enlarge the powers of the judge to impose terms under the application *sub judice*.

[3] Section 35 of the act of 1900, p. 372, is not in point, because, being under a subdivision of the evidence act, that refers to depositions of witnesses within the state who are old, infirm, or about to remove from the state, and is inapplicable to foreign witnesses. Nor do I think that section nor section 46 is in conflict with section 35, for they refer to entirely different conditions and subjects.

It may be here remarked that the phrase "de bene esse" applies both to evidence taken upon interrogatories under a commission, as well as to that procured upon notice. The phrase means "provisionally," referring to the right to offer the evidence depending upon the absence of the witness or his disability at the time of trial.

The true construction of the forty-fifth section is, I think, that for certain localities, viz., where the witness is in a foreign state or sister state lying west of the Mississippi, the notice shall be regulated by the judge. In all other cases the statute regulates the notice according to the distance.

The case in hand being to take the evidence in a foreign kingdom, it was necessary to apply to a judge to fix the number of days' notice, and incidentally, because of the probable lack of a proper officer in that kingdom, to have a commissioner appointed at the same time. Section 45 is applicable to the case in hand and it does not fall within the act of 1902 as above construed. The law does not authorize the imposition of terms.

Therefore the order will be made.

SISTERS OF CHARITY OF ST. ELIZABETH v. MORRIS R. CO. et al.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 198*)—APPOINTMENT OF COMMISSIONERS—POWERS OF JUSTICE.

When a railroad company duly incorporated applies for the appointment of commissioners to condemn lands, and the proceedings are regular, the justice of the Supreme Court to whom such application is made cannot inquire into the motives of the incorporators procuring the incorporation, and by refusing to appoint the commissions determine that the franchises granted by the state are nonexistent; nor can the bona fides of such a corporation be tested by certiorari.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. § 198.*]

Certiorari by the Sisters of Charity of St. Elizabeth against the Morris Railroad Company and others to review an order appointing commissioners to appraise lands. Proceedings under review affirmed.

See, also, 81 Atl. 817.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Robert H. McCarter, of Newark, Edward K. Mills, of Morristown, and Arthur F. Egner, of Newark, for prosecutor. Vreeland, King, Wilson & Lindabury, of Newark, and Alan H. & Theodore Strong, of New Brunswick, for defendants.

BERGEN, J. The purpose of this writ is the review of an order made by one of the

justices of this court appointing commissioners to examine and appraise the lands of the prosecutor which the Morris Railroad Company desires to take for the construction of its railroad, and to fix the compensation to be paid therefor. The facts not disputed are that, the Morristown Traction Company having built a street railroad operated by electricity between Morristown and Lake Hopatcong, and between the city of Summit and the city of Elizabeth, in 1911 it filed with the Secretary of State a description of a proposed extension route between the Morristown and Summit termini of its railroad; that the company, being unable to obtain the requisite municipal consent to permit the construction of said railroad, and failing in an attempt to acquire private lands by condemnation proceedings, abandoned a portion of said extended route; that thereupon a railroad company, being the defendant company, was organized under the General Railroad Act, which, if lawfully constituted, is invested with the right to acquire lands for railroad uses by condemnation; that the defendant company at once adopted the route abandoned by the traction company as its route, and filed with the Secretary of State the required certificate and designation, whereupon it applied for, and was allowed, the order now under review.

The first and material point presented by the prosecutor in support of this writ is that the defendant company is not a "bona fide separate railroad company," but was organized through the procurement and agency of the traction company for the purpose of permitting it to condemn lands for its use in the name of a corporation having power to condemn land for its own purposes, but not for the use of any other corporation. That the prosecutor has no right to inquire into the legality of the corporate existence of the defendant in these proceedings was settled by this court when the present case was before it on motion to strike out reasons (Sisters of Charity of St. Elizabeth v. Morris R. Co., 81 Atl. 817), but under the determination in that case we are required to pass upon the question whether the railroad company is acting within the limits of its authorized agency; that is, in seeking to condemn prosecutor's land do the facts show that the defendant corporation is exercising its agency in good faith for the purpose of acquiring a right of way for its own use, or on the other hand, it is using its power of condemnation for a purpose other than that for which it is granted. The distinction sought to be drawn in this case between what is an assault upon the corporate existence, and the legality of acts done by virtue thereof is extremely fine. All the testimony is directed against the bona fides of those instrumental in procuring the incorporation of the defendant company, and that would tend to show that there was an unlawful purpose

sought to be obtained by it, and perhaps furnish ground for a direct attack by the Attorney General to forfeit the franchise, but assuming its existence *de jure* or *de facto* with power to condemn lands, and without power to transfer to the traction company the fruits of its exercise of the power of eminent domain, for that it cannot do, it is difficult to see how it is exceeding the limit of its agency in exercising a power vested, so long as its corporate existence continues. When a railroad company duly incorporated applies for the appointment of commissioners to condemn lands, and the proceedings are regular, the justice of the Supreme Court to whom such application is made cannot inquire into the motives of the incorporators procuring the incorporation, and by refusing to appoint the commissioners determine that the franchises granted by the state are non-existent. Nor can the bona fides of such a corporation be tested by certiorari.

In this case there is no direct proof that the defendant company in undertaking to condemn lands is exceeding the limit of its agency as conferred by the state. All that the prosecutor urges is that such an inference may be drawn from circumstances shown to exist previous to the incorporation of the company. We think that this assails the bona fides of the corporation, and the remedy is by *quo warranto*, and not by certiorari.

The second objection to this order is that it should not have been allowed until after the determination of *quo warranto* proceedings instituted by the Attorney General against the company. It is not contended that the information in *quo warranto* acted as a stay, but it is urged that in this particular case the order should not have been made pending that proceeding, because the order afforded affirmative relief to a corporation whose corporate existence was then under attack by the state. That situation will exist in every case of like nature, and it is not perceived why this should be made an exception. We do not consider this objection fatal to the order complained of.

The third objection is that the proceedings upon which this order is based were illegal because commissioners had been previously appointed, and the proceedings abandoned because the commissioners failed to act within the time required. The defendant company then entered an order duly allowed by the court, discontinuing those proceedings, and began the present. The point made being that, as the statute allows the appointment of new commissioners if the report is not made in the time fixed, they should in this case have been appointed under the old proceeding. We do not think this objection substantial. The first proceeding failed through no fault of the applicant, and it is not material whether the new commissioners were appointed under the old application or under

the new if the landowner had due notice, and that it had is not denied.

We have examined the other objections contained in the brief, and find nothing in them justifying the setting aside of the order.

The proceedings under review are affirmed.

NICHOLSON v. BOARD OF EDUCATION OF SWEDESBORO DIST. et al.

(Supreme Court of New Jersey. May 21, 1912.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 139*)— RESIGNATION OF SCHOOL TEACHER—ACCEPT- ANCE.

The supervising principal of a school district tendered to the district board of education her resignation to take effect at a date after April 1, 1911. On March 31, 1911, the board decided not to accept the resignation and so notified the incumbent on April 1, 1911. On April 3, 1911, the board (whose personnel changed on April 1st) summarily and without notice to the party affected accepted the resignation. *Held*, that such action was invalid: (a) Because the acceptance of the resignation was not pending on April 3, 1911; (b) because no notice or opportunity to be heard was afforded the party affected by the summary action.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 139.*]

Certiorari by Elsie B. Nicholson against the Board of Education of the District of Swedesboro and others to review the action of defendant Board in accepting prosecutrix's resignation as principal. Action of Board of Education reversed.

Argued before GARRISON, J., under the statute.

D. O. Watkins, of Woodbury, for prosecutrix. Davis & Davis, of Woodbury, and Frank S. Katzenbach, of Trenton, for defendants.

GARRISON, J. By this certiorari Elsie B. Nicholson challenges the validity of the action taken on April 3, 1911, by the board of education of Swedesboro accepting her resignation as supervising principal. This action, which was taken at the first meeting of the new board, was based upon a communication that had been sent to the old board and acted upon by it; the new board differing from the old, in that three old members went out and three new ones came in on April 1, 1911.

The action complained of started at the first meeting of the new board on April 3, 1911, with the reading of the minutes of the last meeting of the old board held on March 31, 1911, by which it appeared that "it was regularly moved and seconded—that the supervising principal's resignation which was laid over at a meeting held on February 8th be accepted. After careful discussion the president ordered votes cast, the board going on record as follows (5 no; 4 yes). The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

motion being lost the president declared the supervising principal's resignation not accepted."

The minutes which contained the foregoing were "approved, except motion as to supervising principal's resignation," with respect to which "it was then regularly moved and seconded—that the supervising principal's resignation be accepted which was unanimously carried and the president ordered the supervising principal's resignation accepted."

The resignation on which this action of the new board was based and to which the rejected minute of the old board referred was as follows:

"Swedesboro, N. J., February 8, 1911.

"To the Board of Education of the District of the Borough of Swedesboro, Swedesboro, N. J.—Gentlemen: I hereby tender my resignation as supervising principal of schools in the district of the borough of Swedesboro, to take effect when the work of the present school year will have been completed. To those members of the board who have aided me in the discharge of my duties as supervising principal I am most grateful. Wishing you success in all your undertakings of the future, I am,

"Very truly yours,

"[Signed] Elsie B. Nicholson."

The action taken upon this communication by the old board on March 31, 1911, was officially communicated to the supervising principal by the clerk as follows:

"Swedesboro, N. J., April 1, 1911.

"Miss Elsie B. Nicholson, Salem, N. J.—Dear Madam: At a regular meeting held March 31st, the board, after carefully considering your resignation, decided not to accept it.

"Very respectfully,

"[Signed] C. S. Crispin,

"District Clerk. [Seal]"

The action of the new board on April 3, 1911, was officially communicated to the prosecutrix as follows:

"Swedesboro, N. J., April 4, 1911.

"Miss Elsie B. Nicholson, Salem, N. J.—Dear Madam: At a regular meeting held April 3d, your resignation previously rejected was accepted.

"Very respectfully,

"[Signed] C. S. Crispin,

"District Clerk. [Seal]"

Upon receipt of this notice prosecutrix being advised by and acting through her counsel notified the board that its action was illegal and that she would continue her said office, which she did without further communication from the board until August 31, 1911, when the following was received:

"The Board of Education of the School District of the Borough of Swedesboro, Swedesboro, N. J., August 31, 1911.

"Miss Elsie B. Nicholson, Salem, N. J.—Dear Madam: In accordance with our no-

tice to you of the third day of April, A. D. 1911, you are hereby again notified that your resignation as supervising principal of the schools in the district of the borough of Swedesboro was regularly and duly accepted by the board of education of the district of the borough of Swedesboro on the third day of April, A. D. 1911.

"You are therefore no longer in the employ of, or under contract with said board as supervising principal or otherwise.

"Done by order of the board of education of the district of the borough of Swedesboro.

"Yours truly,

"[Signed] C. S. Crispin,

"Clerk of the Board."

Later the following was also received:

"The Board of Education of the School District of the Borough of Swedesboro, Swedesboro, N. J., Sept. 18, 1911.

"Miss Elsie B. Nicholson, Salem, N. J.—Madam: You are hereby again notified that you are not under contract with, nor in the employ of the school board of the district of the borough of Swedesboro, your resignation having been duly and properly accepted by the said board. You will, therefore, please not trespass upon the said school property. and, if you persist in so doing, it will be necessary for the board to take proper action to prevent such trespass.

"Done by order of the school board of the district of the borough of Swedesboro.

"Very respectfully,

"[Signed] C. S. Crispin,

"District Clerk."

These excerpts from the testimony, which show the action of the defendant of which the prosecutrix complains and the effect ascribed to its action by the defendant, present the question in controversy, which is whether or not on April 3, 1911, there was pending before the board of education a resignation by the prosecutrix of her office of supervising principal that required nothing but its acceptance by the board to constitute a concurrence of the two parties to the voluntary relinquishment of her office by the incumbent, which is both the legal and the ordinary meaning of a resignation.

If the resignation was pending before the board on April 3, 1911, it was because it was placed before them either by the prosecutrix herself or by some one acting in her behalf either in fact or by imputation of law.

The language in which the prosecutrix tendered her resignation, the date at which she tendered it, the action taken by the board thereon, and the communication of that action to the prosecutrix on April 1, 1911, being fixed facts, the only remaining question of fact is whether she or any one acting for her placed her resignation again before the board after she had been notified of its decision not to accept it. As there is no claim made that this was done, the proper infer-

ence to be drawn from the uncontroverted facts is that the resignation of the prosecutrix was not as matter of fact before the new board on April 3, 1911.

The defendant, however, contends that nevertheless the resignation was as matter of law before the board on that date relying for this conclusion upon the difference being a continuous and a not continuous body pointed out in *State v. Rogers*, 56 N. J. Law, 480, 28 Atl. 726, 29 Atl. 173, and in *Gulnac v. Bergen Co.*, 76 N. J. Law, 543, 64 Atl. 998, 122 Am. St. Rep. 405.

The argument is that, inasmuch as the old board could not have filled the vacancy that would have resulted from the acceptance of the proffered resignation, it was without power to decline to accept it, and hence in legal contemplation did not so decide, but in legal effect transmitted it to the new board; in fine, that the legal effect of what happened was exactly the opposite of what actually happened—which leads one to remark that it is most unfortunate when the conduct of people who have acted upon their ordinary understanding of what they are doing is given a totally different meaning by force of technical legal rules of which they never heard or dreamed.

I shall not discuss, still less pass upon, the several important legal propositions included in this argument, for the reason that conceding the ultimate doctrine for which counsel contends, and applying it impartially to the case in hand, it strengthens rather than weakens the conclusion that the prosecutrix's resignation was not before the board on April 3d, either by her own act or by that of her agent in fact or by the legal imputation suggested.

The ultimate doctrine for which the defendant contends, as stated in the carefully prepared brief of counsel (the case being presented on written briefs), is as follows: "The old board to which the resignation was presented served only as a messenger or conduit pipe to convey the resignation to the board of education of the district of Swedesboro which was organized on the first Monday of April, 1911."

If this be so, and if this legal rule is to be applied to the present case regardless of what the parties actually did and intended to do, it follows that the only purpose for which the old board could accept the prosecutrix's resignation was for the purpose of acting as such messenger or conduit, from which it imperatively follows that the board decided not to accept the resignation for this purpose, and hence its notification to the prosecutrix that her resignation was not accepted was a declaration to her that it would not be transmitted to the new board through the old board acting as her messenger.

Whether the board was right or wrong in this decision is of no consequence upon the

question we are considering, for Miss Nicholson clearly did not herself lay her resignation before the new board, and it is equally clear that the agent imputed to her by the legal rule contended for by the defendant declined, according to such rule, to accept the special agency and hence did not act as her agent even by imputation.

Of course, if we regard what the old board actually did and intended to do, by its decision not to accept the resignation, the case presented is that of a quasi judicial determination which rendered the resignation functus after the expiration of the body that had thus acted upon it.

So that whether we regard the case as one of fact as the parties themselves understood it, or whether we regard it under the technical legal rule advanced by the defendant equally and in either case there was no presentation of a resignation to the new board by the acceptance of which the office in question became legally vacant.

It is perhaps needless to add that with Miss Nicholson's willingness to submit her resignation to the board as constituted at the time she tendered it and her unwillingness to have it passed upon by the board as constituted at a subsequent period, we have nothing whatsoever to do, although her motive may be surmised from the outcome. The status of the resignation after it had been adversely acted upon by the outgoing board is the sole matter of present legal concern.

If I thought that I was wrong in the foregoing conclusion as to such status both on the facts and the law, I should still consider the action under review to be invalid as an exercise of a quasi judicial function without notice to the party affected or an opportunity to be heard. The board was charged with knowledge of its own minutes and of the official acts of its officers. The question, therefore, notwithstanding these acts the prosecutrix was still tendering her voluntary retirement from office for acceptance was, to say the least, an open question that lay at the foundation of the jurisdiction of the board in the premises. The common fairness that enters into the judicial rule upon this subject therefore required that, before deciding that question, the party affected should have had notice that such a question touching her rights was under consideration and should have been accorded an opportunity to be heard in her own behalf.

I entertain no doubt as to the right of the prosecutrix to prosecute this writ notwithstanding the adjudication of the domestic tribunals erected under the school law, whose judgments are reversed by the judgment of this court vacating and setting aside the action of the board of education brought up by this writ.

Such a judgment may be entered, with costs.

FITZGERALD SPEAR CO. v. KELLY.

(Supreme Court of New Jersey. March 23, 1911.)

FRAUDS, STATUTE OF (§ 23*)—PROMISE TO PAY DEBT OF ANOTHER.

Where the rector of a Catholic church promised to pay a subcontractor of a contractor to erect a rectory for the church the entire lumber bill, if he would furnish the materials required for the completion of the contract, made after the contractor had failed to pay for materials delivered and the refusal of the subcontractor to supply more materials until he had received something on his account, the promise of the rector was personal, and was an original engagement by him to pay his own debt, and not the debt of the contractor, so far as related to materials delivered for the building after the promise, and it was not within the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

Error to Circuit Court. Warren County.

Action by the Fitzgerald Spear Company against Peter J. Kelly. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued November term, 1910, before GUMMERE, O. J., and MINTURN and TRENCHARD, JJ.

Martin P. Devlin, for plaintiff in error.
George H. Peirce, for defendant in error.

GUMMERE, C. J. The defendant, Kelly, was the rector of St. Rose's Roman Catholic Church at Oxford Furnace. A written agreement was made between the church and one Lennon for the building of a rectory for the use of the church corporation as a home for its rector. Lennon procured from the plaintiff a considerable quantity of lumber to be used in the erection of the building. Failing to pay for the same, the plaintiff refused to supply any more lumber to him until it had received something on account. Thereupon, according to the testimony offered on behalf of the plaintiff, the defendant, Kelly, promised it to pay the entire lumber bill if it would furnish and deliver to the building the materials required for the completion of Lennon's contract. The plaintiff accepted this offer and delivered the material. The plaintiff had a verdict and judgment.

The principal question presented by this writ of error is whether the case is within the statute of frauds; that is, whether the promise sued on was a promise by Kelly to pay the debt of Lennon. If it was, admittedly the defendant cannot be held, for the promise was not in writing. In the leading case of *Hetfield v. Dow*, 27 N. J. Law, 440, it is said: "If A. purchases goods to be delivered to B., or promises to pay for goods that may be purchased and received by B., it is an original contract on the part of A., and the promise need not be in writing; it is an original engagement to pay his own debt, and not the debt of B." In the present case,

the recovery was had for materials delivered by the plaintiff to the rectory building after the promise made by Kelly. To the extent that the promise was to pay for these materials, it was an original engagement by Kelly to pay his own debt, and not the debt of Lennon. The recovery against him for this sum was therefore properly permitted.

The contention on the part of counsel for plaintiff in error that in making this promise Kelly was a mere agent of the church is, we think, without force. He made no attempt to bind the church. The obligation which he assumed was a personal one.

The judgment under review will be affirmed.

MATLACK v. PUBLIC SERVICE CORPORATION.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

**1. PLEADING (§ 59*)—DECLARATION—DEMUR-
RER.**

Where a declaration sets up a condition precedent to be performed by the plaintiff, and then avers nonperformance of it, no legal cause of action is shown, and a demurrer to such a declaration will be sustained.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 124-127; Dec. Dig. § 59.*]

2. PLEADING (§ 8*)—DECLARATION—CONCLUSIONS OF PLEADER.

The legal conclusions of the pleader, where set out in the declaration, cannot be considered in determining its legal sufficiency.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Error to Circuit Court, Burlington County.

Action by Joshua Matlack against the Public Service Corporation. Demurrer to narrative sustained, and plaintiff brings error. Affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Joshua Matlack, of Mt. Holly, pro se. Leferts S. Hoffman and Leonard J. Tynan, both of Newark, for defendant in error.

BERGEN, J. The declaration filed by the plaintiff in this cause sets up as a cause of action the following facts, viz.: That Irvin Carter, "deeming himself injured" by the destruction of a shade tree, chargeable to defendant's negligence, "hired and engaged this plaintiff as his agent to collect from this defendant damages for the destruction of said tree;" that plaintiff engaged counsel and caused a suit to be brought in the name of Carter; that just before the trial the plaintiff made a settlement with defendant of the claim for damages by an agreement manifested by two letters written to plaintiff by the defendant, which were inserted at length in the declaration and made a part thereof. The first letter reads as follows:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Receiving your statement of costs in the case of Irvin Carter, amount including settlement, \$241.53, and in reply to same, beg to say, it was satisfactory with the exception of the charge for two experts, amount \$15.00, which the company will not allow. If you are willing to deduct this from the \$241.53, kindly let me know and I will send you a release for \$226.53." This letter does not indicate anything more than an offer to settle, based upon acceptance of the terms offered. The second letter incloses a release, with request to "have same executed and return to this office and we will send you check to cover this amount." The declaration then avers that the plaintiff did accept the said sum "in settlement of said claim of Irvin Carter against this defendant, and did receive from this defendant the release referred to, which release this plaintiff immediately forwarded to his principal, the said Irvin Carter, but who refuses to sign and deliver the release to this plaintiff." The pleader then proceeds to state certain legal principles which, he avers, entitle him, upon the foregoing statement of facts, to recover for his own use the aforesaid sum. The defendant demurred to the declaration, and the circuit court of the county of Burlington sustained the demurrer, and judgment final was entered, which the plaintiff by this writ seeks to reverse.

[1, 2] As legal conclusions set out in a pleading cannot be considered in determining its sufficiency, the only case made by the facts set out in this declaration seems to be that plaintiff was engaged to collect damages for his principal, which he compromised, without the statement of any facts showing his authority to do this for his principal. In addition to this, the written evidence of the compromise, as set out in the pleading, and which must be taken as accurately setting forth the agreement (*Dick v. McPherson*, 72 N. J. Law, 332, 62 Atl. 383), contains a condition precedent to be performed by the plaintiff, viz., the execution and return of the release of his principal to the defendant, the performance of which the pleader expressly negatives. This declaration is destitute of every element of good pleading, and the demurrer to it was properly sustained.

The judgment under review will be affirmed.

MEANEY et ux. v. STORK.

(Court of Chancery of New Jersey. May 9, 1912.)

1. INJUNCTION (§ 113*)—VIOLATION OF BUILDING RESTRICTIONS—TIME TO SUE.

One who seeks to enjoin the violation of a building restriction must act promptly upon being advised of that which he asserts does or will constitute the violation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198-201; Dec. Dig. § 113.*]

2. INJUNCTION (§ 62*)—VIOLATION OF BUILDING RESTRICTION—WAIVER.

Where complainants and defendant owned adjoining lots acquired from a common source of title under a restrictive covenant providing that no building should be erected within 10 feet of the street line, and where the complainants, observing that a building which was being erected by the defendant projected over the 10-foot line with its eaves and with bay windows for which sills had been laid, notified the defendant that they would consider the bay windows a violation of the covenant, but made no mention of the eaves, they were not entitled to an injunction as to the eaves, especially where almost every other house on the street on lots unincumbered with the same restriction projected over the 10-foot line; the defendant being warranted in concluding that the projection of the eaves was unobjectionable to the complainants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127, 129; Dec. Dig. § 62.*]

3. COVENANTS (§ 49*)—RESTRICTIVE COVENANTS—CONSTRUCTION.

Restrictive covenants are strictly construed against the person seeking to enforce them.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 49; Dec. Dig. § 49.*]

4. INJUNCTION (§ 58*)—ENFORCEMENT OF RESTRICTIVE COVENANTS—RIGHT.

Restrictive covenants will not be enforced by injunction when they are vague or uncertain, or where the right to relief is doubtful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113; Dec. Dig. § 58.*]

5. INJUNCTION (§ 58*)—ENFORCEMENT OF RESTRICTIVE COVENANTS.

Restrictive covenants, to be enforceable in equity, must be reasonable.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113; Dec. Dig. § 58.*]

6. COVENANTS (§ 49*)—RESTRICTIVE COVENANTS—CONSTRUCTION.

The meaning of a restrictive covenant must be ascertained not only from its language, but also from the circumstances of its creation and its obvious purpose.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 49; Dec. Dig. § 49.*]

7. COVENANTS (§ 51*)—RESTRICTIVE COVENANTS—CONSTRUCTION.

A restrictive covenant, providing that no building should be erected upon the lot within 10 feet of the street line, and that the 10-foot strip should be kept open and unincumbered, except that light open fences not more than 6 feet in height might be built to inclose a yard, did not prohibit the projection of steps from the front of the house over upon the 10-foot strip.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

Bill by Richard B. Meaney and wife against Frederick B. Stork. Heard on pleadings and proofs in open court. Bill dismissed.

Weller & Lichtenstein, of Hoboken, for complainants. F. N. Eberhard, of Hoboken, for defendant.

GARRISON, V. C. This is a bill filed to enforce a building restriction. The lands in question lie in a place named Eldorado, at Weehawken, Hudson county, this state. The complainants and the defendant are

owners of adjacent lots at that place, claiming through a common source of title; the complainants' title having left the common grantor first. The restriction in question reads as follows: "That neither he nor they will erect or permit to be erected on any lot any building within 10 feet of the line of the street, avenue or place upon which said lots front, but shall keep said strip of land open and unincumbered, except that light, open fences not more than 6 feet in height may be built to inclose said strip as a courtyard if so desired." The complainants' lots are unimproved. Upon the defendant's lots he has erected a house. The street or avenue in question is called Liberty Place, and I am assuming, in favor of the complainants, that the restriction in question obtains throughout Liberty Place. I am also assuming that there was a common scheme for building improvement with similar restrictions imposed upon the land by the common grantor, and that the same is enforceable by the complainants by reason of the circumstances and the principles of law applicable to the situation. The proofs show that on Liberty Place, to the west of the lots of the complainants, there are other houses, built since he acquired his title, and that in almost, if not every, instance, some part of the 10 feet back from the street line has projecting over it, or resting on it, eaves of a house, or a porch, or steps or porticoes. To the east of the complainants' lots there is, I think, at the present time, the proofs show, only the house of the defendant; and the eaves of his house, as completed, project from the front of the house, which is 10 feet from the street line, about 3 feet and 8 inches, and the steps that lead up to the front door of his house occupy several feet of the 10-foot strip.

The object of the bill and the supplemental bill is to restrain the continuance of these two alleged violations of the above-quoted covenant. It appears from the proof that the defendant planned a house with a bay window projecting from the front of it, and that when the male complainant observed this in the course of the building he consulted his counsel, who sent a notice to the defendant, notifying the defendant that the erection of this bay window was a violation of the restriction, and if continued would result in the complainants applying for relief. The defendant, after the receipt of this communication, contemplated moving his house farther back than it then was (it then being, as above stated, just a little over 10 feet from the street line) so as to be able to erect the bay window and still be at least 10 feet from the street line. Subsequently, however, he changed his mind, and eliminated the bay window, and continued with the erection of the house.

Since I propose to concede, in behalf of the complainants, for the purposes of this

case, all of the principles of law for which he contends, it does not seem to me to be necessary or proper to burden this opinion with citations of authority. I propose, for the purposes of this case, to consider it settled that there was a common building scheme applicable to the lands on Liberty Place, and that among the restrictions was the one contained in the above-quoted covenant, and that the complainants were entitled to enforce that covenant against the defendant.

The defendant argued that the court should find that the complainants were not entitled to relief because of the facts concerning the other alleged violations of the same covenant on the same street. It is the fact, as above mentioned, that on this same street almost every other house had something projecting from it which hangs over the 10 feet in question—that is, the 10 feet between the front of the house and the street line—or has a porch or steps resting upon part of the 10 feet. The answer of the complainants to this argument is that such projections or encroachments of the other houses on the street did not affect him, as they were all to the west of him; whereas, the view of the Hudson river and the Boulevard from his lots was the desirable and valuable view, and the defendant's lots lie between the complainants' property and the Hudson river, and anything erected upon the defendant's lots which interfered with or obstructed the view was injurious.

The complainants, in respect to the law applicable to this situation, cited those cases which hold that slight and immaterial violations by others in the same neighborhood will not be held to deprive a complainant peculiarly injured by the violation he is attempting to restrain from being accorded the protection to which it is found he is entitled with respect to the injurious violation. Under all the circumstances, therefore, I am not content to find, as against the complainant, that his conduct with respect to the alleged violation by others of the same covenant deprives him of the right to enforce it as against the defendant.

[1, 2] I take it to be perfectly settled in such cases that one who seeks the aid of equity must act promptly upon being advised of that which he asserts is or will be a violation of the restriction; and therefore I am of opinion that, even if the covenant should be construed as prohibiting the projection of the eaves of the defendant's house over the 10 feet mentioned in the covenant, the complainant may not have accorded to him, in a court of equity, injunctive relief under the circumstances disclosed by the proofs in this suit. The bill in this case charges that "when the cornice" (and by this the complainants mean the eaves) "was placed on said building, your orators noticed that the same was over the said building

line; * * * that thereafter bay window frames were put up; * * * and that on the 11th day of August, 1910, their said solicitor served upon the said (defendant) the notice." The notice, as will be recalled, confined itself specifically to the bay window. After receiving this notice, the defendant, as I have already stated, seriously contemplated digging a new cellar, or making a new foundation and moving his whole house back a certain distance, so as to be able to preserve the front of it with the bay window, and still not in any way encroach upon or project over the disputed 10 feet, but subsequently determined to simply eliminate the bay window to which the complainants had objected, and completed his house in that way.

I am entirely clear that, under these circumstances, it would be unjust to the defendant for a court of equity by injunction to prevent the maintenance of the said cornice or eaves. It appears from the bill and proofs that, when the defendant had so far progressed with his building as to show that he intended to place bay windows in the front and to have a cornice or eaves projecting from the said front some 3½ feet, the complainants observed this situation and communicated to the defendant their objections to the existing plan of the defendant, and warned him that the bay windows were a violation of the covenant. They did not warn him with respect to, nor in any way call his attention to, the cornice or eaves.

Under these circumstances, I think the defendant was entirely justified in determining that the complainants did not object to anything in the existing situation other than that which they specifically pointed out and stated as their objection. And I think that the defendant was entirely justified then in acting upon that determination, and leaving the rest of the building as it was originally planned, eliminating the feature to which the complainants had objected.

Furthermore, the defendant, by reason of existing conditions, upon that street, was entirely justified in reaching the conclusion he did, because almost every other house on the street in some way or other projected over the 10 feet in front of it; and when the complainants were advised by the physical situation of what the defendant contemplated doing, and only objected to the bay windows, he clearly, in my view, led the defendant to the conclusion that whatever other projection there was, was unobjectionable to the complainants.

With respect to the matter contained in the supplemental bill, what has just been said is not applicable, because at the time of the filing of the bill the steps leading up from the ground to the front entrance were not in place and were placed subsequent to the filing of the original bill, and became the subject-matter of the supplemental bill.

[3, 4] This leads us to a consideration of the language and meaning of the covenant. In this connection it should be recalled that courts of equity do not aid one to restrict another in the uses to which the latter may lawfully put his property, unless the right of the former to such aid is clear; that restrictive covenants are strictly construed against the person claiming the right to enforce them; and that such covenants must not be vague or uncertain. Where the right to a complainant to relief by the enforcement of a restrictive covenant is doubtful, his right to such relief must be denied. For a late expression of these principles, see *Fortescue v. Carroll*, 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79 (Ct. of Er. 1910); applied in *Goater v. Ely*, 82 Atl. 611 (Garrison, V. C., 1912).

[5, 6] I take it as firmly settled that a restrictive covenant, to be enforceable in equity, must be reasonable, and that the meaning to be attributed to it must be ascertained not only by a consideration of its language, but also by a consideration of the circumstances existing at the time of the creation of the covenant and its obvious purpose.

[7] It will be recalled that the language of the covenant with which we are dealing prohibits the erection "on any lot of any building within 10 feet of the line of the street * * * but shall keep said strip of land open and unincumbered, except that light, open fences, not more than 6 feet in height, may be built to inclose said strip as a courtyard, if so desired." In the case of *Brigham v. Mulock*, 74 N. J. Eq. 287, 70 Atl. 185 (Leaming, V. C., 1908), the court said, at page 289 of 74 N. J. Eq., at page 186 of 70 Atl.: "The covenants in question provided that no building shall be erected within 20 feet of the property line of any street. * * *" And in that case (74 N. J. Eq. 290, 70 Atl. 186) the court entertained grave doubts whether open porches and bay windows, not extending to the ground, were within the language of the covenant.

The complainant in this suit seeks to escape this construction of the covenant in question in this suit by referring to the subsequent language in the covenant in question with respect to keeping the said strip of land open and unincumbered.

"Open," in one sense, unquestionably means *absolutely without obstruction*; and "unincumbered" may be properly used, in some connections, as meaning *absolutely without anything resting on or projecting over land*. But when this whole covenant is read together I think its meaning is reasonably plain, and, further, that it is entirely plain that it cannot be given the broad construction contended for by the complainants. The obvious purpose of this covenant was to prevent the erection of a building within the 10 feet. Every house was to have in front of it—that is, in front of its

front line—10 feet of unbuilt-on property. It cannot be successfully argued that any such absurd result should be attributed to a construction of this covenant as to prevent that 10 feet from having placed upon it anything. Surely walks could be built through it, and to that extent the land would be unincumbered. Little copings along the side of the walks to protect flower beds bordering the walks would surely not be within any reasonable construction of this covenant. And yet, if broadly construed, the walk itself and the coping or projection along the side of it, put there for protection, would be an "incumbrance" in some use of that word, and probably would also cause the land not to be "open"; that is, absolutely free of obstruction, within a broad and in some senses proper use of the word "open."

I am of the opinion, on the one hand, that if the front of the building was 10 feet from the line of the street, and then a covered porch projected from it onto the 10 feet, that would be part of the erection of the building, and would violate the covenant. On the other hand, I am of opinion that it is within the meaning of this covenant to permit an approach by way of steps to rest on the said 10 feet; and I do not think that, in the proper sense of this covenant, such steps cause the said strip of land to be unopen and incumbered—that is, violate the provisions of the covenant that the said strip of land should be open and unincumbered. In other words, I incline to the opinion that the obvious purpose of the covenant was to have in front of each house a strip of land 10 feet wide across which the vision of the neighbors would be unobstructed, and that the prohibition was against the erection of anything upon or within the said 10 feet which should prevent free observation across it. Read in this way, the restriction is entirely reasonable; the obvious purpose of it is served, and the owner of each lot is not deprived unreasonably of a perfectly proper use of his property. Read in the broad way that the complainants insist it should be read, giving the most extreme meaning to each word of which each word is capable, the said strip of land would have to be left absolutely unimproved in any way, because anything placed upon it which nature had not placed there would then "incumber" it, in the broadest sense of the word, and this is so entirely unreasonable that we discard it and search for the more reasonable construction.

In conclusion, I can only, by way of summarization, say that I cannot believe it proper to construe this covenant so as to prevent the building of walks across this strip, or the resting of steps upon a portion of this strip; and I am also inclined to think that the projection of the eaves from the roof of a house, or a "cornice," as the complainants

call it, was not within a reasonable construction of the covenant. However, I do not decide that in this case, because I think the complainants are remediless in equity with respect to that, for the reasons previously pointed out.

Under the circumstances of this case, and the law which I find applicable thereto, I have determined that the bill should be dismissed; but since it was entirely proper for the complainants to obtain a judicial construction of this covenant, and there was nothing unreasonable in his bringing the defendant before the court for that purpose, I will exercise the discretion vested in the court with respect to costs, and shall make the said dismissal without costs as against the complainants.

STATE v. HUGGINS.

(Supreme Court of New Jersey. June 14, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 421*)—HEARSAY EVIDENCE—AGE.

The prosecutrix, upon the trial of an indictment for rape, when it is essential to prove that she is under the age of consent, may testify to her own age.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 976-983; Dec. Dig. § 421.*]

2. CRIMINAL LAW (§ 1169*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR.

Upon the trial of an indictment for rape, the court permitted the prosecutor of the pleas to ask if the girl made a complaint against the defendant. The case was presented to this court under section 136 of the criminal procedure act (2 Comp. St. 1910, p. 1863). *Held*, that no manifest wrong or injury was done to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

Error to Court of Quarter Sessions, Burlington County.

George D. Huggins was convicted of rape, and brings error. Affirmed.

Argued February term, 1912, before the CHIEF JUSTICE, and GARRISON and SWAYZE, JJ.

Robert Peacock, of Mt. Holly, and James Mercer Davis, of Vincentown, for plaintiff in error. Samuel A. Atkinson, of Mt. Holly, for the State.

SWAYZE, J. The defendant was convicted of rape of a child under 16 years of age. The case is presented to us under the 136th section of the criminal procedure act (2 Comp. St. 1910, p. 1863). The substantial reasons urged for reversal are that the evidence failed to show penetration; that it was not proved that the girl was under 16 years of age; that her story was not corroborated;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and that the court erred in admitting evidence of a declaration of the mother as to the child's age, without proof that the mother was dead or out of the jurisdiction, and evidence that in her complaint she mentioned the name of the defendant. As to the evidence of penetration, it is enough to say that if the jury believed the girl's testimony the fact was proved. Further details than she gave were unnecessary. The medical evidence tended to corroborate her.

[1] The girl herself testified to her own age, and, although at one time on her cross-examination she said that all she knew about it was what Mr. Williams told her, she also said on her recross, when asked whether that was all she knew, that her mother told her. It is well settled that one may testify to his own age. *Wigmore on Evidence*, § 667. Even the prosecutrix in an action for rape may do so, when it is essential to prove that she is under the age of consent. *Commonwealth v. Phillips*, 39 N. E. 109, 162 Mass. 504; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *People v. Colbath*, 141 Mich. 189, 104 N. W. 633. The reasons for permitting testimony of this character have been nowhere better stated than by Mr. Justice Dixon, speaking for the Court of Errors and Appeals, in *Hancock v. Catholic Benevolent Legion*, 69 N. J. Law, 308, 55 Atl. 246. Testimony as to the exact birthday must, as he says, rest on hearsay; but testimony as to the approximate age rests on one's own recollection. By counting the years of memory and adding the short period that antedates memory, a period which all normal persons can from observation and experience approximate with much accuracy, a person can form a sufficiently accurate estimate of his age. It has even been held that a witness in a criminal case may testify as to the date of his birth. *Commonwealth v. Stevenson*, 142 Mass. 466, 8 N. E. 341. As Prof. Wigmore says, "practically a person's belief on this point has a satisfactory basis. Courts have commonly preferred to accept this practical certainty, rather than to insist on academic nicety." In a doubtful case, where the precise age to a day becomes important, it would be the duty of the court to warn the jury that the testimony of a person as to his birthday must be considered with caution, but that is not the present case. The testimony of the prosecutrix and of the physician was enough to prove that she was under 16. The evidence of Williams as to the records of his institution, showing the age given by the mother when the child was intrusted to his society, was incompetent; but, as there was competent proof of the fact, and it was not contradicted, as it might have been, by testimony that the development of the girl indicated a greater age than 14, we think

there was no manifest wrong or injury done the defendant by admitting the testimony.

[2] The objection to the complaint made by the girl is that details were permitted, contrary to the rule of *State v. Ivins*, 36 N. J. Law, 233. We cannot in this court consider whether that rule goes too far as has been held in more recent cases elsewhere. *Wigmore*, §§ 1134ff, 1760; *Reg. v. Lillyman*, 65 L. J. M. C. 195. The trial judge followed the rule of the *Ivins* Case, as we understand it, and excluded all details, except that he permitted the prosecutor of the pleas to ask if the girl made a complaint against the defendant. There is nothing in the opinion in the *Ivins* Case which makes it improper to put the question whether the prosecutrix complained of the prisoner; and a consideration of the history of the rule and the practical effect of evidence of the complaint leads us to think it permissible. The custom of excluding the details of the complaint, the history of which is traced by Prof. Wigmore, was referred to by Baron Parke, in *Reg. v. Walker*, 2 M. & Rob. 212. He there said: "The usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of the complaint by cross-examination. In *Reg. v. Osborne*, C. & M. 622, however, Creswell, J., held that it was improper to ask the name of the person of whom the prosecutrix complained. He expressed, however, his difficulty, since it would be competent to prove that in consequence of the complaint the prisoner was apprehended. This practical difficulty must exist whatever theory we adopt as to the philosophical basis for evidence of such declarations. Unless it relates to the prisoner on trial, the evidence is of no value; and whether his name is mentioned or not the jury cannot avoid the inference that the complaint made by the prosecutrix was a complaint of the prisoner. The Court for Crown Cases Reserved, in *Reg. v. Lillyman* (1896), 65 L. J. M. C. 195, in an elaborate judgment by Hawkins, J., in which Lord Russell of Killowen, Baron Pollock, Cave, J., and Wills, J., concurred, explained Justice Creswell's ruling in *Reg. v. Osborne*, upon the ground that he held only that the statement of the prosecutrix was not part of the *res gestæ*; and they held that it was not even an authority against admitting the details of the complaint. We are not required to go as far as that. It is enough for us that, since the jury could not but have inferred that the complaint was of the prisoner, no manifest wrong and injury was done him by permitting the witness to say so.

The judgment is affirmed.

HULBERT v. ARNOLD.

(Supreme Court of New Jersey. June 5, 1912.)

*(Syllabus by the Court.)***1. LIBEL AND SLANDER (§§ 120, 126*)—PUNITIVE DAMAGES.**

In an action for slander, if express malice is shown, punitive damages may be awarded, depending upon the malicious character of defendant's conduct, the amount being left to the discretion of the jury, and a new trial will not be granted unless the verdict is so large that the excess is perverse, or the result of some gross error in a matter of principle.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351, 375, 376; Dec. Dig. §§ 120, 126.*]

2. LIBEL AND SLANDER (§ 120*)—PUNITIVE DAMAGES.

Punitive damages are not awarded, in a slander suit, upon the theory of compensation to the sufferer, but as a punishment of the offender, and a warning to others.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

Action by Lucy C. Hulbert against Willis C. Arnold. Judgment for plaintiff. Rule to show cause discharged.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Freeland, King, Wilson & Lindabury, of Newark, for plaintiff. Willard W. Cutler, of Morristown, for defendant.

BERGEN, J. This issue was framed in the Supreme Court and sent to the Morris county circuit for trial, where the plaintiff had a verdict for \$10,000, whereupon a rule to show cause why the verdict should not be set aside and a new trial granted was allowed, no exceptions being reserved, which the defendant now moves be made absolute. This action was brought to recover damages for slanderous words spoken by the defendant defamatory of the plaintiff. The testimony introduced by the plaintiff shows that she is 26 years of age and was supporting herself by teaching, being at the time of the alleged slander engaged as teacher of the Washington Valley school in Morris county, one of the public schools of this state of which the defendant was one of the members of the board of education having the management thereof; that the defendant said the plaintiff was a whore, and repeatedly allowed two men to come to the schoolhouse, and had illicit intercourse with them, each in turn watching outside while the other was in the schoolhouse with the plaintiff; that as a consequence she became with child and her condition of pregnancy was plainly observable, of which she was relieved by an operation for abortion performed by physicians at the Morristown hospital. These charges against the plaintiff were made by the defendant to several persons, and when one of them, a Mr. Mills, remonstrated with

him about these statements, and said they were not true, he said he could prove them, and when he was advised to go to the hospital and ascertain the truth he replied that women went there for that purpose, and it was always put in the papers that they had appendicitis. He also said her condition was such that it was disgusting to have her in the school, that she was so far in the family way that the children all talked about her, and that the neighbors talked about it. The substance of these charges is that a young woman engaged in teaching children dismissed them from school in order to submit herself to the embraces of two paramours in immediate succession, the one waiting and watching while the other gratified her lustful passions, a prostitution of the most degrading character, and that she, becoming pregnant, submitted to an operation for abortion, charges which he persisted in reiterating, and asserting he could prove after he had been assured of their falsity with knowledge of the names of reputable physicians in charge of the hospital from whom he might obtain the truth if he so desired. The defendant was called as a witness and did not undertake to establish the truth of his statements, but, on the contrary, denied making them. The evidence that he did so defame the plaintiff is so overwhelming as to lead to the conclusion that the defendant was purposely untruthful, and, under such conditions, now asks to have the verdict set aside as excessive. That the words spoken by defendant of the plaintiff were mendacious, and his purpose malicious, the evidence fully demonstrates. His purpose, inferable from the testimony, was to so defame and destroy the character of this young woman as to prevent her retention as a school teacher where she was employed.

[1] That the damages are punitive is manifest from the amount awarded in view of the testimony bearing upon the question of compensation or general damages; but in an action for slander, if express malice is shown, punitive damages may be awarded, depending upon the malicious character of defendant's conduct, the amount being left to the discretion of the jury, and a new trial will not be granted unless the verdict is so large that the excess is perverse, or the result of some gross error in a matter of principle. Odgers on Libel & Slander, 222, and cases there cited.

The charges made by the defendant in the present case were of the most vile, indecent, and criminal character. They assailed the most valued and cherished characteristic of chaste womanhood, an element so sensitive that once darkened by the tongue of slander, however untruthfully, legal exoneration can only partly restore it. The slander proven in this case is of the most despicable character, tending to permanently injure the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—32

good name and fame of a chaste and virtuous young woman, and if a person should ever be admonished that he cannot wantonly defame the fair names of good citizens, this is such a case.

[2] Punitive damages in a slander suit are not awarded upon the theory of compensation to the sufferer, but as a punishment of the offender, and a warning to others. Under the circumstances which appear in this record, we are not inclined to say that the verdict is so excessive as to indicate that it was the result of prejudice, bias, or gross error in a matter of principle, and we refuse to set the verdict aside for this reason.

The next point urged is that the trial court improperly admitted in evidence slanderous words spoken by the defendant of the plaintiff other than those set out in the declaration. The testimony to which the plaintiff refers in his brief, and to which our attention is specifically called, was not objected to, nor any exception taken, and as to any other testimony objected to, it is not pointed out either in the reasons or brief; but aside from this the defendant requested the court to charge the jury that there could be "no recovery unless the plaintiff had proved the words alleged in the declaration were spoken by the defendant even if they believe other slanderous words had been spoken by the defendant." The court charged as requested, so, if other slanderous words were proven, they would only tend to show the malice of the defendant in using the words set out in the declaration, and not be considered as an element of damage. And for the purpose of showing the temper of defendant's mind toward plaintiff, they were competent under the rule adopted in *Evening Journal Ass'n v. McDermott*, 44 N. J. Law, 430, 43 Am. Rep. 392.

The defendant also claims that it was error to exclude a question asked on the cross-examination of one of the witnesses called by the plaintiff. This witness had testified that defendant said to him that the condition of the plaintiff had become so noticeable that the neighbors had spoken of it, and she had gone to the hospital to have an operation performed. He had also testified during his direct examination to other conversations with the defendant regarding the conduct of the plaintiff, and on cross-examination it was shown that the witness and defendant were members of the school board, and then witness was asked, "And Mr. Arnold was talking the matter over with you as a member of the board, wasn't he?" This was objected to and excluded upon the ground that it asked for a conclusion and not a fact. There was no testimony showing that they were conversing as members of the board concerning their duties as such, and as the case then stood the answer could only give the conclusion of the witness as to

defendant's purpose. The question was not competent, and therefore properly overruled.

This disposes of all the substantial reasons pressed in favor of the rule, against defendant's contention, and it will be discharged.

KOSHER DAIRY CO. v. NEW YORK, S. & W. R. CO.

(Supreme Court of New Jersey. June 8, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 442*) — EVIDENCE — INJURY TO ANIMALS — COMPETENCY — REMOTENESS.

It was error prejudicial to defendant to exclude the proffered testimony of the defendant's surveyor and photographer tending to show observations made by them at a railroad crossing nearly two years after the happening of an accident at said crossing of the extent of view in the direction in which a locomotive engine of the defendant approached said crossing and killed several of the plaintiff's cattle, which were being driven over the crossing by the plaintiff's servants, to one approaching the crossing in the direction that the plaintiff's servants were, where it appeared that the roadbed had remained unchanged, and, although it further appeared by testimony on behalf of the defendant that it was uncertain whether at the time said observations were made certain obstructions and surroundings testified to by the plaintiff's witnesses to have existed at the time of the happening of the accident, and which it was claimed obscured the view in the direction in which defendant's locomotive engine approached the crossing, still existed at the time when the observations were made by the defendant's surveyor and photographer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1596-1607; Dec. Dig. § 442.*]

2. RAILROADS (§ 442*) — COMPETENCY — REMOTENESS.

Though it appeared that the observations offered to be proved were made in the daytime, and the accident happened in the dusk of the evening, and though the defendant's testimony left it uncertain whether the surroundings of the roadbed and the conditions at the crossing were the same when such observations were made as at the time of the accident, nevertheless such proffered testimony was admissible because the extent of view to be had at the crossing in the direction in which the defendant's locomotive engine approached bore materially upon the exercise of reasonable care by the plaintiff's servants at the time for the safety of the cattle in driving them onto the crossing. The probative weight to be given to such testimony was for the jury to pass upon, under all the circumstances, under proper instructions from the court.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1596-1607; Dec. Dig. § 442.*]

Appeal from District Court of Hoboken.

Action by the Kosher Dairy Company against the New York, Susquehanna & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and new trial awarded.

See, also, 78 Atl. 1052.

Argued November term, 1911, before TRENCHARD and KALISCH, JJ.

Collins & Corbin, of Jersey City, for appellant. William B. Stites, of Hoboken, for appellee.

KALISCH, J. The plaintiff's servants were driving nine of the plaintiff's cows across the Paterson avenue railroad crossing, in Jersey City, at about 8 o'clock in the evening of the 18th of July, 1909, when a locomotive engine of the defendant company ran into the cows with the result that three of them were killed. The plaintiff brought its action against the defendant company in the Hoboken district court to recover damages for the loss of its three cows, upon the allegation that such loss was the result of the defendant company's servants' negligence in charge of the locomotive engine in failing to give either of the prescribed statutory signals for said crossing. The case was tried by the court sitting with a jury. A verdict was returned in favor of the plaintiff for \$350. At the close of the case the defendant moved for a direction of a verdict in its favor on two grounds: (1) That there was no evidence of negligence on the part of the defendant; (2) that contributory negligence on the part of the plaintiff's servants conclusively appeared. Neither contention seems to us to contain any merit.

At the crossing in question, the line of the defendant company and that of the Northern Railroad Company of New Jersey run parallel with each other, each company maintaining two tracks, an east-bound and west-bound track; there being a space of 41 feet between their respective lines at said crossing. 'From the state of the case it appears that the cows were in charge of two servants, one of whom kept himself in the lead and the other in the rear of them. In the direction which the cows were being driven the tracks of the Northern Railroad would be the first to be crossed. When the railroad crossing was reached, Devon, who was the servant driving the cows, stopped them, and Harney, who was the servant in the lead, went on to the tracks to make observations. Upon this point, Devon testified as follows: "Q. Did you stop before you crossed the track? A. Yes; they were all stopped and bunched up together. Q. Did you take any view of the tracks yourself? A. I could not just at present. I was behind them. I was behind the cattle. Q. What did Mr. Harney do? A. He looked up and down the tracks and said it was all right, to come ahead and drive up. He hollered to me." Thereupon it appears that Devon started to drive the cows across the tracks, and had passed the two tracks of the Northern Railroad in safety, and was driving them towards the first track of the defendant company, several of the leading cows being then already on the track, when his attention was called to an approaching engine thereon by his companion, but it was too late to save them from being hit. Devon further testified that he was on the lookout

for a train, and that he was in a position where, if a bell had been rung or a whistle blown, he would have heard it, and that he heard neither a whistle blown nor a bell rung. It further appeared from the testimony of Devon and other witnesses that there was a curve in the track in the direction from which the locomotive engine was approaching, which prevented its being seen until it was within from 250 to 300 feet from the crossing. There was also testimony on the part of the plaintiff that there were trees and cat-tails which obstructed a clear view in the direction from which the locomotive engine was approaching. There was also testimony of other witnesses on the part of the plaintiff, who were in a position to hear if a bell had been rung, or a whistle blown, to the effect that they heard neither a bell rung nor a whistle blown.

The failure on the part of the defendant company to give either of the statutory signals in approaching the crossing would constitute negligence. Whether the company performed its duty in that regard was a jury question. Whether plaintiff's servants exercised reasonable care in driving the cows over the tracks of the defendant under the circumstances and conditions which presented themselves to them was also a question for the jury to determine.

We find, therefore, no error in the refusal to direct a verdict for the defendant on either ground.

[1] The defendant offered to show by a surveyor and photographer, by observations made by them in May, 1911, nearly two years after the accident happened, the extent of the view of an approaching west-bound train, in the direction in which the plaintiff's servants were approaching with the cattle. This offer was overruled by the trial judge on the ground that it did not appear with sufficient certainty that the physical conditions at the crossing at the time observations were made were the same as they were at the time of the accident. It appeared that no change had been made in the roadbed. The trial judge erred in excluding the testimony offered. The extent of view which the plaintiff's servants had before they drove the cattle on to the crossing, in the direction in which the locomotive engine, that hit the cattle, approached such crossing, bore materially upon the question whether the plaintiff's servants had exercised reasonable care for the safety of the cattle in doing so and thus were free from any negligence on their part contributing to the negligence charged against the defendant, and was a question of fact for the consideration of the jury.

[2] Though the observation was made nearly two years after the accident happened, and though it was made in the daytime and the accident happened in the dusk of the evening, and though the testimony on behalf of the defendant left it uncertain whether some obstructions to the view testified to by

the plaintiff's witnesses as having existed at the time of the accident still existed at the time when the observations were made by the defendant's surveyor and photographer, they did not constitute a sufficient legal basis upon which to exclude the proffered testimony. Such testimony was competent for the purpose for which it was offered. Its tendency was to establish a fact directly involved in the issue between the parties.

The circumstances attending and the then conditions and surroundings of the roadbed under which the surveyor and photographer made their observations did not render their testimony incompetent, irrelevant, or immaterial, but rather affected its probative force which was within the province of the jury to pass upon under proper instructions from the court. The exclusion of the proffered testimony was error prejudicial to the defendant, and for that reason the judgment of the court below will be reversed and a new trial awarded.

VAN GILDER et al. v. BOARD OF CHOSEN FREEHOLDERS OF CAPE MAY COUNTY.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

HIGHWAYS (§ 44*) — LOCATION — JUDICIAL FUNCTIONS.

The determination to lay out a public highway in a particular locality, and to take the lands of special owners for that purpose, is the exercise of a judicial, and not a legislative, function.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 27, 137-140; Dec. Dig. § 44.*]

Certiorari by Washington Van Gilder and others against the Board of Chosen Freeholders of the County of Cape May to review resolutions as to the improvement of public highways. Resolutions set aside.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Robert H. McCarter, of Newark, and Allen B. Endicott and Charles C. Babcock, both of Atlantic City, for prosecutors. Joseph Douglass, of Cape May, and Bourgeois & Coulomb and Thompson & Smathers, all of Atlantic City, for defendants.

BERGEN, J. A rule having been allowed requiring the board of chosen freeholders of the county of Cape May and the Sutton & Corson Company, contractors, to show cause why a writ of certiorari should not be allowed to review certain resolutions adopted by the said board of chosen freeholders, relating to the improvement of a public highway, under which rule testimony was taken covering the entire matter in controversy, and counsel having agreed that, if the court reached the conclusion that the rule should

be made absolute, then the court should consider the testimony as though taken on the return of the writ of certiorari, and dispose of the case the same as if the writ had been allowed and returned, and we, being of the opinion that the writ should go, have considered and determined the merits presented by the record. Many reasons are urged why the proceedings under review should be set aside; but, as that result must flow from the affirmance of one of them, it is not necessary to consider or pursue the others.

The board of chosen freeholders of the county of Cape May, having determined to change and alter the location of a portion of a public highway, adopted and repealed a series of resolutions purporting to carry out its purpose, the remaining and operative one being adopted September 14, 1911, which declared "that a road, known as the Ocean City road, be widened, straightened, and the location thereof changed, and the said road improved as follows." Then follows the description. The effect of this change was the laying out of a new highway between two points of an existing highway a considerable distance from the old roadbed, and the affording of highway facilities to a tract of land which it had not theretofore the benefit of. This land belonged to a Mr. Fox, a member of the board of freeholders, who not only voted for the resolution, but was the active agent in the promotion of the change in the location of the highway. The board proceeded to the acceptance of bids, awarding of the contract to Sutton & Corson Company, and the adoption of a resolution providing for the issue of bonds to defray the cost of the improvement, all of which proceedings have been brought here by this writ; but, as they all depend upon the legality of the resolution providing for the improvement, they must stand or fall with it.

The principal resolution declares that the improvement is to be made under "An act to authorize the boards of freeholders to lay out, open, widen, straighten, alter, change the grade or location of or otherwise improve any public highway under their control, and for that purpose to acquire lands by gift, purchase or condemnation, and to vacate any part of said public highway that may be rendered necessary for public travel by the widening, straightening, altering or changing the location," etc., approved April 13, 1908. This act (P. L. 1908, p. 469) confers upon boards of chosen freeholders the powers stated in its title, and declares the method of instituting proceedings to condemn. It also provides that when commissioners are appointed in such proceeding they shall ascertain the value of the land taken, as well as the damages resulting therefrom, in doing which they shall take into account the benefits conferred on the remaining land. We have thus this situation: A board of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

freeholders decides, by a resolution, to lay out a public highway over the lands of one of its members to the possible advantage of his remaining lands, which resolution he votes for as a member of that body.

The defendant does not dispute the principle that no man can be a judge in his own case, but urges with great persistency that the act of voting by Mr. Fox was legislative and not judicial; but we think this contention is not supported by reason or authority. The resolution is not one relating to a general system affecting all the citizens of a municipality, but provides for the making of a particular improvement affecting property in one locality, and is therefore not legislative. *State, Vanatta, v. Morristown*, 34 N. J. Law, 445. The determination to lay out a public highway in a particular locality, and to take the lands of special owners for that purpose, is the exercise of a judicial, and not a legislative, function.

It was held, in *Traction Co. v. Board of Works*, 56 N. J. Law, 431, 29 Atl. 168, that an ordinance "laying out a particular street, or ordering it to be paved, would be judicial in its quality," and this was affirmed by the Court of Errors. 57 N. J. Law, 710, 30 Atl. 581.

The adoption of the resolution to alter and change the course of the highway was, in this case, in substance and effect the laying out of a highway, and not a mere inconsequential alteration of an existing highway. It was a judicial conclusion in which an interested party participated, and therefore voidable. The trouble is not cured, even if there were sufficient votes without giving any effect to that of Mr. Fox. *Traction Co. v. Board of Works*, supra.

The resolution altering the location of the highway will be set aside, and, as a sequence, those which follow and rest upon it will also be set aside.

WESTLECRAFT et al. v. BARRY.

(Supreme Court of New Jersey. June 14, 1912.)

(Syllabus by the Court.)

1. DAMAGES (§ 124*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action by a builder against an owner upon a building contract, where the plaintiff is wrongfully prevented by the defendant from fully performing his contract, it is error to adopt as the basis for calculating the damages a schedule of payments provided in the contract, where it is not claimed that the payments in the schedule were in proportion to the cost incurred up to the several stages of progress of the work.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

2. CONTRACTS (§ 322*)—PLEADING CONTRACT—ACTION FOR BREACH—EVIDENCE.

In an action by a builder against an owner upon a building contract, where the plaintiff claims that the defendant's failure to make a payment was the cause of the failure of the

plaintiff to prosecute the building with the speed required by the contract, it is error to exclude evidence that stop notices were served upon the owner by materialmen pursuant to the third section of the Mechanic Lien Act (3 Comp. St. 1910, p. 3294).

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534-1542; Dec. Dig. § 322.*]

Action by Charles G. Westlecrafft and others against David A. Barry. Rule to show cause why report of referee should not be set aside. Report set aside.

Argued February term, 1912, before the CHIEF JUSTICE, and GARRISON and SWAYZE, JJ.

Frederick A. Pope, of Somerville (W. S. Angleman, on the brief), for plaintiff. Gilbert Collins, of Jersey City, for defendant.

SWAYZE, J. This cause was referred by consent. Upon motion to confirm the referee's report, a rule was allowed by a justice of this court requiring the plaintiff to show cause why the report should not be set aside and a new trial granted. To avoid any question as to the power of a justice other than the one who had made the reference to grant such a rule, it was subsequently confirmed by the court as a rule of this court. This was proper practice. *Potts v. Excelsior Carpet Lining Co.*, 36 N. J. Law, 301; *Children's Home Association v. Hall*, 47 N. J. Law, 152. The plaintiff is in error in assuming that the decision of the single justice was final. In the first place, although the rule recites his determination to confirm the report and allow a rule to show cause, it does not in form confirm the report, but merely requires the plaintiff to show cause why the report should not be set aside and a new trial be granted. The plaintiff errs, also, in thinking that the rule was limited to the objection that the referee was not qualified to act. It is general in form, and all that it contains as to the qualification of the referee is a mere permission to take depositions on that subject. If, however, the rule had been limited, it was in the power of the court to allow a rule that a single justice had denied. It is common practice on an application for a new trial, and is justified by our decision in *Key v. Paul*, 61 N. J. Law, 133, 38 Atl. 823.

We need not consider whether the findings of the referee were against the weight of the evidence, since we are satisfied that he acted upon an erroneous conception of the law applicable to the case.

[1] The suit was upon a building contract by the contractor against the owner. The latter had prevented the contractor from going on with the buildings, and had completed them himself, claiming the right to do so under the contract. Assuming that the defendant's action was wrongful, the rule of damages applicable was the rule in *Kehoe v. Rutherford*, 56 N. J. Law, 23, 27

Atl. 912, which was applied to a building contract in *Wilson v. Borden*, 68 N. J. Law, 627, 54 Atl. 815. The referee recognized this rule, but found that the evidence did not enable him to apply it. He therefore adopted as the basis of his calculation a schedule which had been agreed upon as a guide to the amount of payments to be made at different stages of the work. It is not claimed that the payments in this schedule were in proportion to the cost incurred up to the several stages of progress of the work. The earlier payments may have been less or more than the cost, dependent upon whether the parties contemplated that the owner should hold back money in order to secure performance by the contractor, or should advance more than had been earned in order to enable the contractor to proceed. The fact that these prices were agreed upon as representing the value of the work does not help. They were mere arbitrary figures. The referee himself finds that the plaintiff failed to prove that any profit would have accrued to him if he had been permitted to complete the work, and, since the plaintiff testified that on the whole work he would have made a profit of \$1,804, it is quite probable that the figures for the early part of the work were large enough to make that profit possible, and that the figures for the later part of the work were the bare cost, or even less. These considerations suffice to show that the rule adopted by the referee did not correspond with the legal rule as settled by the cases already cited.

[2] The defendant offered to prove that notices had been served upon him under the third section of the Mechanic's Lien Act. This evidence the referee excluded because the materialmen who had served the notices had not been paid by the defendant. The ruling involved a misconception of the effect of the notice. The statute provides that notice in writing shall be given to the owner, who shall thereupon be authorized to retain "the amount claimed, giving the contractor written notice of the demand." Such notice was given at least in some of the cases. Counsel for the defendant expressly stated that the object of the evidence was not for the purpose of an allowance on the debt, but to prove that the owner was obliged under the law to withhold the money. One of the questions in the case was whether the defendant was in default in making a payment to the plaintiff, and the contention was that his failure to make the payment was the cause of the failure of the plaintiff to prosecute the building with the speed required by the contract. It was certainly proper for the defendant to prove that he had a valid excuse for failure to make payment, and the stop notices were one step in that proof.

For these errors the report of the referee must be set aside, and there must be a new

trial. In view of this result, it may be well to express our opinion upon the right of rescission claimed by the defendant. We think that the architect by giving the three days' notice elected to stand on that provision of the contract rather than on the provision authorizing the owner to terminate the employment of the contractor; and the question of fact is whether the contractor fairly complied with the notice and supplied, as the contract required, a sufficiency of properly skilled workmen, and materials of the proper quality, and was ready to prosecute the work with diligence. It may also be well to point out that the referee erred in holding that the architect was bound to reject defective materials and workmanship before the particular part of the work in question was done. No doubt he must exercise the power to reject promptly (6 Cyc. 35), but each part of the work depends on its own circumstances, and sometimes it may happen that the architect cannot know until the work is done whether it will comply with the contract. The referee erred also in holding that damages for the plaintiff's delay could only be for the time that elapsed from October 15th to November 4th. The real question was how long it ought to have taken the owner, with reasonable diligence, to have finished the work. The delay for which the plaintiff was chargeable would be from October 15, when he should have finished, to the time when the owner with reasonable diligence should have finished. The rule adopted by the referee in effect held the owner responsible for finishing the work on the very day he took possession—an impossibility.

WILSON, Atty. Gen., v. THOMPSON et al.
SAME v. HARLAN et al. SAME v.
JONES et al.

(Supreme Court of New Jersey. June 3, 1912.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 9*)—STATE DENTAL SOCIETY—POWERS.

By inspection of informations in the nature of a quo warranto, filed by the Attorney General, ex officio, and on behalf of the state, it appears that the New Jersey State Dental Society was incorporated in 1873 by act of the Legislature (P. L. 1873, p. 932); that section 2 of act to regulate the practice of dentistry (P. L. 1898, p. 120, as amended, P. L. 1901, p. 395) provides that such society shall, at each of its annual meetings, recommend to the Governor for appointment as a member of the State Board of Registration and Examination in Dentistry a dentist, whom the Governor shall appoint a member of such board; that such society adopted a constitution and by-laws, which provide for the election of a president, secretary, and treasurer, and the selection of a nominee for such board, at a stated annual meeting; that at or about the time of such meeting in July, 1911, two bodies, each claiming to be the society, met and one elected.

or attempted to elect, one set of such officers and a nominee for such board, and the other another set of officers and another nominee for such board; that the Governor has declined to appoint either nominee certified to him by the respective sets of officers until the legality of their respective nominations shall be determined. *Held* that, since section 2 of the act to regulate the practice of dentistry in effect constitutes the society as the appointing power of members of the board having entire control, as the agent of the state, of the practice of dentistry in the state, the society is in this aspect a public corporation, and its executive officers are public officers having public functions connected with the government of the state.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 13; Dec. Dig. § 9.*]

2. **QUO WARRANTO (§ 33*)—NATURE OF REMEDY—AUTHORITY OF ATTORNEY GENERAL.**

Held that, by the common law, which no statute has abridged in this respect, the Attorney General, ex officio, and on behalf of the state, has power to bring in question, by an information in the nature of a quo warranto, the right of persons to the respective offices of president, secretary and treasurer of such society.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 40; Dec. Dig. § 33.*]

3. **QUO WARRANTO (§ 48*)—PROCEEDINGS—PARTIES.**

Held, that such informations are not rendered invalid by the fact that they are not directed to the nominees of the State Dentistry Board.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 49–52, 59, 60; Dec. Dig. § 48.*]

4. **QUO WARRANTO (§ 39*)—PROCEEDINGS—PARTIES.**

Held, that proper practice does not permit the Attorney General to join two different persons as respondents in one and the same information of this character, except in cases where the rights involved, and the proof in support of them, are substantially the same.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 45; Dec. Dig. § 39.*]

5. **QUO WARRANTO (§ 39*)—PROCEDURE—SEVERANCE.**

Held that, when such an information sets up separately the facts as to the election of each respondent, and calls upon him to show by what warrant he claims the office, upon the objection of one of the respondents to such improper joinder, the court may order a severance.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 45; Dec. Dig. § 39.*]

Informations in the nature of quo warranto by Edmund Wilson, Attorney General, against William I. Thompson and others. Motion to quash informations denied.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Edmund Wilson, Atty. Gen., and Edward M. Collie, for informant. McCarter & English, of Newark, for respondents Hawke, Meeker, and Hull.

TRENCHARD, J. These three informations were filed by the Attorney General, ex officio, and on behalf of the state, one

against two persons, each claiming to be president of the New Jersey State Dental Society, one against two persons, each claiming to be the secretary of such society, and one against two persons, each claiming to be the treasurer of such society, each calling upon the respondents to answer by what warrant they, and each of them, claim to have, use, and enjoy such offices. The informations are alike, excepting such changes of names and descriptions of offices as results from the different official positions involved in the respective informations.

Notices of motions to quash were given on behalf of the respondents William W. Hawke, Charles A. Meeker, and Henry A. Hull, one set of officers claiming to be, respectively, the president, secretary, and treasurer of the said society, and the Attorney General has given notices of motions to dismiss the motions to quash.

There is thus presented simply the question of the right and power of the Attorney General, ex officio, and on behalf of the state, to file the informations in question; and it is quite evident that an early decision is imperative.

We are of opinion that the Attorney General, ex officio, and on behalf of the state, has the power to bring in question, by an information in the nature of a quo warranto, the right of the respondents to the respective offices of president, secretary, and treasurer of the New Jersey State Dental Society.

[1] By inspection of the informations, it appears that the New Jersey State Dental Society was incorporated in 1873 by an act of the Legislature (P. L. 1873, p. 932); that section 2 of an act to regulate the practice of dentistry (P. L. 1898, p. 120, as amended P. L. 1901, p. 395) provides that such society shall, at each of its annual meetings, recommend to the Governor for appointment as a member of the State Board of Registration and Examination in Dentistry a dentist, whom the Governor shall appoint a member of such board, and that such board shall annually report its proceedings to the society; that such society adopted a constitution and by-laws, which provide for the election of a president, secretary, and treasurer, and the selection of a nominee for such board, at a stated annual meeting; that at or about the time of such meeting in July, 1911, two bodies, each claiming to be the society, met, and one elected, or attempted to elect, one set of such officers and a nominee for such board, and the other another set of such officers and another nominee for such board; that the Governor of the state of New Jersey has declined to appoint either nominee certified to him by the respective sets of officers until the legality of their respective nominations shall be determined.

We think that by section 2 of the act to regulate the practice of dentistry, which be-

comes, for the purpose of construction, a part of the statute creating the New Jersey State Dental Society, that society becomes the appointing power, appointing, in effect, annually a member of the State Dentistry Board, which has entire control, as agent of the state, of the practice of dentistry in the state. The society is therefore, in this aspect, a public corporation, and its executive officers are public officers, having public functions connected with the government of the state.

[2] Confessedly, these informations are filed in pursuance of the common-law powers of the Attorney General. By the common law, which no statute of this state has abridged in this respect, the Attorney General, ex officio, and on behalf of the state, has power to bring in question, by an information in the nature of a quo warranto, the rights of persons to the respective offices of president, secretary, and treasurer of such society. *Attorney General v. Delaware, etc., R. R. Co.*, 38 N. J. Law, 282.

[3] And the informations are not rendered invalid by the fact that they are not directed to the nominees to the State Dentistry Board. The right to file the information is wholly independent of that question, and results from the power of the society to nominate the member of the State Board, whom the Governor must appoint.

[4] We think that proper practice does not permit the Attorney General to join two different persons as respondents in one and the same information of this character, except in cases where the rights involved, and the proof in support of them, are substantially the same. Such was the rule at common law (*High's Extraordinary Legal Remedies*, p. 661), and these cases apparently do not fall within the exception stated.

[5] But this should not result in quashing the informations. There may be a severance in each case without embarrassment, as each sets up separately the facts as to the election of each respondent, and calls upon him to show by what warrant he claims the office.

Upon the filing by the Attorney General of appropriate pleadings resulting in such severance in each case, the Attorney General may enter a rule, denying the motion, to quash the information in each case.

No costs will be allowed either party as against the other.

MOONEY v. McMAHON.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 19*)—FAMILY EXPENSES—LIABILITY OF WIFE.

Domestic services rendered by a daughter in a household of which her father is the head

will not raise an implied promise on the part of a stepmother, who requested the services, to pay for them out of her own estate, to the exoneration of the husband. To fix such a liability, there must be either an express contract to pay out of her own estate, or circumstances clearly showing the assumption of individual liability on her part, exclusive of that of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 109, 121-138, 142, 146, 322; Dec. Dig. § 19.*]

Error to Circuit Court, Warren County. Action by Della Mooney against Cecelia W. McMahon, administratrix of Mary Ward Mooney. Judgment for plaintiff, and defendant brings error. Reversed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Smith & Brady, of Phillipsburg, for plaintiff in error. W. H. Walters, of Phillipsburg, for defendant in error.

BERGEN, J. This is a suit by a daughter against the estate of her stepmother for personal services. The plaintiff recovered a judgment, and defendant brings error.

The only error assigned is refusal to nonsuit, upon the ground that the services were chargeable to the husband, and not to the wife. The claim of the plaintiff is an engagement and promise to pay by the wife. The husband, wife, and a son lived together in a house owned by the husband, and the wages of both were given to the wife, who put it in the bank in her own name and used it for the ordinary domestic expenses, including clothing, for the family. In fact, she paid for everything that the husband was bound to supply, receiving and caring for and applying to that use the wages earned by the husband and son, having no estate of her own. The son never was emancipated and continued to remain at home, turning over to his stepmother his wages, to which his father would be entitled while he remained at home. We are of opinion that the only inference to be drawn from the evidence is that the wife acted as the agent of the husband in the management of the household. The plaintiff had left home and was earning her living in New York City at the time she returned to her father's house, which she did at the written request of the stepmother, who had become so enfeebled as to be unable, as the son testifies she said, "to do the work any more around the house." The father died about six months before the mother, leaving some estate, against which the plaintiff presented no claim, and now seeks to recover from the estate of the deceased stepmother.

The plaintiff relies upon a contract of employment by the wife, and circumstances which, she claims, tend to show a charging by the wife of her separate estate, to overcome the presumption that between members of a household services are gratuitously ren-

dered; for "proof of the services, and as well, of the family relation, leaves the case in equipoise, from which the plaintiff must remove it, or fail." *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678.

Domestic services rendered by a daughter in a household of which her father is the head will not raise an implied promise on the part of a stepmother, who requested the services, to pay for them out of her own estate, to the exoneration of the husband. To fix such a liability, there must be either an express contract to pay out of her own estate, or circumstances clearly showing the assumption of individual liability on her part, exclusive of that of her husband.

In this case there is no evidence establishing such a contract, or proof of circumstances from which such assumption can be inferred. The strongest evidence in favor of the plaintiff comes from the testimony of Hannah Leahey, a sister of the plaintiff, who says that she saw a letter written by the stepmother to the plaintiff, in which she said that she "had been very sick, and that she felt now that she could not take care of the home, my father and my brother and herself, and that she needed some one up there in the house, and she thought that Dell would be the best, and she asked Dell; if Dell would come, she would pay her the same as she was getting in New York City, which was \$8 a week." This letter is consistent with the employment by the wife of a servant to do the work which the husband was bound to provide for. It imports nothing more than that, as the agent of the husband, she was employing some one to do the housework. It is not denied that a wife can contract as a principal in a matter of this kind. "But to fix upon her such a liability it must affirmatively appear that she made the purchase on her individual credit. There must be either an express contract on her part to pay out of her separate estate, or the circumstances must be such as to show clearly that she assumed individual responsibility for payment, exclusive of the liability of the husband. For, if the purchase be made under such circumstances as that an action could be maintained against her husband for the contract price, the debt so contracted becomes his debt, and the statute invalidates the contract of the wife for its payment." *Wilson v. Herbert*, 41 N. J. Law, 454-461, 32 Am. Rep. 243; *Feiner v. Boynton*, 73 N. J. Law, 136, 62 Atl. 420.

Can it be doubted that if the daughter had brought suit against her father, or presented a claim against his estate after his death, for these services she could have recovered, if they were not gratuitous, or that the husband would have been charged with a contract, if one existed, as made in his behalf by his wife as his agent? We think not.

There was no express contract to pay out of the wife's separate estate—in fact, she had none—and the circumstances clearly show that the wife's action was within the line of her implied agency to employ a servant for her husband. In most cases the employment of domestic servants is by the wife; and there is nothing in this case which takes it out of the ordinary agency of a wife in such matters.

We think that the nonsuit ought to have been allowed; and therefore this judgment should be reversed.

BLANCHARD v. EASTERN PENNSYLVANIA POWER CO.

(Court of Chancery of New Jersey. May 15, 1912.)

1. INJUNCTION (§ 137*)—PRELIMINARY INJUNCTION—RIGHT.

A preliminary injunction will not be granted, where the plaintiff's right, which the injunction is to protect, is doubtful.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 307-309; Dec. Dig. § 137.*]

2. EMINENT DOMAIN (§ 119*)—ADDITIONAL SERVITUDE—STRINGING OF WIRES.

At common law, and in the absence of lawful statutory restrictions, an owner may restrain the stringing of wires over lands within the highway, of which he owns the fee, though poles to sustain the wires are erected only on lands of adjoining owners; and a statute should not be construed as taking away this right, unless it does so clearly, rather than by liberal construction or implication.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

Bill by Frank E. Blanchard against the Eastern Pennsylvania Power Co. On application for preliminary injunction. Application denied.

B. W. Ellicott, of Dover, for complainant. Elmer King, of Morristown (Vreeland, King, Wilson & Lindabury, of Morristown, of counsel), for defendant.

EMERY, V. O. Complainant in this case seeks a preliminary injunction to restrain an electric light company from suspending its wires over his lands located within the lines of a public highway. The poles, from which the wires are thus suspended, are not located on complainant's lands, but on lands of adjoining owners, and by their consent. The township committee of Randolph township, in which the lands are located, have, according to defendant's affidavits, passed a resolution giving the lighting company the right to erect poles and string electric wires therefrom on the public highway in question; but this permission is given for the purpose of aiding defendants in carrying out a contract for public electric lighting with the borough of Mendham. To reach Mendham from defendant's power plant at Dover, the line must

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pass through Randolph township; but the permission of Randolph township, not being for the purpose of public lighting within its limits, cannot avail the defendant as authority to stretch its wires over complainant's lands within the highway.

[1] Complainant's claim to a preliminary injunction is based on his constitutional right to prevent the taking of his lands against his consent, without compensation. If, under our decisions, it is clearly settled that the suspension of wires over the owners' lands located in a highway is such "taking" of his property, then it is a right which should be protected by preliminary injunction. But if, under our decisions, the right is not clear, but has been fairly questioned, then a preliminary injunction cannot be granted. *Halsey v. Rapid Transit, etc., Co.*, 47 N. J. Eq. 380, 20 Atl. 859 (Van Fleet, V. C., 1890). By the act of April 21, 1896 (P. L. p. 322), full power was granted to electric light companies, so far as township highways are concerned, "to use the public highways for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures, upon first obtaining the consent in writing of the owners of the soil." My first impression as to the construction of this statute is that it requires the consent of the owners of the soil over which the wires are suspended, as well as of the owners of the soil in which the poles are located.

[2] At common law, and in the absence of lawful statutory restriction, the right of the owner to prevent the stringing of wires over his highway lands is settled; and a statute should not be construed as taking away this common-law right, unless it does so clearly, rather than by liberal construction or implication. And if the words "owners of the soil," whose consent is to be obtained, are not clearly to be construed as limited to the owners of the soil on which the poles are located, then the protection of consent would seem to be given to the owners over whose soil the wires are suspended. This form of the statute, as will be observed, is not such as to confer the express authority merely to erect poles in the highways with the consent of the owners of the soil. The poles authorized to be erected are to sustain wires. I think it must be assumed, for present purposes, that the Legislature has the right to grant to a lighting company the use of lands in a highway for the erection of poles and the suspension of wires, for the purpose of public lighting, without the consent of the owners of the soil on or over which either poles or wires are located, and that it may authorize this without compensation as for additional use or servitude, and also that the consent of only one or of both classes of owners may be required, according to the legislative discretion. Whether both classes

of consents are required is a question purely of statutory construction of the legislative grant. In the construction of analogous statutes, it has been held that the consent of the owner of the lands over which the wires were suspended was not required, but only that of the owners of the soil on which the poles were erected. *Roake v. American Telephone Co.*, 41 N. J. Eq. 35, 2 Atl. 618 (Runyon, Ch., 1886), so construed the telegraph company law of 1880 (P. L. p. 201), in reference to telegraph wires; and in a case involving the construction of the statute now in question (P. L. 1896, p. 322), Vice Chancellor Pitney, in *East Orange v. Suburban Electric Light & Power Co.*, in an opinion reported in 59 N. J. Eq. 563, 567, 44 Atl. 628 (1899), held that it did not require the consent of the owner of the soil over which only wires were strung.

The opinion of the Court of Errors and Appeals, affirming the decree for injunction, did not, it is true, reaffirm this construction, resting its decision upon another ground, not involving the point. This may prevent the opinion of Vice Chancellor Pitney from being treated as finally settling the construction of the statute in this court, and leave its construction an open question at final hearing; but due weight must be given to the learned Vice Chancellor's considerate judgment.

In view of these decisions, I conclude that, although my first impression of this statute is that the consent of the owners of the soil over which the wires are suspended must also be obtained, yet this right is not so clear as to entitle complainant to a preliminary injunction, and must be determined either at final hearing, or, if the complainant is so advised, by an action of ejectment, in which, as some courts hold, the wires may be removed by virtue of a writ of possession. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

The application for preliminary injunction is denied, costs to abide the event of the suit.

STATE v. STRONG.

(Supreme Court of New Jersey. June 4, 1912.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 404*)—EVIDENCE—EXHIBITS.

Where, in a criminal case, a specimen or exhibit contains more than one mark or external appearance relevant to the issue being tried, a part only of such specimen or exhibit, containing but one of such marks, selected for the purpose by the party offering it, is not admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error to Court of Oyer and Terminer, Atlantic County.

William H. Strong was convicted of murder, and brings error. Reversed and remanded.

William H. Strong, indicted for the murder of his wife, Mary H. Strong, at their home near Nesco, in Atlantic county, on October 14, 1910, was convicted of murder in the second degree, and sentenced to confinement in the state prison for a term of 30 years. He has brought this writ of error to review the conviction.

The important facts disclosed upon the trial may be stated thus: The defendant, about 4 o'clock in the afternoon of October 14, 1910, went to a neighbor's house about 300 yards away, and announced that his wife had been murdered by being struck with a hoe. He also immediately thereafter reported the fact to two or three other neighbors, who then returned with the defendant to his home, and there in one of the stalls in a shed or stable found Mrs. Strong lying dead. Her face had been battered into an unrecognizable mass, her head was in a pool of blood, and the manger was spattered with blood. She was lying with her arms folded over her heart, her limbs close together, and her dress and underclothing partly between her legs. A superficial examination made that evening disclosed abrasions and bruises on the vagina. The undertaker who arrived a little before 6 o'clock found the blood on the face had then hardened, from which he concluded that she had been dead from three to four hours. The burial took place some three days thereafter without an autopsy. The theory at that time seems to have been that the crime had been committed in an attempt at rape. -On November 1st the body was exhumed for the purpose of performing an autopsy, and there was found on the front part of the neck three markings, one on the right side, two on the left, in the opinion of the medical expert produced by fingers. There was opinion evidence given at the trial that choking was the cause of death, that it had preceded the mutilation of the face, and that death had ensued approximately three hours after a meal.

The defendant and his wife had dinner together at their home on the day of the murder about noon, and after it he left about 12:30 with his horse and wagon in which were chickens and eggs which he intended to sell. He drove to Elwood, about five miles, and en route took a man into the wagon, who rode with him the rest of the way. The defendant stopped about a mile from Elwood, and there sold his produce, talked some moments and left about 2:30, driving back to Elwood, where he bought tobacco, hitching his horse, and going into the store to make the purchase. There was evidence that it was then about 3 o'clock, when he

started on his return home, and that he reached there shortly before 4 o'clock.

It was not seriously controverted that Mr. Strong was absent from home from about 12:30 until nearly 4 o'clock. His home was in the woods in a sparsely settled region. He was 60 years of age, had been married in 1880, and had built the small house wherein the couple had lived for 31 years. They were childless. They had paid for their home by their united exertions, and had a bank account of about \$500 in their joint name.

Strong appears to have been illiterate, artless, and credulous. He believed in mediums. On November 3, 1910, he went to Atlantic City in order to consult a medium, to whom he had been recommended, to learn who had murdered his wife. He was accompanied by Mrs. Reed, an acquaintance and former neighbor whom he had invited to go with him, and to whom he had disclosed the object of his visit. They failed to get the desired information from the man to whom they first went, and then they proceeded to a woman practicing her trade on the Boardwalk who gave "crystal readings," and requested a reading from her. The defendant thus details the occurrence: "I went in. I had Mrs. Reed with me. She [the medium] wanted to know who it was wanted the reading, her or I. Mrs. Reed spoke up and says, 'It is him. He would like to know his troubles;' and she says, 'Anything concerning stolen goods I can't tell,' and Mrs. Reed said it wasn't stolen goods he wanted to know of his troubles other ways, and she said, 'I think I can tell you.' Then she began after taking my housekey and rolling it in her hand, 'I see trees. I see there two buildings. It isn't in the kitchen. It is either into a closet or a pantry, and there came a man that come up to her that had some words concerning quarreling, and then my wife grabbed him by the collar with her left hand and he grasped her by the throat, and by her being weak and nervous by the crushing of the throat, it overcame her, and her heart stopped beating. Then he picked her up and he carried her to this place, and there he beat her with a hoe till there was nothing you could recognize of any part of her face. Her hands were crossed, and she was laid out in a form as a person should be laid out. He started away and he washed and he had burned his garment. He is a great deal younger man than you with brown hair, with a round face, and broader across the chest.'"

Mrs. Reed and Pauline Elder, the medium or clairvoyant, are in substantial accord in their testimony with that of the defendant concerning what took place at this interview. Madame Elder admitted that she had many weeks previous when the murder happened, read a newspaper account of it; that she had not previous to the first interview

seen the prosecutor, or the detectives, but stated that at the first interview on November 3d she saw it clairvoyantly, and was not speaking of what she had read. What she gave him in the reading she told him clairvoyantly, and by this insight she saw the murder, that the woman was choked to death in her dining room and carried over to the barn by a man that looked like Mr. Strong, and that he there mutilated her face with a hoe.

After this first interview on the 3d of November, Strong, on going away, said to Madame Elder that, if she found out anything new, she could write to him. He had on the 1st day of November told Baitzel, one of the detectives engaged on the case, that he intended going to Atlantic City on the following Thursday to consult a medium and ascertain if he could who it was that had committed the crime. On the morning of the 3d on his way he stopped at the prosecutor's office to see Baitzel, but, not finding him there, he went to the reading, and afterward he returned to the prosecutor's office in the afternoon, saw the prosecutor, made himself known, and asked for Baitzel. Learning from the prosecutor that he was not there, he told the prosecutor that he had a woman who knew who committed the murder, who could describe what the man looks like, and pulled a slip of paper from his pocket on which was written, "Madame Pauline, Boardwalk and Jersey Avenue," and related some of the things which she had told him that afternoon. The prosecutor then made an arrangement with the so-called clairvoyant, had her write a letter to Strong, asking him to come again to her on the 7th alone. The second interview took place as arranged. Mr. Strong went to her upon the morning of that day, having previously prepared a series of questions which he wished her to answer. She took the questions and told him he must return in the afternoon, which he did. At the time appointed in the afternoon Detective Baitzel and Guyer were concealed in an adjoining room where they could hear what occurred.

Before going to Elder's, on the same morning, November 7th, the defendant met Baitzel in Atlantic City, and said to him: "I am glad to see you. I am going down to see the fortune teller, and I would like you to go with me." Baitzel said, "No." At the second interview was obtained the alleged confession, without which it may be stated there is slight, if any, evidence of the defendant's guilt. Whatever other acts or words proceeded from Strong seem as consistent with his innocence as with his guilt. He was arrested the next morning, and had a hearing on the 27th of November.

At the second interview, after answering the questions which Strong had propounded in writing, the clairvoyant said, "Let us go over this case and talk about it." She then

commenced, according to her own evidence: "Well, Mr. Strong, you came here to-day to have a talk with me simply. You said you knew that I had something else that I could tell you in regards to this affair, in fact, that I could tell you who the murderer of your wife was"; and I said, 'Yes I can tell you that,' but I said, 'Before we go that far, let us talk about this case.' I talked to him about how good his wife had been, and I said, 'How you had even nagged her and ill treated her many times in the years she has been married to you through the awful temper you have.' He said, 'Yes; I know I have a terrible temper.' I said, 'You know how hard she has always worked for you.' And he said, 'Yes; I know it,' and I said, 'Now, Mr. Strong, you have something on your mind. You have had it on your mind since the day your wife was murdered. You know you have not had any peace of mind.' He said, 'No; I haven't had any peace of mind.' 'Your wife would like you to relieve your mind of the awful burden you have.' He said, 'What shall I do, what does she want me to do?' I said 'She wants you to tell the truth, and nothing else only the truth.' He wrung his hands for a moment or two. 'What must I do? What must I do?' he kept saying. I said, 'You must not do anything but tell the absolute truth.' I said, 'You asked me if I could tell you who murdered your wife. I will tell you what the man looked like. Yes; the man, Mr. Strong, looked exactly like you look.' He said, 'That means then I killed my wife?' I said, 'Yes; that means that you killed your wife. You murdered your wife in an awful manner.' He shook his head that way, nodded it several times. I said, 'Mr. Strong, don't shake your head, don't nod your head that way, say "Yes" or talk about it.' And he said, 'Yes; I killed my wife.' With that he began to groan and moan, and seemed to be nauseated, and the perspiration poured off of him and dropped from the side of his hair on his coat collar. I saw that he was slipping off the chair. I got up from my chair, and said, 'Mr. Strong, be careful, you will slip off your chair.' He said, 'Oh, help me.' And I assisted him into a rocker and he put his feet upon the chair he had been sitting on. I sat down again and kept on talking to him. 'Now that you have relieved your mind of the awful burden, tell me what happened.' He said, 'Let me think for a moment. It is so awful I can hardly think.' In a moment he got cool and collected and he began to talk."

Then follow in detail answers alleged to have been made by Strong to questions put by her to him, or suggestions made by her. In which she and the detectives say that the defendant not only admitted having committed the murder, but in detail described it. The defendant denies it, and charges that he became faint at the time he fell from his

chair, that he became ill and his mind dulled, and that something was given by the medium to him to drink. She admits that she gave him water.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Carrow & Kraft and Westcott & Westcott, all of Camden, for plaintiff in error. C. L. Goldenberg, of Atlantic City, Prosecutor of the Pleas, for the State.

VOORHEES, J. (after stating the facts as above). With this writ the defendant has not caused to be returned the entire record of the proceedings had upon the trial, pursuant to section 136 of the Criminal Procedure Act (C. S. p. 1863). Our consideration of the case must therefore be confined to the questions raised by the strict bill of exceptions.

It appeared that upon a superficial examination of the body of the deceased made on the day of the murder by the coroner, who is a physician, that bruises or abrasions of a bright red color were discovered upon her genital organs. It also appeared that the face had been mutilated beyond recognition. The body had been buried some three days after the death, and on November 1st, some 15 days thereafter, had been exhumed, and an autopsy then first performed. An examination was then also made by means of a swab to determine whether spermatozoa were present, in order to ascertain whether the woman had been raped. The physician performing this operation, not the coroner, testified upon the trial that "there were markings upon each side of the neck which in my opinion were produced by the fingers." This force, he said, had constricted or pressed upon the parts in a manner to produce before death certain signs and markings which from his experience are found in suffocation, and gave it as his opinion that death was caused by throttling. He further said he found no spermatozoa or semen on her drawers, and that the injuries to the face were produced after death.

The following testimony appears: "Question by the prosecutor: Q. Did you remove any part of the body of Mary Strong? A. I removed some of the parts; yes, sir. Q. Have you a specimen at the present time of her body? A. Yes. Q. What part of her body? A. I have the neck, which shows the finger markings very plainly at the present time.

"Mr. Westcott: The state tells me they are going to produce a horrible picture here, the woman's neck. We object to that. We object to it, first, upon a moral basis. It is not necessary to do that. Nobody questioning the fact that this witness has testified to. We do not want the degradation and moral sickening that must come from an exhibition of this sort. On legal grounds we object to

it because, if part of the body is to be shown, we want the whole of it. The whole of the woman's body is just as important as any part of it, and the evidence already before your honor shows that that is so, and I think the state ought not to be permitted to cut off the head of this woman and bring it here before this jury. If they are going to insist upon doing that, we think they must produce the whole body, otherwise we object to it.

"Mr. Schwinghammer: It is necessary for the state to prove that Mary Strong met her death by suffocation or throttling, among other things, to bear out the confession which Strong made, and the specimen is undoubtedly a proper exhibit to be brought before the court if there is reason shown for it. Our reason we say is that the marks appear distinctly on the throat, showing the cause of death to have been by throttling and strangulation, and not by the chopping of the head. First, I want to ask preliminary questions. We are not offering it at the present time."

The specimen was the neck from the chin down. The medical witness was then allowed to stand aside and oral proof was given to show that since the time of death no marks had been made upon that part of the body, that after exhumation it had been in the custody of the state's representatives, and that the marks upon the neck had been seen at the time of the coroner's inquest. The offer of the specimen was renewed, and again objected to, on the ground that the rest of the body was just as material, and that the whole body might disclose many circumstances and conditions which would throw light upon the case. The specimen was then admitted and an exception allowed and sealed.

That real or as it is sometimes called autoptical evidence is a legitimate means of proof is well recognized. Prof. Wigmore says (section 1151): "Accordingly, it might be asserted a priori that, where the existence or the external quality or condition of a material object are in issue or are relevant to the issue, the inspection of the thing itself, produced before the tribunal, is always proper, provided no specific reason of policy or privilege bears decidedly to the contrary." That such evidence in criminal cases tends to produce an unfair prejudice against the accused is usually now denied by the court, although the production of repulsive objects may in the discretion of the court be excluded. Our courts have recognized in a bastardy case the probative force of the resemblance of a child to its putative father. *Gaunt v. State*, 50 N. J. Law, 490, 14 Atl. 600. *Commonwealth v. Brown*, 14 Gray (Mass.) 419, was an indictment for an unlawful attempt to procure abortion. The court said: "The parts of the person upon whom instruments were alleged to have been used for the purpose of procuring an abortion, which had been preserved, were properly allowed to be submitted to the inspection of the jury in

connection with the testimony of the physician who made the post mortem examination." In the following cases portions of the human body have been admitted in evidence: *State v. Vincent*, 24 Iowa, 570, 95 Am. Dec. 753; *State v. Wieners*, 66 Mo. 13; *State v. Moxley*, 102 Mo. 387, 14 S. W. 969, 15 S. W. 556; *Savary v. State*, 62 Neb. 166, 87 S. W. 34; *Turner v. State*, 89 Tenn. 547, 15 S. W. 838.

But the objection in the case sub judice is much deeper. The body not only contained the marks upon the neck alluded to, but the face furnished evidence of mutilation. That this had been done after death had ensued by strangulation had been asserted by the expert. Moreover, it was admitted that the sexual organs were injured, giving rise to the theory that death had been caused in an attempt to perpetrate rape. This was so plausible that an examination had been made to determine that fact, a fact which, if true, would be incompatible with the guilt of the husband of the deceased woman. So it appeared that not only the neck, but the face as well as the private parts of the body, were each relevant to the issue being tried. That strangulation caused death was necessary to sustain the alleged confession, and, without such proof of the corpus delicti, the confession was bereft of evidential value. *State v. Guild*, 10 N. J. Law, 163, 18 Am. Dec. 404. But for the confession the proof was entirely circumstantial, and, in that posture of affairs, the marks upon the body, other than the neck, were important to the defendant to break the force of that character of evidence by tending to show facts inconsistent with it. By the control which the state had over the body, it was put out of the power of the defendant to produce the other marks. The body was a single piece of evidence. If admissible, it was admissible as to all its parts, so far as any part supplied a piece of evidence. As an instrument of evidence in this case, it should have been offered as an entirety, or at least none of the evidential parts should have been excluded, and one only selected by the state to support its particular theory admitted in evidence. If the finger marks were evidential, so were the bruises and other marks, and especially did the latter make strongly for the innocence of the defendant whose perpetration of a sexual assault against his wife is unthinkable, and might have convinced the jury that the perpetrator other than the husband in seeking to gratify his passions had choked his victim.

Where, in a criminal case, a specimen or exhibit contains more than one mark or external appearance relevant to the issue being tried, a part only of such specimen or ex-

hibit, containing but one of such marks selected for the purpose, by the party offering it, is not admissible. For this error, which we think was harmful to the defendant, there must be a reversal.

A series of photographs taken on November 25th were offered by the state, and over objection admitted in evidence. The prosecutor stated that they had been taken some time after the murder, and after quite some changes had taken place. The objection proceeded upon the ground that they did not show conditions as they existed at the time of the murder, and were misleading. They were admitted for the purpose of showing the conditions as they existed on the day they were taken. There was no other proof. It was not shown what changes had taken place. Under such circumstances, they should have been excluded as irrelevant. The learned trial judge had before him evidence of the voluntary character of the confession, and, having decided upon it preliminarily to admit it, we are not to review that question on error. *State v. Zeller*, 77 N. J. Law, 619, 73 Atl. 498; *W. A. Manda, Inc., v. City of Orange*, 82 Atl. 869, as we might have done upon a rule to show cause.

Since the reversal of this conviction may lead to a retrial, we cannot forbear to characterize this confession and the circumstances under which it was obtained as suspicious. It was given to a woman who under oath stated that at her first interview by supernatural power she saw the occurrences attending the murder and the participation of the defendant in it. That she should have had such sight and knowledge is incredible. It is contrary to all human experience to account for her utterances on that occasion as detailed in the testimony of what took place at the time of the murder, if they did occur, unless she had been informed by word or reading it before that time. No proof was given whether she knew Strong when he first went to her. If she knew him, it was easy for her to have "seen" the tragedy. Three days had then elapsed since the body had been exhumed, and the autopsy had taken place. Moreover, she admitted that she had read of the murder at the time of its commission. Having claimed on the witness stand her supernatural powers is quite enough to weaken the force of her testimony as to the confession made at the second prearranged interview. That she dominated the defendant in his admitted feeble condition, and put words in his mouth, by suggesting answers to her questions, seems apparent.

The judgment will be reversed and the record remitted, to the end that a venire de novo may issue.

HORANDT v. CENTRAL R. CO. OF NEW JERSEY (three cases).**BENDER v. SAME.**

(Court of Errors and Appeals of New Jersey.
March 13, 1911.)

1. RAILROADS (§ 327*)—CROSSINGS—COLLISIONS—CONTRIBUTORY NEGLIGENCE.

A driver of an automobile, approaching a railroad crossing, who is chargeable with notice of the presence of the railroad, is guilty of contributory negligence in failing to discover an approaching train which he could have seen, had he looked, in time to avoid a collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. NEGLIGENCE (§ 92*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Passengers in an automobile are not chargeable with the contributory negligence of the driver.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142-146; Dec. Dig. § 92.*]

3. RAILROADS (§ 350*)—COLLISIONS—NEGLIGENCE—QUESTION FOR JURY.

Where three persons injured in a collision with a train at a railroad crossing and six others testified that they did not hear the bell or whistle, though they were near enough to hear a whistle or bell, and they were contradicted by witnesses, the question of the negligence of the railroad company in approaching the crossing without sounding the whistle or ringing the bell was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Pitney, Ch., and Garrison, Minturn, and Congdon, JJ., dissenting in part.

Error to Supreme Court.

Actions by Carrie S. Horandt, as executrix and individually, and by Ruth Horandt, by next friend, and by Reinhardt Bender, by next friend, against the Central Railroad Company of New Jersey. There were judgments for defendant, and plaintiffs bring error. Affirmed in part, and reversed in part.

Wayne Dumont and Clifford L. Newman, for plaintiffs in error. Frederick J. Faulks and William A. Barkalow, for defendant in error.

PARKER, J. The testimony in these four cases, which were tried together, is identical with that passed upon by the Supreme Court, on rule to show cause why a new trial should not be granted, in *Horandt v. Central Railroad Co.*, 78 N. J. Law, 190, 73 Atl. 93. That court ordered a new trial in all four cases, which were submitted at the second trial on the evidence taken at the first one. The trial judge, deeming that the opinion of the Supreme Court was dispositive of all the cases, directed a verdict for defendant in each of them; and this action constitutes the sole ground of attack in this court on the four judgments thus entered.

[1] In the case of *Carrie S. Horandt*, executrix of *Christopher Horandt*, deceased, who was driving the automobile, the judgment should be affirmed, upon the ground of the contributory negligence of said deceased.

We concur in the view of the Supreme Court that, under the circumstances shown to have existed at the time and place of the accident, Mr. Horandt was legally chargeable with notice of the presence of a railroad, and, being so chargeable, was guilty of contributory negligence in failing to discover the approaching train in time to avoid collision. On this phase of the case I am authorized to say that the latter part of the Supreme Court opinion (78 N. J. Law, 196 to 198, 73 Atl. 93), satisfactorily expresses the views of a majority of this court, and the judgment against the executrix is accordingly affirmed on the grounds therein stated.

[2] With respect to the other three cases we reach a different result. These plaintiffs were passengers in the automobile, and, consequently, as pointed out in the Supreme Court opinion, not chargeable with the contributory negligence of the driver, nor was any claim made that they were individually negligent. Was there, then, any question of negligence on the part of the railroad company that should have been submitted to the jury? On this branch of the case the trial judge construed the Supreme Court opinion as holding that no case for the jury had been made out. We agree that none was made out on the theory of failure to ring the crossing bell, and none on the theory that the place was one of special danger, demanding extra precaution on the part of the railroad company. But we do not think, and do not interpret the opinion as holding, that there was no case for the jury on the absence of statutory signals by bell or whistle. All that we understand that court to have decided on this phase of the case is that the verdict for plaintiff was against the weight of evidence. If it had intended to say that a direction for defendant on this ground was proper, the discussion of contributory negligence in the case of the executrix would have been needless.

[3] Assuming that the Supreme Court rightly decided that the three verdicts in favor of the passengers were against the weight of evidence, the question of omission of statutory signals still remained one for a second jury to pass upon. Whether a second verdict on identical evidence ought to stand, or be likewise set aside, is beside the question at present. Suffice it to say that whatever the Supreme Court may have decided as to the preponderance of evidence—a question not cognizable by this court in such a case as this—a substantial conflict of testimony was presented. Nine witnesses, including the three plaintiffs, testified to hearing neither bell nor whistle. True, their evidence was negative; but it is not valueless if, as seems to have been the case, they were near enough to hear a whistle, if blown, or a bell, if rung. They were contradicted by witnesses who said they did hear bell or whistle, or both. Without going into the details of

the evidence, we think that a jury question on this point was fairly presented, and that the trial judge erred in treating it on the second trial as a court question. The judgments under review in the three cases of the passengers in the automobile will be accordingly reversed, to the end that a venire de novo issue in each of said cases.

The judgment in the case of Carrie S. Horandt, Executrix, v. Central Railroad Company of New Jersey, was affirmed by the following vote:

For affirmance—The CHIEF JUSTICE, and SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, BOGERT, VREDENBURGH, and VROOM, JJ. 10.

For reversal—The CHANCELLOR, and GARRISON, MINTURN, and CONGDON, JJ. 4.

The judgments in the cases of Carrie S. Horandt, Ruth Horandt, and Reinhardt Bender v. Central Railroad Company of New Jersey were reversed by the following vote:

For affirmance—None.

For reversal—The CHANCELLOR, CHIEF JUSTICE, and GARRISON, SWAYZE, REED, TRENCHARD, PARKER, BERGEN, VOORHEES, MINTURN, BOGERT, VREDENBURGH, VROOM, and CONGDON, JJ. 14.

SCULLY v. MANCHESTER ST. RY.

(Supreme Court of New Hampshire. Hillsborough. May 7, 1912.)

1. WITNESSES (§ 311*)—CREDIBILITY—EVIDENCE.

A witness having testified that about the time of the accident he saw a street car pass at a speed of 18 or 20 miles an hour, the question asked by the court whether its speed was the subject of comment by him and others was competent, for testing his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1072-1075; Dec. Dig. § 311.*]

2. TRIAL (§ 48*)—RECEPTION OF EVIDENCE—EVIDENCE ADMISSIBLE FOR ONE PURPOSE.

Testimony being competent for testing the credibility of witness, even if incompetent for other purposes, its admission was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.*]

Transferred from Superior Court, Hillsborough County; Chamberlin, Judge.

Action by William I. Scully, administrator, against the Manchester Street Railway, for negligence of defendant, resulting in death of plaintiff's intestate. Verdict for plaintiff, and case transferred from superior court on defendant's exception. Exception overruled.

One point in issue was the speed of the car which collided with the intestate. A witness for the plaintiff having testified that about the time of the accident he saw another car pass by at the rate of 18 or 20 miles an hour, he was asked by the court whether the speed of the car was the subject of comment by himself or others. Subject

to the defendants' exception, he was allowed to answer that it was.

Taggart, Burroughs & Wyman, of Manchester, for plaintiff. Burnham, Brown, Jones & Warren, of Manchester, for defendant.

WALKER, J. [1, 2] The question was clearly competent for the purpose of testing the credibility of the witness. If he had answered the question in the negative, it would have had some tendency, under the circumstances, to show that he was exaggerating the speed of the car, while the affirmative answer which he gave tended to show he was telling the truth. As the testimony was at least competent for this purpose, its admission was not error, even if it was incompetent for other purposes. *Haskell v. Railway*, 73 N. H. 587, 64 Atl. 186; *Robinson v. Stahl*, 74 N. H. 310, 67 Atl. 577; *Conn. River Power Co. v. Dickinson*, 75 N. H. 353, 358, 74 Atl. 585.

Exception overruled. All concurred.

FOSTER v. HARGATE et al.

(Supreme Court of New Hampshire. Merrimack. May 7, 1912.)

WILLS (§ 684*)—CONSTRUCTION—TESTAMENTARY TRUST—SHARE DEVISED.

A testamentary trust recited that it was testator's desire that his executor be trustee of the estate during the lifetime of his sisters, and on the death of the survivors of the sisters, after payment of certain legacies, he should pay "the residuum of my said estate * * * to the residuary legatee, * * * less the expenses incident to the care and administration of said estate by my said executor, acting as trustee. It being my wish and intention that, in addition to the payment of debts, expenses of last sickness, there shall be deducted the usual and ordinary expenses of administration of my said estate by my said executor, before" it vests in him as trustee. Held, that testator's sisters were entitled to the gross income of trust estate; the last clause merely limiting the estate in which they should have the income, and not referring to the same expenses mentioned in the prior clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.*]

Transferred from Superior Court, Merrimack County; Mitchell, Judge.

Suit by William H. Foster, trustee, against Ellen Hargate and another. Case transferred from the superior court. Case discharged.

The trust is created by the fourth clause of the codicil, the material parts of which are as follows: "It is my desire that my said executor * * * be not only my executor, * * * but that he also be trustee of my estate during the lifetime of both of my said sisters, * * * and upon the death of the last survivor of my sisters, after the payment of the legacies provided in

said will, pay the residuum of my said estate, or deliver the same, to the residuary legatee, * * * less the expenses incident to the care and administration of said estate by my said executor, acting as trustee. It being my wish and intention that, in addition to the payment of debts, expenses of last sickness, there shall be deducted the usual and ordinary expenses of administration of my said estate by my said executor, before my estate vests" in him as trustee.

William H. Foster, of Concord, pro se. Taggart, Tuttle, Burroughs & Wyman, of Manchester, for cestuis que trustent. Foster & Lake, of Concord, for residuary legatee.

YOUNG, J. The testator's sisters are not entitled to the whole of the income of the trust estate, if the expenses mentioned in the final clause of this section of the codicil are the same as those mentioned in the clause which precedes it. If the words the testator used are given their ordinary meaning, "by expenses," in the final clause, is intended those incident to the settlement of the testator's estate, for they are the "usual and ordinary expenses of administration," and are to be deducted "before my estate vests" in the trustee; and by "expenses" mentioned in the preceding clause is intended those incident to the administration of the trust, for they are the expenses incident "to the care * * * of said estate by my said executor, acting as trustee," and are not to be deducted until the trust estate is finally distributed. It is probable, therefore, that the expenses the testator had in mind in the final clause are not the same as those in the clause which precedes it; in other words, that the final clause is not intended to explain what expenses are meant in the clause which precedes it, but to limit the estate of which the testator's sisters are to have the income.

It follows, therefore, that the testator probably intended to give his sisters the whole of the income of the trust estate, when he said that the expenses incident to its care and administration are to be deducted from the residuum before it is delivered to the residuary legatee.

Case discharged. All concurred.

UNITED STATES FIDELITY & GUARANTY CO. v. LITTLE et al., Board of License Com'rs.

(Supreme Court of New Hampshire. Hillsborough. May 7, 1912.)

1. INTOXICATING LIQUORS (§ 87*)—LICENSE—FORFEITURE OF RIGHTS—LIABILITY OF SURETIES.

Under Laws 1903, c. 95, § 14, which provides that a license for the sale of liquor may be revoked at any time where any provision of the act is violated by the holder or his

agent or any person in charge of the premises, a licensee's sale or assignment of his stock and retirement from business does not discharge the sureties on his bond.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 90; Dec. Dig. § 87.*]

2. INTOXICATING LIQUORS (§ 87*)—LICENSE—TRANSFER—OFFENSE AFTER TRANSFER—LIABILITY OF SURETIES.

Under Laws 1903, c. 95, § 12, which provides that a licensee may sell his license upon making a new application and bond by the purchaser and the presentation of the license to the board of commissioners for its consent, and that no sale or transfer shall be made except in accordance with the act, a transfer not assented to by the board is not valid as against the state, and the transferor remains the licensee responsible to the state on his bond.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 90; Dec. Dig. § 87.*]

Transferred from Superior Court, Hillsborough County; Plummer, Judge.

Petition by the United States Fidelity & Guaranty Company against Cyrus H. Little and others, Board of License Commissioners. Transferred without ruling from the superior court. Petition dismissed.

Petition for the cancellation of a bond to the state given by one Howe who on May 1, 1905, was granted a third-class license for the sale of liquor at 365 Elm street, in Manchester, by the defendants, the board of license commissioners. Howe filed the bond which was executed by himself as principal and the plaintiff as surety to secure his strict adherence to the terms of the license. He thereupon engaged in the liquor business at the place designated and so continued until August 4, 1905, when he made a common-law assignment for the benefit of his creditors of all his property to one Bodwell, who accepted the same and took full possession of the premises. Howe also delivered to Bodwell the liquor license. August 20, 1905, Howe unlawfully entered the premises and gave some of the liquor remaining there to two little girls. Upon complaint for this act to the board of license commissioners, a hearing was had on September 15th, the license was revoked and canceled, and a demand was made for the amount of the bond. In December the plaintiff brought this petition for a cancellation of the bond. No objection was made to the form of the proceeding. The question whether upon the facts the prayer of the petition should be granted, or whether the petition should be dismissed, was transferred without ruling from the May term, 1911, of the superior court by Plummer, J.

Taggart, Burroughs & Wyman and William J. Starr, all of Manchester, for plaintiff. Edwin G. Eastman, Atty. Gen., for defendants.

WALKER, J. [1] There is no contention that Howe's act of giving the liquor to the

little girls was not an offense which justified the commissioners in revoking the license and claiming a forfeiture of the bond, if Howe at that time had been carrying on the business under his license. But it is urged that previous to his alleged offense Howe had disposed of the business he was licensed to carry on at 365 Elm street by a common-law assignment of it to Bodwell, together with the license issued to him by the board of license commissioners, and that thereupon he ceased to be a licensee and the bond became ineffective as security for his subsequent acts. The simple fact that he sold or assigned his stock and retired from the business did not amount to an abrogation of the license or relieve him of the responsibilities assumed by him as a licensee, nor did it discharge the sureties upon his bond. That this was the intention of the Legislature is apparent from section 14, c. 95, Laws 1903, where it is provided: "At any time after a license has been issued to any person, the same may be revoked and cancelled by said board, if any material statement in the application of the holder of the same was false, or if any provision of this act is violated at the place designated in the said license by the holder of the same, or by his agents, servants, or any person whomsoever in charge of said premises." The holder of the license cannot avoid the consequences of a violation of its terms by transferring the business to another. So long as the license stands in his name, he is a licensee and not a nonlicensee and is responsible for illegal acts done by "any person whomsoever in charge of said premises," even though such person may be his vendee or assignee. Such, at least, seems to be the meaning of the statute, and, if that view is correct, it is difficult to see why Howe is not responsible as a licensee for his illegal act, though committed after his voluntary assignment, or why that fact furnishes a defense to an action on his bond.

In *State v. Corron*, 73 N. H. 434, 446, 62 Atl. 1044, 1046 (6 Ann. Cas. 486), it is said: "One of the terms of the license, either expressed therein or understood from the language of the act, was therefore that the provisions of the act should not be violated at the place designated in the license by the holder himself or by any of the persons named above. Such violation by any of these persons would constitute a breach of the bond conditioned upon constant adherence to the terms of the license." If during the term of license the licensee turns over the control and management of the designated place to others, who violate the provisions of the license, his bond may be forfeited. Whether the transaction as between parties to it is deemed to be a sale or not is immaterial in the absence of knowledge of it by the commissioners. A sale does not relieve the person to whom they issued the

license of the duties he voluntarily assumed thereunder in relation to the conduct of the business which they permitted to be carried on at the designated place. When Howe therefore assigned his business to Bodwell, he still remained the responsible licensee he was before, unless the assignment of all his property for the benefit of his creditors and the delivery of his license to the assignee was a valid method of transferring the license as against the state.

[2] Section 12 of the license act provides: "The person to whom a license is issued, except a pharmacist, may sell, assign, and transfer such license during the time for which it was granted to any other person not forbidden to traffic in liquor under the terms of this act, * * * upon the making and filing of a new application and bond by the purchaser, in the form and manner provided for the original application and bond, and the presentation of the license to said board, who shall write or stamp across its face the words, 'Consent is hereby given for the transfer of this license to —': Provided, however, that no such sale, transfer, or assignment shall be made except in accordance with the terms of this act." Evidently this provision of the statute was intended as a protection to the state against the transfer of licenses to irresponsible parties. So far as the state is concerned, the licensee is not permitted by a mere transfer or sale, unassented to by the commissioners, to relieve himself of the obligations of that position and install another in his stead. He acquires a personal privilege to traffic in liquors at a particular place which is not absolute property transferable at his pleasure.

Under a similar statute the court say in *Gilday v. Warren*, 69 Conn. 237, 239, 37 Atl. 494, 495: "Since the law prohibits the sale of the intoxicants without a license, it follows that the granting of the license confers a right which previous thereto did not exist. * * * This right is personal. It cannot be transferred except by virtue of the express provisions of the statute (section 3071). If it is done by virtue of such enactment, it must be done in strict compliance and accordance therewith. The transfer must be with the consent of the county commissioners, and it must be to a suitable person, and upon this the county commissioners decide in giving or withholding their consent. But further, not only must the person be suitable and the consent of the county commissioners granted, but the proceedings must be in the prescribed form, embracing an application, a recommendation, and a bond, as required of the person to whom the license was originally granted. That all of these things are essential to the creation of the right in the transferee is evident both from the very character of such right and also from the language employed

in the statute providing what shall be done, not by the person to whom the license is, but by the one to whom it is to be, transferred, making these acts therefore precedent conditions to any transfer of the right."

"Such license, when issued, is not a contract between the municipality and the licensee in which the latter has a vested right, but it is a mere permit which is not transferable except such transfer be authorized by ordinance, and then only in the manner and form prescribed." *Hill v. Sheridan*, 128 Mo. App. 415, 419, 107 S. W. 426, 427. That a liquor license is not assignable under Massachusetts law so as to bind the licensing board is clearly stated in *Tracy v. Ginzberg*, 189 Mass. 260, 75 N. E. 637. See, also, *Commonwealth v. Lavery*, 188 Mass. 13, 73 N. E. 884; *Hall v. Hoagland*, 38 N. J. Law, 350; *Joyce, Intox. Liq.* § 298; 25 Cyc. 625.

If Howe's assignment in some sense transferred to the assignee his right to sell intoxicating liquors, and if as to him it transferred the license (*In re Wiesel* [D. C.] 173 Fed. 718), it did not bind the state. As to the state, he remained the licensee and was responsible to it in that character for the conduct of the business at the place designated when he entered the building and furnished the little girls with liquor. As he thus violated the terms of his license, his bond became liable for forfeiture therefor.

The order must be petition dismissed. All concurred.

CLARK v. CLARK.

(Supreme Court of New Hampshire. Grafton. May 7, 1912.)

1. WITNESSES (§ 178*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Where defendant administrator took the plaintiff's deposition as to a claim against decedent's estate, he thereby irrevocably elected to make plaintiff a witness in the case, and it was error to thereafter exclude plaintiff from testifying for himself.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 722-725; Dec. Dig. § 178.*]

2. DEPOSITIONS (§ 86*)—RIGHT TO USE—WAIVER.

Where defendant took the plaintiff's deposition, and plaintiff's counsel waived the defendant's obligation to file the deposition as required by Pub. St. 1901, c. 225, § 11, this waiver did not take from the deposition its character as evidence, or avoid right of plaintiff to use the deposition at the trial, where the plaintiff's counsel did not understand that it should have such an effect.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 234-236½; Dec. Dig. § 86.*]

Exceptions from Superior Court, Grafton County.

Presentation of claim by Ira P. Clark against Leslie A. Clark, administrator. From the disallowance of the claim against the decedent's estate, Clark appealed. After the appeal was taken, the defendant sum-

moned the plaintiff to give his deposition. Before it was taken, counsel agreed to waive the defendant's obligation to file the deposition, as required by section 11, c. 225, Public Statutes. The defendant intended to avoid the right of the plaintiff to use the deposition at the trial by means of this agreement, but the plaintiff had no such understanding. At the trial the defendant did not elect to become a witness. The plaintiff was excluded from testifying generally, and excepted. Exception sustained.

Alvin F. Wentworth, of Plymouth, for plaintiff. Edward J. Cummings, of Littleton, for defendant.

PEASLEE, J. [1] By taking the plaintiff's deposition, the defendant made the plaintiff a witness in the case. A person giving a deposition is a witness, and his answers to the questions put to him are testimony. The act of the administrator in thus calling the adverse party to testify in the cause was an election on his part to testify generally. The finding in the case that there was no such election at the time of the trial is a conclusion of law, and not controlling here. *Palmer v. Bass*, 69 N. H. 300, 41 Atl. 447. Having so elected, he could not withdraw his election to the manifest detriment of his opponent.

[2] The agreement made by counsel before the deposition was taken does not affect the result. It merely relieved the administrator from the duty to file the deposition at once. P. S. c. 225, § 11. It did not take from the deposition its character as evidence, but merely left it to be dealt with like a deposition of one not a party. The understanding of the administrator's counsel that by this agreement he had avoided the usual legal consequences of calling the adverse party as a witness is immaterial. The opposing counsel had no such understanding, and the agreement of the parties does not go to such an extent. The plaintiff was a competent witness for himself at the trial.

Exception sustained. All concurred.

BROWN v. CURRAN et al.

BRIGHTMAN v. SAME.

(Supreme Court of Rhode Island. May 27, 1912.)

1. DEDICATION (§ 19*)—WAYS—CREATION—PLATS—EASEMENTS.

The owners of adjacent land making separate plats thereof may agree to a scheme providing for a street between the two plats contemplating that the land left for the street should be open and that their grantees should have an easement or right of way over the entire length thereof.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

2. DEDICATION (§ 29*)—ABANDONMENT.

Where the proprietors of adjacent land on platting the same indicated an intention that a street should be laid out between the two plats, part of the land being taken from each side, but a wall divided their lands and such wall and a succeeding fence thereafter remained, and the land was afterwards sold under covenants of warranty by a description including the streets so shown on the plat as laid out, and the property so attempted to be dedicated had been used by the grantees in the same way as the adjacent land, any easement which might have arisen from the original dedication, if any, was abandoned and extinguished.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

3. DEDICATION (§ 19*)—WHAT CONSTITUTES—FILING PLAT—SALE OF PROPERTY.

In general the filing of a plat showing lots and streets and the sale of a single lot with reference to the plat will complete the dedication, after which it cannot be recalled by the owner; the time of actual opening of the streets being left to the proper local authorities.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

4. DEDICATION (§ 29*)—STREETS—RIGHTS OF PUBLIC—ACCEPTANCE.

Though the filing of a plat of lots and streets and the selling of land with reference thereto is a dedication as to the owner of the land, it may be revoked at the instance of the original owners and their grantees in so far as the public is concerned until there has been a sufficient acceptance thereof either by user or by action of the public authorities.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 79; Dec. Dig. § 29.*]

5. DEDICATION (§ 44*)—STREETS—ACCEPTANCE.

Evidence held insufficient to show an acceptance by the public of land alleged to have been dedicated for street purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

6. EVIDENCE (§ 461*)—PAROL EVIDENCE—DEDICATION—PLAT.

Where an intention to dedicate land for street purposes is evidenced by the filing of a plat, parol evidence as to the intention of the persons filing the plat to dedicate the land for street purposes is inadmissible; such proof being competent only in cases of implied dedication to be established by user, etc.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

7. DEDICATION (§ 43*)—INTENTION OF PARTIES.

Where the owners of adjoining land platted the same so as to show a space left between the two parcels for a street, the parcels being separated by a wall, evidence of acts of the platters of the land and their successors in title with reference to the use of the land so alleged to have been dedicated was admissible on the issue whether the platters agreed to dedicate the strip for street purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 83, 84; Dec. Dig. § 43.*]

Appeal from Superior Court, Newport County; Darius Baker, Judge.

Suits by Jeremiah Brown and by William E. Brightman against Daniel V. Curran and others. From a decree in favor of complainants, respondents appeal. Affirmed and remanded.

The following is the opinion of Judge Baker in the court below:

"The complainant Brown in his bill alleges that he is the owner of certain land in Tiverton in said county, being those lots numbered 31, 32, 33, 34, 35, 36, 37, and 38 as laid out and delineated on a plat of land entitled, 'A plat of land of Davol, Easton, Milne and Osborne, and Davol and Easton,' surveyed August 10, 1871, by Benjamin C. Borden, surveyor, which said plat was recorded in the town clerk's office in said Tiverton on January 1, 1872; and also a tract of land shown on said plat as lying immediately north of said lots and which extends easterly from the Town Hall road, so called, to the center line produced northerly of the way shown on said plat as extending north and south approximately through the center of said plat, and which last tract is bounded east on said Town Hall road, north by a stone wall separating said last-mentioned tract from land of the respondent Anna L. Curran about 110 feet, and also bounded on the north by a fence which is in continuation westerly of said stone wall about 340 feet.

"The Brightman complainants allege that they are owners of certain land in said Tiverton, being lots numbered 39, 40, 41, 42, 43, 44, and 45 on said plat, and also of a tract immediately to the north of said lots which extends easterly from the Main road, so called, to the center line produced northerly of a way shown on said plat as extending north and south approximately through the center of said plat, and is bounded on the north by a fence which extends easterly from the Main road, so called, about 40 feet to the north of a northerly line as shown on said plat of said numbered lots till it meets said center line produced as aforesaid.

"The tract of land secondly described in the Brown bill of complaint, and the tract of land secondly described in the Brightman bill of complaint, together form a strip of land about 40 feet in width, measured from north to south, extending from the Town Hall or Highland road on the east to the Main or Shore road on the west, and bounding southerly on said lots of said Brown and said Brightman, and for 40 feet on said way extending north and south approximately through the center of said plat and constitute about a two-thirds southerly portion of North avenue, as shown on said plat.

"The complainants aver that the respondents have at numerous and divers times since June 1, 1908, entered upon said tract last above referred to against the wish, desire, and command of the complainants, and have committed trespasses thereon frequently, and have at divers times knocked, broken, and cut down certain fences, posts, gates, and bars which the complainants were lawfully maintaining on said tract, and also have opened and left open said gates; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the respondents have repeated said acts and threatened to continue to do so. The complainants therefore pray that the respondents may be permanently enjoined and restrained from entering upon said premises, from breaking down the gates, fences, posts, and bars upon said premises, from opening and leaving open said gates.

"The respondents admit the doing of the acts complained of as trespasses and to their threatening to continue to do similar acts, but justify their doing the same as in the exercise of their lawful rights, in that, first, there is an easement of way appertaining to the land now owned by said Anna L. Curran of and over the entire length of said North avenue; and, second, in that said North avenue is a public way over which the public have at all times the right to pass and repass without any obstruction on the part of the complainants.

"The respondents set up that in July, 1871, one Eunice S. Robinson was the owner of the tract of land immediately to the north of the land claimed to be owned by the complainants and extending from Town Hall to the Main or West road, and that on July 5, 1871, she caused a plat of said land to be made by said Benjamin B. Borden and had the same recorded in the town clerk's office in said Tiverton on July 27, 1871.

"On said Robinson plat the land is divided into 30 lots similar in dimension to those on the plat of the land on the south, and the plat also shows an unnamed way 40 feet in width running north and south approximately about halfway between said Town Hall road and said West road, and apparently in continuation of a similar way in the land to the south. On said Robinson plat the lots are bounded south on North avenue and north on Robinson avenue, 60 feet wide. By deed dated July 7, 1871, said Eunice S. Robinson conveyed to James S. Anthony lot No. 1 on the Robinson plat aforesaid, which lot by mesne conveyances has come to and is now owned by the respondent Anna L. Curran; said lot No. 1 on said Robinson plat being bounded southerly on North avenue as shown on said plat. The plat of Davol and others shows North avenue to be 60 feet wide. There is nothing on the Davol plat to indicate that North avenue is not laid out entirely from the Davol land. A comparison of the measurements of the east and west boundary lines of the two tracts purchased of Charles Manchester by Davol and others in 1871 with measurements on the plat shows that only about 40 feet in width of North avenue falls within the Manchester purchases, and that a strip of about 20 feet in width of the north portion of said North avenue for its whole length was not owned by Davol and his co-owners. On the Robinson plat running through North avenue for its whole length and about 20 feet south of this north

boundary line is indicated a line wall. It is plain that the portion of North avenue lying to the north of this line wall is part of the Robinson land.

"The respondents aver that the ancestors in title of the complainants, said Davol and others, and the respondents' ancestors in title laid out their respective plats in pursuance of an agreement, scheme, and plan agreed upon between them; that it was their intention that said North avenue should be thrown open as a street and that their grantees on the northerly and southerly sides thereof respectively should have an easement or right of way over the entire length thereof.

[1, 2] "Of course it was competent for the owners of the adjacent land on the two plats to make such an agreement, and, if they properly did so, the said easements were created. The plats certainly have features from which it is easy to infer that there was some mutual or common understanding between the parties in the platting of the adjacent properties. Whether such understanding was embodied in such form as to be binding upon the parties under the statute of frauds and to be capable of creating an easement is a question. I am by no means satisfied that the filing of these two plats, not simultaneously, for the Davol plat was not prepared until after the filing of the Robinson plat, without other evidence than their obvious adaptation to each other, is sufficient evidence of an agreement to effectively create the rights of way claimed by the respondents. All the oral testimony on the point negatives the existence of such an agreement. If no such agreement was made, then no such easements were created. But it does not seem necessary to determine whether or not there was such an agreement, because, if such right of way as appurtenant to the respondents' land ever existed, it has clearly been abandoned and extinguished. If an agreement existed, it was on the part of Davol and others to throw out a strip of land about 40 feet in width, and on the part of Eunice Robinson to throw out a strip of land 20 feet in width; the two taken together to constitute a street or way 60 feet in width called North avenue. The line wall dividing these two strips has in part remained till this day, and, when it was partially removed, a fence was immediately erected in its stead, so that running down through its whole length, from the days of the filing of said plats to the present time, have stood this dividing wall and fence. In other words, if the intention of the parties was to open a way 60 feet wide, they abandoned such intention by failing to put it into effect by removing said division wall and fence. There is no evidence offered that more than lot No. 1 was sold by reference to the Robinson plat, and it is in evidence also that the ancestors in title of Mrs. Curran

and herself have together occupied and used continually as a portion of lot 1 the 20-foot strip lying between said stone wall and the south boundary of lot 1 as shown on the Robinson plat. Furthermore it appears that the remainder of the 20-foot strip of the Robinson land indicated as part of North avenue has since been included in a conveyance by deed of all the rest of the Robinson land other than lot 1 as one parcel, including all the streets shown on said plat with the usual covenants of warranty, and that the successors in title of the said Eunice S. Robinson have occupied and used as their own such 20-foot strip in the same way as the adjacent land on the north. Under such conditions there can be no doubt that if a right of way as appurtenant to lot 1 of the Robinson plat in North avenue was ever created, it has been abandoned and extinguished. *Steere v. Tiffany*, 13 R. I. 568; *Baker v. Barry*, 22 R. I. 471, 48 Atl. 795.

[3] "But is that portion of North avenue which at the time of the filing of their plat belonged to Davol and others as co-owners, a public highway? The respondents claim that it is. If so, it is such by virtue of dedication and acceptance; dedication by the owners of the land platted on the plat of Davol and others above referred to and acceptance by the public. Probably it is ordinarily held that the filing of a plat showing lots and streets and the sale of a single lot with reference to the plat will complete the dedication, and that the owner or owners cannot recall the dedication, for he or they leave the streets to be opened by the proper local authorities at such times as the public interest may require. *Elliott on Roads & Streets* (3d Ed.) vol. 1, §§ 128, 129.

"The right of a grantee of a lot on such a plat to use and to have used by the public the streets delineated on the plat as appurtenant to said lot is unquestioned. It was so decided with reference to said North avenue and lot No. 31 on said Davol plat in the case of *Chapin v. Brown*, 15 R. I. 579. But it has been held that, 'as between the original owners of the land and the several grantees of parcels thereof, these rights are fixed, but until the public has in some way become a party to the transaction the whole arrangement is subject to be rescinded by the joint act of the original owners and of all who own and have the right to represent the land sold.' *Child v. Chappel*, 9 N. Y. 246, 258. This quotation appears in *Clark v. City of Providence*, 10 R. I. 437, 440, with a comment that it well expresses 'the law and common sense of these cases.'

[4] "It would seem fair, therefore, to regard it as the law of this state that the filing of a plat of lots and streets and the selling of the land thereby is no more than an incipient dedication so far as the public is concerned, and that conditions may exist

under which such incipient dedication may be revoked. But, whether or not the filing by the owners of land of a plat showing the division of said land into lots and streets and the sale of lots with reference to such plat constitutes an irrevocable dedication for public use of such streets, nevertheless the public acquires no rights in such streets until there has been sufficient acceptance thereof either by user or by action of the public authorities.

[5] "In this case, therefore, without considering whether or not the dedication of North avenue has been rescinded, and even assuming that there has been a dedication of North avenue, it must also appear that, in order for it to be regarded as a public highway or street, it has been accepted as such by user of the public as there is no claim of acceptance otherwise. The testimony shows an occasional use of North avenue during its whole length by vehicles, and more frequently for a short distance from the West road and from Highland road but, with the exceptions mentioned below, practically entirely by the complainants and their ancestors in title or persons visiting them on lawful occasions.

"Mr. Daniel A. Chapin and Dr. Jackson, his tenant, used North avenue somewhat about 25 years ago. The respondents have been over North avenue a few times within the past two years. I do not think that there is any evidence which definitely shows the use of North avenue with vehicles by any other persons. On September 5, 1881, said Mr. Chapin and others presented their petition to the town council of Tiverton alleging that North avenue 'is highly necessary and useful' and praying that 'said highway may be laid out and opened as by statute * * * provided.' On October 3, 1881, said petition was denied. Mr. Chapin by deed dated November 25, 1881, became the purchaser of lot 31. In 1885 William J. Brightman, the father of William E. Brightman, one of the complainants in No. 1,187, brought an action of trespass *quare clausum fregit* against said Daniel A. Chapin for using North avenue. Jury trial was waived. The plaintiff admitted that the defendant had the right to use the way as appurtenant to lot 31, but it was shown that he had used the way for the purpose of going from his house and land on the east side of Highland avenue to the West road. *Brightman v. Chapin*, 15 R. I. 166, 1 Atl. 412. The defendant was found guilty as a trespasser for such use. In 1886 said Chapin and Jackson filed a bill in equity against said Jeremiah Brown, the present complainant in No. 1,186, to enjoin the respondent from maintaining fences across certain avenues, among others said North avenue. The court held in substance that Mr. Chapin as grantee of lot 31 had the right to pass and repass over the platted

streets and ways in manner as full and unrestricted as if such streets or ways were public highways, and enjoined the respondents from maintaining fences on North avenue. See *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639.

"In the action of trespass against him, Mr. Chapin made no claim that North avenue was a public highway. In his equity suit he relies entirely upon his right as owner of lot 31 to use said ways and makes no claim or suggestion that either of said streets is a public highway. Dr. Jackson was in 1886 tenant of Mr. Chapin as to lot 31 and afterwards became owner thereof. There having been testimony offered showing the use of North avenue by Mr. Chapin and Dr. Jackson, the records, opinion, judgment, and decree of the court in the two Chapin cases already referred to are relevant in the present case as throwing light on the claim then made by Chapin and Jackson in their use of North avenue, whether it was that there existed an easement appurtenant to lot 31 or that said avenue was a public highway. Mr. Chapin conveyed lot 31 to Charles W. Anthony, from whom he had originally purchased it, by deed dated March 9, 1885, and recorded October 1, 1888. Considering Chapin's acts chronologically in reference to the use by him of North avenue, it would seem to have been his main purpose to use the way in connection with his residence on the east side of Highland avenue, and that, failing in accomplishing that, he reconveyed lot 31. If his main purpose is thus rightly interpreted, his failure to claim any right to use North avenue as a public way is significant, and, in the absence of any evidence to the contrary, it does not seem unfair to infer that up to 1887 at least there had been no use of North avenue by the public under a claim that it was a public highway. The testimony, however, shows that the Davol portion of North avenue has for a long time been used either for its entire length or for a part thereof by a number of people on foot. Until quite recently such use was chiefly confined to perhaps four families living on Highland avenue near North avenue. They for the most part entered North avenue at its east end, and, after going a short distance west, went across lots to Middle avenue and thence to the Main road. Some time within recent years a church has been built on Highland avenue, and on Sundays in the summer it appears that people have come across the Seaconnet river in boats and gone up North avenue to the church. But in determining whether such use has been under a claim of right or simply permitted, it is proper to consider what the condition of North avenue has been as to being open or obstructed. Considering all of the testimony on the point, it seems fair to infer that from the filing of the Davol plat January 1, 1872, until some time between Mr. Chapin's pur-

chase of lot 31 in November, 1881, and 1885, just what time therein does not appear, there was a wall across the east end of North avenue with a gate therein. The answer in the Chapin-Brown suit sets up that Chapin had removed said wall and gate and that in consequence the defendant had erected a fence across North avenue at the west boundary line of lot 31. The evidence further shows that William J. Brightman bought his lots on said plat bounded on the West road in 1876; that until such purchase the west end of North avenue was an impassable bank; that within a year or two after such purchase Mr. Brightman graded down said bank as an approach to his own house, but built a fence across North Avenue east of his house; that 30 years ago he erected a henhouse and a henyard near the north side of North avenue but within it; that they have been maintained there ever since; that a fence across North avenue at the Brightman and Brown lots has been maintained for many years; that the western part of said North avenue has been used as a pasture for some time. In these fences across North avenue there are gates both for teams and people on foot. At the extreme northeast corner of North avenue there has been an opening two or three feet wide through which people have passed on foot, and at times there has been no gate there. Most of the witnesses who testified to using North avenue on foot said they closed these gates after passing through them. There is no suggestion in the testimony that anyone used or attempted to use North avenue under a claim that it had become a public highway or as a matter of right until the respondents set up such claim in their answer, although in their testimony they apparently claim the right to use it as appurtenant to their lot.

[6.7] "Fairly considered, the evidence does not in my judgment show the acceptance of North avenue by public use. As to the suggestion of North avenue as a convenience to the growing summer population, the evidence shows that Middle avenue 250 feet to the south is open to public use and is considerably used in the course of the season. (Certain parol evidence was admitted *de bene*. In so far as such evidence relates to the intention of the persons filing the Davol plat as bearing on the question of dedication, I am inclined to think it is inadmissible, as the plat speaks for itself. 9 Am. & Eng. Ency. of Law, 63. Such evidence would doubtless be admissible in cases of implied dedication; for example, when dedication is attempted to be established by user. Such evidence on the point mentioned has not been considered in reaching the conclusions herein stated. Evidence admitted *de bene* showing acts of the ancestors in title of the respondents in relation to the use of the land lying between said lot 1 and the wall to the south, and on the question of an agreement

existing between Eunice Robinson and Davol and others in the filing of the two plats, is definitely admitted and has been considered in reaching the conclusion referred to.)

"Upon the issues of fact, I find as follows: (1) Without attempting to determine the extent and character of the complainants' interest in the tract of land immediately north of the numbered lots as described in complainants' bills, I find that their interest in the tract when the bills were brought was sufficient to entitle them to maintain the suits and is so now. (2) Admitted by respondents. (3) Admitted by respondents. (4) No. At least, not proven. (5) Understanding the word 'intention' to imply a mutual agreement on the part of Robinson and Davol and others, my finding is, 'No.' (6) No. (7) The filing of the plat, sales of lots, reference thereto, imply at least an incipient but not necessarily an irrevocable dedication of North avenue to the public. (8) No. (9) No.

"Being therefore of the opinion that North avenue is not a public highway, the respondents have shown on their part no right to use such way. The complainants are accordingly entitled to a decree for a permanent injunction."

Frank F. Nolan, of Newport, Comstock & Canning and Patrick P. Curran, all of Providence, for appellants. Gardner, Pirce & Thornley, of Providence (William W. Moss, of Providence, of counsel), for appellees.

PER CURIAM. These suits involve the same questions of law and fact. They were brought in the superior court for the county of Newport to obtain permanent injunctions restraining the respondents from using, or exercising any right in or over, a strip of land in the town of Tiverton alleged to belong to the complainants. They were heard in the court below upon an agreed statement of facts, and a decree was entered in each case, whereby it was adjudged and determined that the respondent Anna Curran, as owner of her said lot, has no right of way, over the strip of land in question, and that said strip is not a public highway, and that the respondents, their agents, and servants, and their heirs and assigns, were perpetually enjoined in accordance with the prayers of the complainants' bills of complaint, and were decreed to pay the complainants' costs. From this decree in each case the respondents have appealed, and upon the appeals thus taken both cases are now before this court.

We have carefully examined the records and papers in said cases, together with the briefs and the authorities cited therein. We do not find any error in the decree of the superior court, and the decree of that court is affirmed for the reasons stated in the rescript thereof, and the causes are remanded to that court for further proceedings.

MERCHANTS' UNION TRUST CO. et al. v. NEW PHILADELPHIA GRAPHITE CO. et al.

(Court of Chancery of Delaware. New Castle. May 23, 1912.)

1. MORTGAGES (§ 199*) — RIGHTS OF MORTGAGEE—RENT—LIABILITY ON LEASES MADE PRIOR TO AND SUBSEQUENT TO MORTGAGE.

After notice and demand, a mortgagee may recover rents from a lessee, who holds under a lease made prior to the mortgage; but, as against a lessee from the mortgagor subsequent to the mortgage, the mortgagee cannot recover rent, unless an authority to that effect is contained in the mortgage, because there is no privity of contract or estate between the mortgagee and the tenant.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 513-525; Dec. Dig. § 199.*]

2. CONTRACTS (§ 186*) — OPERATION — RIGHTS OF THIRD PERSONS—PRIVITY OF CONTRACT.

A party, to recover on a contract, must be the person from whom the consideration of the contract actually moved; and a stranger to the consideration cannot sue on the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 790-797; Dec. Dig. § 186.*]

3. MORTGAGES (§ 199*)—TRANSFER OF MORTGAGED PROPERTY—ACTION FOR RENT—LIABILITY OF LESSEE OF MORTGAGOR'S ASSIGNEE.

A trust company, as mortgagee for the benefit of first mortgage bondholders, in possession after foreclosure, filed a bill seeking to recover rent against the lessee of the mortgagor's grantee, who had covenanted to pay to his lessor an annual rental of \$3,500, of which \$3,000 was to be paid to the trust company as mortgagee, and the remaining \$500 to the lessor, but showed no covenant by the lessee with it, and no consideration for the covenant furnished by it either to the lessor or the lessee, or any privity between itself and the lessor or the lessee. *Held*, on demurrer, that for want of privity of contract or estate between the mortgagee and the lessor or lessee the bill stated no equity entitling the mortgagee to payment of any part of the rent reserved by the lease.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 513-525; Dec. Dig. § 199.*]

4. MORTGAGES (§ 199*)—TRANSFER OF MORTGAGED PROPERTY—LIABILITY OF LESSEE OF MORTGAGOR'S ASSIGNEE.

Where a bill by a mortgagee against the lessee of the mortgagor's subsequent grantee, to recover rent reserved to the grantee as lessor, \$3,000 of which was to be paid to the mortgagee and the balance retained by the lessor, did not show that the lessor received any property or benefit from the mortgagee, in consideration of which it promised or became liable to pay over the rent to the mortgagee, nor any agreement of the lessor with the lessee or the mortgagor to pay rent, the mortgagee could not recover; the mere fact of the mortgagor's debt or the mortgagee's legal rights against it not constituting such an obligation on the part of the lessor, who purchased subject to the mortgage, as to entitle the mortgagee to enforce the covenant for rent for its own benefit.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 513-525; Dec. Dig. § 199.*]

5. CONTRACTS (§ 187*)—OPERATION—PARTIES—CONTRACT FOR BENEFIT OF THIRD PARTY.

To give a third party an action on a promise, there must be an intent by the promisee to secure some benefit to the third party, and also some privity between the promisee and the third party, and some obligation of the

promisee to the third party which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from the promisee.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

6. TRUSTS (§ 25*)—CREATION—COVENANT OF LESSEE OF MORTGAGOR'S ASSIGNEE.

Lessees of a mortgagor's grantee, who took subject to the mortgage, covenanted to pay rent to their immediate lessor, \$3,000 of which was to be paid to the mortgagee and the balance retained by the lessor; there being no consideration moving from the mortgagee to the lessor, and no promise by either the lessees or the lessor to pay rent to the mortgagee, and no intention of the lessees to constitute themselves trustees for the mortgagee. *Held*, in view of the power of the lessor and the lessees to have canceled the lease, before its assignment, that no trust was established against the lessees in favor of the mortgagee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 34-37; Dec. Dig. § 25.*]

7. MORTGAGES (§§ 199, 200, 207*)—TRANSFER OF MORTGAGED PROPERTY—RIGHT OF MORTGAGEE AGAINST LESSEE OF MORTGAGOR'S ASSIGNEE.

A mortgagor of premises containing deposits of graphite subsequently conveyed them, subject to the mortgage, and the grantee leased them, by a lease providing that the lessee should manufacture graphite on hand and pay to the lessor a royalty of 10 per cent., and also a like royalty on graphite mined and sold, and that the lessee should pay taxes on the premises. No consideration for such covenant moved from the mortgagee to the lessee. *Held*, on bill by the mortgagee, in possession after foreclosure, against the lessee, that as the covenants were not made to the mortgagee, and there was no privity of contract or estate between it and the lessee, it was not entitled to an accounting, to damages for waste, nor to a decree for the lessee's payment of unpaid taxes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 513-531, 553; Dec. Dig. §§ 199, 200, 207.*]

8. MORTGAGES (§ 205*)—WASTE—INJUNCTION—RIGHT OF MORTGAGEE.

A mortgagee, for the protection of his security, is entitled to enjoin the mortgagor or his grantee from waste imperiling his security.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 544-550; Dec. Dig. § 205.*]

9. MORTGAGES (§ 137*)—ESTATE OF MORTGAGEE—SECURITY.

A mortgage on land in Pennsylvania, by the law of that state, vests no title or estate in the mortgagee before foreclosure, but is only security for the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 270-276; Dec. Dig. § 137.*]

10. COVENANTS (§ 57*)—COVENANT RUNNING WITH LAND—PARTIES BOUND—INTEREST OF MORTGAGEE.

A party is not bound by a covenant running with the land, unless he is a party to it, or privy in estate with the original covenantee; and hence such covenants, in a mortgage under which the mortgagee has no title or estate before foreclosure, are not binding upon a lessee of the mortgagor's assignee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 54; Dec. Dig. § 57.*]

11. INJUNCTION (§ 62*)—AGREEMENTS RESTRAINING USE OF LAND—RIGHT AS AGAINST PURCHASER WITH NOTICE.

The right of equitable relief in favor of a grantor, who has attached to the land an

agreement as to its use by his grantee, though such agreement does not run with the land, as against a purchaser with notice, is confined to agreements or covenants restricting the mode of using the land.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

12. COVENANTS (§ 84*)—RESTRICTIVE CHARACTER—PERSONS LIABLE.

Covenants by the mortgagor of property containing graphite, for the payment of interest and for the payment to the mortgagee of a percentage of net earnings, are not restrictive in their character, and are not enforceable by the mortgagee against a lessee from a purchaser from the mortgagor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 90-92; Dec. Dig. § 84.*]

Suit by the Merchants' Union Trust Company and others, trustees for bondholders under a mortgage of the New Philadelphia Graphite Company, against the New Philadelphia Graphite Company and others, for discovery and an accounting. The Chancellor being disqualified to hear and determine this cause, it was heard by the Chief Justice on demurrer to the bill of complaint. Demurrer sustained.

Ward, Gray & Neary and E. B. Seymour, of Philadelphia, Pa., for complainants. Anthony Higgins, of Wilmington, and James C. Sellers, of Philadelphia, Pa., for respondents Curtis and others.

THE CHIEF JUSTICE. This case is before the court on demurrer to the complainants' bill, the material allegations of which may be briefly stated, as follows:

The New Philadelphia Graphite Company being the owner of certain lands in Chester county, Pa., some in fee and others under lease for years, mortgaged the same on June 10, 1905, to the Union Trust Company, to secure an issue of bonds of \$50,000. Afterward, in March, 1908, the said New Philadelphia Graphite Company, by indenture, conveyed the mortgaged lands and premises to the Keystone Graphite Company, a corporation of the state of Delaware. On April 1, 1908, the Keystone Graphite Company, by indenture, leased the said lands and premises to Frederick William Curtis and Frederick D. Chester, who, on June 12, 1908, made an assignment of the lease to the Chester Graphite Company. The lease contains the following covenant by Curtis and Chester:

"The lessees shall pay to the party of the first part an annual rental for the said term of \$3,500, payable semiannually in advance on the 30th day of September and 31st day of March in each year. Three thousand dollars of said sum to be paid to the Union Trust Company, of Philadelphia, for the benefit of the first mortgage bondholders of the New Philadelphia Graphite Company and \$500 of the balance of said rental to be paid to the party of the first part for the general purposes of the said lessors."

Paragraph 12 of the bill sets forth section 8 of the lease, as follows:

"The lessees shall manufacture, separate and refine any graphite now on hand belonging to the party of the first part either on the said leased premises or on the premises of the party of the second part and pay to the lessors 10 per cent. of the value of all of said graphite when so manufactured and marketed as aforesaid. And further, the said lessees shall pay to the party of the first part 10 per cent. of the sale price of all graphite mined on the said demised premises and manufactured there or elsewhere during the term of this lease. Such royalties to be payable and be paid to the party of the first part semiannually on the 1st day of October and on the 1st day of April of each year. For the purpose of ascertaining and paying said royalty, the lessees shall keep or cause to be kept true and accurate books of account showing the production and sale of graphite from the said land, which books shall be kept open and free to the inspection of the manager of the party of the first part at all times."

Paragraph 13 of the bill sets forth section 10 of the lease, as follows:

"The lessees shall also further pay all rates, taxes and assessments, payable in respect of the premises and plant hereby demised, and produce receipts for such rates and taxes from time to time to be in addition to all rentals and royalties herein when called upon to do so. Said rates, taxes and insurance to be paid in addition to all rentals and royalties herein otherwise reserved."

Paragraph 24 of the bill is as follows:

"The graphite on said premises is a material part of the complainants' security under said mortgage, and the graphite having been mined and taken away from the said premises without the payment of the stipulated rent agreed to be paid to the said the Union Trust Company, for the benefit of the bondholders as aforesaid, and without the accounting and the payment of the royalties provided for in the said lease and by reason of the respondents permitting taxes to become in arrear and a lien to be filed therefor, the said mortgaged premises have been depleted and wasted, to the irreparable injury of the complainants and the holders of the bonds secured by the said mortgage."

Paragraph 11 of the bill alleges, that although demand had been made upon Curtis, in his lifetime, and upon his executrix since his death, and upon Chester and the Chester Graphite Company by the complainants, none of them has paid to the complainants or to any of them the sum of \$1,500, due on October 1, 1910, for the benefit of the first mortgage bondholders of the New Philadelphia Graphite Company, in accordance with the terms and conditions of the lease; nor has any of them paid to complainants, or any of them, any portion of the rental ac-

cruing subsequently to October 1, 1910, and continuing until December 21, 1910, under said lease.

Under the terms of the mortgage, the principal of the bonds became due and payable April 1, 1910. The New Philadelphia Graphite Company and the Keystone Graphite Company have defaulted in the payment of the principal of the bonds, and no interest has been paid thereon since the 1st day of April, 1910. Also under the terms of the mortgage, the Union Trust Company, as mortgagee and trustee on behalf of the bondholders, on December 21, 1910, sold and conveyed the mortgaged premises to Hiram C. Himes, acting on behalf of all the bondholders of the New Philadelphia Graphite Company, for the sum of \$5,000. On December 21, 1910, the bondholders of the New Philadelphia Graphite Company conveyed to Hiram C. Himes, Charles L. Reid and Edmund C. Seymour, as their trustees, all their right, title and interest in the said bonds, and agreed, in the event of the purchase of the property by the Union Trust Company at the forthcoming foreclosure sale, to convey to the said trustees all their right, title and interest in and to the premises. A copy of this deed is annexed to the bill, marked "Exhibit C." On January 11, 1911, the Union Trust Company was merged in and consolidated with the Merchants' Trust Company, another Pennsylvania corporation, under the title of Merchants' Union Trust Company, which thereupon succeeded to all the rights and powers of the Union Trust Company, including those under the said mortgage. On January 20, 1911, the said Merchants' Union Trust Company, successor to said the Union Trust Company, trustee as aforesaid, in pursuance of the authority of said mortgage, and in furtherance of the sale, by deed of assignment and conveyance, granted to Hiram C. Himes, Charles L. Reid and Edmund C. Seymour all the estate of the New Philadelphia Graphite Company and the Keystone Graphite Company in and to the said lands and premises.

Paragraph 21 of the bill avers that the royalty provided for in section 8 of said lease had not been accounted for and paid over to the Keystone Graphite Company on October 1, 1910, or at any subsequent time prior to the filing of the bill, and also avers the refusal on the part of Mr. Curtis, during his lifetime, and his executrix since his death, Frederick D. Chester and Chester Graphite Company to make such accounting and payment. Paragraph 22 of the bill avers that the taxes have not been paid by the defendants, as provided for in said lease. Paragraph 23 of the bill avers that Mr. Curtis, in his lifetime, and his executrix since his death, together with the said Chester owned the controlling interest in the Keystone Graphite Company and the Chester Graphite Company, and that, by reason of

such ownership, the said Curtis in his lifetime and his executrix since his death, and the said Chester, have restrained said Keystone Graphite Company from taking any action to secure an accounting and the payment of the rentals, royalties and taxes due under the terms of said lease, and have caused the Chester Graphite Company to refuse to make any payment of either the stipulated sum provided for under section 7 of said lease, or the amount apportionable from October 1, 1910, to December 21, 1910, or for the accounting or the payment of the royalties due under section 8 of the lease, or for the payment of the rates, taxes and assessments under section 10 of the lease.

The bill filed by the complainants is, in effect, the bill of a mortgagee in possession (after foreclosure proceedings) against the lessees of the assignee of the mortgagor, and prays for the payment by Curtis' executrix, Chester and the Chester Graphite Company, to the complainant, Merchants' Union Trust Company, as trustee under the mortgage, \$1,500, being interest at six per cent., due October 1, 1910, and \$625, interest at six per cent. on \$50,000 for two months and 21 days, under section 7 of the lease; that an account be taken for what is due for royalties under section 8 of the lease; that the said respondents be decreed to pay the taxes; that the said respondents and also the Keystone Graphite Company be directed to pay to complainants, for the benefit of the bondholders of the New Philadelphia Graphite Company, the amount which shall be found to be due on said account, together with costs; and that the respondents be decreed to pay for the waste of the mortgaged premises, and the damages arising from a confederation among them during a period in which the mortgagee could not recover possession of the premises.

The demurrer of Sarah Corbit Curtis, as executrix of Frederick William Curtis, Frederick D. Chester and the Chester Graphite Company, sets forth the following causes of demurrer:

First. That the complainants have not in and by their said bill of complaint made or stated such a case as calls for (1) the payments alleged by said bill to be due to the Merchants' Union Trust Company, as trustee for the first mortgage bondholders of New Philadelphia Graphite Company, either for rental or for interest; (2) for any account for royalties alleged to be due said Trust Company as trustee as aforesaid, under the provisions of section 8 of the lease, marked "Exhibit B," or for the payment of any amounts, which said bill alleges would be found to be due on said accounting; (3) or for the payment to the commonwealth of Pennsylvania, to the tax collector of West Pikeland county, and to the receiver of taxes of Chester county, of the several sums alleged to be due to them, respectively, for taxes due on said demised premises, together

with any penalties or costs thereon, for the reason that the complainants have shown no title to maintain this suit.

Second. For the reason that it appears by the bill that there is no intent by the Keystone Graphite Company to secure any benefit to the complainants by reason of the covenant of the lessees, Curtis and Chester, contained in article 7 of said lease, and set forth in paragraph 7 of the said bill.

Third. For the reason that it appears by the bill that there is no privity between said complainants and the Keystone Graphite Company, respondent, the covenantee in said covenant, and no consideration moving from the said complainants to the said Keystone Graphite Company, respondent, to enable said complainants to call on these defendants for any payment of any debt or royalties to the complainants from these respondents, or for the payment of any taxes to the aforesaid officials.

Fourth. That it appears by the bill that there is no privity between said complainants and said three respondents, and no consideration moving from said complainants to the said three respondents, or any of them, to enable said complainants to call on these respondents for any payment of any debt or royalties to the complainants from these respondents, or for the payment of any taxes to the aforesaid officials.

Fifth. That the complainants have not, in and by their said bill, made or stated such a case as entitled them, or any of them, in a court of equity, to discovery or relief from or against the said respondents or any of them touching the matter contained in said bill.

Sixth. That under section 8 of the lease, annexed to the bill of complaint and marked "Exhibit B," the right of the lessees to mine graphite on the premises therein demised is not dependent as a condition upon an account and payment of royalties, as therein provided for; and that the said mortgaged premises have not been depleted and wasted by mining graphite and taking the same away from the said premises in accordance with the terms of said lease.

Seventh. That the complainants are not entitled to sustain their bill against the said respondents, or any of them, for the reason that the complainants have a full, complete, and adequate remedy at law.

[1-3] The first question to be determined is whether the bill can be sustained because of the covenant by the respondents, Curtis and Chester, to pay to the lessor a certain annual rental, \$3,000 of which was to be paid to the Trust Company, the complainant, for the benefit of the first mortgage bondholders of the New Philadelphia Graphite Company. It is to be noted that the entire rental was required to be paid, by the terms of the lease, to the party of the first part, which was the Keystone Graphite Company. There was no covenant on the part of the lessees to pay

the rental, or any part of it, to the Trust Company mortgagee. The agreement of the lessees was with the Keystone Graphite Company, the assignee of the mortgagor, and the consideration for their undertaking was not made or furnished by the complainants.

Even if the New Philadelphia Graphite Company, the party that executed the mortgage, or deed of trust, had been the lessor, it is by no means certain that the mortgagee could sustain a bill praying that the lessees be decreed to pay to it the rent made payable to the lessor. But in this case the lessor is the assignee of the mortgagor, and the complainants have not shown that there was any privity between the Keystone Graphite Company and the Trust Company, or any consideration moving from the Trust Company to the Keystone Company. Still less has it been shown that there was any privity between the respondents, Curtis and Chester, as lessees and covenantors, and the Trust Company, mortgagee, or any consideration moving from the Trust Company to the said covenantors. While a mortgagee may, after notice and demand, recover rents and profits from a lessee who holds under a lease made prior to the mortgage, there is a clear and well-settled distinction in the law between a lease made by the mortgagor prior, and one made subsequent, to the mortgage. In the latter case the mortgagee cannot destrain, or sue for rent unless an authority to that effect is contained in the mortgage, because there is no privity of contract, or estate, between the mortgagee and the tenant. 4 Kent, Comm. 165; notes to *Moss v. Gilmore*, Doug. 279; 1 Smith's Leading Cases, 627 (6th Ed. 972-976); *Evans v. Elliott*, 9 Adol. & El. 342, 33 E. C. L. 342; *Mayo v. Shattuck*, 14 Pick. (Mass.) 533; *In re Crope & Co.*, [1911] L. R. 2 Ch. 224; 1 Jones on Mortgages, §§ 774-777; *Russell v. Allen*, 2 Allen (Mass.) 42; *Mirick v. Hoppin*, 118 Mass. 582; *McKircher v. Hawley*, 16 Johns. (N. Y.) 290.

The last-mentioned case contains a very full and clear exposition of the law upon this subject, including a reference to the leading authorities, and it is not necessary for me to discuss the subject further, or cite additional authorities. It is a general rule, that a plaintiff must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract; or, as it is sometimes expressed, there must be a privity of contract between the plaintiff and defendant in order to render the defendant liable to an action, by the plaintiff, on the contract. *Mellen v. Whipple*, 1 Gray (Mass.) 317; *Morrison v. Beckey*, 6 Watts (Pa.) 349.

There are certain exceptions to this general rule, which the court in *Mellen v. Whipple* classifies under three heads. But the case before me is not within any of those exceptions. In *Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1, the court recognized the soundness of the rule, and said:

"The recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it."

[4] In view of the law above stated, I am constrained to hold that there is no privity of contract, or estate, shown to have existed between the mortgagee and the lessees, or lessor, which would entitle the former to a decree for the payment of any part of the rent reserved in the lease. The bill does not allege that the lessors received any property or benefit from the mortgagee in consideration of which they promised, or became liable, to pay any portion of the rent to the Trust Company, or that they made any agreement with said company, or with the New Philadelphia Graphite Company, its mortgagor, for the payment of the rent, or that either the mortgagor or mortgagee had any knowledge even of the covenant in the lease respecting the payment of rent. Neither does it appear that there was any debt or duty owed by the lessor, the Keystone Company, to the Trust Company, the mortgagee, or that there was any legal right in the Trust Company, the third party, founded upon any obligation of the Keystone Company, the promisee, to adopt and claim the promise as made for the benefit of the Trust Company.

The present case, therefore, differs materially from those cited by the complainants upon this point. Because there was a debt owing by the New Philadelphia Graphite Company to the Trust Company, or because the Trust Company had certain legal rights under the mortgage against the mortgagor, it does not follow that such debt was owed by the Keystone Company, who purchased the property subject to the mortgage, or that such rights could be enforced in equity against the latter company. The legal right of the Trust Company was against the New Philadelphia Graphite Company, the mortgagor, and the lands and premises covered by the mortgage. It had the power to foreclose the mortgage at any time after default.

[5] It is clear that the complainants cannot recover from the lessees on their covenant to pay rent to the Keystone Company, the lessor, there being neither privity of contract or estate, nor any agency or trust shown, between the lessor and the mortgagee, which would enable the Trust Company to claim the benefit of the covenant made by the lessees. The law upon this subject was so clearly and fully expressed in the case of *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, that it is hardly necessary to quote from other authorities.

In that case the mortgagor conveyed premises to one Mitchell, and through various mesne conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the same to the defendant,

Turner, by deed, which contained a covenant to pay off and discharge the mortgage, the same forming a part of the consideration. In the course of that opinion the court said:

"The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which *Lawrence v. Fox*, 20 N. Y. 268, is a prominent example. To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent, by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.

"It is true that there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promise furnishing an evidence of the intent of the latter to benefit him, and create a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right to claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement.

"Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money, or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee in the third party, to adopt and claim the promise as made for his benefit."

The case of *Lawrence v. Fox*, 20 N. Y. 268, above referred to, has been sometimes cited as an authority opposed to the rule declared in the *Vrooman-Turner* Case, but it is really not inconsistent with the decision in the latter case, because, as was said in *Lorillard v. Clyde & Co.*, 122 N. Y. 498, 25 N. E. 917, 19 Am. St. Rep. 470:

"All that case decides is, that where one person loans money to another upon his promise to pay it to a third party to whom the party so lending the money is indebted, the contract thus made by the lender is made for the benefit of his creditor, and the latter can maintain an action upon it without proving an express promise to himself from the party receiving the money."

[6] The complainants, according to their original briefs, seemed to rely on two grounds in support of their bill, viz.: (1) That the covenant of Curtis and Chester respecting the payment of the rent was a declaration of trust on their part, and, as such, created them in equity trustees for the said Trust Company, the mortgagee. (2) That the Keystone Company was the agent of the Trust Company, and the lessees are therefore liable to the undisclosed principal on their contract with the agent. I have already discussed these propositions in a general way. In respect to the first ground it may be further said, that there might be some force in the argument if the Trust Company was a creditor of the Keystone Company, and the latter company individually liable to the former, as was the Philadelphia Company. But in the absence of any consideration whatever moving from the Trust Company to the Keystone Company, and the Trust Company being mere volunteers, no trust was created, and a court of equity cannot declare one in its favor. There being no consideration moving from the Trust Company, and no promise or agreement to pay the rent, or any part of it, to the Trust Company, and no intention of the lessees shown to constitute themselves trustees, it certainly cannot be successfully contended that any trust has been established in favor of the complainants by the facts set out in the bill.

"Although two persons, for a valuable consideration between themselves, covenant to do some act for the benefit of a stranger, the stranger has not a right to enforce the covenant against the two, although each one might as against the other." *Colyear v. Mulgrave*, 2 Keen, 81 (15 E. C. R. —); *Meek v. Kettlewell*, 1 Hare, 464; *Hughes v. Stubbs*, 1 Hare, 476.

In the last-mentioned case it was said:

"A man who, without communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his creditors. It would therefore

be a result most remote from the contemplation of the debtor, if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property and invest himself with the character of a cestui que trust."

The case of *Gregory v. Williams*, 3 Mer. 582, has been often cited to show that one of the parties to an agreement may constitute himself a trustee of the property for the benefit of the third party.

In *re Empress Engineering Co.*, 16 Ch. Div. 125, Lord Justice James said: "I think it is perhaps as well that we shall say that *Gregory v. Williams* seems to be misunderstood. When that case is considered with the careful criticism with which the Master of the Rolls has examined it, it appears quite clear that there was there a transfer of property with a declaration of trust in favor of a third person, which was a totally different thing from a mere covenant to pay money to that person."

In *Re Rotherham Alum & Chemical Co.*, 25 Ch. Div. 103, the court used the following language:

"* * * But an agreement between A. and B. that B. shall pay C. gives C. no right of action against B. I cannot see that there is in such a case any difference between equity and common law, it is a mere question of contract. It is said that Mr. Peace has an equity against the company because the company has had the benefit of his labor. What does that mean? If I order a coat and receive it, I get the benefit of the labor of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work."

But the question now under consideration has been decided, in principle at least, by our own court in the case of *Waters v. Comly*, 3 Har. 117. In that case, *Waters, Laird and Rldpath* gave a bond to *McMakin, Burgess & Kelly* for \$18,690.63 to secure a debt to *Kelly* of \$400, and the balance in trust to pay other creditors, per schedule. The court said:

"The question is, whether *McMakin, Burgess & Kelly* can claim anything out of the proceeds of sale beyond the sum of \$400, due to *Kelly*. If they can, it must be as trustees for the creditors mentioned in the schedule. If *Waters & Laird*, under the same circumstances, instead of giving the bond, had executed a deed conveying their property to *McMakin, Burgess & Kelly* for the payment of these debts, to which the creditors were neither parties nor privies, it would not have divested the beneficial interest of *Waters & Laird*, and created the real relation of trustees and cestui que trust between *McMakin, Burgess & Kelly*, and the creditors mentioned in the schedule. Wall-

wyn v. Coutts, 3 Mer. 707; *Garrard v. Lord Lauderdale*, 3 Sim. 12; *Acton v. Woodgate*, 2 Myl. & K. 495. In *Acton v. Woodgate*, Sir John Leach says: "The deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay the creditors, and before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered." In the case of *Bill v. Cureton*, 2 Myl. & K. 511, the Master of the Rolls says: "In *Wallwyn v. Coutts*, and *Garrard v. Lord Lauderdale*, the character of trustee and cestui que trust never existed between the creditor and the trustees, for the settler himself was the only cestui que trust; and therefore he was entitled to direct the application of his own trust fund. The rule is adopted to promote the views and intentions of the parties. A man who, without any communication with his creditors, puts property into the hands of trustees, for the purpose of paying his debts, proposes only a benefit to himself and not to his creditors; it would be a result most remote from the contemplation of the debtor, if it should be held that any creditor discovering the transaction, should be able to fasten upon the property and invest himself with the character of cestui que trust."

"The same principle would prevail if *Waters & Laird* had sold their property and placed the proceeds in the hands of *McMakin, Burgess & Kelly*, for the payment of the debts mentioned in the schedule; the latter would not by that mere fact have become liable to suit, either at law or in equity, on the part of the creditors. *Stewart v. Fry*, 7 Taunt. Rep. 339; *Williams v. Everett*, 14 East, 582; *Acton v. Woodgate*, 2 Myl. & K. 495; *Gibson v. Minet*, 2 Bing. 7.

"In the present case there was no conveyance by deed of the property, nor payment of money to *McMakin, Burgess & Kelly*, but simply a bond, which is an acknowledgment of indebtedness under seal, and was designed, as the first step in a proceeding, to enable the obligees through the instrumentality of the process of the courts, to convert the property of the obligors into money for the purpose which has been stated. Before that process of conversion was completed the execution of the respondent, *Comly*, became a lien on the property in the hands of the sheriff. It has been already stated, that *McMakin, Burgess & Kelly* have no beneficial interest in these funds beyond the sum of \$400, and it is clear, that they cannot claim the balance as trustees of the creditors; for the relation of trustees and cestuis que trust, never had existed between them and the creditors. If the funds were to pass into their hands they would be the trustees of *Waters & Laird*, who might revoke the authority to pay the creditors, and

recall the money. 7 Taunt. Rep. 339, *Stewart v. Fry*."

I can see no reason why the Keystone Company, the lessor, and Curtis and Chester, the lessees, could not at any time after the execution of the lease, and before its assignment, have canceled the same if they had seen fit so to do. If that be so, then there was no trust established by or under the lease in favor of the complainant Trust Company, and no rights secured thereby which could be enforced in law or equity by said complainant.

It is hardly worth while to consider the contention that the Keystone Company, the lessor, was the agent of the mortgagee in the matter of the lease, and that the covenants therein contained were for the benefit of such principal. There is nothing contained in the bill which supports such contention, or which shows or tends to show the existence of such a relation.

[7] I am clearly of the opinion that the complainants are not entitled to an accounting from the respondents for royalties under the provisions of the lease, nor for the payment of any sums which might be found to be due on such an accounting. The lease contains no covenant or promise on the part of the lessees to pay to the Trust Company, or to pay for its benefit, any royalties whatever; and there was certainly no privity of contract, or estate, between the Trust Company and the lessees in this regard, or any consideration moving from the former to the latter. For the same reason I hold that the complainants are not entitled to a decree that the lessees, or their assignee, pay the taxes on the mortgaged premises.

The ground upon which the complainants base their claim for the payment of royalties and taxes, is stated in paragraph 24 of the bill, as follows:

"The graphite on said premises is a material part of the complainants' security under said mortgage, and the graphite having been mined and taken away from said premises without the payment of the stipulated rent agreed to be paid to the said Union Trust Company, for the benefit of the bondholders as aforesaid, and without the accounting and the payment of the royalties provided for in the said lease, and by reason of the respondents permitting taxes to become in arrear and a lien to be filed therefor, the said mortgaged premises have been depleted and wasted to the irreparable injury to the complainants and the holders of the bonds secured by the said mortgage."

[8] It is unnecessary to consider whether any waste, within the meaning of the law, was committed by the lessees in using or working the land under a mining lease, and for the purposes for which it was leased, because it is clear that the complainants are not entitled to recover from the lessees damages for any waste that may have been committed. There is no doubt that the mort-

gagee, for the protection of his security, was entitled, as against the mortgagor, or his grantee, to an injunction to restrain any waste which put in peril his security, but he cannot recover from these lessees, or their assignee, damages for waste they may have committed.

[9, 10] The complainants in their supplemental brief, and in those recently submitted in reply, seem to have departed from the grounds first relied upon for a decree under their bill, and urge the following new claims based upon the covenants contained in the mortgage, viz.: (1) That such covenants run with the land, and are equally binding upon the mortgagor and assignees. (2) That if the covenants are not such as run with the land, they nevertheless come within the equitable rule laid down in *Tulk v. Moxhay*, 2 Ph. 774, and are enforceable against those taking with notice.

I think it unnecessary to discuss the first proposition at much length, because it is clear that the stipulations or covenants of the mortgage, with which we are concerned, did not run with the land and bind the lessees of the mortgagor. Where covenants run with the land, the party charged is not liable unless he was party to the covenant or privy in estate with the maker of the covenant; and the privity of estate thus required is with the original covenantee, not with the original covenantor. 11 Cyc. 1080 (note 80); *Norcross v. James*, 140 Mass. 188, 2 N. E. 946.

There was no privity of estate between the complainants and Curtis and Chester, and the Chester Graphite Company, respondents, because the complainant Trust Company had no title to the land, and held no estate under it until it had taken title by sale and entry. In *Taylor on Landlord and Tenant*, vol. 1, § 122, it is said:

"But the common-law rules of mortgage have been modified in many states. * * * In Pennsylvania, Michigan and other states, a mortgage is only security for a debt, and no estate vests until after foreclosure and sale."

The mortgage in question is a Pennsylvania mortgage. The same writer, continuing, says:

"It is, however, well settled that no contract of lease or otherwise which the mortgagor may make with respect to the land either inures to the benefit of the mortgagee or is binding on him. There is in such a case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease and releases the lessee from any obligation. *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 90 Fed. 379, 33 C. C. A. 113, 61 U. S. App. 741."

[11] But even though the covenants in the mortgage are not binding on the lessees of the mortgagor as covenants running with the land, are they binding because they come

within the equitable rule laid down in *Tulk v. Moxhay*?

In that case the owner of certain houses in the square sold the land adjoining, with a covenant from the purchaser not to use it for any other purposes than as a square garden. It was contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him could violate it without the court having any power to interfere, because it was a covenant that did not run with the land. The court held that the question did not depend upon whether the covenant runs with the land, but whether an equity was attached to the property by the owner.

"For if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. * * * Covenants restraining the use of real property afford an instance of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement nor runs with the land. The jurisdiction is not confined to cases in which an action at law can be maintained, and such covenants, although not binding at law, will be enforced in equity, provided the person into whose hands the land passed has taken it with notice of the covenant. * * * But the tendency of the later decisions, both in England and in the United States, is, it seems, to restrict, rather than to extend, this equitable doctrine."

It may also be said, as the result of an examination of the authorities, that the English and American courts have confined the application of this principle of equitable relief to covenants *restricting the mode of using the land*. *Haywood v. Building Society*, 8 Q. B. Div. 403; *London & So. Ry. Co. v. Gomm*, 20 Ch. Div. 462; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946; *Atlantic City v. Atlantic City Pier Co.*, 62 N. J. Eq. 139, 49 Atl. 822.

[12] Manifestly the case before me is in no way analogous to the case of *Tulk v. Moxhay*, and cannot be governed by the doctrine declared therein. Even if such doctrine could be held to apply to covenants between mortgagor and mortgagee, the so called covenants in the mortgage, upon which the complainants rely, are not restrictive in their character but, in fact, the very reverse.

The case of *National Bank of Dover v. Segur*, 39 N. J. Law, 173, which counsel for the complainants insist should rule the present case, seems to me to be not at all in point. The question in that case was, whether a covenant by Segur that he would not enter into banking business at Dover for a period of ten years in consideration of the sale by himself to Hoagland of a certain

lot and banking house, ran with the land. The case arose between Hoagland's assignee and Segur, and concerned the covenant made by the latter to pay \$1,000 if he should violate his covenant. It was held that he was liable to Hoagland's assignee on the covenant. The plaintiff was the grantee of the premises, and claimed the right to enforce, in its own name, the agreement, by virtue of the last clause in it, which was to the effect, that in case of a breach of the covenant sued on, the right of action should be in the owner in fee of the land. The court held, that although the deed was in form inter partes, it contained a covenant to a third party, and such third person might sue in his own name for a breach of such covenant, it appearing in the instrument to have been the intention to confer such right. It was also held, that if the plaintiff was not a party to the agreement, so as to give him an ability, as such, to sue upon it, he nevertheless could maintain the action, on the ground that the covenant was such as was capable of running with the land, and passed, with the title, to the plaintiff. The court, in deciding whether the covenant was capable of running with the land, made a distinction between those that imposed a burden and those that gave a benefit, and held the covenant in question to belong to the latter class, being unable "to see why any contract, which is of a nature to attach to the land, and which has a beneficial tendency, should not be considered assignable, by act of law, as against the covenantor, with the title. * * * A covenant touches and concerns land when its performance confers a direct benefit on the owner of land by reason of his ownership, and tested by such a definition the covenant sued on has clearly such a capacity." The two grounds, or reasons, upon which the decision was based, were, first, the agreement that the covenant was to attach to and run with the land, which meant that in case of a breach the right of action should be in the owner of the fee. Second, the fact that the covenant was beneficial to the land and the owner. It is manifest that this case cannot be regarded as an authority for the complainants' contention, because the facts were essentially different, and the reasoning and decision of the court wholly inapplicable to the present case.

The complainants, in their bill, rely, apparently, not upon the covenants in the mortgage, but upon the covenants in the lease. It cannot be claimed that the covenants in the lease and mortgage are identical. There is no covenant in the mortgage for the payment of rent, but there is a covenant for the annual payment of interest, which amounted to \$3,000. The covenant in the lease is for the payment of an annual rental of \$3,500. The covenant in the lease respecting royalties is not the same as the stipulation in the mortgage. In the mortgage the provision was,

that the mortgagor should pay to the mortgagee a sum equal to 10 per centum of its net earnings for the 12 months ending, etc. In the lease the lessees covenanted to pay to the lessor 10 per cent. of the value of the graphite when manufactured and marketed, and also 10 per cent. of the selling price of all graphite *mined* on the premises and manufactured there or elsewhere during the term of the lease.

For the reasons stated in this opinion, I am constrained to hold that the complainants have not, in and by their bill of complaint, made or stated such a case as entitles them, or any of them, in a court of equity, to the discovery, payment or relief prayed for, and the demurrers to the bill are, therefore, sustained.

Let an order be entered accordingly.

ASKAM v. PLATT et al.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

FOOD (§ 25*) — LIABILITY FOR INJURIES — PLEADING.

Where, in an action for selling unwholesome meat which made plaintiff and his family ill, he pleaded a particular sale, recovery could not be based on other sales on other days.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 18; Dec. Dig. § 25.*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by William F. Askam against Arthur J. Platt and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert C. Stoddard, of New Haven, for appellant. Charles S. Hamilton and Omar W. Platt, both of New Haven, for appellees.

RORABACK, J. The essential allegations of the complaint are as follows: "(2) On or about the 18th day of February, 1910, the plaintiff bought of the defendants certain meat known as pork or pork chops, for the purpose of using the same immediately as food for himself and family, and the defendants sold this meat to the plaintiff knowing that the same was to be used by the plaintiff and his family as food. (3) The defendants sold this meat with the implied guaranty that the same was fit and wholesome for food. (4) Said meat was not fit and wholesome for food, but was diseased and liable to cause illness and sickness to any person who ate the same. (5) Upon the delivery of said meat to the plaintiff's family, said meat was within a reasonable time thereafter prepared and consumed by the plaintiff and his family. * * * (7) As a result of eating said meat, the plaintiff, his wife, and his minor children were made sick." The answer admitted paragraph 2, denied paragraphs 3, 4, 5, and 7; and also al-

leged that the plaintiff selected the meat in question and in so doing relied upon his own skill and judgment.

On the trial the plaintiff in the presentation of his case offered no evidence to prove that he had purchased and eaten any meat of any kind from the defendants except 4¼ pounds of pork chops, bought on the 7th day of February, 1910. After the close of the plaintiff's case the defendants in reply, with other testimony, offered witnesses who testified as to the purchase of sausages by the plaintiff on the 5th, 8th, and 11th days of February, 1910, and of pork chops on the 12th day of February, 1910.

In his charge the court, in speaking of the issues presented for the consideration of the jury, used the following language: "The parties are very much in controversy upon this part of the case, and I ought here to say to you, before I go any further, that the plaintiffs have put up their cases to you, in the opening, upon the ground that they bought pork chops upon a certain day, and that their damage resulted from eating those pork chops. Now, that is their case, and that case they must prove. You cannot bring in a verdict against the defendants unless the plaintiffs have proven that those pork chops concerning which they gave evidence in the opening of their case were infected with trichinæ, as they claim them to have been. It will not do, and you cannot, even if you should find that the defendants sold other pork products or other pork, upon other days, which was diseased, to these plaintiffs, on that account find a verdict in favor of the plaintiffs, for these plaintiffs must prove the case that is here before you. Have the plaintiffs proved by a fair preponderance of evidence that these pork chops concerning which they have testified, that being the only pork which they have introduced evidence to show that they have consumed, have they shown to you that those pork chops were infected and unwholesome?"

These instructions upon this subject embody a correct statement of the law necessary for the proper guidance of the jury under the issues and evidence of the plaintiff as he had presented his case. The plaintiff had voluntarily chosen the cause of action upon which he relied. Under that election and the evidence which he had introduced to sustain that cause of action he must stand. The plaintiff could not recover upon another separate and distinct cause of action, because the defendants, as a part of their case, in answer to the case which the plaintiff had attempted to make out, introduced evidence as to the sales of meat upon days other than the one upon February 7th. At that stage of the case it was too late for the plaintiff to change his cause of action. "Regard must always be had, not only to the pleadings, but to the issues of fact actually

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—34

presented on the trial. When a plaintiff specifies the negligence he complains of, and explains the circumstances of his injury and how it happened, the opposing party and the court have a right to assume the case thus presented to be the whole case." *Lennon v. Rawitzer*, 57 Conn. 583, 586, 587, 19 Atl. 334, 336.

It is undoubtedly true that the jury could have based a verdict in favor of the plaintiff upon evidence which the defendants had introduced by their witnesses, provided it related to the cause which the plaintiff by his complaint and evidence had elected to try. But one sale of meat had been mentioned by the plaintiff in his complaint which by his evidence he had determined was upon February 7, 1910. He could not claim to recover upon another independent cause of action. Either might have been the true one in the first instance, but both under the pleadings and evidence could not stand together. Choosing the one, he necessarily abandoned the other. Especially is this true when the finding discloses that the plaintiff made no claim or offered evidence to prove that pork or meat of any kind was sold to him by the defendants with an implied warranty, except that referred to in his complaint as being sold on February 7, 1910.

There is no error. The other Judges concurred.

ALLEN v. NEW YORK, N. H. & H. R. CO.
(Supreme Court of Errors of Connecticut.
June 13, 1912.)

APPEAL AND ERROR (§ 979*)—VERDICT—VACATION—EXCESSIVE DAMAGES—REVIEW.

Vacation of a verdict in an action for injuries because the damages awarded were excessive would not be interfered with on appeal, in the absence of a showing of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.*]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Action by Wellington Allen against the New York, New Haven & Hartford Railroad Company to recover for personal injuries alleged to have been received through defendant's negligence. Plaintiff had a verdict for \$3,000, and, a motion having been granted to set it aside, plaintiff appeals. Affirmed.

Donald G. Perkins, of Norwich, and George Curtis Morgan, of New London, for appellant. Michael Kenealy, of Stamford, for appellee.

PER CURIAM. This verdict was set aside for the reasons (1) that the plaintiff had failed to offer evidence sufficient to go to the jury that he was free from contributory negligence; and (2) that its amount was excessive. We have occasion to notice only the

second of these reasons. The rule to be applied by us where a verdict has been set aside as being excessive is stated in *Gray v. Fanning*, 73 Conn. 115, 117, 46 Atl. 831, 832, as follows: "In such a matter a large discretion is of necessity vested in the trial court, and only in cases where that discretion is unreasonably exercised ought the action of the trial court to be set aside." It is the action of the court, and not that of the jury, which is directly under review. *Loomis v. Perkins*, 70 Conn. 444, 446, 39 Atl. 797.

We cannot say that the court's discretion was unreasonably exercised. There is no error.

JOHNSON v. CONNECTICUT CO.
(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. DAMAGES (§ 24*)—PERSONAL INJURIES—POSSIBLE INJURY.

Injuries in tort actions which are merely possible are speculative, and can furnish no basis for a recovery of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 65-67; Dec. Dig. § 24.*]

2. DAMAGES (§§ 185, 6*)—"CERTAINTY"—"REASONABLE CERTAINTY"—"REASONABLE PROBABILITY."

"Certainty," as applied to the law of damages, means freedom from doubt, and as "reasonable certainty" and "reasonable probability" bear no resemblance to each other, plaintiff, in an action for personal injuries, while entitled to recover for such future suffering and injury as she proves to be reasonably probable, is not required to prove such future injuries and suffering by testimony reasonably certain or free from doubt.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 503-508, 5; Dec. Dig. §§ 185, 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1028, 1029; vol. 7, p. 5957.]

3. ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.

In tort plaintiff must recover all his damage in a single action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

4. APPEAL AND ERROR (§ 1053*)—INSTRUCTIONS—POSSIBLE FUTURE DAMAGES.

Where, in an action for injuries, the charge limited plaintiff's recovery to fair and reasonable compensation for the injuries physical and mental which the jury found by a fair preponderance of the evidence plaintiff had undergone or would undergo as a result of her injuries and which were the natural and proximate consequences of defendant's negligence, and the jury were also authorized to include compensation for any permanent injuries if they found such had resulted, and as to those should consider the probabilities of her future improvement rather than the possibilities of nonimprovement, such instructions withdrew any claim for future damages which were merely possible, and therefore cured the admission of evidence of possible injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

5. TRIAL (§ 261*)—INSTRUCTIONS—REFUSAL.

A request to charge should be considered as a whole, and, where it contained in part an erroneous rule of damages, it was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Action by Rosa Johnson against the Connecticut Company for personal injuries. From a judgment for plaintiff for \$5,000, defendant appeals. Affirmed.

Joseph F. Berry, of New Haven, for appellant. Ulysses G. Church, of Waterbury, for appellee.

WHEELER, J. The plaintiff was a passenger on defendant's trolley car, and the verdict of the jury imports that she suffered the injuries complained of through an explosion caused by a defective controller, which the defendant in the exercise of its duty would have discovered and remedied; and that the plaintiff's physical injuries were severe, and resulting therefrom was a highly nervous condition of chronic neurasthenia or nervous exhaustion. The defendant complains that evidence of future apprehended injuries, which were merely possible, was received against its objection; and, further, that the court refused to instruct the jury, in accordance with its request, that recovery could only be had for those injuries "which are reasonably certain to ensue" and for "apprehended future consequences of an injury" only those of which there is "such a degree of probability of such consequences as to amount to reasonable certainty."

[1] Injuries in tort actions which are merely possible are speculative, and can furnish no basis for a recovery of damages. Pullen v. Boston Elevated Ry. Co., 208 Mass. 356, 94 N. E. 469. In some jurisdictions, in tort, the rule of damages includes prospective injury in those instances only where the apprehended consequences are such as in the ordinary course of nature are reasonably certain to ensue. C., M. & St. P. Ry. Co. v. Newsome, 154 Fed. 665, 83 O. C. A. 422; Williams v. Clarke County, 143 Iowa, 328, 120 N. W. 306; Hardy v. Milwaukee St. Ry., 89 Wis. 187, 61 N. W. 771.

[2] "Certainty" is freedom from doubt, and if a plaintiff is required to prove that future apprehended consequences are reasonably free from doubt, he has imposed upon him a burden far beyond the ordinary requirement of proof in a civil action and approximating closely to the proof beyond a reasonable doubt of the criminal action. Other jurisdictions hold that all that is meant by the reasonably certain rule is that there must be such a degree of probability as amounts to a reasonable probability. Brininstool v. Mich. U. Ry. Co., 157 Mich. 172,

180, 121 N. W. 728; Watson, Personal Injuries, § 384; Booth, St. Rys. (2d Ed.) § 409. "Reasonable certainty" and "reasonable probability" bear no resemblance to each other, and judicial construction which brings them into apposite relation seems to us forced, perhaps, to save the appearance of a rule which violates a fundamental of the theory of evidence. This attempt has been aided by text-book writers who no doubt saw that the requirement of proof of future injuries to a reasonable certainty was an exception to the ordinary requirement of proof. "A presumption or a probability * * * is an inference as to the existence or nonexistence of one fact from the existence or nonexistence of some other fact, founded in a previous experience of that connection." Hoyt v. Danbury, 69 Conn. 341, 348, 37 Atl. 1051. And when the trier has a reasonable belief of the probability of the existence of a fact material to the issue it is its duty to find it. Fay v. Reynolds, 60 Conn. 217, 220, 21 Atl. 418; Finken v. Elm City Brass Co., 73 Conn. 423, 47 Atl. 670; Hoyt v. Danbury, supra.

[3] In tort the plaintiff must recover in a single action all of his damage. The consequences of an injury cannot be definitely predicted. The plaintiff should be permitted to prove those results which are likely to happen, that is, those which are reasonably probable, for that is but establishing results which under like circumstances generally come to pass. When a plaintiff has by a fair preponderance of the evidence satisfied the jury that future pain and suffering in consequence of his injury is reasonably, likely, or probable, or to be expected, he should be compensated for these as well as for those which are certain to occur. Smedley v. Railway Co., 184 Pa. 620, 626, 39 Atl. 544; Amos v. Del. River Ferry Co., 228 Pa. 362, 369, 77 Atl. 12; Pullen v. Boston El. Ry. Co., 208 Mass. 356-358, 94 N. E. 469; Arkansas City v. Payne, 80 Kan. 353, 102 Pac. 781, 782; Lentz v. City of Dallas, 96 Tex. 258, 72 S. W. 59; Snook v. City of Anaconda, 26 Mont. 128, 66 Pac. 756; Norfolk Ry. & Lt. Co. v. Spratley, 103 Va. 379, 49 S. E. 502; Colby v. Inhabitants, 61 Me. 304, 306; Hale on Damages (1896 Ed.) § 30. "In civil actions it is not necessary that the triers should be free from all reasonable doubt as to the proper conclusion to be drawn from the evidence." Hoyt v. Danbury, 69 Conn. 341, 348, 37 Atl. 1051. One end of the law is to end controversy, and to accomplish this courts may rest their judgment in a civil action upon reasonable probabilities. The law esteems the fact which in all reasonable likelihood will occur as existent. Much of the confusion in the authorities has come from assertion of the reasonable certainty rule in the case of Stroh v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 304, 306. And while this case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has been frequently followed by the inferior courts of New York and in *Briggs v. N. Y. C. & H. R. Co.*, 177 N. Y. 62, 69 N. E. 223, 101 Am. St. Rep. 718, the Court of Appeals of New York has, in *Cross v. City of Syracuse*, 200 N. Y. 393, 94 N. E. 184, 21 Ann. Cas. 324, said: "The prevalent mistake in regard to that decision (*Strohm v. Railroad*) is the supposition that it forbade the introduction of any opinion evidence as to the probable existing condition due to injury unless the opinion could be pronounced with reasonable certainty. The *Strohm* Case in fact laid down no such rule." *Griswold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61, 64, 21 N. E. 726, 12 Am. St. Rep. 775; *Feeney v. L. I. R.*, 116 N. Y. 375, 382, 22 N. E. 402, 5 L. R. A. 544. The defendant's criticism that the evidence of possible injuries should have been excluded is well taken.

[4] But we think in its instructions the court so placed the rule of damages before the jury that they could not have considered the subject of possible damages without disregarding the instructions. The charge limited the recovery to the fair and reasonable compensation for the injuries, physical and mental, which the jury found by a fair preponderance of the evidence the plaintiff has undergone or will undergo as a result of her injuries and which were the natural and proximate consequences of the defendant's negligence. And the jury were told that they might include compensation for any permanent injuries if they found such had so resulted, and that as to these they were to consider the "probabilities of her future improvement rather than possibilities of non-improvement." The instructions upon the elements of recovery were clear, and the presentation of this subject was fair to each party. We think the jury must be assumed to have done its duty and taken the law as given it by the court, and hence that they rendered their verdict having in mind that only just compensation for the proximate consequences of the defendant's negligence could be awarded and that their consideration of what injuries the plaintiff would suffer in the future must have been confined to those they found to be probable, and not to those they found to be possible. *Gorman v. Fitts*, 80 Conn. 531, 534, 69 Atl. 357; *Schofield Gear & Pulley Co. v. Schofield*, 71 Conn. 1, 23, 40 Atl. 1046. With these definite instructions before them it seems quite unreasonable to conclude that the jury disregarded them and considered a possible result suggested by one of the plaintiff's experts without any suggestion that such was the natural and proximate result.

[5] Upon this subject the defendant requested the court to charge: "If you find a verdict for the plaintiff in the case of *Rosa Johnson*, the damages which you should award are for those injuries which the plain-

tiff has proven by a fair preponderance of the evidence to have been sustained, and for any other injuries or disorders which are reasonably certain to ensue. Consequences which are speculative or merely possible are not proper to be considered by you in estimating damages. In order for the plaintiff to recover damages presently for apprehended future consequences of an injury, there must be such a degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury." This request must be treated as a whole. One of its sentences, "consequences which are speculative or merely possible are not proper to be considered by you in estimating damages," was sound law and was substantially complied with. The rest of the request was an assertion of the "reasonable certainty" rule which we have already discussed and disapproved of. The court was correct in refusing to give the "reasonable certainty" rule and in substantially adopting the rule that damages for future injuries must be confined to those which are found by the jury to be reasonably probable.

We agree with the defendant's counsel that the case of *Murphy v. Conn. Co.*, 81 Atl. 961,¹ affords no countenance of the doctrine that a recovery may be had for speculative or possible injuries. In that case some evidence of a possible injury was received without objection, and no specific request was made to the court concerning the recovery of future apprehended consequences. And we construed the charge as a whole to limit the recovery to such future injuries as were probable. We said: "The defendants' contention that from the size of the verdict it is more than probable that the passages from the instructions of the court above quoted improperly influenced the jury to consider damages of merely a conjectural or of a speculative character is not borne out by the record."

There is no error. The other Judges concurred.

DAVIDSON v. MAX RIPPS CO.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. APPEAL AND ERROR (§ 14*)—FAILURE TO COMPLETE APPEAL—EFFECT.

Where an appeal commenced under Gen. St. 1902, §§ 795, 796, authorizing appeals from findings of fact or refusal to find facts, and providing that every exception may be assigned as a reason of appeal, was not completed, and the trial court granted a motion to withdraw the proceedings for the appeal, an appeal under section 797, authorizing the making of the evidence and rulings a part of the record for examination by the Supreme Court of Er-

¹ Reported in full in the *Atlantic Reporter*; reported as a memorandum decision without opinion in 84 Conn. 711.

rors, could be taken and perfected, since a mere attempt to take an appeal which is not perfected does not affect the jurisdiction of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-58; Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§§ 362, 1011*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where the reasons of appeal alleged that the conclusions of the trial court were not justified by the evidence and that the court erred in finding facts and in refusing to find other facts, and each of the paragraphs of the finding or request to find contained but a single question, the reasons of appeal were sufficiently specific, though an assignment of error directed to the rulings of the court must specify the particular part questioned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 1961; Dec. Dig. §§ 362, 1011.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence and sustained by the testimony of the successful party, corroborated in material statements by admissions, will not be disturbed on appeal; it not being the province of the court on appeal to weigh conflicting testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Court of Common Pleas, New Haven County; Isaac Wolfe, Judge.

Action by Barnett Davidson against the Max Ripps Company to recover for merchandise alleged to have been sold by plaintiff to defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Benjamin Slade, of New Haven, and Spotswood D. Bowers, of Bridgeport, for appellant. Barnett Berman, of New Haven, for appellee.

RORABACK, J. It was found by the trial court that upon the 20th of December, 1910, the plaintiff sold and delivered to the defendant company certain articles of merchandise of the price and value of \$486, which sum has never been paid. One reason of appeal alleges that these conclusions are not justified by the evidence before us. The remaining reasons of appeal are upon alleged errors in finding certain material facts and in refusing to find other facts. The latter is claimed to be based on section 797 of the General Statutes, which provides that, in lieu of a motion to correct, the evidence and rulings may, within one week after the filing of the finding, be filed and certified, and the claims for correction therein may be set forth in the assignments of error on appeal. The record discloses that the finding made by the court of common pleas was filed January 11, 1912, and refiled January 13, 1912. It also appears that on January 15, 1912, the defendant commenced an appeal under sections 795 and 796. This appeal was not completed, and upon January 26, 1912, the trial court allowed a motion to withdraw these proceedings. Upon January 17, 1912,

the appeal now under consideration was filed and perfected by giving a bond for costs.

[1] The plaintiff now moves to dismiss the appeal because it appears that the defendant commenced an appeal under the provisions of sections 795 and 796 of the General Statutes, and also under section 797, and that it cannot proceed under both methods to obtain the corrections sought. A mere attempt to take an appeal which is not perfected does not affect the jurisdiction of the trial court. *Strong v. Hardenburgh*, 25 How. Prac. (N. Y.) 439. The court of common pleas having allowed a motion to dismiss the proceedings first commenced, the case then stood in the court below as though the attempt to appeal had not been made.

[2] It is also urged that the reasons of appeal are defective in that they are not specific and definite. An assignment of error directed to the rulings or action of the court should specify the particular part questioned. *Water Commissioners v. Robbins*, 82 Conn. 623, 641, 74 Atl. 938. Each of the paragraphs of the finding, or request to find, referred to in the appeal now under consideration, contains but a single question.

The method followed by the appellant in its motion to correct, in referring to these paragraphs without repeating the language, was sanctioned by the court in *Julian v. Stony Creek Red Granite Co.*, 71 Conn. 632, 640, 42 Atl. 994. Therefore we have treated this appeal in all of its assignments as properly before this court.

[3] The plaintiff alleges and claims that the merchandise in question was sold and delivered to the defendant the Max Ripps Company. The defendant contends that the sale and delivery was made to Max Ripps individually, and not the company. This is the principal controversy between the parties. The court below sustained the allegations and claims of the plaintiff and rendered judgment for him.

The alleged sale to the defendant is directly supported by the testimony of the plaintiff. The defendant, however, contends that Davidson's evidence, when read in connection with the other testimony appearing in the record, is highly improbable, and that it appears that there is such a preponderance of the evidence in favor of the defendant that the conclusion reached by the trial court is erroneous. The evidence upon the issues does not show any such preponderance.

The plaintiff testified that the goods in question were sold and delivered to the defendant company. This the defendant denied. The plaintiff was corroborated in many of his material statements by the admission of Max Ripps himself.

We must affirm the judgment of the court below if there is sufficient evidence to sustain it, although there may be other evidence of a contradictory nature. It is not our prov-

ince to weigh conflicting testimony coming to us as it does in the present case. *Nogga v. Savings Bank*, 79 Conn. 425, 426, 65 Atl. 129.

The motion to correct is denied.

There is no error. The other Judges concurred.

TAYLOR v. C. M. ROBERTSON CO.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. CORPORATIONS (§ 426*) — OFFICERS AND AGENTS—LIABILITY BASED ON KNOWLEDGE AND CONDUCT OF OFFICERS.

Where the bookkeeper for a corporation represented to a physician that the corporation would be responsible for his services to an injured employé, and such representation was known to the corporation's officers, and a bill for services addressed to the corporation was received by its managing officer, and a reply letter in effect acknowledging liability was written by the bookkeeper by direction of such officer, the corporation was liable for the services, though the employment of the physician had not been authorized at a meeting of the board of directors; the circumstances known to the corporation's officers being such as justified the physician in believing that the corporation would pay for his services.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

2. CORPORATIONS (§ 432*)—ACTION FOR SERVICES RENDERED—EVIDENCE—ADMISSIBILITY.

In a physician's action for services rendered to an injured employé at the request of the defendant's bookkeeper, evidence of the conversation between plaintiff and the bookkeeper, of interviews between him and the defendant's president, and of the contents of the letter written by the bookkeeper under the direction of the managing officer of the corporation, in effect acknowledging liability, was admissible to show circumstances which established a liability in the defendant not founded on its direct promise, but founded on knowledge and conduct of its officers, though incompetent to show an express promise by the defendant to pay for the plaintiff's services.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1717, 1718, 1724, 1726–1737, 1743, 1762; Dec. Dig. § 432.*]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Francis A. Taylor against the C. M. Robertson Company. From judgment for plaintiff, defendant appeals. No error.

The plaintiff is a practicing physician; the defendant a corporation operating a mill for the manufacture of paper board. One McDiarmid, a boy about 17 years of age, worked in the mill as a helper or back tender. The mill was operated at night, and McDiarmid was a member of the night force. While engaged in his work on the night of October 13, 1910, he was found drawn under a large belt, and seriously injured. A fellow workman hastened to the plaintiff's house, near by, and summoned him to the injured boy's aid. The plaintiff responded, cared for the boy, later removed him to his, the boy's,

home, and attended him professionally during the following two months. Within a few days after the accident, and while the plaintiff was attending the boy, one Church, a bookkeeper in the defendant's employ at the mill, came to the plaintiff to obtain information in regard to the extent of the boy's injuries, in order to make report to an insurance company, and during the interview told the plaintiff that the defendant would be responsible for the payment of his services. The president of the defendant knew of the injuries to the boy, and that the plaintiff was attending him professionally, and upon different occasions during the period of this attendance talked with the plaintiff about the boy's condition and prospects of recovery. After the services had been rendered, the plaintiff rendered to the defendant his bill therefor, which was sent by mail in a letter addressed to the defendant. In reply the plaintiff in a few days received a letter upon the defendant's letter head, and reading as follows, in addition to the date and formal address: "It would oblige us very much if you would render a detailed bill of medical attendance to Earl McDiarmid. If you can modify this bill in any way, it would be much appreciated, as it looks now as though we would be forced to stand the full charge ourselves. Thanking you in advance for the favor, we remain, yours truly, The C. M. Robertson Co.—J. E. Church." Church whose name appears written under that of the corporation is the same Church already referred to. He holds no other position with the corporation than that of bookkeeper, and the record does not disclose that he had any special authority to act for the corporation in the matter of McDiarmid, or in the provision of medical or surgical assistance for the defendant's employes. The defendant's board of directors had never taken action empowering any of its agents, employes, or officers to employ the plaintiff to attend McDiarmid, or to ratify such employment, or to pay for services so rendered. Neither Church nor the president of the defendant testified upon the trial. The only evidence offered in its behalf was that of its secretary, to the effect that there had been no directors' vote as stated, that Church's duties were simply those of bookkeeper, and that those of the employé who summoned the plaintiff on the night of the accident were those of an ordinary worker tending a machine.

The trial court in the two concluding paragraphs of its finding finds that said Church represented to the plaintiff that the defendant would be responsible for his services; that this representation was known to the officers of the defendant; that the bill, mailed by the plaintiff addressed to the defendant, was received by the officer in charge of the company; that the reply letter was writ-

ten by Church by direction and authority of such officer, and that it appeared from the evidence that the plaintiff rendered the services in question, under circumstances which justified him in believing that the defendant would pay for the same, and that the officers of the defendant had knowledge of these circumstances. The testimony disclosing Church's conversation with the plaintiff, the interviews between the plaintiff and the defendant's president, and the contents of the letter recited above was received against the objection of the defendant, upon the ground of want of authority shown on the part of Church and the president, respectively, to act for or bind the corporation in the premises. The services rendered were reasonably worth the amount for which judgment was rendered.

Donald G. Perkins and Edmund W. Perkins, both of Norwich, for appellant. Hadlai A. Hull, of New London, and John H. Barnes, of Norwich, for appellee.

PRENTICE, J. (after stating the facts as above). [1] The facts stated in the two concluding paragraphs of the finding having been found, the court's judgment was properly rendered. The situation thus presented is in such striking analogy to that in *General Hospital Society v. New Haven Rendering Co.*, 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168, that the reasoning by which the judgment in that case was supported is conclusive of the correctness of this. It need not be repeated. The foundation of the defendant's liability is not to be found in any express promise, or direct assumption of obligation. The court has found none, and has carefully avoided resting its judgment upon one. What the court has found, and what it made the basis of its judgment, is certain knowledge and conduct on the part of the defendant leading to the ultimate conclusion that it had assumed as its own the assurance of its responsibility for the care of its servant given by its bookkeeper to the plaintiff, and upon the faith of which he acted. *General Hospital Society v. New Haven Rendering Co.*, 79 Conn. 581, 586, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168.

[2] The testimony objected to was properly received. No part of it, of course, was competent to show an express promise by the defendant to pay for the plaintiff's services, or an obligation to do so directly assumed by ratification or otherwise, since no authority to make such promise, or to incur such obligation, was shown in any person who undertook to speak upon the subject. But it was neither received nor used for any such purpose. Its relevancy arose from the fact that it had, as was shown in the case cited, a material bearing upon the pertinent matter of knowledge and conduct, and as

furnishing a basis for material inferences in respect thereto. Each matter was "one link in a chain of circumstances which establishes a liability in the defendant not founded on its direct promise."

Upon the evidence the court's ultimate conclusion embodied in the last two paragraphs of the finding, which we are asked to correct, was justified. The opinion in the case cited sufficiently demonstrates that fact. One other paragraph of the finding which we are asked to correct is fully supported by the testimony. The changes asked for by reason of the court's failure to incorporate in the finding certain paragraphs of the defendant's draft would not, if made, materially alter the situation as we have presented it. The requests to correct are denied.

There is no error. The other Judges concurred.

SAWYER v. HOWARD et al.

(Supreme Court of Vermont. Windsor. May 20, 1912.)

PAYMENT (§ 39*)—APPLICATION—WAIVER.

Where defendant, who was indebted to plaintiff on a number of notes, sent him a check after suit on the notes, requesting it to be applied on the suit, and plaintiff applied it to the earliest note, which was barred by limitations, but which was secured by a collateral note. Defendant, who did not object when that note together with the collateral was returned to him, waived all right to demand that the payment be applied to those notes on which recovery might have been had.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

Exceptions from Windsor County Court. Fred M. Butler, Judge.

Action by Otis C. Sawyer against Austin Howard and trustee. There was a judgment for plaintiff, and defendant excepted. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Wallace Batchelder and John J. Wilson, for plaintiff. William Batchelder and Charles Batchelder, for defendant.

POWERS, J. After this suit had been brought, the defendant sent the plaintiff's attorney a check to take up one of the notes in his hands for collection, and promised early payment of another. But the attorney returned the check, and informed the defendant that he would not treat with him on the basis of a claim represented by notes, but would accept a payment on the suit. Whereupon the defendant sent another check for the exact amount in a bank which had been trusted, saying that the cashier of the bank said that he could see no reason why it should not be received as a payment on the suit, and asking for a statement of the bal-

ance due. The attorney turned this check over to the plaintiff, who drew the money on it, and attempted to apply so much as necessary to the liquidation of a note dated August 14, 1901, and the balance on a note for \$257.39. What he actually did was this: He indorsed \$250 on a note for \$200, signed by Parker & Slayton, which was held as collateral to the note of August 14th. He wrote across the face of the last-named note, "This note paid in full," and he indorsed \$128.65 on the note for \$257.39. When the attorney received the second check, he made prompt acknowledgment thereof, and wrote the defendant that he had sent it to the plaintiff, advising him that it was paid on the suit. He also inclosed a statement, describing four notes, signed by the defendant, payable to A. B. Preston, and transferred to the plaintiff, two of which he described as follows: First. Note dated October 17, 1901, for \$200, with indorsement thereon of \$250 November 17, 1909. Second. Note dated March 29, 1909, for \$257.39, with indorsements thereon of \$23 August 23, 1909, and \$128.65 November 17, 1909. The date thus given of the first note was that of the collateral note, but in other respects this was a good description of the note of August 14, 1901. The next day, November 18, 1909, the defendant again wrote the attorney asking for an itemized statement, carrying out each item so that he could fully see what it was. All this was before any specification had been filed by the plaintiff, and it does not appear that the defendant had previous knowledge of just what notes the suit was brought on, though it appeared that he knew that there was more than one. On December 7, 1909, the plaintiff filed a specification of his claim, which was substantially a copy of the statement sent the defendant as stated. Afterwards, on August 16, 1910, he filed an amended specification, in which he dropped out the note standing first in the original specification, and described the second note as before, except as to the indorsement which was stated as \$57.90. And, finally, at the trial, which was in August, 1911, he amended his original specification by changing the date of the first note to August 14, 1901, thus correcting the error made therein. The plaintiff kept this note of August 14th and the collateral note until August 16, 1910, when he sent them to the defendant in a letter, saying: "I am inclosing your note to A. B. Preston for \$200.00 and the Parker & Slayton note for the same amount turned over to him as collateral security." The defendant received these notes, retained them without protest, and still retains them.

It is agreed that the payment made by the second check was made and received to apply "on the suit," and that any other application would be improper. The plaintiff says that this expression "on the suit" should be held to mean the notes on which the suit was predicated, and since it is found that the suit, which is in general assumption, was brought to recover on four notes, which include the one dated August 14, the plaintiff's application is justified. On the other hand, the defendant insists that the expression should be held to mean the amount which should ultimately be found due in the suit; and, since the court tried the case as if the statute of limitations had been pleaded, he should have the benefit of the statute without regard to the payment.

But we are not required to say what meaning should be assigned to the expression "on the suit," for an unauthorized application of a payment can be ratified, and the case shows that the defendant, by his conduct, has fully ratified and approved the application of this payment as made by the plaintiff. As early as November 18, 1909, he learned that the plaintiff had used a part of his payment upon a note which had already outlawed. Whether he had previously known that such a note was among those held by the plaintiff became immaterial, for it is plain enough that he then understood that he was being called upon to pay an old note—one note of the series to which the others belonged, and one on which the statute had already run. Yet he made no protest or complaint. Nor is this all. He received from the plaintiff the note of August 14th, with the collateral note, and it must then have been made plain to him just what had been done with his payment. With full knowledge, then, he retained these notes a year without complaint, and even at the trial did not offer to return them. It cannot be said that these notes were of no value to the plaintiff, for, though the defendant is disposed to avail himself of the statute of limitations and though the collateral note has outlawed, its signers may have a more lively sense of their obligation, and not be disposed to seek the protection which the statute affords. The chance of collecting the collateral note belonged to the plaintiff, and he could be deprived of it only by payment of the principal note. By retaining the benefits of the application as made, with full knowledge of the facts, he must be held to have ratified it, whatever his rights were when he first discovered what the plaintiff had done.

Judgment affirmed.

**WOODSVILLE GUARANTY SAVINGS
BANK v. ROGERS et al.**

(Supreme Court of Vermont. Orange. May 14, 1912.)

1. APPEAL AND ERROR (§ 761*)—QUESTIONS REVIEWABLE—EXCEPTIONS—BILL OF EXCEPTIONS.

Under the statute, questions of law arising on the trial and duly raised by exceptions come directly to the Supreme Court on a bill of exceptions showing the rulings, the objections thereto, and the exceptions; and though plaintiff, bringing exceptions from an adverse judgment, has, in his brief, in form argued only the motion to set aside the verdict, where he has in effect argued the exceptions taken during the trial, the court will examine the exceptions to determine whether or not they show a ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

2. BILLS AND NOTES (§ 242*)—EVIDENCE (§ 423*)—PARTIES—PRESUMPTIONS—PAROL EVIDENCE—NATURE OF LIABILITY.

Strangers to a note, who sign their names on the back thereof, become prima facie makers, but may show that they are but indorsers and liable only as such.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542, 547, 548, 550, 551; Dec. Dig. § 242.* Evidence, Cent. Dig. §§ 1957-1965; Dec. Dig. § 423.*]

3. BANKS AND BANKING (§ 108*)—OFFICERS—AUTHORITY.

A director of a bank who consulted with the trustees in session as a body as to the making of a loan by the bank to a third person, and who did business in the rooms of the bank, had authority to act for the bank in making the loan.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 262-264; Dec. Dig. § 108.*]

4. APPEAL AND ERROR (§ 664*)—BILL OF EXCEPTIONS—TRANSCRIPT—CONCLUSIVENESS.

A transcript referred to and made a part of the bill of exceptions may be used to supplement the statements in the bill, but it is not controlling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859; Dec. Dig. § 664.*]

5. BILLS AND NOTES (§ 504*)—LIABILITY OF PARTIES—"INDORSER."

The testimony of a witness who signed his name on the back of a note executed by another that the payee told the maker that he could obtain the loan if he could get two indorsers, and that the witness should be one of the indorsers, and that witness signed with another as indorser, was admissible to show that the witness assumed the liability of indorser only; the word "indorser," when used alone, having a technical meaning, and is distinguished from the word "maker."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1719-1727; Dec. Dig. § 504.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3567, 3568.]

6. EVIDENCE (§ 442*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.

An agreement reduced to writing stipulating that the balance of the proceeds of a foreclosure sale of real estate of the maker of a note should be applied on the note, and that whatever should be collected on a note owned by the maker and delivered to the payee should

also be indorsed, is a complete agreement looking to a future payment on the note, and could not be contradicted by a contemporaneous oral agreement of a discharge of the maker from all liability on the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

7. NEW TRIAL (§ 72*)—APPEAL AND ERROR (§ 979*)—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT.

A motion to set aside a verdict on the ground that it is against the weight of the evidence is addressed to the discretion of the trial court, and is not revisable in the Supreme Court on exceptions.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.* Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

8. NEW TRIAL (§ 68*)—APPEAL AND ERROR (§ 979*)—INSUFFICIENCY OF EVIDENCE—DISCRETION OF COURT.

A claim that a verdict is against the evidence is the same as claim that it is against the weight of the evidence, and a motion to set aside the verdict on that ground is addressed to the discretion of the court, and is not revisable on exceptions.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135-140; Dec. Dig. § 68.* Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

9. BILLS AND NOTES (§ 537*)—LIABILITY OF PARTIES—QUESTION FOR JURY.

Whether persons signing their names on the back of a note were makers or indorsers *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1894; Dec. Dig. § 537.*]

Exceptions from Orange County Court: Zed S. Stanton, Judge.

Action by the Woodsville Guaranty Savings Bank against Albert E. Rogers and others. There was a verdict for defendants, and plaintiff brings exceptions. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Smith & Smith and Fred S. Wright, for plaintiff. R. M. Harvey, for defendants.

HASELTON, J. This is an action of assumpsit, general and special. The plaintiff sought to recover upon a promissory note dated March 15, 1905, payable to the order of the plaintiff, signed on its face by A. E. Rogers, and having on its back the names of David S. Conant and M. G. Flanders, written there by them, respectively. The writ in the case was not served upon Rogers, and he did not appear. On trial by jury, a verdict for the defendants Conant and Flanders was returned and judgment was rendered thereon. The plaintiff excepted. During the trial the plaintiff took some exceptions to rulings of the court admitting evidence, and to the charge of the court in giving certain instructions, and in failing to comply with certain requests. After the verdict was rendered, the plaintiff moved that it be set

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

aside and a new trial granted for the following reasons: (1) That the verdict was against the evidence; (2) that the verdict was against the weight of the evidence; (3) that the court misdirected the jury as to the application of the law to the evidence; (4) because the jury were allowed to consider inadmissible evidence received against the objection and exception of the plaintiff.

[1] In briefing the case the plaintiff has, in form, argued only the motion to set aside a verdict. Under our statutory system, questions of law arising upon the trial of a cause and duly raised by exceptions come directly to this court on a bill of exceptions showing the rulings, the objections thereto, and the exceptions; and it is with us, though not everywhere, an unusual proceeding to say, not that an exception to a ruling made during trial should be sustained, but to say rather that an exception to a refusal of the trial court to set aside a verdict should be sustained on the ground that on the hearing of such motion the trial court refused to recognize its prior rulings as sufficient grounds for setting aside the verdict. The two questions are not the same, and to depart from our practice, which is but an interpretation of our statutes, would not only be unwarranted, but would also conduce to great harm and confusion. Here, however, notwithstanding the method of its brief, the plaintiff has really argued in the usual fashion the exceptions taken during trial; and so, without reference to the motion, we examine those exceptions so far as to determine whether or not they show a ground for reversal.

[2] Under the law of this state, Conant and Flanders, being strangers to the note, became prima facie makers by putting their names on the back of the note. But it was open to them to show that they were not makers, but indorsers, and so not holden, unless the bank had taken steps to charge them as indorsers. *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900; *Id.*, 75 Vt. 224, 54 Atl. 191.

[3] The negotiations for the loan were had with one Allen at the rooms of the bank, and Mr. Conant, who was there with Rogers, testified that Allen told Rogers that the latter could have the money on the note if he would get two "indorsers," and that there was some talk that Mr. Conant was to be one of the indorsers, and that he took the note to Bradford, where it was signed in the way it was by himself and Flanders, and then returned to Rogers who got the money on the note. It appears from the exceptions that this evidence was under objection and exception. In its brief the plaintiff urges that Allen had no authority to act for the bank in the matter. He was not then treasurer, but it appears from the bill of exceptions that he was a director, and that

he consulted in this matter with the other trustees, and by the transcript it appears that the trustees were then in session as a body.

[4] The transcript is referred to and made a part of the bill of exceptions, and so, while it is not made controlling, it may be used to supplement the statements in the bill. Considering these circumstances and the fact that director Allen was in the rooms of the bank, doing business there, we think that the evidence tended to show that Allen had authority to act for the bank.

[5] As to the evidence of Mr. Conant, above recited, the plaintiff further says that it had no tendency to show that he and Flanders were indorsers, and not makers. But in the law of bills and notes, as it exists in this state and by common usage, the word "indorser" used alone has a technical meaning not so broad as its etymology suggests. For instance, the statutes provide that the indorsers on a demand note shall be liable upon due notice of dishonor, and not otherwise. P. S. 2698. Of course, this statute has no reference to one who becomes a maker of a note by writing his name upon its back. The word "indorser" is used in the same sense everywhere in our statutes. See P. S. 2682, 2683, 2697. As long ago as 1834, it was said by Isaac Redfield while practicing at the bar that in the popular understanding signing a note is one thing and backing a note is another. His idea was not combatted by opposing counsel or by the court. *Knapp v. Parker*, 6 Vt. 642, 643. Later this court in an opinion delivered by Judge Collamer declared that the word "indorse" is a technical one, having a distinct meaning. *Brooks v. Edson*, 7 Vt. 351, 356. This court has pretty generally been careful in its language in this regard, and has not ordinarily spoken of one who has written his name upon the back of a note as an "indorser" without qualification of the word, unless he was an indorser as distinguished from a maker. *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900; *Lyndon Savings Bank v. International Co.*, 75 Vt. 224, 231, 54 Atl. 191; *Stevens v. Gibson*, 69 Vt. 142, 146, 37 Atl. 244; *Ballard v. Burton*, 64 Vt. 387, 395, 24 Atl. 769, 16 L. R. A. 664; *Flint v. Day*, 9 Vt. 345. The primary meaning of the word "indorsers" seems to have been recognized by the plaintiff in this case, for it introduced testimony to contradict Mr. Conant as to the word used by Allen, and its testimony tended to show that Allen said "signers," and not "indorsers." We think that the testimony under discussion was admissible as against any objections made, and that it tended to rebut the presumption that Conant and Flanders were makers, and tended to show that they assumed the liability of indorsers only.

[6] The defendants pleaded payment of

the note by Rogers. In support of the claim of payment the defendants introduced the deposition of W. S. Thompson, an attorney at law, who testified that as attorney for Rogers he had an interview, at Woodsville, with C. H. Hosford, one of the attorneys for the bank, relative to his bidding off, at a foreclosure sale, mortgaged real estate of Rogers. Thompson testified that Hosford did bid off the farm, and gave the former an agreement in writing the substance of which was that the mortgage indebtedness and costs were to be paid and deducted from the price of the farm, \$3,000, that an additional \$100 was to be paid Thompson, and in like manner deducted from the sum of \$3,000, and that the balance of that sum was to be applied on the note. Thompson testified that on the occasion of this agreement he left with Hosford a note for \$1,940, owned by Rogers, and took from Hosford a written agreement, made a part of the deposition, the substance of which agreement is that whatever should be collected on the note, less the expense of collection, should also be applied on the note held by the bank and in suit here. The exceptions state that Thompson testified in his deposition that "in this way he settled and paid the note in suit." But this agreement did not tend to show payment in full, but a provision by which sums, later to be determined, were to be applied towards payment.

Subject to the plaintiff's objections and exceptions, the defendant read other portions of the deposition in which Thompson testified that on this occasion he settled and paid the note in suit, and that it was agreed between himself and Hosford that the bank was to discharge Rogers from all suits and all liability upon the note. The deponent admits that the whole agreement was reduced to writing except the agreement to discharge from liability, and that, he testifies and the defendants argue, constituted an independent agreement, not contradictory of the written agreement. The defendants claim that throughout Hosford represented the bank, and, if we assume, though we do not decide, that he did, the claimed oral agreement was inconsistent with and contradictory of the written agreement which looked to future payments on the note, and not to a present settlement. The testimony does not tend to show that the oral agreement was subsequent to the written agreement, and we think it was inadmissible as tending to contradict a contemporaneous written agreement. If the note was settled and paid, it would presumably have been taken up, but it was not, and the witness gives no satisfactory explanation of why it was not. We conclude as the evidence stands that the whole agreement must be deemed to have been expressed in the writings, and that there was error in the admission of the oral testimony reviewed.

[7] The motion to set aside the verdict

on the ground that it was against the weight of the evidence was addressed to the discretion of the court, and is not revisable here. *Lincoln v. C. V. R. Co.*, 82 Vt. 187, 196, 72 Atl. 821, 137 Am. St. Rep. 998; *Ward's Adm'r v. Preferred Accident Ins. Co.*, 80 Vt. 321, 332, 67 Atl. 821.

[8] The claim that the verdict was against the evidence is the same as the claim that it was against the weight of the evidence as has frequently been decided. *Lincoln v. C. V. R. Co.*, 82 Vt. 187, 196, 72 Atl. 821, 137 Am. St. Rep. 998; *Coolidge v. Ayers*, 77 Vt. 448, 61 Atl. 40; *German v. Railroad Co.*, 71 Vt. 70, 42 Atl. 972.

[9] But, since the plaintiff may have labored under a misapprehension, we treat this latter claim as raising the question of whether there was evidence to support the verdict. And the answer to that question is that there was, for testimony referred to in the earlier part of this opinion tended to show, notwithstanding the rebuttable presumption to the contrary, that Conant and Flanders assumed only the liability of indorsers, that their implied contract with the bank was that of indorsers merely, and whether they were or not was for the jury to decide on the evidence which was conflicting. If they were indorsers merely, the bank had taken no steps to charge them.

There were some exceptions taken to rulings upon evidence, to the charge as given, and to the failure to charge, which we have omitted to consider. They are not likely to present themselves upon another trial, certainly not in the form of an exception to the refusal of the court to set aside a verdict because of claimed erroneous rulings, made during the trial, duly excepted to and subject to review without circumlocution.

Judgment reversed and cause remanded.

STATE v. COMSTOCK.

(Supreme Court of Vermont. Windsor. May 18, 1912.)

1. CRIMINAL LAW (§ 1036*)—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

An objection to evidence not made at the trial will not be considered on exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2630-2641; Dec. Dig. § 1036.*]

2. CRIMINAL LAW (§ 1043*)—EVIDENCE—OBJECTIONS.

Where evidence offered was objected to, but no ground of objection was stated, the ruling admitting the evidence is not reviewable on appeal, unless it is made to appear that the evidence could not be admissible in any state of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.*]

3. WITNESSES (§ 414*)—CORROBORATION—DOCUMENTARY EVIDENCE.

Where, in a prosecution of defendant for adultery with H. D., there was evidence that,

when the officer arrested defendant in a room where she was found with J. D., he also stated that he had a warrant for him for adultery with M., the information against J. D. was inadmissible to corroborate accused's statement as to what the officer said at the time of the arrest in the presence of J. D., and to show that he must have known what he was arrested for, and that it was not for an offense committed at that time; there being nothing to show that the officer had seen the information or that the warrant named the person with whom it was claimed the offense was committed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

4. CRIMINAL LAW (§ 364*) — ESCAPE — EVIDENCE.

In a prosecution for adultery alleged to have been committed in a hotel by defendant with D., evidence that D. escaped through the window at the time accused was arrested was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

Exceptions from Windsor County Court; Willard W. Miles, Judge.

Minnie Comstock was convicted of adultery, and she brings exceptions. Overruled.

The information charges that respondent committed adultery with one John Duling at Windsor, Vt., on July 14, 1910, and the state claimed conviction only for an offense committed on that day. The evidence of the state tended to show that about 10 o'clock in the forenoon of that day two officers, Thomas and Taylor, went to the Lapine House in that town, rapped at the front door, and were admitted by Mrs. Lapine; that they immediately went upstairs to a certain bedroom, found its door locked, rapped, and were admitted by respondent, who was barefooted, and clad only in her night robe; that on the floor in the bedroom they found a pair of men's shoes and a pair of women's shoes, and on a chair therein a pair of trousers and other articles of a man's clothing, and on the foot of the bed a woman's clothing; that on the further side of the bed they found said John Duling, and that the bedclothes on the front side of the bed were "rumpled" as if some other person had occupied that part of the bed; that Thomas then told respondent and Duling that he had warrants for their arrest for the crime of adultery, and ordered them to dress; that just then the officers' attention was attracted by sounds from an adjoining room, and they stepped into the hall, where Taylor remained while Thomas went into the adjoining room; that immediately thereafter Thomas heard a noise from the outside of the house, and thereupon went into the bedroom where he had left respondent and Duling, and found Duling gone, the only window in the room wide open, and respondent sitting on a hassock at the foot of the bed. There was no exit from the bedroom other than the open window and the door outside of which stood Taylor.

The evidence of the state also tended to show that about 8 or 9 o'clock in the evening of July 3, 1910, respondent, her sister, Hugh Duling, and said John Duling entered by the window a certain paint shop in said Windsor, and that those four were seen in that shop the next day, July 4th, drinking out of bottles, and one of the men and a woman, not respondent, lying on the floor, the woman having her clothes up, and that in the evening of July 4th those four were seen hurriedly to leave that paint shop by the back door and run away. The state relied on the evidence as to what occurred in the paint shop on July 4th only to show an adulterous disposition on the part of respondent; and her only objection thereto was to showing that Hugh Duling was one of the parties, "because he is not on trial here."

Respondent testified that when Thomas made the arrest in the bedroom he said: "I have a warrant for you for adultery with Hugh Duling, and a warrant for John Duling for adultery with Emma Marcy." Both officers denied that Thomas said that, and respondent offered in evidence the information against John Duling as tending to corroborate respondent as to what Thomas said when he arrested her, and as tending to show that Duling must have known that he was not arrested because of his relations with respondent on the day of the arrest. This offer was excluded, subject to the exception of respondent. The evidence as to the escape of John Duling was admitted subject to the objection and exception of respondent.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Homer L. Skeels, State's Atty., for the State. Gilbert A. Davis, for respondent.

ROWELL, C. J. [1] The respondent's only objection to showing that Hugh Duling was one of the parties in the paint shop the 4th of July was that he was not on trial in this case. This objection is not made now, but others that were not made below, and therefore is not considered.

[2] The witness Taylor testified without objection that his attention was called to the affair at the paint shop at the time of it. He was then allowed to testify that he afterwards learned who the people were that were in there, to which objection was made, but no ground of objection stated. This being so, the objection is not available; it not appearing that the testimony could not be admissible in any state of the case. *Herrick v. Holland*, 83 Vt. 508, 77 Atl. 6; *Townshend v. Townshend*, 84 Vt. 319, 79 Atl. 388; *Moore v. Duke*, 84 Vt. 407, 80 Atl. 194.

[3] The information against John Dul-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing, offered in evidence by the respondent to corroborate her statement as to what the officer said at the time of the arrest and in the presence of Duling, and to show that Duling must have known what he was arrested for, and that it was not for an offense committed that day, was properly excluded as having no such tendency, for there was nothing to show that the officer had then seen the information, and it does not appear, and cannot be assumed, that the warrant issued upon it named the person with whom it was alleged the crime was committed, as it would be amply sufficient without naming her (In re Durant, 60 Vt. 176, 12 Atl. 650), and so it cannot be said that the information afforded any evidence that the officer knew the name of the alleged particeps, nor any that he named her as the respondent said he did, and so no corroboration; and certainly it afforded no evidence that Duling knew what he was arrested for, though he might well have thought that it was not for any offense committed at that time.

[4] The fact that Duling escaped through the window was admissible because it was one of a group of facts that constituted a transaction that was itself admissible and being proved; the rule being that every fact that is a part of the same transaction as the facts in issue or dispute is relevant, although it may not itself be in issue or dispute, and might be excluded if not a part of such transaction. *Alken v. Kennison*, 58 Vt. 665, 669, 5 Atl. 757; *Steph. Dig. Ev. (Chase's Ed.)* 8, and note 3.

Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by her exceptions.

POWELL v. WOODBURY et al.

(Supreme Court of Vermont. Chittenden.
May 13, 1912.)

1. MALICIOUS PROSECUTION (§ 72*)—INJUNCTION RESTRAINING SALE UNDER DEED OF TRUST—EVIDENCE—INSTRUCTIONS.

Where, in an action for malicious prosecution based on defendant wrongfully enjoining a sale by plaintiff under a deed of trust executed for the benefit of creditors, plaintiff alleged that material allegations in the bill on which the injunction was granted were false to the knowledge of defendant, and proved that the defendant never offered in good faith to pay the obligations secured by the deed and failed to make a sufficient offer and tender, an instruction that if defendant offered in good faith to pay plaintiff the amount of the obligations and was ready to do so, and plaintiff so understood defendant, or ought to have understood it, or if defendant honestly believed, and had a right to believe, that he had made a proper offer and that plaintiff understood it, or ought to have understood it, and plaintiff refused the offer, or by his own conduct prevented it from being fairly made, there was probable cause for obtaining the injunction

preventing a recovery, was sufficiently favorable to defendant.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 168-173; Dec. Dig. § 72.*]

2. MORTGAGES (§ 338*)—POWER OF SALE—INJUNCTION AGAINST SALE—OFFER OF REDEMPTION.

Though a bill to redeem from a deed of trust executed for the benefit of creditors need only contain an offer to redeem by paying, yet to have any standing for an injunction to stop a sale under the deed, the party seeking to redeem, who seeks an injunction, must at least offer to pay sufficient money to satisfy the obligations and expenses of the trust.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1026-1035; Dec. Dig. § 338.*]

3. INJUNCTION (§ 186*)—WRONGFUL ISSUANCE OF AN INJUNCTION—REMEDIES.

P. S. § 1287, providing that when an injunction is dissolved defendant may recover actual damages caused by the wrongful issuance of the injunction, does not apply where an injunction wrongfully issued was dissolved by a voluntary discontinuance of the case before the expiration of the time for defendant to enter his appearance, since the discontinuance ended the case for all purposes except that of giving judgment for defendant for reasonable costs as provided by section 1758.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 397, 399-405; Dec. Dig. § 186.*]

4. INJUNCTION (§ 186*)—WRONGFUL ISSUANCE OF AN INJUNCTION—REMEDIES.

P. S. § 1284, providing for the ascertainment of damages on the dissolution of an injunction, which damages shall include not only the reasonable rents of the land recovered by the verdict, but the waste committed thereon after the granting of the injunction, relates only to ascertaining damages occasioned by injunctions issued to stay proceedings at law in actions of ejectment after verdict.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 397, 399-405; Dec. Dig. § 186.*]

5. MALICIOUS PROSECUTION (§ 10*)—WRONGFUL ISSUANCE OF INJUNCTION—REMEDIES.

Where a party maliciously and without probable cause obtained an injunction causing damages to the adverse party, an action on the injunction bond conditioned for the payment of the damages sustained by reason of the injunction is not the only remedy of the adverse party, but he may sue for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 11-15; Dec. Dig. § 10.*]

6. MALICIOUS PROSECUTION (§ 10*)—WRONGFUL ISSUANCE OF INJUNCTION—REMEDIES.

An action did not lie at common law for damages caused by an injunction unless it was sued out maliciously and without probable cause, and the requirement of injunction bonds gives an additional remedy, and a party injured by an injunction wrongfully issued may sue on the bond and for malicious use of the process without probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 11-15; Dec. Dig. § 10.*]

7. MALICIOUS PROSECUTION (§ 35*)—WRONGFUL ISSUANCE OF INJUNCTION—REMEDIES.

Where a party wrongfully obtaining an injunction voluntarily discontinued the injunction suit, the adverse party, damaged by the issuance of the injunction could resort to any remedy afforded by law, and, where the injunction was sued out maliciously and without

probable cause, he could sue for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 71-77; Dec. Dig. § 35.*]

8. MALICIOUS PROSECUTION (§ 41*)—WRONGFUL ISSUANCE OF INJUNCTION—REMEDIES.

Where a party entitled to redeem from a deed of trust executed for the benefit of creditors wrongfully obtained an injunction restraining the trustee from selling the premises under the deed, and before the voluntary dismissal of the injunction suit the property decreased in value, the trustee could sue for malicious prosecution, and whether he could recover damages for injury to reputation, feelings, and the like did not affect his remedy, but only involved the amount of a recovery.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 82; Dec. Dig. § 41.*]

9. MALICIOUS PROSECUTION (§ 25*)—DEFENSES—RELIANCE ON ADVICE OF COUNSEL.

A defendant in an action for malicious prosecution may not rely on the defense that he acted under the advice of counsel, where he did not honestly and in good faith act on such advice.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 56-58; Dec. Dig. § 25.*]

10. MALICIOUS PROSECUTION (§ 25*)—MALICIOUS ABUSE OF PROCESS—EVIDENCE.

Where a party entitled to redeem from a deed of trust for the benefit of creditors did not in good faith offer to pay the amount necessary to redeem, and did not believe that he had offered to pay, and did not honestly and in good faith rely on the advice of counsel, believing that he had ground for an injunction to restrain a sale by the trustee, and he obtained an injunction restraining a sale by the trustee by presenting a bill therefor containing false allegations, with knowledge of their falsity, he obtained the injunction maliciously and without probable cause and was liable for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 56-58; Dec. Dig. § 25.*]

Exceptions from Chittenden County Court; Fred M. Butler, Judge.

Action by Max L. Powell against Charles L. Woodbury and another. There was a verdict and judgment for plaintiff, and defendants bring exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, and HASELTON, JJ.

V. A. Bullard, Max L. Powell, and J. W. Redmond, for plaintiff. Rufus E. Brown and Edmund C. Mower, for defendants.

ROWELL, C. J. This is an action for malicious prosecution. The essential facts are these in substance: Before and on May 8, 1909, George M. Delaney owned the Hotel Burlington property in Burlington where he had carried on the hotel business for many years, but it had come to pass that he was financially embarrassed, and so on that day he conveyed to the plaintiff, his largest creditor, by his quitclaim deed of that date, all of said property in trust for the benefit of his creditors in pro rata share, except the secured creditors, who were the plaintiff and

Payette, Meldenshon & Co.; the purpose of said deed being, as declared therein, to enable the trustee so to manage the estate of the grantor that all of his creditors might receive in full the amount of their claims as the assets, at a fair market value, were in excess of all his liabilities. Said deed further declared that the trustee was to handle the estate, both real and personal, for the benefit of the creditors, and to render accurate account of all receipts and disbursements, and to account to the grantor for any excess above the trustee's legal liabilities. The trustee thereupon took possession of said property and managed and conducted the same as a hotel till the 8th of January, 1910, when the hotel proper was practically destroyed by fire and rendered unfit for further use unless rebuilt, but the part of the building in which intoxicating liquor was being sold under a license was not destroyed, and that business continued therein. But before the fire and on September 17, 1909, Delaney executed to the trustee another paper writing, whereby, in consideration of the trustee's raising upwards of \$6,000 with which to pay off the unsecured creditors in full, he agreed to allow the trustee to carry on the hotel as proprietor in any manner he saw fit, giving him full power to look after his interests, and agreed that he might decide whether to sell the property, to rent it, or to carry it on himself, leaving the whole management of it to the trustee for his and the grantor's benefit.

On March 7, 1910, Delaney agreed in writing under seal to sell the property to Rufus E. Brown or his assigns within 60 days from that date at and for the sum of \$24,000, and on the same day that agreement was assigned to the defendants. Afterwards on the 14th day of said March, Delaney, by his deed of that date, quitclaimed to the defendants all his right and title to the real estate aforesaid on the west side of St. Paul street, reserving the use of the barroom till the first day of the then next May.

The plaintiff, trustee as aforesaid, having advertised the property to be sold at public auction on the 26th of said March, the defendants and Delaney jointly brought a bill in chancery against him the 24th of said March and procured an injunction against his selling the property until further order, and the injunction was served the 25th, the day before the sale was to be made.

Said bill alleged the substance of the foregoing facts which were not then and are not now in dispute, and further alleged, among other things, that the defendant therein, the plaintiff here, had failed to account for the insurance money received for the loss by fire; that he threatened to close the bar and stop the sale of intoxicating liquor thereat, and to sell all the personal property held in trust; that soon after Delaney deeded to these defendants as aforesaid, and before bill

brought the orators demanded of the plaintiff, trustee as aforesaid, a full and true account of his trusteeship and management of the hotel business and of the sale of intoxicating liquor, and then and there offered to pay him all and every of Delaney's debts, secured and unsecured, to redeem all of his property from all mortgages and said trust deed, and demanded that he convey the hotel property on the west side of St. Paul street to these defendants, but that the plaintiff neglected and refused to account at all to the orators and to tell them the amount required to redeem and to release the property from any of the incumbrances. The bill further alleged that the orators were then willing and able, and ever since have been and still were willing and able, and had offered, to pay the plaintiff, trustee as aforesaid, the full amount of all the incumbrances and indebtedness on said property, and all claims and demands against Delaney that they ought to pay to the plaintiff, trustee as aforesaid, or to Henderson as mortgagee, who was also a defendant in the bill, together with all just charges, expenses, and allowances in order fully to redeem said property from all mortgages and said trust deed, but that the plaintiff then refused and still refused to receive and accept the same, but claimed the sole and absolute right to control and dispose of said property, and was advertising the same for sale at public auction. And the bill offered to redeem by paying the full amount of the incumbrances and indebtedness found due on accounting for which it prayed, and also to pay all just charges and expenses of the trusteeship.

[1] This bill is the suit complained of as malicious, made so, it is claimed, by the injunction, which, it is said, caused the damage sought to be recovered, as the property shrank in value by delaying the sale until the 7th of May, when the suit was voluntarily discontinued by the orators.

That the defendants and Delaney had a right to redeem the property from the trust is not denied. The court told the jury that. But what the plaintiff complained of below and complains of here is the injunction. He says that it was obtained by reason of material allegations of the bill that were false to the knowledge of the defendants, without which the bill did not contain enough to warrant the injunction, and consequently that it would not have been granted.

The court told the jury that the material allegations of the bill were that the plaintiff failed to account to the orators; that he ought to have accounted for the management and control of the property, and to have informed the orators of the amount of money required to pay all obligations of the trust, and to have released the property to them; that they demanded of him an accounting and offered to pay him sufficient money to satisfy all the obligations of the trust; that the plaintiff claimed and his evidence tended

to show that the defendants never made any offer in good faith to pay those debts and obligations, and failed to make a sufficient offer and tender in that behalf, and did not act in good faith in respect thereto. In this connection the court told the jury to inquire whether said allegations were true or false, and, if false, whether knowingly so or not, and to inquire as to the good faith of the defendants in bringing the suit.

It appeared that the principal interviews between the parties took place at the Van Ness house before the bill was brought. As to those interviews the court told the jury that, if thereat the defendants, having obtained an option and a deed from Delaney, offered in good faith to pay the plaintiff, and gave him fairly to understand that they were ready and wanted to pay him sufficient money to satisfy all the obligations and expenses of the trust—that is, all the creditors of Delaney and his obligations to the plaintiff—and were prepared to do so as soon as the plaintiff gave them a full statement thereof, and requested a deed from him, and the plaintiff understood it, or ought to have understood it if he had exercised the care and prudence of a prudent man, and would have understood it but for his own fault, or if the defendants in those interviews honestly believed and had a right to believe that they had made such an offer and that the plaintiff understood it or ought to have understood it, and the plaintiff refused the offer, or by his own conduct prevented it from being fairly made, and gave the defendants to understand that he refused it, or refused to comply with their requests, then there was probable cause for bringing the injunction suit, and the plaintiff could not recover. But if, on the other hand, the defendants failed through their own fault to offer to pay the plaintiff sufficient money for the purposes aforesaid, and without the fault of the plaintiff they could not maintain that suit, but that they might, nevertheless, have honestly believed they had made a sufficient offer, and unless they did thus believe, and were fairly justified in that belief, there was no probable cause unless found in the advice of counsel as to which the court charged that the defendants had a right to act under the advice of competent counsel, and if they went to such counsel and stated the case fairly to them, just as they understood and believed it to be as far as the facts were not already known to the counsel, and all the material facts were understood by counsel, then the defendants would have a right to rely on their advice, and if, acting honestly and in good faith, they did rely upon the advice of counsel that the allegations of the bill were sufficient to maintain it and the injunction, then that was probable cause, and the plaintiff could not recover. And the court further charged that the plaintiff could not recover unless malice on the part of the

defendants in bringing the suit and procuring the injunction was established.

Under this charge, the verdict being for the plaintiff, the jury must have found that the defendants did not in good faith offer to pay the plaintiff nor give him fairly to understand that they were ready and wanted to pay him sufficient money to satisfy all the obligations and expenses of the trust, and that the plaintiff did not so understand the matter, and was not in fault for not so understanding it, and that the defendants did not honestly believe, and had no right to believe, that they had made such an offer and that the plaintiff understood it, and also must have found that the defendants did not honestly and in good faith take the advice of counsel and rely upon it, believing that they had ground for an injunction, and that they were actuated by malice in bringing the suit and procuring the injunction.

[2] Now the charge as to offering to pay before bill brought was quite as favorable to the defendants as they were entitled to have it, for though for the purpose of redemption merely it was enough that the bill offered to redeem by paying, yet, in order to have any standing for an injunction to stop the sale, the defendants should at least have offered to pay sufficient money to satisfy the obligations and expenses of the trust, which the jury has found they did not do and did not believe they had done. It is unnecessary, therefore, to inquire whether they should have done more than to offer, and should have tendered, paid into court, or otherwise secured the plaintiff.

Mr. High says that a sale of property under a trust deed will not be enjoined when the complainant admits by his bill that a portion of the debt thereby secured is justly due, but makes no tender of that amount; that he who seeks equity must do equity, and, in the absence of any offer by the complainant to pay the amount he admits to be due, he is entitled to no consideration in a court of equity. 1 High, Inj. (3d Ed.) § 443. And Mr. Perry says that if any amount is admitted to be due, or appears to the court to be due, that sum must be brought into court or tendered to the creditor before an injunction will be granted. 2 Perry, Trusts (3d Ed.) 192. So Mr. Jones, speaking of powers of sale in mortgages and trust deeds, says that payment of the amount justly due must be tendered to entitle the person seeking the injunction to the consideration of the court. 2 Jones, Mort. (2d Ed.) § 1806.

In Sloan v. Coolbaugh, 10 Iowa, 31, it is held that an injunction should not be granted in a proceeding to cancel a sale of property under a mortgage and restrain the purchaser from taking possession and disposing of the same when the petition does not allege a tender of the amount admitted to be due on the mortgage.

So a party who comes into a court of equity

asking for relief against a usurious contract must, before he is entitled to injunctive relief, bring into court the money actually advanced to him, with legal interest, and then the court will aid him as to the usurious excess. Rogers v. Rathbun, 1 Johns. Ch. (N. Y.) 367.

It is held in Meysenburg v. Schlieper, 46 Mo. 209, that an incumbrancer has no right to enjoin the sale of property under a prior incumbrance unless he is ready and offers to pay off the prior incumbrance in full. Powell v. Hopkins, 38 Md. 1, is to the same effect.

Macleod v. Jones, L. R. 24 Ch. Div. 289, decided in 1883, was an application to restrain a mortgagee from exercising his power of sale. Brett, M. R., said that, as far as he understood the practice of the court, the mortgagee could not be stopped from selling the estate without the mortgagor pays into court or otherwise secures to him, not what the court might think *prima facie* was due to him as far as it could ascertain, but without paying into court that which the mortgagee demands, subject to a subsequent inquiry. Cotton, L. J., said that under ordinary circumstances the court never interferes unless there is something very strong; that it does not interfere on any suggested case without requiring the plaintiff applying to pay into court, not what the judge or the court on hearing the evidence is satisfied will probably be the amount due, but what the mortgagee, the accounts not having been yet taken, swears is due to him on his security. And this, he said, is perfectly right, because they ought not to prevent mortgagees from exercising the powers given to them by their security without seeing that they are perfectly safe. Bowen, L. J., said substantially the same.

[3] But the defendants say that, conceding the wrongful issuance of the injunction and resulting injury to the plaintiff as trustee, his only remedy is on the injunction bond as prescribed by P. S. 1287, which provides that, when an injunction in chancery is dissolved by final decree in favor of the defendant, he shall be entitled to recover his actual damages caused by the wrongful issuing of the injunction which shall be ascertained by reference to a master. But assuming that that is the only way of ascertaining damages in cases within the statute, yet here the case is not within the statute, for there was no dissolution of the injunction by final decree, but only by voluntary discontinuance of the suit before the expiration of the time for the defendant to enter his appearance. That discontinuance ended the case for all purposes except that of giving judgment for the defendant to recover reasonable costs as provided by P. S. 1758, which it does not appear were ever asked. Woods v. Darling, 71 Vt. 348, 45 Atl. 750. It is seen, therefore, that the defendants themselves put

it out of the power of the plaintiff to have his damages ascertained in that case, and they cannot now claim that that was his only remedy.

[4] Nor have we any other statute applicable to the case, though the defendants refer to P. S. 1284, in connection with 1287. But 1284 relates only to ascertaining damages occasioned by injunctions issued to stay proceedings at law in actions of ejectment after verdict.

[5] But the defendants further say that, if the statute does not control the method of ascertaining the damages, then an action on the injunction bond is the only remedy, as the bond is conditioned for the payment of such damages as may be sustained by reason of the injunction. And this would be so when want of probable cause and malice do not combine, but when they do, as here, another cause of action thereby accrues to the party injured, namely, an action on the case for malicious prosecution, which is not merged in the remedy on the bond, but may be pursued instead of that. This is generally so held, though the defendants refer to and largely rely upon *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245, which was an action on the case for falsely, maliciously, and without probable cause procuring an injunction to be issued restraining the plaintiff from disposing of certain lumber and collecting certain debts, whereby he was damaged, and it was held that the action could not be maintained for that the injunction bond was designed by the statute to cover all damages that the party injured could possibly sustain, and that he was bound to sue upon it and could not resort to an action on the case. The court sharply criticised *Cox v. Taylor*, 10 B. Mon. (Ky.) 17, which holds the other way, and said it found no other case that did. But now many such cases are to be found, and in the note to *Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275, it is said that the Illinois case stands alone against the decisions of various courts upholding an action for malicious prosecution based on an injunction obtained maliciously and without probable cause. Thus in *Keber v. Mercantile Bank*, 4 Mo. App. 195, it is held that the common-law remedy is not merged in the remedy on the bond, but that the common law gives no remedy for an injury done by legal proceedings unless the process of the court is abused through malice and want of probable cause, in which case the party who abuses it is considered as a trespasser from the beginning and as if he had acted without authority from the start.

So in *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505, it is held that there can be no recovery of damages arising from an injunction except in an action on the bond unless it is averred and proved that the process of the court was abused maliciously and without probable cause.

Robinson v. Kellum, 6 Cal. 399, was an action on the case for wrongfully suing out an injunction, and it was held that such an action will not lie unless it is alleged as an abuse of process through malice and without probable cause; that, if the act complained of is destitute of these elements, the remedy is upon the bond. The same thing is held in *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

[6] No action lies at common law for damages caused by an injunction unless it was sued out maliciously and without probable cause. To remedy this defect, injunction bonds were devised, and then there were two remedies, one on the bond and one for malicious use of the process without probable cause. *Railway Co. v. Railway Co.*, 47 W. Va. 725, 35 S. E. 978; *Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275, and note.

Mr. High says that there is some conflict in the cases on this subject, but that the better doctrine is that the defendant's right of action at common law is not merged in the remedy on the bond, and that an action on the case will lie if there is malice and want of probable cause. 2 High, Inj. (3d Ed.) § 1648. So in 22 Cyc. 1061, it is said that, when an injunction has been wrongfully issued, there is no liability for damages in an action other than the injunction suit, except in an action on the bond, unless the party against whom the injunction was issued can make out a case of malicious prosecution by showing malice and want of probable cause, and that the remedies on the bond and by an action for damages may both exist.

[7] But the defendants still further say that, whatever may be the broad general rule as to the propriety of malicious prosecution, it does not lie here, even on the reasoning of the courts that sustain the action, for, if the plaintiff could recover no damages not fairly within the scope of the bond, his remedy was exclusively in chancery, and that the rule deducible from our own cases and expressly embraced in the condition of the bond is that all damages reasonably flowing from the wrongful issuance of the injunction are covered by the bond, and that in *Center v. Hoag*, 52 Vt. 401, the court suggested even a broader rule than this when the injunction is obtained and used in bad faith and for the purposes of oppression.

[8] But, as we have seen, the plaintiff's remedy in chancery was taken away by the defendants themselves when they discontinued their injunction suit, and then, if not before, the plaintiff was free to resort to such other remedy as the law afforded him, and that it afforded him the remedy he is here pursuing we have already held, and if, as the defendants claim, suing as trustee as he does, he can recover only damages ordinarily incident to injunctions of this kind, and not damages predicated upon the peculiarly personal nature of the action, such as for injury

to reputation, feelings, and the like, matters entirely foreign to his trusteeship, it makes no difference, for those things go, not to the right to this remedy, but only to the things for which recovery can be had by it.

[9] The defendants lay much stress upon their claim of acting under the advice of counsel. But that defense was completely taken from them by the finding that they did not honestly and in good faith act upon that advice, and whether they did or not was a question for the jury.

[10] Thus it appears, contrary to the claim of the defendants in their motion for a verdict, that there was evidence tending to show both want of probable cause and malice; to show want of probable cause in the facts found that they did not in good faith offer to pay the plaintiff as they alleged, and had no reason to believe, and did not honestly believe, that they had, and did not honestly and in good faith take the advice of counsel and rely upon it, believing that they had ground for an injunction; to show malice in the want of probable cause, and the known falsity of the allegations made to show it, to say nothing of the manner of obtaining the option, the purpose for which it was obtained, and what was said about it, to which the court specially directed the attention of the jury. *Wheeler v. Nesbitt*, 24 How. 544, 550, 16 L. Ed. 765; *Stewart v. Sonneborn*, 98 U. S. 187, 193, 25 L. Ed. 116; *Driggs v. Burton*, 44 Vt. 124, 148.

Judgment affirmed. All concur.

POWERS, J., did not sit.

AMERICAN AGRICULTURAL CHEMICAL CO. v. ELLSWORTH et al.

(Supreme Judicial Court of Maine. June 6, 1912.)

(Syllabus by the Court.)

1. GUARANTY (§ 38*)—CONSTRUCTION—CONTINUING GUARANTY.

The plaintiff appointed, in writing, one Berry its agent for the sale, on commission, of its fertilizers. Berry, by the same writing, agreed to make, at a time stated, full settlement in cash for all sales made by him. On the back of the writing was written a guaranty, which was signed by the defendants, by which they guaranteed "the faithful performance by Berry of all and singular the obligations of the within agreement on his part to be kept, * * * so long as the agency shall be continued." The contract of agency itself provided that it should "not be in force until accepted by the home office," which was in New York. No sufficient notice of acceptance of the contract or guaranty was given until 11 months after the date of the guaranty, and 10 or 11 months after Berry received the fertilizer which he sold, and several months after he had received and appropriated to his own use the proceeds of the sales. In a suit upon the guaranty, *held*, that the guaranty was a continuing one.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 47; Dec. Dig. § 38.*]

2. GUARANTY (§§ 6, 7*)—REQUISITES—ACCEPTANCE—NOTICE.

In the case of such a continuing guaranty for debts to be created, and uncertain in their amount, the guarantor is not liable, unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 8, 9; Dec. Dig. §§ 6, 7.*]

3. GUARANTY (§ 7*)—REQUISITES—ACCEPTANCE—NOTICE.

In this case the notice of acceptance was not given to the guarantors within a reasonable time.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 9; Dec. Dig. § 7.*]

4. GUARANTY (§ 7*)—REQUISITES—ACCEPTANCE—NOTICE.

The facts in the case do not bring it within the exceptions to the general rule, requiring notice of acceptance of a continuing guaranty, namely, that the consideration of the guaranty was a valuable one, moving, directly or indirectly, to the guarantor from the creditor, or that the guaranty was made at the request of the creditor, or that it was contemporaneous with the contract guaranteed.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 9; Dec. Dig. § 7.*]

Report from Supreme Judicial Court, Franklin County, at Law.

Action of assumpsit by the American Agricultural Chemical Company on a written contract of guaranty against John A. Ellsworth and others for the sum of \$1,812.20. Plea, the general issue. At the conclusion of the evidence, the case was reported to the law court for determination. Judgment for defendants.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, KING, BIRD, HALEY, and HANSON, JJ.

Frank W. Butler, of Farmington, for plaintiff. Joseph C. Holman, of Farmington, and D. R. Ross, of Phillips, for defendants.

SAVAGE, J. [1] This case comes before the court on report. The plaintiff, on March 11, 1909, appointed, in writing, one George E. Berry as its agent for the sale, on commission, of its fertilizers in Salem, Me., and vicinity. By the same writing, Berry agreed to make, at a time stated, full settlement in cash for all sales made by him of plaintiff's goods consigned to him. On the back of the writing, and under the same date, was written a guaranty, signed by the defendants. The material part of the guaranty, so far as necessary now to state it, was as follows: "In consideration of the sum of one dollar to me in hand paid by the American Agricultural Chemical Company, * * * I do hereby guarantee the faithful performance by George E. Berry of all and singular the obligations of the within agreement on his part to be kept and performed and all renewals and extensions thereof, so long as said agency shall be continued." Fertilizers

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

were consigned by the plaintiff to Berry in accordance with the terms of his appointment. He sold the same, but failed to account for the proceeds. He was afterwards, in June, 1910, adjudged a bankrupt. This suit is brought on the above-mentioned guaranty. The defendants tender several defenses; but we shall have occasion to notice only one.

[2] This is a continuing guaranty; and the general rule is well settled in this state, as well as elsewhere, that in case of such a guaranty for debts yet to be created, and uncertain in their amounts, the guarantor is not liable, unless the guaranty is accepted, and notice of the acceptance is given to the guarantor within a reasonable time. *Norton v. Eastman*, 4 Me. 521; *Tuckerman v. French*, 7 Me. 115; *Howe v. Nickels*, 22 Me. 175; *Mussey v. Rayner*, 22 Pick. (Mass.) 223; *Lee v. Dick*, 10 Pet. 482, 9 L. Ed. 503. Until acceptance and notice, the writing of guaranty is merely a proposal, making necessary acceptance by the other party to complete the contract. *Allen v. Pike*, 3 Cush. (Mass.) 238; *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686. In this respect the rule differs from that applicable to contracts in general. 20 Cyc. 1405. The reason for the rule, as commonly stated, is that, the guarantor being only secondarily liable, he should be informed that his offer has been accepted, that he may know the amount of his liability, and may have an opportunity of taking indemnity from the principal debtor, or of otherwise securing himself against loss. 20 Cyc. 1406; *New Haven County Bank v. Mitchell*, 15 Conn. 206.

Also the creditor, in case of a continuing guaranty, must give the guarantor reasonable notice of the amount which may have been advanced; and failure to give such notice will defeat the guaranty, pro tanto, at least, if it has operated injuriously to the guarantor. *Howe v. Nickels*, 22 Me. 175; *Vinal v. Richardson*, 13 Allen (Mass.) 521.

There are some exceptions to the general rule, above stated, three of which the plaintiff relies upon in this case. One is when the consideration of the guaranty is a valuable one, moving, directly or indirectly, to the guarantor from the creditor. Another is when the guaranty is made at the request of the creditor. And a third is when the agreement to accept, or the contract guaranteed, is contemporaneous with the guaranty. In such cases notice of acceptance of the guaranty is unnecessary. *Davis v. Wells*, supra; 20 Cyc. 1407.

Since a contract of continuing guaranty is not complete without acceptance, or the existence of conditions which render acceptance unnecessary, the burden is on the plaintiff, suing upon such a guaranty, to show that it was accepted, or that it comes within the exceptions to the rule; that is, the plaintiff

must show a completed and binding contract. Merely showing a signed guaranty is not enough.

[3] In this case no sufficient notice of acceptance is shown until 11 months after the date of the contract of guaranty, and 10 or 11 months after Berry received the fertilizer which he sold, and several months after he had received and appropriated to his own uses the proceeds of the sales. The notice was not seasonable. It is true that one of the defendants, Ellsworth, knew when the fertilizers arrived. But this was after the plaintiffs had completed the consignment now in controversy, and Berry's responsibility had attached. But even if this were sufficient implied notice to Ellsworth, it cannot avail the plaintiff in this suit; for, by the original guaranty, the several guarantors became liable to contribute to each other. If, for want of notice of acceptance, the other guarantors were released from the proposed guaranty, this one defendant is deprived of his right of contribution by the neglect of the plaintiff. Under such circumstances, we think the plaintiff cannot effectively pursue this defendant.

[4] Nor is it shown that the case comes within any of the claimed exceptions to the rule of notice of acceptance. No valuable consideration is shown, moving from the creditor to the guarantors; the consideration named in the contract of guaranty, "one dollar," being evidently only a nominal consideration. The real consideration lay in the contract between the creditor and Berry. It is conceded in argument that the guarantors signed the guaranty at the request of Berry. If the fact that the contract of guaranty was written and signed on the back of the agreement guaranteed is presumptive evidence that the making of the guaranty was contemporaneous with the making of the original contract, still that will not avail the plaintiff. The case shows that the original contract was executed at Salem, in this state, by Berry and by an agent of the plaintiff in its behalf. But the contract itself provided that it should not "be in force until accepted by the home office, which was in New York." Therefore it was not a contract until accepted in New York. Only such an acceptance would complete it as a contract. If the guaranty was signed contemporaneously with the execution of the original contract in Salem, the guarantors could not know that the latter contract would ever be accepted, and their guaranty thereby become in force. The general rule should apply in such a case, and we hold that it does apply. The guarantors were entitled to notice that their responsibility had attached by the acceptance of the original contract.

For these reasons, the plaintiff cannot recover in this suit.

Judgment for defendants.

STATE v. ALBANES.

(Supreme Judicial Court of Maine. June 6, 1912.)

1. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of murder with malice aforethought.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

2. CRIMINAL LAW (§§ 419, 420*)—HEARSAY TESTIMONY—ADMISSIBILITY.

In a trial for uxoricide, testimony as to what conversations witness had with decedent the day before the killing, and as to what decedent said about accused's manner, was properly excluded as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

3. HOMICIDE (§ 181*)—UXORICIDE—EVIDENCE—ADULTERY BY DECEDENT.

In a trial for uxoricide, evidence tending to show that decedent had committed adultery was inadmissible in the absence of a showing that accused had knowledge thereof.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 383-385; Dec. Dig. § 181.*]

4. CRIMINAL LAW (§ 1168*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

On a trial for uxoricide, any error in a ruling that evidence tending to show commission of adultery by decedent must be confined to facts occurring within four days before the homicide was harmless, where it appeared that accused had been informed of his wife's illicit relations long before, and that on that information he had brought a libel for divorce.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.*]

5. HOMICIDE (§ 163*)—EVIDENCE—PROOF OF ACCUSED'S GOOD REPUTATION.

Where, in a trial for uxoricide, accused is permitted to show good reputation in the community in which he had lived for the preceding 10 years, it was not reversible error to exclude testimony showing good reputation in another community where he had lived for 10 years before that time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. § 163.*]

6. CRIMINAL LAW (§§ 667, 1153*)—EVIDENCE—ACCUSED'S GOOD REPUTATION.

On an issue as to accused's good reputation, the question of relevancy or irrelevancy of testimony on the ground of remoteness in time is a preliminary question, to be determined by the presiding justice in his discretion, exercise of which will be disturbed only for gross abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1599, 1601, 3061-3066; Dec. Dig. §§ 667, 1153.*]

7. CRIMINAL LAW (§ 676*)—NUMBER OF WITNESSES—ACCUSED'S GOOD REPUTATION.

The trial court can reasonably limit the number of witnesses on an issue of accused's character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.*]

8. HOMICIDE (§ 156*)—UXORICIDE—EVIDENCE—MALICE.

In a trial for uxoricide, an undertaker was properly permitted to testify for the prosecution that on the day after the homicide accused said that he wanted decedent buried that night, that he did not want to pay more than \$10 for a casket, and that, if one could not be

procured for that price, to "put her in a pine box"; the testimony being admissible on an issue of malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.*]

Haley, J., dissenting.

Appeal and Exceptions from Supreme Judicial Court, Oxford County.

Ignazio Albanes, alias Joe Bill, was convicted of homicide, and he appeals, moves for a new trial, and brings exceptions. Appeal dismissed. Motion and exceptions overruled.

The defendant was indicted for the murder of his wife, Rosie Albanes, and a verdict of "guilty as charged in the indictment" was returned by the jury. The defendant then filed a general motion for a new trial, which was denied by the presiding justice. The defendant then appealed to the law court under Rev. St. c. 135, § 27, which provides that: "If a motion for new trial in any case in which a person has been convicted of any offense for which the punishment is imprisonment for life, is denied by the justice before whom the same is heard, the respondent may appeal from said decision to the next law term; and the concurrence of but three justices shall be necessary to grant such motion." The defendant also took various exceptions.

Mem.—It will be noted that under Rev. St. c. 135, § 27, that the concurrence of only three of the eight justices who constitute the Supreme Judicial Court is necessary to grant a motion for a new trial in a case where a "person has been convicted of any offense for which the punishment is imprisonment for life."

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

William R. Pattengall, of Waterville, Atty. Gen., and Ralph T. Parker, of Rumford, Co. Atty., for the State. McGillicuddy & Morey, of Lewiston, for defendant.

CORNISH, J. At the October term, 1911, of the Supreme Judicial Court for the county of Oxford, the respondent was found guilty of the murder of his wife, Rosina Albanes, on May 11, 1911. He thereupon filed a motion for new trial, which was denied by the Presiding Justice, and an appeal from this decision was taken to this court under R. S. c. 135, § 27. Various exceptions were also reserved. We will consider the appeal first.

Appeal.

[1] The single question before this court on this branch of the case is whether in view of all the testimony "the jury were warranted in believing beyond a reasonable doubt and therefore in finding that the defendant was guilty of the crime charged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against him." *State v. Lambert*, 97 Me. 51, 53 Atl. 879.

In this state degrees of murder have been abolished, and the crime, as now defined by R. S. c. 119, § 1, is the unlawful killing of a human being with malice aforethought, either express or implied.

A careful study of the occurrences which were either uncontroverted or which, from the evidence, the jury were warranted in believing took place, not only justified, but demanded, the verdict rendered. In fact, a verdict for a less crime would have been a miscarriage of justice. The respondent was a man of mature years, a native of Italy, who had been in this country since 1887, and in this state about 20 years, 10 of which were spent in Lewiston and 10 in Rumford. His domestic relations had been unpleasant for several months because of his wife's alleged relations with one Nicola Ballistiri, and the respondent had brought a libel for divorce against her on the ground of adultery, returnable at the May term, 1911, of the Supreme Judicial Court for Oxford county. On the 11th day of May a hearing was had in the court, then being held in Rumford, on the wife's motion for a continuance of the case to the October term, the motion being strenuously resisted by the husband. The presiding justice granted the continuance. This was between 12:30 and 1 p. m. When the decision was announced, the respondent's expression was noted. His face was "pallid and colorless." He went directly to his house, where his wife still lived and ate dinner, his wife and a boarder being at the table. When the dinner was finished, the boarder withdrew, but the respondent remained. The wife was removing the dishes from the table, and, as he described it to the officer, she threw up her head, laughed, and said: "I told you I would beat you. I could get my case put over to October." He told her to keep still, but she continued to laugh at him, whereupon he drew a revolver and fired three shots, each of which took effect in her body as she faced him. She fell upon the floor and he left the house, sought an officer, and was placed in the police station at his own request. If malice in law can be implied from the intentional doing of a wrongful act or of an injury to another without legal justification or excuse, the implication exists here in full force.

But the state's case did not stop here. There was reliable evidence of express malice. On May 8th the attorney for the wife in the divorce proceedings met the respondent in the banking room of the Rumford Falls Trust Company, where the respondent signed and gave to the attorney a check for the amount due for attorney's fees and separate support pending the libel, as decreed by a justice of this court at a prior hearing, and then repeated a most significant threat

which he had previously made to his wife. The attorney's testimony is as follows: "While we were there he said to me, 'I have told my wife what I should do if she put the case over.' I replied to him that she had told me what he had said—that he had said he would kill her; 'but,' I says, 'Joe you won't do that.' He says, 'I shall kill her if the case is put over.'" Here then we find a threat made first to the wife herself and then to her attorney, a threat which was carried into fatal execution three days later within an hour after the case was "put over" by order of the Presiding Justice.

All the requirements of murder have been met—premeditation, malice, and the killing.

But the defendant seeks to reduce the crime to manslaughter by injecting into the wife's remarks which preceded the shooting the assertion that the baby in the cradle did not belong to him, but to Nicola, and that this remark, coupled with some letters in his possession showing their guilty relations, released the clutch on his mental machinery causing him to fire the fatal shots in the heat of provoked passion. What his wife actually said was a question of fact for the jury to decide, and they were warranted in taking the state's view. The evidence comes on the one side from the officer to whom the respondent made his statement soon after the homicide, and on the other from the respondent himself when on the stand. The officer testified that he never heard of the taunt in regard to the paternity of the child until he heard it in court. The respondent's testimony on this point lacks probability. It would hardly seem reasonable that the wife who was contesting the divorce should admit the charge on which it was based; while the testimony of the officer is perfectly consistent with what had been the immediate subject of contention between the respondent and his wife, viz., the postponement of the trial of the libel. So far as the letters were concerned, the respondent admits that they had been in his possession since the previous September or October, and had at least been partially translated to him before the full translation a few days prior to the shooting. Of their purport he must have been fully aware, and there could have been no sudden shock of his wife's infidelity that swept away his reason, because in the libel for divorce which he had signed and brought on the third day of April the sole cause alleged was adultery. The respondent therefore for a long time prior to the 11th of May had believed his wife to be unfaithful, and was attempting to divorce her on that ground. If his testimony of her statement to him was true, it revealed little that was new to him. But the probabilities are strongly against its ever being made.

Without discussing the evidence further, it is the opinion of the court that the jury

were warranted in finding that a husband who, armed with a revolver, fired three shots at his defenseless wife with no more provocation than is here revealed, and especially after twice making threats to kill her if the divorce case were continued, who turned and left her lying upon the floor in the blood that was pouring from her wounds, without attempting to ascertain whether she were living or dead, or to call a physician to her assistance (although she lived three hours and regained consciousness before her death), but sought his own safety in delivering himself up to the officers, who never afterwards manifested the slightest remorse or even regret at his deed, but rather continued to cherish his hatred towards her, for, though a man of some property, when asked by the undertaker on the next day after the homicide when he wanted her buried, answered, "To-night," and, when asked in what price casket, told the undertaker to bury her in a pine box if he could not get a casket for \$10, is, according to the laws of Maine, guilty of murder, and nothing less.

Exceptions.

Although several other exceptions were taken, only three were pressed in argument, viz.:

[2, 3] 1. The exclusion of certain evidence of John Zacoll, offered by the respondent as to what conversation he had with the deceased on the day before the shooting, and when objected to by the state, the counsel for the respondent stated the object of the testimony as follows: "I wish to show what she had to say about Joe Bill's manner." The ruling was correct. The evidence offered was merely hearsay, and clearly inadmissible. In this connection the counsel challenged the ruling of the court, that, on the question of admissibility of evidence charging the deceased with adultery, "they must be confined to acts occurring within one, two, three, or four days prior to the homicide." No specific evidence was offered on this point and ruled upon, and, had the same been offered, it would properly have been excluded, unless knowledge of the facts could have been brought home to the respondent by other evidence. The mere facts were not admissible per se. Knowledge of them by the respondent would have been, but the record is silent as to any offer to connect such facts with the respondent.

[4] Moreover, the exclusion was harmless in any event, because the record shows that the respondent had been informed of his wife's relations with Nicola long before and on that information had brought his libel for divorce. Harmless error, if such there was, should not be permitted to overturn a just verdict.

[5-7] 2. The second exception is based upon the exclusion of certain evidence offer-

ed by the respondent tending to show his good character. The respondent had raised this question as he had a legal right to do, and had been permitted to introduce the testimony of two of the leading citizens of Rumford who had known him during the preceding 10 years that he had lived in that town. The respondent then offered the testimony of two other witnesses who lived in Lewiston to testify as to his reputation while in that city during a period from 10 to 20 years prior to the trial.

In other words, the respondent was permitted to introduce evidence of his general reputation for peaceableness in the community in which he then lived and had lived for a period of 10 years, but evidence of his reputation in another community which he had left 10 years before was excluded. There was no error in this ruling. The inquiry under ordinary circumstances is confined to the place of residence at the time of trial, provided the residence there has been of sufficient length for a reputation to have been acquired. This is especially true where the evidence so offered is not controverted by the other side. If a person has lived but a short time in a community, it might be proper and even necessary to go to his former home in order to establish his reputation. But that is not this case. Rumford had been the respondent's home for 10 years, his reputation was well established, and under these circumstances to go back to a prior home was too remote both in time and place. Moreover, it is well settled that whether the evidence offered to show a person's reputation is irrelevant because too remote in time or the community is too distant in space is a preliminary question, to be determined by the presiding justice in his discretion, and his ruling on this point will not be disturbed unless the discretion has been grossly abused; and, further, the court has the power to impose a reasonable limitation upon the number of witnesses who shall be permitted to testify on the issue of character.

These are all familiar principles of evidence. 3 Ency. Ev. pp. 30-32; 16 Cyc. p. 1276 et seq.; State v. Potts, 78 Iowa, 656, 43 N. W. 534, 5 L. R. A. 814, and they were carefully observed in this case. The respondent had the benefit before the jury of the evidence of two of his neighbors who had known him in Rumford for the past 10 years, and their statements were not attacked by the state. Certainly he was not prejudiced because the inquiry was not extended further and two other witnesses who had known him at a remote time and in a somewhat distant place were not permitted simply to corroborate them. Their evidence at most was merely cumulative.

[8] 3. The third exception rests upon the admission of the evidence of one Voter, an undertaker and a witness for the state, as to a conversation which took place the next day

after the homicide and which has already been referred to. The testimony is as follows:

"A. I went to the lock-up to ask him what he wanted done with the remains of his wife.

"Q. What did he say?

"A. I asked him when he wanted her buried. He says, 'To-night.' I told him I couldn't do it on such short notice as that. * * * I asked him what price of casket he wanted. He said, 'Put her in a \$10 one.' I told him I had never seen one like that, we didn't have any at that price. He says, 'If you haven't got one, telephone for one.' I says, 'I don't know where you can get a casket for that price.' He says, 'Then put her in a pine box.'"

In his charge the Presiding Justice instructed the jury to disregard this testimony, but this caution was unnecessary, because the evidence was admissible as bearing upon the question of express malice, tending to show the attitude of mind at the time of shooting; its weight, of course, being for the jury.

This conversation took place 24 hours after the shooting. The respondent had had time to repent, if the deed had been done in the heat of passion. But his words indicated neither regret nor remorse, but continued hatred.

Upon the question of express malice, his heartless replies were clearly admissible. *Wilkinson v. Drew*, 75 Me. 360; *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060; *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; *Duncan v. Commonwealth (Ky.)* 12 S. W. 673.

A careful study of the whole record fails to reveal any error on the part of court or jury and therefore the entry must be:

Appeal dismissed.

Motion for new trial denied.

Exceptions overruled.

Judgment for the state.

HALEY, J. (dissenting). I do not concur in the opinion of the majority of the court, and many careful readings of the case convince me that the defendant is entitled to a new trial. My convictions are so firm that I desire to state my reasons, and enter my protest against what seems to me to be a wrong done the defendant.

At the October term, 1911, of the Supreme Judicial Court, in the county of Oxford, the respondent was found guilty of the murder of his wife on May 11, 1911. He thereupon filed a motion for a new trial, which was denied by the Presiding Justice, and an appeal from his decision was taken to this court under R. S. c. 135, § 27. Various exceptions were also reserved at the trial.

In this state different degrees of murder have been abolished, and the crime is now defined by the revised statutes as the unlawful killing of a human being with malice

aforethought, either express or implied. Chapter 119, § 1, R. S.

Manslaughter, by chapter 119, § 2, R. S., is thus defined:

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or commits manslaughter as defined by the common law, shall be punished by imprisonment for not more than twenty years, or by fine not exceeding one thousand dollars."

Upon the question of appeal, the opinion states the single question before this court on this branch of the case is whether, in view of all the testimony, the jury were warranted in believing beyond a reasonable doubt, and therefore finding, that the defendant was guilty of the crime charged against him. *State v. Lambert*, 97 Me. 51, 53 Atl. 879. That undoubtedly states the rule of law governing cases of this nature, but cases may arise which require it to be stated with some modification. The jury being judges of the facts, if the trial was conducted according to the rules of law, and there was testimony which justified the jury in believing, beyond a reasonable doubt, that the defendant was guilty, this court upon appeal has no right to substitute its judgment for the verdict of the jury; but, if the trial was not conducted according to the rules of law, if it was conducted in such a manner that testimony was admitted which was inadmissible, and did not bear upon the guilt or innocence of the accused, and the only result of which was to prejudice the jury against the defendant, if testimony was excluded which was admissible, if the justice who presided at the trial neglected to give the jury the instructions which the law requires, then the question before the court upon appeal, as this case, is, Did the defendant have a fair trial? Did the inadmissible evidence, the rulings of the court excluding evidence and admitting evidence, and the neglect to give proper instructions tend to prejudice the jury against the defendant's case, so that, but for those errors, the jury would have been justified in returning a verdict more favorable to the defendant than the verdict which was returned?

The defendant was entitled to a verdict of the jury, uninfluenced by prejudice or inadmissible testimony and to proper instructions by the court. If inadmissible testimony was introduced, which the jury was instructed to consider, and the instructions to which he was entitled were not given, then this court cannot say that the neglect to charge the jury as required by law did not prejudice them, and that, if they had disregarded the inadmissible testimony, they would have returned the verdict they did, because but for that evidence and the errors of the court they would have been justified in finding,

and might have found, the defendant guilty of manslaughter.

It is urged that the errors to which I shall refer were open to the defendant upon exceptions, and as he failed to take exceptions, or request the instructions he was entitled to as to manslaughter, this court cannot consider them upon appeal. A very plausible reply, but my answer to that is that no government in a civilized country should ask for a conviction of the crime of murder upon technicalities. To do so would be abhorrent to every principle of justice. The party accused, in fighting for his life, may be justified in relying upon technicalities, but the government never. To hold otherwise would be to make a trial for murder, a contest in which liberty for life is the stake, to depend, not upon the guilt or innocence of the accused, but upon the skill of the counsel engaged in the trial, and the court, instead of protecting the accused and seeing that he had a fair trial, would only be concerned in the points scored and the blunders made by opposing counsel, and by his neglect to give proper instructions to the jury, if counsel were negligent in claiming exceptions, and by admitting inadmissible testimony, instead of aiding the jury in the discovery of the truth and assisting them in arriving at a just verdict, would prevent a fair trial of the accused.

It was the duty of the court to exclude inadmissible testimony, to admit admissible testimony and to give proper instructions to the jury, and, although the defendant had the right of exception for the failure of the court to do so, this court, upon appeal, must look to the whole record, and, if the errors were such that the defendant was, or might have been, prejudiced, then the court cannot say he has had a fair trial, and cannot say but for such irregularities the jury might have returned a verdict of manslaughter.

Was inadmissible evidence admitted that had a tendency to and might have influenced the jury against the defendant?

Mr. Hutchins, a witness called by the government, upon cross-examination was asked if he had not been circulating stories that the defendant had killed a person in another state, and admitted that he had. The state then questioned the witness as follows:

"Q. Now, Mr. Hutchins, he has referred to this matter, and I wish you would tell the jury just what you have heard?

"Witness: Would it be admissible, your Honor?

"County Attorney: He has opened it up, if the Court please.

"The Court: You may answer.

"A. I have heard from the police of Rumford that the chief of police of the town of Rumford had a communication from the chief of police of another city asking whether Ignacio Albanes, who is known in Rumford as Joe Bill, was the same Ignacio Albanes who killed a party at Buffalo, N. Y.;

and I had previously had information from Mrs. Joe Bill herself covering this same event. She told me in the month of March, last March, that Joe Bill had told her that he had killed a woman in or near Buffalo when he was living there at Buffalo. She told me that he had described to her how he escaped from that place in the night under the cover of the woods, guided by the stars; that he hid in the woods during the daytime; that he ate roots and leaves, not daring to come out in the open; that he finally reached Albany, went to New York City, to Boston, and came to Lewiston, Me., where he was known as Joe Bill. She told me this several times, and she said that he had told her on several occasions; that he went into details more when he had been drinking than he did when he was sober. That is all I know about it. I have never mentioned it to a member of either panel nor in their presence. I have mentioned it to members of this bar and to one of the defending counsel.

"Q. When did you hear of this letter to the chief of police?

"A. Since I came to Paris to attend this term of court.

"Q. And it has been since that letter that you say you heard the chief of police had that you circulated these stories?

"A. I have told my associate counsel, Mr. Swasey, before this time; but up to that time without any corroborating evidence I have kept silent what a client had told me.

"Q. Did you take pains to hunt up this letter and see it yourself?

"A. I took pains before announcing any information on the subject to see a man who said he had read it, a selectman of the town of Rumford, L. H. Veillieux.

"Q. And you did not go to the police to find out about it?

"A. I have since consulted the chief of police, Mr. Violette, and, although I have not seen the letter, he has stated to me its contents.

"Q. You never have seen the letter?

"A. I have not."

It is not pretended that the above testimony was admissible. Even the witness protested to the court against giving it, but the court ruled that he should answer the question as to what he had heard. Not a sentence of that testimony was admissible, and, taken in connection with the testimony given by the same witness in answer to this question, "Referring to the above testimony. I ask you if you claim it is true? A. In my opinion it is"—it shows that not only was hearsay evidence admitted, but admitted to prejudice the jury against the respondent by accusing him of the crime of murder 20 years before the offense charged. Also into the scales was placed the opinion of Mr. Hutchins, a citizen of the county, that the defendant was guilty of the acts recited by him in his inadmissible testimony. It is

true no exceptions were taken to its admission, but a reading of the case shows that the court was determined that it should be admitted. Admitting it against the protest of the attorney for the defense and against the protest of the witness who gave it, its only effect could be to prejudice the jury. And this court cannot say what effect that prejudice had upon the jury in arriving at the verdict which it returned. And again I say that, although the defendant did not take an exception to the admission of this testimony, the government should not ask for a conviction of the respondent for the crime of murder upon technicalities, and this court, upon a review of the whole case, cannot say but for that testimony the jury might have arrived at the conclusion that the defendant was guilty of manslaughter, as claimed by his counsel, and not guilty of the crime of murder.

The opinion of the court sets forth fairly the claim of the government as to the commission of this crime. Afterwards, in different parts of the opinion, it refers to some things claimed by the defense; but, in order to determine whether the defendant had a fair trial, it is well to also consider the position of the defense.

The defendant was a native of Italy, and had been in this country since 1887, and in this state about 20 years, 10 of which were spent in Lewiston and 10 in Rumford. His domestic relations had been unpleasant for some months because of his wife's alleged relations with one Nicola Ballistiri, and the respondent had brought a libel for a divorce against her on the ground of adultery, returnable to the May term of the Supreme Judicial Court for Oxford county. On the 11th day of May a hearing was had in the court on the wife's motion for a continuance of the case to the October term; the motion being resisted. The justice presiding granted the continuance. The defendant claimed that he had received two letters from his wife's uncle in Italy, to whom he had loaned money; that he was unable to read them, and that they were finally translated to him at about the time of the hearing on the motion for a continuance of the libel for a divorce, and that the letters were such as to arouse his passion; that the respondent had taken the children from their mother and sent them to an asylum in Portland on account of the mother's conduct; that an infant child was not taken with the other children, but left in the same house with the respondent and his wife, although they did not live together as husband and wife; that at about the same time the letters from the uncle in Italy were translated, the respondent also had the possession of and was informed of the contents of a letter from the wife's lover Nicola, and of a letter from his wife to Nicola; that immediately after the hearing on the divorce matter

the respondent went home; that his wife got dinner for him and his hired man, and the wife, having been informed that the case had been continued, tantalized and taunted him with the fact, saying, "I told you I would beat you," and that the respondent replied to her, "Do your business and nobody say anything now," but that she kept on laughing and said, "I beat you any time I want to," and that she continued laughing and taunting him, telling him that she could beat him. Then, finding that that did not arouse him, she said: "You see that baby? That no belong to you. It belong to Nicola. I going to put you on the dirt before you get through, and after I put you on the dirt I going to marry Nicola." The respondent claims that at those words, with what he knew of his wife's conduct, the letters of her uncle, Nicola's letter to her and her's to Nicola, he lost control of himself—aroused by the taunt that the child that he had held in his arms and caressed as his own child was not his own, but was the fruit of an illicit love of his wife's and that then, in the heat of passion, he shot his wife. This is the position of the defense.

If it is true, and if the jury were not satisfied beyond a reasonable doubt that it was not true, then it needs no citation of authorities to show that the killing was not murder, but manslaughter.

After the people arrived at the house, Mrs. Bill was informed that she was dying, and was asked if she wanted to make a statement, and, in answer to questions put to her, stated that the defendant shot her three times.

The state then offered evidence of other statements made by her after her statement that the defendant had shot her three times; and, under the ruling of the court that "any statements she made while knowing that she was at the point of death are admissible," the witness was allowed to testify "that she said that lawyer Hutchins telephoned her at noontime that Joe Bill was mad and was going to kill her, and was going up to the house, and for her to get out of the house as soon as she could, and she said she was going just as soon as she could get some clothes together." This was not in the presence of the accused, and was the introduction of threats by the defendant that no one had testified to his making, and was not a part of the declaration connected with the homicide, and was clearly inadmissible.

"The declarations of the deceased are admissible only to those things to which he would have been competent to testify if sworn in the case." Greenl. Ev. § 159.

"But courts have refused to extend the rule beyond the cause and circumstances of death." State v. Wood, 53 Vt. 560.

"Dying declarations, when they relate to former distinct transactions and embrace facts or circumstances not immediately con-

nected with the declarant's death, are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify." *State v. Baldwin*, 79 Iowa, 714, 45 N. W. 297.

"The rule is well settled as to the class of declarations admitted as dying declarations. Declarations of facts stated by the deceased must be such as he would be permitted to testify to if a witness." *Hall v. State*, 132 Ind. 317, 31 N. E. 536.

Under the above authorities, the statement by the deceased of her conversation with lawyer Hutchins and the threats of her husband and of what she was about to do were inadmissible, and prejudiced the defendant's case.

It is urged that the inadmissible testimony did not work prejudice to the defendant, as the other evidence was sufficient to justify the jury in returning the verdict they did. In *State v. Westfall*, 49 Iowa, 328, which was a case where the defendant was convicted of murder in the second degree, the court disposes of the same objection in the following language:

"The Attorney General does not contend with great confidence that the evidence was admissible, but he insists that its admission did not work prejudice to the defendant, for the reason that the other evidence, apart from this now under consideration, was amply sufficient to authorize the verdict. But his position is unsound. Without the illegal testimony the jury may not have found the verdict for the state. This testimony may have made the complement of proof which satisfied their minds. In that case the defendant would have been convicted upon illegal evidence. This court cannot determine what quantity of evidence was lawfully sufficient to authorize the verdict."

In the absence of the jury, counsel argued the question of the admissibility of evidence charging the deceased with adultery, and the court ruled that, "under the authorities, the testimony must be confined to acts occurring within one, two, three or four days prior to the homicide."

If acts showing the adultery of defendant's wife were admissible, as the court held they were, the ruling limiting such acts to within four days of the time of the homicide was error; it being the claim of the defendant that his wife's past conduct and action on the day of the murder so far aroused anger that, in the heat of passion, he shot her, and if evidence of her adultery within four days of the shooting was admissible as tending to show how, with her taunts, he might have become so angry as to lose control of himself, evidence of her adultery five days before was admissible for the same purpose, and the rule of law is that her conduct for a long time prior to the homicide, if brought home to the knowledge of the defendant, was proper to be proved,

and to be considered by the jury in connection with the other facts as showing that he might, as claimed by himself, have lost control of himself; that all her acts, together with her taunt in regard to the parentage of the child, took from him his reason, and the jury had the right to consider all that evidence, and the limiting of the acts of adultery of the defendant's wife to four days before the homicide cannot be defended upon any rule of law.

The defendant admitted the killing, and claimed that his wife's conduct in the past, the letter from her uncle, her letter to her lover that day translated to him, her language after dinner taunting him and informing him that his supposed child was that of her paramour, altogether was such that it aroused his passion to that extent that he lost control of himself, and in the heat of passion, caused by her acts and her language, he, without malice, caused her death, and the jury, if they believed his statement of the tragedy, would have been justified in returning a verdict of "guilty of manslaughter."

No instruction was given by the court to the jury in regard to manslaughter. All that the court said was: "The defendant, however, through his able counsel, admits the killing, but says that it was manslaughter as defined by the statute which has been read to you (not by the court); that it was the unlawful taking of a human life in the heat of passion and on sudden provocation, without malice aforethought, either express or implied, and he urges the statute of this state in his plea that it was manslaughter instead of the higher degree, on the ground that while a voluntary manslaughter occurs where one unlawfully kills intending to kill, but under such circumstances as he has described, the law, in its tender mercies for the frailties of human kind, mitigates the crime from murder to manslaughter."

It was the duty of the court to so fully instruct the jury upon every degree and kind of crime of which the accused might be convicted under the indictment as to give him the benefit of having the evidence considered by the jury with full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict might be returned against him.

In *State v. Meyer*, 58 Vt. 457, 3 Atl. 195, the defendant was tried on an indictment for murder. The defendant, in the fifteenth request, asked the court to charge: "If the jury should find that the respondent killed Herman Krause, in the absence of any proof of malice or premeditation, they are at liberty to find him guilty of murder in the second degree, manslaughter, or to acquit him." The court so instructed the jury, and also instructed them as to what constituted murder in the first degree, and the statement of the statute that all other kinds of murder

should be murder in the second degree, and telling them what was the punishment for murder in each degree and the punishment for manslaughter, and then explained to the jury what constituted the crime of murder; also what constituted the crime of manslaughter, but did not explain to the jury what constituted murder in the second degree, or wherein murder in the second degree differed from murder in the first degree. The court say: "The reading of the statute declaring what was murder in the first degree, and that all other kinds of murder shall be murder in the second degree, was not a sufficient explanation of the two degrees. Upon an indictment for murder, where the jury may convict the respondent of murder in the first degree, and second degree, or manslaughter, the state, to convict of murder in the first degree, must first overcome by evidence the presumption of innocence that always shields the respondent until the contrary is proved beyond a reasonable doubt, and, when that is overcome, the state must next overcome every reasonable doubt that the crime which the respondent has committed is not manslaughter, nor murder in the second degree, advancing from the lesser to the greater crime, the presumption to be first in favor of innocence, and then of the lesser crimes in their order. And it was the duty of the trial judge to so fully instruct the jury upon every degree and kind of crime of which the respondent may be convicted under the indictment as to give the respondent the benefit of having the evidence considered by the jury under a full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict may be returned against him, so that he may have the benefit of every reasonable doubt that may arise, both as to the commission of crime and as to the kind and degree of it.

* * * The respondent was entitled to a full explanation to the jury of what constituted each degree of murder, and the distinguishing characteristics of each. This the learned judge wholly neglected to give, and, as this neglect and omission might have been prejudicial to the respondent, it was error."

In this case the respondent was entitled to a full explanation of what constituted manslaughter under the laws of Maine, and, as the learned judge wholly neglected to give such instruction, his neglect and omission may have been prejudicial to the respondent, and it was error.

The above case was before the court upon exceptions, but, as the fifteenth request was given in the language that it was asked for, the court must necessarily have believed that it was the duty of the court to go further and define the various kinds of crime of which the defendant might have been convicted, and the fact that the case was taken up on exceptions does not change the rule of

law in regard to the duty of the court to instructing the jury, and the right of the defendant to have proper instructions.

It is stated in many cases that the defendant upon appeal cannot take advantage of the admission of illegal testimony, the excluding of the legal testimony, or neglect by the court to give proper instructions unless he took exceptions at the time of the admission or exclusion of the testimony, or requested the proper instruction and excepted to the refusal of the court to give the instruction. It should be so when the evidence admitted, excluded, or instruction not given does not materially affect the case; technicalities which do not go to the merits of the case may well be considered as waived, unless raised at the proper time; but inadmissible testimony, or the exclusion of legal testimony, that goes to the merits of the case, or neglect to give the instructions that the defendant is entitled to, should not be within that rule, and the defendant should have the right upon appeal to take advantage of errors that affect the merits of his case.

In *State v. Beal*, 82 Me. 284, 19 Atl. 458, the defendant was convicted of murder in the first degree, and the case was before this court upon appeal. The opinion states: "At the bar a new trial was urged solely upon the ground of evidence newly discovered. The motion was not pressed for any other cause; nor does the court, after a careful consideration of the whole evidence, see any good reason why it should have been. The trial seems to have been a fair one. The charge of the justice was plain and easy to be understood by the jury. * * * The court is of opinion, after a careful consideration of the whole case, that no just cause has been shown why the appeal should be sustained."

By the opinion it seems that the court carefully examined the whole case, and found no errors. They found that the defendant had a fair trial, which means a trial where illegal testimony was not admitted, when legal testimony was admitted. They found the charge to the jury plain and fair and covered the case, and included the instructions the defendant was entitled to as a matter of law. There are many well-considered cases that hold that the court upon appeal will consider the errors of which the defendant complains, and which are in line with the opinion in *State v. Beal*, supra.

In *Conner v. State*, 23 Tex. App. 378, 5 S. W. 189, held: "The failure to define murder of the second degree in a case where the jury, upon the evidence, might have found the defendant guilty of the less offense, will be cause for reversal, whether the instructions were asked or not."

In *People v. Rodawald*, 177 N. Y., on page 428, 70 N. E., on page 7, the court say: "Only errors raised by exception require a

new trial, and it is only when we are satisfied the verdict was against the weight of evidence, or against law, or that justice requires a new trial, that we are permitted to reverse, whether exceptions have been taken or not in the court below." *People v. Tobin*, 176 N. Y. 278, 68 N. E. 359.

In *Sutton v. State*, 2 Tex. App. 342: "But in view of the evidence adduced on the trial, and bearing in mind the nature of the defense necessarily relied on, we are of the opinion the rights of the accused were prejudiced by the failure of the court to charge the law of self-defense otherwise than with reference to threats against the accused. Proper instructions on this subject were required by the evidence as a part of the law of the case which the judge should have given, whether asked or not"—citing *Marshall v. State*, 40 Tex. 200.

In *Honesty v. Commonwealth*, 81 Va. 283: "It is well said that the accused has a right to a full and correct statement by the court of the law applicable to the evidence in the case, and that any misinstruction by the court in point of law or matters material to the issue is ground for a new trial."

In *Potter v. State*, 85 Tenn. 88, 1 S. W. 614, the defendant was tried for the crime of murder, and it was assigned as error that the court failed to instruct the jury in regard to threats of the deceased communicated and uncommunicated to the defendant. For the state it was urged that this omission was not error:

First: "Because the finding of the jury that the offense was murder in the first degree negatives the idea that they considered the act as committed under any other circumstances, justifiable, or excusable, and the facts sustained the verdict."

Second. "That no instruction on this point was asked, and therefore need not have been given."

The court say: "As to the first of these objections, it is sufficient to say that a verdict cannot negative the existence of a defense the jury was not properly instructed to consider, and we are not satisfied that the facts sustain a verdict which is not the result of the deliberate judgment of the jury after a full, fair, and proper exposition of the law in a case involving the life of the citizen or his hopeless consignment to servitude and infamy. In such case this court would not stand upon any too nice technicalities of requiring the defendant to have demanded any instruction essential to a fair trial, which the law is supposed to guarantee to him without a demand, in order that he should be entitled to it. It is the duty of the circuit judge to charge the law applicable to the evidence, and to give the defendant the benefit of it, and not decide for himself

the case he supposes to be made out and apply the law to such supposititious case and leave to the jury only that of decision and to us to speculate on its effect and the possible injury, or want of injury, done the defendant. In this case it can be clearly seen that the omission to charge the law is as vital an error as it would have been to have charged it incorrectly, and we hold that the defendant was entitled to have it given without demand. We by no means intend to intimate that such is, or is to be the rule in ordinary cases, or in less vital omissions: but, where life is to be taken, or devoted to punishment and the omission as serious as the affirmative injury of an erroneous charge, the verdict will not be allowed to stand."

People v. Barberi, 149 N. Y. 256, 43 N. E. 635, 52 Am. St. Rep. 717: "In reviewing a capital case, we must be satisfied that a fair trial has been had, and when we see that the case has been tried and submitted to the jury upon an erroneous theory, prejudicial to the accused, and which had a controlling influence upon the trial and the results, we ought to regard the principle which has been decided, rather than the concrete form in which the question arose and became a practical one at the trial, and should not be astute to seek for some technical ground not urged upon the trial or here to sustain the ruling. * * *

"Those portions of the charge are also fairly covered by the exceptions, and, even if they were not, an erroneous statement of the law, or improper comments upon facts, or the evidence bearing upon them, may be reviewed and corrected in this court in a capital case without exceptions, when it can be seen that they operated to the prejudice of the accused. * * * From an examination of the whole case we are impressed with the conviction that the defendant has not had a fair trial, and that it should be submitted to another jury to the end that all competent proof may be given in the regular and orderly way, and all the questions presented in that temperate and dispassionate manner which is so important in the trial of a capital case, and so essential to the protection of all the rights of the accused."

Also see *State v. Westfall*, supra; *State v. Meyer*, supra.

To me it seems that an examination of the case shows that the defendant did not have a fair trial; that there was error in admitting testimony, in excluding testimony, and in the neglect to give the instruction to the jury that the defendant was entitled to: that those errors were prejudicial to the defendant; and that this court can and should review and correct them upon this appeal, and grant the defendant a new trial.

TURGEON v. BEAN.

(Supreme Judicial Court of Maine. June 6, 1912.)

1. **BANKRUPTCY (§ 392*)**—“ARREST”—CIVIL ARREST—EXEMPTIONS—BANKRUPTCY.

Bankruptcy Act July 1, 1898, c. 541, § 9, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3425), which provides that a bankrupt shall be exempt from civil arrest, should be construed to exempt from arrest made after a bankruptcy petition is filed, and not to apply to an arrest on civil process properly made before filing of the petition (citing 1 Words and Phrases, 501).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 619-622; Dec. Dig. § 392.*]

2. **FALSE IMPRISONMENT (§ 8*)**—ILLEGALITY OF IMPRISONMENT—RES ADJUDICATA.

Release of a bankrupt from civil arrest, made before the petition in bankruptcy was filed, on habeas corpus proceedings before the United States District Court, is conclusive, in a subsequent action for false imprisonment, on the question of illegality of bankrupt's imprisonment while the bankruptcy proceedings were pending, where notice of the habeas corpus hearing was served on defendant creditor and his attorney of record, and the release was resisted, but no appeal was taken.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68-73; Dec. Dig. § 8.*]

Report from Supreme Judicial Court, York County.

Action by Joseph Turgeon against Harry E. Bean. On report. Judgment for plaintiff.

Action on the case to recover damages for an alleged false imprisonment of the plaintiff in the common jail at Alfred, in the county of York. Plea the general issue, with a brief statement alleging, in substance, that the plaintiff was arrested and committed to jail on a process issued by a disclosure commissioner upon an execution in favor of the defendant. At the conclusion of the evidence, it was agreed that the question of liability should be determined by the law court on report of the evidence, and that a special finding as to damages in case of liability be submitted to the jury. A special finding was then rendered by the jury, assessing damages in favor of the plaintiff in the sum of \$298. It was then agreed that if the law court held that the defendant was liable that judgment should be for the plaintiff for \$298 and costs; otherwise judgment should be for the defendant.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Cleaves, Waterhouse & Emery, of Biddeford, and Ruggles S. Higgins, for plaintiff. Louis B. Lausier, for defendant.

CORNISH, J. [1] This is an action on the case for false imprisonment. The plaintiff was arrested on July 16, 1910, on a process issued by a disclosure commissioner upon an execution in favor of the defendant on a debt provable and dischargeable in

bankruptcy, and was committed to jail. On July 18, 1910, upon his own petition, he was duly adjudicated a bankrupt; but the record does not show that he has ever obtained his discharge. He was held in jail, the defendant paying the necessary charges therefor, until November 24, 1910, when he was released by the United States District Court upon habeas corpus proceedings brought by himself. *Turgeon v. Emery* (D. O.) 182 Fed. 1016. This suit followed. It is admitted that the arrest and commitment of July 16, 1910, and his detention until July 18, 1910, when his petition in bankruptcy was filed, were legal; but the plaintiff contends that his detention after that time was illegal. This raises the question whether mere adjudication in bankruptcy entitles a bankrupt to release from arrest, made upon a provable and dischargeable claim prior to the filing of petition, and that is a question of statutory construction.

Were this question open in this case, we would have no hesitation in holding that mere adjudication in bankruptcy does not, ipso facto, entitle the bankrupt to release under such circumstances.

The obvious purpose of the bankrupt law, speaking in general terms, is the uniform and equal distribution of a bankrupt's assets among his creditors. Its benefits are twofold: On the one hand, the creditors share equally in the payment or partial payment of their claims, except so far as matured liens and certain preferences are concerned; and, on the other, the debtor, in the absence of fraud, is relieved from the harassment of obligations that he cannot meet.

Under the Constitution and laws of the United States, the federal courts are given exclusive powers in matters of bankruptcy, and in the enforcement of these powers their jurisdiction is supreme. These powers, however, are statutory in their origin, and in interference with the processes of the state courts is not to be presumed. As Judge Story said: “Certainly the courts of the United States have no authority to intermeddle with state process, except in cases where, either expressly or by necessary implication, such an authority is given by law. The state sovereignty is supreme within its own sphere; and the process thereof must have full effect and operation until displaced by some other constitutional authority, which controls or qualifies it.” *In re Cheney*, Fed. Cas. No. 2,636.

A decree in bankruptcy affects the bankrupt's property, but not his person; it dissolves attachments made within a certain prescribed time, and vests in the assignee or trustee all the bankrupt's property, not exempt. An arrest on execution creates neither an attachment nor a lien. It simply affords the creditor a possible method of obtaining payment; but all the unexempted

property passes from the bankrupt debtor, whether he is under arrest or not. Under the Bankruptcy Act of 1841 (Act Aug. 19, 1841, c. 9, § 5 Stat. 440), which contained no provision as to immunity from arrest during the pendency of proceedings, the court uniformly refused to grant a release on habeas corpus to a bankrupt who had been arrested before petition filed, but had not obtained his discharge. *In re Hoskins*, Fed. Cas. No. 6,712; *Ex parte Rank*, Fed. Cas. No. 11,566. *In re Comstock*, Fed. Cas. No. 3,073; *In re Cheney*, Fed. Cas. No. 2,636.

Judge Story, in the case last cited, in a characteristically able and exhaustive opinion, met and answered all the contentions raised in favor of the petitioner, and, upon the legal effect of merely filing a petition in bankruptcy, said: "Now, upon what ground can it be said, in this case, that the bankrupt has a clear title to be released from imprisonment? He has not as yet obtained any certificate of discharge from the debt, or his other debts. Non constat, that he ever will obtain such a certificate. If he never does obtain it, he must still remain liable for the debt, and be bound by the execution to satisfy it. How, then, can he now be entitled to be discharged from imprisonment under the execution, since the debt is not satisfied and discharged, and it rests in contingency whether it ever will be by any proceedings under the bankruptcy." This decision is cited with approval in *Craggin v. Bailey*, 23 Me. 104.

The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, § 14 Stat. 5) provided that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." Section 26.

The federal courts in a long line of decisions have held in the most emphatic language that this section did not relieve from arrest one who was legally in custody upon civil process at the time the petition in bankruptcy was filed. *In re Walker*, 1 Low. 222, Fed. Cas. No. 17,060; *Hazelton v. Valentine*, 1 Low. 270, Fed. Cas. No. 6,287; *Minon v. Van Nostrand* (D. C.) 1 Low. 458, Fed. Cas. No. 9,642; *Id.* (O. C.) 1 Holmes, 251, Fed. Cas. No. 9,641. See, also, *Brandon Nat. Bank v. Hatch*, 57 N. H. 460; *Stockwell v. Silloway*, 100 Mass. 287; *Hussey v. Danforth*, 77 Me. 17.

The Bankruptcy Act of July 1, 1898, c. 541, § 9, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3425) provides that "a bankrupt shall be exempt from arrest upon civil process, except," etc. We are unable to discover any essential difference between this section and section 26 of the act of 1867, before referred to. Both are designed to cover the same situation; that is, immunity from arrest made after petition filed. In one case the prohibi-

tion is expressed affirmatively, in the other negatively; but the meaning of both is the same. So, too, general order No. 27, established by the United States Supreme Court in connection with the act of 1867, covers the same ground as No. 30 (89 Fed. xii, 32 O. C. A. xxx), in connection with the act of 1898. Both provide for the production of the bankrupt, upon habeas corpus, before the court to facilitate the bankruptcy proceedings, and his restoration to custody, if arrested before proceedings begun, and his release, if arrested after, upon a provable and dischargeable debt.

Moreover, in construing the act of 1898, no little weight should be given to the fact that the exemption from arrest clause in the act of 1867 was frequently and clearly interpreted by the courts to be confined to subsequent arrests; and when this clause was placed in the act of 1898 in substantially the same language Congress must be presumed to have intended to adopt the former language as interpreted by the court. Had it wished to extend it beyond the limit already placed upon that section, and to release the bankrupt from detention as well as arrest, it should have expressed itself in clear and unmistakable terms, leaving nothing to inference. In other words, the act of 1898 is to be construed in the light of the act of 1867, plus the decisions thereunder.

In the first case arising under the act of 1898, *In re Claiborne* (D. C. N. Y. 1901) 109 Fed. 74, § 9, was construed as had been section 26 of the act of 1867; and, following the decisions before cited, Judge Browne refused the petitioning bankrupt a discharge from custody. In the second case, *People ex rel. Taranto v. Erlanger* (D. C. N. Y. 1904) 132 Fed. 883, the opposite view was taken by Judge Holt, and the debtor was discharged. The opinion seeks to find a distinction between the two sections, and is based upon the idea that detention under an arrest made prior to bankruptcy is equivalent to an actual arrest made subsequent thereto. This definition of the term "arrest" is not only novel, but is in conflict with the interpretation of the word as given by text-writers and courts. *Bouvier*, Law Dic. "Arrest"; *Jacobs*, Law Dic. "Arrest"; *Words and Phrases*, vol. 1, p. 501; *French v. Bancroft*, 1 Metc. (Mass.) 502. To give section 9 the interpretation contended for would make it read, "A bankrupt shall be exempt from arrest upon civil process made after bankruptcy proceedings begun, and from detention under arrest on such process made prior thereto." This is further than Congress has ever seen fit to go; and this result seems to be reached by the court, in the *Taranto* Case, by judicial legislation, rather than by judicial construction.

The third case was that out of which the case at bar arose, *Turgeon v. Emery* (D. C. Me. 1910) 182 Fed. 1016, where the court, without discussing the question, accepted the

Taranto decision in preference to the Claiborne, saying: "I am constrained to believe this decision follows the spirit and meaning of the bankrupt law and should be followed. I make this decision with some hesitation, after so eminent an authority as Judge Addison Browne, in the Claiborne Case, has given a different construction of section 9 of the Bankrupt Act, taken in connection with general order 30."

Upon the fundamental legal proposition, therefore, the federal courts are at variance; but upon both reason and authority we think the construction placed upon the statute in the Claiborne Case is the sound one, and that the discharge, under such circumstances, should be refused.

[2] It is for that reason that we have devoted more space to this question than the situation would otherwise warrant, because, whatever our view upon this point as an academic legal proposition, we feel that in the case at bar it is *res judicata*; a court of competent jurisdiction, with the same parties before it, having in fact granted a discharge to this plaintiff. *Turgeon v. Emery*, 182 Fed. 1016, supra. By that decision this court feels itself bound in these proceedings.

"It is an elementary principle of high importance in the administration of justice that the judgment or decree of a court of competent jurisdiction is final as to the subject-matter determined, and that it cannot be opened before any court of concurrent jurisdiction." *Emery v. Goodwin*, 13 Me. 14, 29 Am. Dec. 475. "It may also be laid down as a general principle that a prior decision is conclusive upon all matters and issues which were in fact there tried and decided in all subsequent litigation between the same parties or their privies, even in a suit which is not for the same cause of action." *Corey v. Independent Ice Co.*, 106 Me. 485, 76 Atl. 930, and cases cited. The case at bar falls within these elementary principles. The issue in the District Court was the legality of *Turgeon's* detention in jail. Notice of the hearing was served on the creditor, Bean, and on his attorney of record, by order of court, and the counsel was present at the hearing and resisted the discharge. No appeal was taken from the decision, although appeal would lie. Under these circumstances, the question of illegal restraint is *res judicata*. It was determined by a court of competent jurisdiction, after due notice to all parties in interest, and the proceedings were regular. By that determination an appeal from the defendant must abide. It is true that in habeas corpus proceedings the doctrine of *res judicata*, at common law, does not apply, in so far as a refusal to discharge on one writ is no bar to the issuance of a new writ. *Ex parte Partington*, 13 M. & W. 679; *Cox v. Hakes*, 15 App. Cas. 506; *Bradley v. Beetle*, 153 Mass. 154, 26 N. E. 429. But it is equally true

that a discharge of a prisoner stands on a different footing, and that it constitutes a determination that at the time he was improperly restrained, and cannot be rearrested without some new circumstance to authorize the arrest which did not exist when the discharge was granted. 21 Cyc. p. 349. *McConologue's Case*, 107 Mass. 154, 171.

In *Castor v. Bates*, 127 Mich. 285, 86 N. W. 811, 89 Am. St. Rep. 471, this precise question arose; and it was held that judgment for the plaintiff in habeas corpus proceedings, in which the person causing the arrest appeared and was heard, is *res judicata* in an action by such plaintiff against such person for false imprisonment.

The liability of the defendant having, therefore, been already determined, final judgment must be rendered for the plaintiff in the sum of \$298 and costs, in accordance with the special finding of the jury on the question of damages.

So ordered.

PARKS et al v. GRIFFITH & BOYD CO.
(Court of Appeals of Maryland. Feb. 28, 1912.)

1. PLEADING (§ 217*)—DEMURRER—OPENING RECORD.

In passing upon a general demurrer, the court must inspect the whole record up to the first fault, and give judgment against the party committing the first material error if the fault be one of substance.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540–548; Dec. Dig. § 217.*]

2. SALES (§ 8*)—CONTRACT—OPTION.

A contract, consisting of an offer to sell various grades of fertilizer in different quantities and at different prices, provided a certain total quantity were taken, and of an acceptance stating that the offer was "accepted upon terms and conditions stated in this contract," being indefinite, uncertain, and incomplete because it did not specify the grades desired or the amount of each, was not enforceable against the buyers, but was a mere option to be exercised before they could be bound.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 6–19; Dec. Dig. § 3.*]

3. APPEAL AND ERROR (§ 1170*)—REVERSAL—DIFFERENT COUNTS.

Where six counts of a declaration are for the recovery of a small debt and are good, and the seventh count is for damages for breach of a contract and is bad, and the amount of the verdict shows that damages have been allowed under the seventh count, Code Pub. Gen. Laws 1904, art. 5, § 17, providing that no judgment or verdict shall be reversed if there be one good count in the declaration, will not prevent a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540–4545; Dec. Dig. § 1170.*]

4. PLEADING (§ 221*)—DEMURRER—EFFECT OF SUSTAINING.

A bill of particulars as to the six common counts of a declaration alleged indebtedness merely for fertilizer shipped and delivered, and made no reference to a contract relied on in the seventh count, and did not declare that the sale and delivery were under this

contract. Defendants filed a plea which by its terms was directed solely to the contract, though it did not expressly state that it was a plea to the seventh count, and to this plea the plaintiff demurred. Held, that the plea being to the seventh count alone, the court, by sustaining the demurrer, declared the seventh count to be good.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567; Dec. Dig. § 221.*]

5. PLEADING (§ 88*)—SUFFICIENCY.

It is not necessary that a plea, to be a plea to one count only of the declaration, shall expressly state that it is a plea to such count.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 181-183; Dec. Dig. § 88.*]

Appeal from Circuit Court, Talbot County; James A. Pearce, Wm. H. Adkins, and Philemon B. Hopper, Judges.

Action by Griffith & Boyd Company against Rufus F. Parks and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE BURKE, THOMAS, PATTISON, and STOCK-BRIDGE, JJ.

R. Groome Parks, for appellants. Hope H. Barroll and Frank Gosnell, for appellee.

PATTISON, J. The appellee company, engaged in the manufacture of fertilizers in the city of Baltimore, in June, 1910, submitted to the appellants, dealers in fertilizers, of Chestertown, Md., the following written proposition:

To Messrs. R. F. Parks & Son, Post Office, Chestertown: County, Kent; State, Md.: We will sell you the following named quantities of fertilizers during fall season at prices and terms named below:

Tons.	Per Ton.	Bags.
Bone Meal.....	\$23.	200
Soft Ground Bone.....	24.	167
Special Guano.....	22.	"
Ammoniated Bone Phos.....	19.	"
Fish Bone & Potash.....	19.	"
Royal Potash Guano.....	18.	"
Harvest Queen.....	17.50	"
Cereal Plant Food.....	16.	"
Valley	15.25	"
Peerless	13.50	"
600 Soluble 12-5 Mixture.....	15.80	"
XX Potash Mixture.....	14.40	"
Standard Potash Compound.....	13.75	"
Special Alkaline Bone Mixture.....	14.30	"
Special Grain Guano.....	12.00	"
H. G. Acid Phos. 16%.....	12.60	"
H. G. Acid Phos. 14%.....	11.60	"
Original Superphos.....	11.10	"
Gem Phosphate.....	10.50	"
Dissolved Animal Bone.....	22.00	"

And as much more as may be mutually satisfactory at the above price, f. o. b. Cars or Vessel at Baltimore, Md.

It is understood that accounts, notes or money arising from the sale or use of these fertilizers shall be the property of the company until they shall have received full payment for all fertilizers shipped you.

To be shipped during fall '10 route M. D. & V. Ry. Co.

Shipping Point, Chestertown; County, Kent; State, Md.

Terms cash Dec. 1st, less 5%.

You agree to handle our goods exclusively.

Respectfully yours,

Griffith & Boyd Co.,
Per T. A. Noble."

Attached to and immediately preceding the above proposition is found in writing the following provision: "All agreements are contingent upon strikes, fires and other delays unavoidable or beyond our control, and are subject to the approval of Griffith & Boyd Co."

To the above proposition the appellants replied as follows: "To Messrs. Griffith & Boyd Co., Baltimore, Md. Your offer hereby accepted upon terms and conditions stated in this contract. R. F. Parks & Son. Chestertown, Md., June 17th, 1910."

In the record we also find the following letter dated as of the date of the letter of acceptance: "Baltimore, Md., 6/17/10. Messrs. R. F. Parks & Son, Chestertown, Md. —Gentlemen: In consideration of your pushing the sale of our goods during the fall season we will allow you the following rebates from prices named you in contract No. 2,013 bearing even date, namely, \$1.50 per ton on all ammoniated goods, except bone meal, soft ground bone and dissolved animal bone, \$1.00 per ton on dissolved animal bone; and on alkaline and acid goods we will meet Martin & White Co. prices. Very respectfully, Griffith & Boyd Co., per Noble."

On the 12th of December the appellee brought suit by titling against the appellants in the circuit court for Kent county, and on the 12th of February following filed its declaration, containing six common counts and two special counts, each based upon the said written contract; that is, upon the written offer and acceptance heretofore given. Subsequently the case, at the instance of the appellee, was removed to the circuit court for Talbot county for trial, in which court the declaration was amended. The six common counts were permitted to remain therein as in the original declaration, the eighth count was omitted therefrom, and the seventh count, which is a special count upon the alleged written contract, was amended so as to include the above letter of the appellee to the appellant dated June 17, 1910, which did not appear in the original declaration.

In the seventh amended count the above contract is set out in totidem verbis, and in the assignment of its breach the declaration states: "The plaintiff offered itself ready and was ready and willing at all times, during the life of said contract, to carry the same out according to its terms and to deliver the goods at and for the prices named; but the defendants refused to accept the goods or to pay for same whereby the plaintiff suffered great loss and damage."

Before pleading to the amended bill, the appellants demanded a bill of particulars as to the first six counts. This was furnished by the plaintiff, which shows an alleged indebtedness from the defendant to the plaintiff of \$70.21, for guano sold and delivered by the plaintiff to the defendant, the items thereof being dated June 21, 24, and 27, 1910.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

respectively. The defendant then filed the following pleas: "The defendants, by Lewin W. Wickes, T. Hughlett Henry, and R. Groome Parks, attorneys, for pleas to the plaintiff's amended declaration say: (1) That they never promised as alleged. (2) That they never were indebted as alleged. (3) That the defendants paid the account filed by the plaintiff in compliance with the defendants' demand for a bill of particulars on the first six counts of the plaintiff's declaration. (4) That at the time the alleged written contract was executed, the plaintiff knew that defendants had contracted with and were to handle the goods and fertilizers of Martin & White Company, and that it was understood between the plaintiff and defendants that the defendants were to handle the goods and fertilizers of Martin & White Company and were not to handle the goods of the plaintiff exclusively." To which the plaintiff replied by joining issue on the first and second, by traversing the third, and demurring to the fourth. The demurrer to the fourth plea was sustained, and upon a joinder of issue on the third replication the case was heard before a jury, which rendered a verdict in favor of the plaintiff for the sum of \$1,861.79.

The docket entries disclose that the plaintiff and defendant each offered a number of prayers and that exceptions were noted by the defendants to the plaintiff's granted prayers. These prayers, however, are not in the record, nor does it contain the evidence offered. Therefore the sole question submitted to us on this appeal is one of pleading, which was raised by the demurrer of the plaintiff to the defendants' fourth plea, which demurrer, as we have stated, was sustained.

[1] It is a well-established rule of law that, whenever in the progress of a case a demurrer is interposed to any pleading, it is the duty of the court in passing upon it to inspect the whole record, and mounting up to the first fault, to give judgment against the party committing the first material error, if the fault be one of substance. *Poe*, vol. 1, § 706; *Eakle v. Smith*, 27 Md. 480; *Pres. Man. & Co. of the Wash. & Balto. Turnpike Road v. State*, 19 Md. 239; *Gusdorff v. Duncan*, 94 Md. 160, 50 Atl. 574; *Osceola Tribe No. 11 I. O. R. M. v. Schmidt*, 57 Md. 106; *State, to Use of Buckey, v. Culler*, 18 Md. 430. Following this rule, we will inspect and carefully examine the plaintiff's declaration to ascertain if, by the above test, it is legally sufficient.

As the seventh count of the declaration is based upon the alleged written contract, created as it is contended by the written offer of the plaintiff and the acceptances thereof by the defendants, we will first inquire into the validity and binding effect of such alleged contract.

In the case of *Wheeling Steel & Iron Co. v. Evans*, 97 Md. 305, 55 Atl. 373, which was

an action of trespass on the case, instituted by the Wheeling Steel & Iron Company against Evans for breach by the latter of his alleged warranty of the authority of William J. Driscoll to contract on behalf of the Evans Marble Company for the purchase of 100 tons of tack plate for the manufacture of tacks, the Evans Marble Company on September 13, 1899, wrote the Wheeling Steel & Iron Company to quote its best price on 100 tons of tack plate from 12 to 17 gauge. The latter company on September 15th replied: "We quote you for one hundred tons tack plate * * * Nos. 12 and 14, \$2.72, f. o. b. Wheeling. No. 15 and 16 \$2.80. * * * We make this quotation subject to wire reply not later than Monday, the 18th inst." On the 20th the Marble Company replied thereto by telegram, saying: "Enter our order for 100 tons tack plate if at prices quoted on 15th, specifications to follow." To which telegram the Wheeling Steel & Iron Company replied on the 22d of September, saying: "We have your telegram of the 20th inst., and have entered your order for 100 tons of tack plate at prices quoted by us on the 15th inst." Thereafter the Marble Company refused to take the tack plate, and the suit, as stated, followed. In speaking of this alleged contract, created by the correspondence above given, Judge McSherry, in delivering the opinion of the court, said: "The letter of September the fifteenth quoted the prices of four grades of tack iron, viz., Nos. 12 and 14 at \$2.72 per one hundred pounds, and Nos. 15 and 16 at \$2.80 per one hundred pounds; whilst the telegram of the twentieth simply directed the Steel & Iron Company to enter the Marble Company's order for one hundred tons of tack plate, 'specifications to follow.' No specifications—that is to say, no designation of the number of tons of any of the four grades—was ever furnished. If the purchaser had the option to specify for any or all of the four gauges, it is clear that until such specifications had been made there could be no definite agreement, because it was the purchasers' privilege and right to designate 100 tons of No. 12, or of No. 14, or of No. 15, or of No. 16, or 25 tons of each gauge, or any other of a vast multitude of different proportions of the whole four gauges, or of any two or three of them. The price of each gauge was definite, the total quantity of tons was definite, and the times of delivery were definite; but the proportion of each gauge, as well as which of the four would be required, is wholly indefinite and uncertain. As to that element of the alleged contract there was obviously no consensus ad idem. The telegram of September the 20th was not a direct and unequivocal acceptance of any definite and unequivocal proposal which by acceptance could become a complete contract. So far as the price and the gross number of tons were con-

cerned, the telegram may be treated as an acceptance of an antecedent offer; but the superaddition of the words 'specifications to follow' left something essential for future action by the purchaser, and therefore constituted, in legal effect, a new and independent offer requiring an acceptance by the vendor. The test of this lies in considering what would have been the measure of damages in a suit instituted by the vendor against the vendee for a breach of the alleged contract. Would the vendor have been entitled to recover the difference between the contract price and the market price of the whole 100 tons, reckoned on the basis of \$2.80 per hundred pounds; or on the basis of \$2.72 per hundred pounds; or on some other basis founded on an arbitrary apportionment of the whole number of tons amongst the four different gauges? And would not the difficulty of fixing a correct measure of damages have sensibly increased if the market price of the four gauges had fallen in an unequal ratio and in different rates of percentage? What quantity of each gauge could a court or jury declare that the vendee ought to have specified? If either court or jury had undertaken such a task, it would have supplied a term of the contract which the parties themselves failed to incorporate, and manifestly such a proceeding would have been unwarranted."

[2] In the case before us, the appellee offered to sell to the appellants "the following *named quantities* of fertilizer during the *fall season*, the prices and terms named below." It then names the various grades of fertilizers so offered, numbering 20, with the prices following each grade so named, ranging in amount from \$10.50 to \$28 per ton, and the prices therefor all differing, with the exception that two of the grades are offered at \$22 and two at \$19 per ton. Following this were certain conditions in the offer, and to that offer the appellants replied, saying: "Your offer hereby accepted upon terms and conditions stated in this contract." It is true that in this acceptance it did not provide that specifications would follow, as in the case from which we have quoted (*Wheeling Steel Co. v. Evans*); but, nevertheless, specifications or designation of the grades desired by the appellants were necessary before the contract or agreement of sale became definite, certain, and complete. It was the appellants' privilege and right to designate 600 tons of any one of the grades of fertilizer named, or an equal number of tons of each grade, or any other of a "vast multitude of different proportions" of the whole 20 grades; and, as we have said, this right or privilege was left to be exercised before the agreement or contract of sale became definite and complete. In this case, as in the *Wheeling Steel & Iron Co.'s Case*, the price of each grade was definite, the total quantity of tons was definite, and the time

of delivery was definite, but the proportion of each grade, as well as which of all would be required, is wholly indefinite and uncertain. The difficulty found in the *Steel Company's Case* as to the measurement of damages exists in this case, and it would seem that the test there applied is the proper one to be applied here. What would be the measure of damages here? Upon what grade of fertilizer or upon what proportion of all the grades, differing so in prices, and thus necessarily affecting the amount of damages, should such damages be placed? As was said in the *Wheeling Steel & Iron Company's Case*, if either court or jury should undertake to declare what grades of fertilizer the vendees should specify, it would be supplying a term of the contract which the parties themselves have failed to incorporate. The contract, we think, is incomplete, and thus the seventh count of the declaration based thereon is bad.

This case is unlike the case of *Kirwan v. Roberts*, 99 Md. 341, 58 Atl. 32. In that case the contract of sale was evidenced by bought and sold notes, and this court, in construing those notes, held that it was agreed "by the purchaser that he should select the styles of cans to be delivered," and then stated that: "If the defendant agreed to specify the style of cans to be delivered, as we have said, it was his duty to exercise that right reasonably and fairly. Hence it follows that a failure on the part of the defendant to make the selection was of itself a violation of the contract." Moreover, in that case the defendant, in part, exercised the option by ordering and receiving upon the alleged contract a large number of cans, but refused to order more, and the court, in speaking of this feature of the case, said: "But again, if it should be assumed *ex gratia* that the contracts sued on gave the vendee a mere option to select and did not require him to do so, yet it must be conceded that after July, 1900, some time before the defendant repudiated the contract, when he made a selection or specification of cans to be delivered, the contracts became complete."

In this case there was no partial exercise of the option as disclosed or alleged by the declaration, nor was there any agreement on the part of the defendants that they should at any time order any of the grades of fertilizer. As we construe the offer and acceptance, they created only an option which was to be exercised before there was a complete binding obligation resting upon the appellants. It is a well-settled principle of law, "that an agreement may be so framed as to leave one party an option, and thus impose no obligation on the other party until the option is exercised so as to create an obligation. But when the notice is given and the option exercised, a binding obligation is imposed on both parties—on the part of the vendor to sell and deliver, and on the part

of the vendee to accept and pay the stipulated price." *Kirwan v. Roberts*, supra; *Dambmann Bros. & Co. v. Lorentz & Rittler*, 70 Md. 382, 17 Atl. 389, 14 Am. St. Rep. 332.

[3, 4] It is contended, however, by the appellee, that although this seventh count of the declaration be bad, the remaining counts of the declaration are good, and as section 17 of article 5 of the Code of Public General Laws provides, "nor shall any judgment or verdict be reversed if there be one good count in the declaration," the judgment therefore in this case cannot be reversed.

It will be remembered that, before pleading to the declaration, the defendants demanded a bill of particulars as to the first six counts—common counts—of the declaration, which was furnished them. By the statement so furnished it is shown that the alleged indebtedness thereunder amounted only to \$70.21 and was for fertilizer shipped June 21, 1910, to C. W. Rinehart, Tolchester, Md., and J. H. Baker, Quaker Neck, Md. In the bill of particulars no reference is made to the alleged contract, nor does it disclose that the common counts were inserted in the declaration to recover for fertilizer sold and delivered under it. The statement contains the following memorandum, "Terms less 5% cash Dec. 1st, 1910, Fall acct.," and shows the shipments were made four days after the acceptance of the offer referred to; but we do not think it is disclosed by these facts that such counts were so inserted in the declaration to recover the price of goods sold and delivered under the alleged contract, when it appears by the statement that the shipments were made long in advance of the time of shipment mentioned in the contract, and were made to places other than Chestertown, the shipping point named in such alleged contract. There is nothing in the bill of particulars inconsistent with the fact that the goods were delivered under an order previously given, or under a previously existing contract or agreement. It is clear, however, that the common counts were inserted in the declaration to recover the price of fertilizer that had been sold and actually delivered, and were certainly not inserted to recover damages for breach of contract by the defendants in their not handling the goods of the plaintiff exclusively or for their refusal and failure to accept and pay for goods said to have been sold them under said alleged contract.

Upon being furnished the bill of particulars, the defendants, in addition to the pleas of "never promised as alleged," and "never was indebted as alleged," filed the further plea that they "had paid the account filed by the plaintiff in compliance with the defendants' demand for a bill of particulars on the first six counts of the declaration." In addition to the above pleas, the defendants filed their fourth plea, which, as we have said, was demurred to by the plaintiff and

the demurrer sustained by the learned court below.

The defendants contend, in support of their demurrer, that the fourth plea was to the whole declaration, and therefore, as the common counts in the declaration are good, the demurrer to that plea was properly sustained, even though it should be found that the seventh count of the declaration is bad. It is true that the fourth plea does not specifically state that it is a plea to the seventh count of the declaration, but it is sufficiently shown by its language that it was to be a plea to that count only. One of the provisions of the alleged written contract in this case was that the appellant should handle the goods of the appellee exclusively, and, although the declaration does not allege any breach of the contract in this respect, the defendants in the fourth plea state: "That at the time the alleged written contract was executed, the plaintiff knew that defendants had contracted with and were to handle the goods and fertilizers of Martin & White Company, and that it was understood between the plaintiff and defendants that the defendants were to handle the goods and fertilizers of Martin & White Company and were not to handle the goods of the plaintiff exclusively." It is thus seen, from the language of this plea, that it is in answer to the seventh count of the declaration and has no reference or application to the common counts, which, as we have said, were inserted to recover the purchase price of goods actually sold and delivered, amounting in the aggregate to \$70.21. The issue attempted to be raised by this plea could in no way affect the plaintiff's right to recover under the common counts for the goods sold and delivered, even though sold under the contract.

[5] It is unnecessary, in our opinion, that a plea, to be a plea to one count only of the declaration, should expressly state that it is a plea to such count, although it is the better practice to do so, if from the language of the plea it is conclusively shown that it is a plea to such count only and that it has no reference or application to any other count of the declaration. Our predecessors, in the case of *Crain v. Yates*, 2 Har. & G. 336, said: "When a plea is only intended for a part of the declaration, the rule is: It must not cover the whole, but must *ascertain* the part to which it is applied, or the plaintiff may demur." It does not say it shall specifically state in the plea that it is intended as a plea to a particular count of the declaration and not to the whole, but that it must *ascertain* the part to which it is applied. It may be ascertained by expressly stating that it is a plea to such particular count, or it may be ascertained or *made known* from the language used in the plea showing conclusively that it was pleaded in answer to such count and to it alone. We think the fourth plea was to the seventh count alone, and not to the whole declaration. This being true, the

court below was specifically called upon to inspect the seventh count of the declaration and to pass upon its legal sufficiency, and before they could sustain the demurrer to the plea they were required to find that this count of the declaration was sufficient. As they sustained the demurrer to the plea, they virtually decided that this count of the declaration was good—the effect of which is the same as if the defendants had specifically demurred to this count of the declaration and the court had overruled the demurrer.

Taking this view of the action of the court in sustaining the demurrer, and thereby declaring the seventh count of the declaration to be good, we do not think the seventeenth section of article 5 of the Code of Public General Laws can have the effect of preventing a reversal of this judgment.

The common counts were inserted, as we have said, for the purpose of recovering the purchase price of goods sold and delivered, while it is under the seventh count alone that recovery could be had for the alleged damages suffered by the plaintiff in the failure and refusal of the defendants to accept and pay for goods said to have been sold them under the contract. Therefore, if the seventh count is bad, there is no *good count* in the declaration under which such damages could be recovered.

It is shown by the amount of the verdict, \$1,861.79, that the jury considered not only the claim for which the common counts were inserted to recover, to wit, the sum of \$70.21, but likewise the claim for damages sought to be recovered under the seventh count, which we have said is bad.

As we have said, the record does not contain the evidence in this case; therefore we do not know what evidence was before the lower court, and it is because of the omission of such evidence in the record before us that it is suggested by the appellee that the verdict might have been for goods bargained, sold, and delivered in excess of the few tons set out in the bill of particulars, or it may have been for money lent, money paid, etc. The bill of particulars states the indebtedness for which the six common counts are brought to recover, and this will preclude the giving in evidence of any other demand or claim not included in it. *Scott v. Leary*, 34 Md. 389. Therefore, to assume that this large judgment was obtained upon these counts of the declaration, we must further assume that the rights of the defendants to hold the plaintiff to the claim made thereunder was waived by them, which we think we are not called upon to assume in determining this case. Therefore, from what we have said, we think the judgment in this case should be reversed, and new trial awarded.

Judgment reversed, with costs to the appellants, and new trial awarded.

STATE ex rel. EBERT v. LODEN, Justice of the Peace.

(Court of Appeals of Maryland. Feb. 9, 1912.)

1. CONSTITUTIONAL LAW (§ 287*)—DUE PROCESS OF LAW—REGULATION OF MOVING PICTURE MACHINE OPERATORS.

Acts 1910, c. 693, providing for a board of examining moving picture machine operators, and requiring operators of such machines to submit to an examination by the board and procure a license, enacted to protect the public from injury resulting from the operation of moving picture machines by incompetent persons, is valid and is not in violation of the due process of law clause of the fourteenth amendment to the federal Constitution and state Constitution Bill of Rights, art. 23.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905; Dec. Dig. § 287.*]

2. THEATERS AND SHOWS (§ 3*)—LICENSES—STATUTORY REGULATIONS.

Acts 1910, c. 693, creating a board of examining moving picture machine operators, providing that all persons engaged at the time of the enactment of the act in the business of a moving picture machine operator shall within a specified time comply with the act, and that if any person desires to engage or continue in the business he must apply to the board for a license and submit to an examination as to his qualification, etc., includes all classes of moving picture machine operators and is not confined to that class of operators in business at the time of the passage of the act.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. STATUTES (§ 107*)—TITLE—SUFFICIENCY.

Where the several sections of a statute refer to and are germane to the same subject-matter which is described in the title, the statute embraces but a single subject within Const. art. 3, § 29, requiring every law to embrace but one subject which shall be described in the title, and, though the title must indicate the subject of the act, it need not give an abstract of its contents nor mention the means by which the general purpose is to be accomplished.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

4. STATUTES (§ 114*)—TITLE—SUFFICIENCY.

The title of Acts 1910, c. 693, entitled, "An act to add a new article to the Code of Public Local Laws, to be known as 'moving picture machine operators,' subtitle 'Baltimore city,' and be numbered," does not embrace more than one subject within Const. art. 3, § 29, requiring every law to embrace but one subject which shall be described in the title, and the provisions of the act providing for a board of examining moving picture machine operators and for the licensing of such operators by the board after examining into their qualifications with the authority of the board to revoke licenses, and imposing a fine for operating a machine without a license, are germane to the same subject-matter described in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 145-149; Dec. Dig. § 114.*]

5. CONSTITUTIONAL LAW (§ 63*)—DELEGATION OF LEGISLATIVE POWER.

Under the rule that the state may delegate the police power to subordinate boards and commissions, Acts 1910, c. 693, empowering the government to appoint a board of examining moving picture machine operators in the city of Baltimore with power to issue and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

revoke licenses to operators, is not invalid as a delegation to the board of legislative power contrary to Const. Bill of Rights, art. 8.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

6. JURY (§ 31*)—RIGHT TO TRIAL BY JURY—STATUTES—VALIDITY.

Acts 1910, c. 693, requiring licenses for operators of moving picture machines and imposing a fine on the operation of machines without a license, is not invalid because it vests summary jurisdiction in police magistrates and justices of the peace to try and punish violations of the law without providing for trial by jury or for an appeal to a higher court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.*]

Appeal from Baltimore City Court; Thos. Ireland Elliott, Judge.

Certiorari by the State on the relation of Frank M. Ebert against Daniel J. Loden, a justice of the peace presiding at the Western Police Station in the city of Baltimore. From an order quashing the writ and remanding the case to the justice of the peace for further proceedings, the relator appeals. Affirmed in part and reversed in part, and case remanded.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, STOCKBRIDGE, and PATTISON, JJ.

Watson E. Sherwood and J. Wallace Bryan, for appellant. Emory L. Stinchcomb and Isaac Lobe Straus, for appellee.

PATTISON, J. In this case the relator, Frank M. Ebert, on the 22d day of October, 1910, was arrested upon a warrant charging him with having unlawfully operated a moving picture machine in the city of Baltimore without having first secured a license in accordance with the provisions of chapter 693 of the Acts of 1910 of the General Assembly of Maryland, and when carried before the respondent, a police magistrate of that city, he protested against and denied the jurisdiction and authority of the magistrate to find him guilty of any punishable offense upon the facts alleged in the warrant for the reason that said alleged act of Assembly which he was charged with having violated was unconstitutional and void. The case was from time to time postponed until on the 6th day of December, 1910, the relator, after unsuccessfully protesting against the jurisdiction of the magistrate for the reason stated above, asked for a jury trial which was refused him, but the justice took his recognition for his appearance before him at a later day therein named. Before the case was heard, however, the relator filed his petition in the Baltimore city court alleging the facts as we have stated and further alleging therein: First. That the said act of 1910 violates the fourteenth amendment to the Constitution of the United States by unjustly, arbitrarily, and unreasonably dis-

criminating against the petitioner and all others in like situation with him, who were engaged in the vocation of moving picture machine operator in the city of Baltimore at the time of the passage of said act, by depriving him and all others in like situation with him of his and their liberties and property without due process of law, and denying to him and them the equal protection of the laws. Second. That the said act is also void for the reason that it violates the Constitution of Maryland: (1) For the reasons assigned above by which it is alleged it contravenes the federal Constitution. (2) "Because it embraces more than one subject and its subject-matter is not sufficiently described in its title." (3) It assumes unlawfully to delegate to a certain board of examiners attempted to be created therein legislative powers and discretion, contrary to article 8 of the Bill of Rights of the state of Maryland. (4) Because as interpreted it vests complete summary jurisdiction in police magistrates and justices of the peace of Baltimore city to try and punish violations under it without providing for trial by jury or for any appeal to a higher court.

The petition then prays the court to issue its writ of certiorari commanding the justice, Daniel J. Loden, to send and certify to such court the record of the proceeding in the case together with the writ that the jurisdiction of the magistrate might be inquired into. The writ was issued as prayed, to which a return was made and filed by the justice of the peace termed the defendant in the certiorari proceedings, and by him a motion was made to quash the writ. The court after hearing argument held that the petitioner having prayed a jury trial was under the act entitled to a trial by jury, and thus passed an order quashing the writ and remanding the case to the justice of the peace for further proceedings to be had in conformity with his opinion therein expressed. It is from this order that the relator has appealed.

The title of the act of 1910, c. 693, is: "An act to add a new article to the Code of Public Local Laws, to be known as 'moving picture machine operators,' subtitle 'Baltimore city,' and be numbered." Following the title are several "whereas" clauses in which attention is called to the danger to life and property incident to the use of explosives in the operation and management of moving picture machines by careless and incompetent operators and to the necessity for the enactment of a law "by which none but persons who are skilled in the avocation of operating moving picture machines or electrical projecting apparatus should be allowed to pursue that calling, and to that end a board of examining moving picture machine operators should be created whose duty it shall be to examine moving picture machine operators

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

desiring to follow that trade and give such as may possess the proper requisites a proper certificate of proficiency." Thereafter follow the seven sections of the act. The first section is the enacting clause. The second section defines the meaning of the term "moving picture machine."

The third section provides that the Governor "shall biennially appoint in and for Baltimore city three persons, one from the Board of Fire Underwriters' Association, one master electrician to represent the building inspector's office of the city of Baltimore, and one moving picture machine operator, all of whom have had not less than five years' experience at the business and who have resided in Baltimore city, state of Maryland, for a period of not less than two years next preceding their appointment, who shall be known as the Board of Examining Moving Picture Machine Operators."

Section 4 provides that "all persons who at the time of the enactment of this act are engaged in the business of a 'moving picture machine operator' in the city of Baltimore, as described in section 2 of this act, shall within sixty days after the first day of May, 1910, comply with all the provisions of this act; otherwise they shall be guilty of a misdemeanor, and, upon conviction before a justice of the peace or a police justice, be fined a sum not less than ten dollars, nor more than fifty dollars, for each day or fraction thereof that they shall pursue the business 'moving picture machine operator' in the city of Baltimore, and, if said fine is not paid, he shall be subject to imprisonment for ninety days, or both, at the discretion of the judge."

By section 5 it is provided that: "If any such person desires to engage or continue in said business of 'moving picture machine operator' after the passage of this act he shall apply to the board provided for in section 3 of this act for a license and submit to an examination as to his qualification before said board; and * * * if the said board shall find after due examination, that the said applicant for a license possesses a reasonable knowledge of the 'moving picture machine operator' business and electricity, then the said board shall, upon the payment of the fee herein provided for, issue to said applicant a license for a term of not more than one year, and shall keep a record of all licenses so issued; and no person shall be granted a license who has not reached the age of 21 years and makes oath to such fact, and has served at least one year with a licensed moving picture machine operator in the business. * * * No person granted a license under the provisions of this act shall operate a moving picture machine or electrical projecting apparatus after the expiration of said license or after said license shall have been suspended or revoked as herein provided, unless the said license or renewal of

same shall have been received as herein provided. This action also names an original as well as the renewal fee to be paid for licenses so granted."

Section 6 vests in the Board of Examining Moving Picture Operators the power to suspend or revoke the license of any operator who is negligent in the operation of his machine or who operates it in a manner dangerous to the safety of life or property, but this power is to be exercised only after full opportunity is afforded the party charged to be present in person, or by counsel, and make any defense he may have, and then only subject to the restriction and limitation therein named.

Section 7 states the amount to be paid to the Board of Examiners for their services and directs that it together with certain expenses therein named be paid out of the funds received from the issuance of licenses, and further directing that the surplus, if any, from such source be paid over to the state treasurer. It also provides for the times of meeting of said board and the notice to be given by them of such meeting.

[1] Taking up the objections urged against the validity of this statute, which the defendant is here charged with having violated, we will first consider the objection that it contravenes the fourteenth amendment to the federal Constitution, and the twenty-third article of the Bill of Rights of this state, both of which declare that no person shall be deprived of his life, liberty, or property without due process of law. These constitutional safeguards have been so fully considered and discussed not only by the Supreme Court of the United States, but by this court as well, that the proper construction to be placed thereon when attempted to be applied in cases of this character seems to be well settled and established. *Dent v. W. Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Magler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411; *State v. Hyman*, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742; *Watson v. State*, 105 Md. 650, 66 Atl. 635.

It is plain that the act in question was passed for the purpose of protecting the public from the consequent injury and loss to life and property resulting from the operation of moving picture machines by incompetent persons.

In the case of *Singer v. State*, supra, similar requirements and restrictions were by statute imposed upon plumbers of Baltimore

city. There the court said: "As to the common and ordinary occupations of life, little or no legislation may be necessary; but if the occupation or calling be of such a character as to require a special course of study, or training, or experience, to qualify one to pursue such occupation or calling with safety to the public interests, no one questions the power of the Legislature to impose such restraints and prescribe such requirements as it may deem proper for the protection of the public against the evils resulting from incapacity and ignorance. And neither the fourteenth amendment of the federal Constitution nor article 23 of the Bill of Rights of the Constitution of this state was designed to limit or restrain the exercise of this power.

* * * We all know that in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health largely depends upon the proper and efficient manner in which the plumbing work is executed. And, this being so, the Legislature not only has the power, but it is eminently wise and proper that it should provide some mode by which the qualification of persons engaged in that business shall be determined. Such an act is but the ordinary exercise of the police power of the state and does not violate in any sense the constitutional rights of the traverser."

The danger to life and property incident to the use of moving picture machines when operated by incompetent persons is known to all. The films used in connection with the machine are highly explosive and dangerous in their character, and if not properly managed and cared for are liable to explode.

In large cities compactly built like Baltimore, there exist possibilities of immense loss of property by fire as was shown by the great fire of 1904 which swept the business section of the city and destroyed property worth many millions of dollars. Moreover, in large cities moving picture machines are usually operated in large, crowded rooms or halls filled with a constantly changing assemblage, largely composed of women and children, and where in the event of explosion or fire excitement and panic usually follow resulting in great loss of life. Therefore every reasonable and proper precaution and safeguard should be taken to prevent or lessen the possibilities of fires so destructive and disastrous in their consequences. It was to prevent or lessen explosions and fires and to avoid the consequences mentioned that this act was passed providing a mode by which the qualification of moving picture machine operators operating machines in the city of Baltimore shall be determined. The act was to protect the people of Baltimore city against the consequences resulting from the work of incompetent moving picture machine operators and was passed in the exercise of the police power of the state, and does not in our opinion violate either the federal or

state Constitution. *Singer v. State*, supra; *State v. Broadbelt*, supra.

[2] It is contended, however, by the relator, that the act complained of, as construed by him, applies only to those persons who were at the time of the passage of the act engaged in the business of moving picture machine operators of Baltimore city, and not to those who were not at the time of its passage engaged in said business, but who have since become engaged therein, or who may now or hereafter wish to engage in said business; and by reason of this alleged discrimination between the classes mentioned, which classification he alleges is unreasonable and arbitrary, the act is in violation of both the federal Constitution and the Bill of Rights of this state. We cannot adopt the contentions of the relator for in our opinion he improperly construes the statute in holding that it does not apply to both classes of persons mentioned by him.

It is true that section 4 of the act applies only to those persons who were engaged in the business of moving picture machine operators at the time of its enactment, and by its provisions they were given 60 days after the 1st day of May, 1910 (from and after which date the statute became effective), within which to procure the license required by the succeeding section of the act. These persons were permitted to continue in said business, without violating the statute, if they at any time before the expiration of the said 60 days procured such license. It was only upon their failure to obtain the license within that time that their continuance in business thereafter, without such license, was made a misdemeanor by the statute, subjecting them upon conviction to the payment of a fine of not less than \$10 nor more than \$50 for each day or fraction thereof that they thereafter pursued said business.

Before a license could be procured, it was made necessary by the statute that the applicant should submit to an examination to be made by the board of examiners. The applicant therefore was subject to all the necessary delays incident to such examination before a license could be obtained by him, if successful in his examination. Thus a provision such as is found in section 4 of this act would seem to be necessary, for without it places of amusement where moving picture machines were operated at the time of the enactment of the statute would have to be closed immediately upon the act becoming effective and before a license could be procured under the act. It was to prevent this, no doubt, that this provision was inserted in the statute, and thus it had application only to those persons who were in the business at the time of the enactment of the statute. But, as we construe the statute, section 5 applies to both classes; that is, to those that were in business at the time of its enactment as well as to those not at that time in busi-

ness, but who thereafter wished to engage therein.

Section 5 provides that "if any such person desires to *engage* or continue in said business of 'moving picture machine operator' after the passage of this act he shall apply to the board provided for in section 3 of this act for a license and submit to an examination as to his qualification before said board," etc. The relator in construing the language of this section contends that by "such person" is meant such persons only as are included within the provisions of the immediately preceding section of the act, or section 4, and, as that section applies only to those persons who were in business at the time of the enactment of the statute, this section likewise applies only to that class of persons and not to those who should thereafter desire to engage in said business and who were not in such business at the time of the enactment of the statute. This we think is not a proper construction of this section of the act.

The preamble or "whereas" clauses of the act point out the danger to life and property resulting from the use of moving picture machines when operated by careless and incompetent persons, and then declares, as we have said before, "that a law (should) be enacted by which *none* but persons who are skilled in the avocation of operating moving picture machines or electrical projecting apparatus should be allowed to pursue that calling and to that end a board of examining moving picture machine operators should be created, whose duty it shall be to *examine moving picture machine operators desiring to follow that trade*, and give such as may possess proper requisites a proper certificate of proficiency." From this language it is shown that all classes of moving picture machine operators were intended to be included within the provisions of the act. "*None* but persons skilled in the avocation" were by it permitted to pursue that calling, and all operators are required to submit to the examination provided for by this statute and to obtain a license before engaging or continuing in such avocation. Moreover, the language is "if any such person desire to *engage* or *continue* in said business" he shall apply for license as the statute directs. It will thus be seen that it embraces within its provisions, not only those that desire to *continue* in the business, but includes as well those who desire to *engage* in such business. In our opinion this language is sufficiently comprehensive to include all classes of moving picture machine operators and is not confined to that class of operators who were in business at the time of the enactment of the statute as claimed by the relator.

It is also urged against the statute that its title is insufficient because (1) it embraces more than one subject, and (2) that the subject-matter of the act is not sufficiently de-

scribed in the title. We have already in this opinion set out the title in full and have given at least the substance of the provisions of the statute, and therefore it is unnecessary for us to do so again. The requirement of the Constitution (article 3, § 29) in respect to this objection is that "every law enacted by the General Assembly of Maryland shall embrace but one subject, and that shall be described in the title."

[3, 4] In *Baltimore v. Reitz*, 50 Md. 574, this court in construing this section of the Constitution said: "If several sections of the law refer to and are germane to the same subject-matter which is described in its title, it is considered as embracing but a single subject and as satisfying the requirements of the Constitution in this respect. While the title must indicate the subject of the act, it need not give an abstract of its contents, nor need it mention the means and method by which the general purpose is to be accomplished." Applying this rule of construction to the title of the act here involved, we do not find it defective for either of the reasons urged against it.

[5] As to the third objection made against the act, which objection is not referred to or mentioned in the brief of the appellant, we think it unnecessary to do more than refer to the case of *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739, 134 Am. St. Rep. 586, and the cases there cited. In that case the court speaking through the late Judge Schmucker said: "It has also been settled by numerous decisions that the state may delegate the police power to subordinate boards and commissions, and that the reasonable and just exercise by them of the delegated power will be upheld." *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *State v. Broadbelt*, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433, 73 Am. St. Rep. 201; *State v. Knowles*, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411; *Watson v. State*, 105 Md. 650, 66 Atl. 635.

[6] We have now reached the fourth and last objection urged against the act which is that it vests summary jurisdiction in the police magistrates and justices of the peace of Baltimore city to try and punish violations under it without providing for trial by jury or for an appeal to a higher court. We find this subject fully discussed in the case of *State v. Glenn*, 54 Md. 572. In that case the defendant was by a justice of the peace of this state convicted upon the charge of being a vagrant, habitually disorderly person, and was by the justice sentenced to the Maryland House of Correction for the period of six months. The defendant was afterwards discharged from the institution to which she had been sentenced under a writ of habeas corpus; the judge discharging her, holding

that the jurisdiction under which she had been convicted was unconstitutionally conferred, and therefore the conviction was a nullity. When the case reached this court, one of the questions presented was whether the Legislature could confer upon the justices of the peace of this state summary jurisdiction to try and convict a party of an offense such as that with which the prisoner was charged. Judge Alvey in discussing the question thus presented, after referring to similar statutes in England by which summary jurisdiction was given to justices of peace to try like offenses, and where the punishment prescribed by such statute was imprisonment and hard labor, said: "That the exercise of the summary jurisdiction, therefore, is not in England at least regarded as being in violation of the fundamental guaranties of the rights and liberties of the people; and the personal liberty of the subject at this day is as well and jealously protected in England as in any other country where the principles of magna charta and of the common law are enforced. The judge then, after naming a number of the English statutes that conferred summary jurisdiction upon justices of the peace, stated that "these statutes have been in force here from our earliest history and are still in force, and we are not aware that it has even been supposed that these provisions were in any way restrained or controlled by the declaratory provisions in the Declaration of Rights. There are a great many statutes upon the statute books relating to a great variety of subjects prescribing fines, penalties, and forfeitures as punishment, for doing or omitting to do certain things, and by many of those statutes jurisdiction has been given to justices of the peace, from whose judgments no appeal was provided for until within a comparatively recent period. The opinion also refers to the act of 1777, c. 6, known as the Fines and Penalties Act, which was passed at the first session of the state Legislature after the adoption of the Declaration of Rights and the Constitution of 1776; and also the statutes of 1781, c. 13, and 1785, c. 47, in regard to bastardy, and in which reference it says of them that "these statutes have all coexisted with the several Constitutions of the state; and in various cases that have occurred, involving these provisions, we have never heard it contended that the proceedings thereby authorized were not constitutional, because the trial by jury was not provided for, either in the first instance or by appeal."

In *State v. Ward*, 95 Md. 121, 51 Atl. 848, the defendant was convicted before a justice of the peace for violation of certain sections of the public local laws of Anne Arundel county, amended by chapter 582 of the Acts of 1892, which regulated the shooting of wild fowl in said county. The statute provided for the obtaining of licenses to place blinds

and shoot therefrom, and also made it unlawful to establish blinds nearer to other blinds than the distance therein given, and, upon conviction before a justice of the peace for the violation of any of the foregoing provisions, the statute imposed a fine of not less than \$5 nor more than \$25 for each offense, with the additional fine upon the owner of the blind placed nearer to the already established blind than the distance allowed in the statute the sum of \$5 for each week such blind remained, after due notice given to such owner by the owner of the previously established blind to remove the same. No right of appeal was given by the statute, and this court in that case said: "Where the jurisdiction has been conferred by special statute, the alleged offender has no right to call for a jury unless there is something in the act directing to the contrary. There being nothing in the act that confers upon the party charged the right to demand of the justice a jury trial, it follows that the justice has jurisdiction to hear and finally determine the charge set out in the warrant."

Upon the authority of the cases cited we are unable to find that the jurisdiction conferred upon justices of the peace by the statute here questioned violates the constitutional provisions mentioned by the relator in this his fourth contention. The justice of the peace before whom the relator was carried had jurisdiction to finally hear and determine the charge under which he was arrested, but we do not think the relator was entitled to a jury trial as prayed by him. Therefore the learned court below in our opinion erred in holding that he was so entitled and in remanding the case to the justice with directions to him that he "grant unto the petitioner his prayer for a trial by jury."

The counsel of the relator have urged other objections to the validity of this statute and have pointed out a number of alleged defects and omissions therein, all of which we have carefully considered, but we do not think they go to the extent of rendering the statute void, although they show a great want of thought and skill in the drafting of the bill. We therefore suggest, inasmuch as the Legislature is now in session, that the statute be amended by supplying the omissions and by removing therefrom the uncertain features or provisions of the act so that it may be more easily understood and enforced.

As the order of the court below not only quashes the writ of certiorari and remands the case to the justice of the peace, but also *directs him to grant unto the petitioner his prayer for a trial by jury*, we will affirm in part and reverse in part the order of the lower court and remand the case.

Order affirmed in part and reversed in part, and case remanded. The appellant Frank M. Ebert to pay the costs above and below.

HAGERSTOWN BREWING CO. v. GATES.
(Court of Appeals of Maryland. Jan. 31, 1912.)

1. COURTS (§ 14*)—JURISDICTION—ACTIONS BETWEEN NONRESIDENTS AND FOREIGN CORPORATIONS—STATUTES.

Under Acts 1908, c. 240, § 67, authorizing any person or corporation, resident or nonresident, to sue any foreign corporation regularly doing business in the state for any cause of action, a nonresident may sue a foreign corporation in the courts of the state on any cause of action, and is not confined to cases in which the cause of action arose, or the subject of the action was situated, in the state, as was the case under Code Pub. Gen. Laws 1904, art. 23, § 411.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 39; Dec. Dig. § 14.*]

2. COURTS (§ 14*)—JURISDICTION—ACTIONS AGAINST FOREIGN CORPORATIONS—STATUTES.

Acts 1908, c. 240, § 67, authorizing any person or corporation, resident or nonresident, to sue any foreign corporation regularly doing business in the state for any cause of action, is not repealed or modified by Acts 1908, c. 309, providing that any foreign corporation shall be liable to suit in any of the courts of the state on any dealings therein and also shall be liable to suit on any controversy which may arise between it and any resident of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 39; Dec. Dig. § 14.*]

3. CORPORATIONS (§ 519*)—CIVIL ACTIONS—PRESUMPTIONS—CONTRACT NOT ULTRA VIRES.

Where the declaration, in an action against a corporation on a contract of guaranty, alleged that the contract was executed by the corporation by its agent while acting within the scope of his authority, and the corporation in its plea admitted that it was authorized to guarantee the obligations of others for a valuable consideration moving to it, the court, in the absence of any proof to the contrary, must presume that the contract was made under the conditions specified and was not invalid as ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088-2093; Dec. Dig. § 519.*]

4. CORPORATIONS (§ 416*)—OFFICERS—IMPLIED AUTHORITY—CONTRACTS OF GUARANTY.

Where the president and manager of a foreign corporation, authorized to make and sell beer and to guarantee the obligations of others for a consideration moving to it, executed, in the name of the corporation, a contract guaranteeing the obligation of the buyer of a liquor business to pay the seller the price thereof in consideration of the buyer agreeing to sell exclusively the beer of the corporation, the contract was within the implied authority of the president and manager, having for its purpose the sale of the beer of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1623-1625; Dec. Dig. § 416.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge fully covered by a charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. WITNESSES (§ 269*)—CROSS-EXAMINATION—EXTENT.

The cross-examination of a witness having no reference to the matter testified to by the witness in chief is properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

7. EXCEPTIONS, BILL OF (§ 24*)—SEPARATE BILLS—RULINGS ON EVIDENCE.

Each ruling on evidence must be presented by a separate bill of exceptions, and a bill of exceptions, including more than one exception to rulings, will not be considered on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 31; Dec. Dig. § 24.*]

8. CORPORATIONS (§ 432*)—CONTRACTS—ULTRA VIRES—EVIDENCE.

In an action against a corporation on a contract executed in its name by its president and manager, the by-laws of the corporation defining the powers of the president and general manager are inadmissible as against plaintiff having no knowledge of the by-laws.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1737, 1743, 1762; Dec. Dig. § 432.*]

9. CORPORATIONS (§ 519*)—CONTRACTS—VALIDITY—EVIDENCE.

Where a corporation, when sued on a contract executed by its president and manager, insisted that such officer was not authorized to make the contract, evidence of a proposition by plaintiff to release the corporation from any liability on specified conditions was inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088-2093; Dec. Dig. § 519.*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by George E. Gates against the Hagerstown Brewing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Alexander R. Hagner and Albert A. Donb. for appellant. A. C. Strite and F. G. Wagaman, for appellee.

THOMAS, J. The appeal in this case is from a judgment recovered against the Hagerstown Brewing Company, a corporation (appellant), on two contracts executed in its name by its president and general manager, indorsed on and guaranteeing the payment of two single bills of one Kurtz in favor of the appellee, each for the sum of \$500, and both dated the 18th of November, 1907; one payable 27 months after date, and the other payable 30 months after date.

The case was instituted in the circuit court for Washington county, and the declaration contained five of the common counts and four special counts. The sixth count charges that the plaintiff was the owner of a stock of goods, fixtures, etc.; that Kurtz desired to purchase the same and to give in part payment therefor his promissory note

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under seal or single bill for \$500, dated November 18, 1907, and payable 27 months after date; that the defendant, "by its servants and agents, while acting within the scope of their authority, promised and agreed with" the plaintiff that if the plaintiff would sell and deliver said stock of goods, fixtures, etc., to Kurtz, it would pay said single bill "at its maturity"; that the plaintiff, in consideration of the defendant's promise, sold and delivered said stock of goods, fixtures, etc., to Kurtz, but Kurtz did not pay said single bill; and that the defendant had due notice of that fact, but refused to pay the same when requested to do so. The seventh count makes the same charge in reference to the single bill payable 30 months after date. And the eighth count alleges: That the plaintiff was the owner of the stock of goods, etc., and that Kurtz desired to purchase the same and to give in part payment therefor his single bill in the following words: "Johnstown, Pa., November 18, 1907. Twenty-seven months after date we promise to pay to the order of George E. Gates, five hundred dollars, without defalcation, value received with interest from maturity, at Dollar Deposit Bank of Johnstown. And further, we do hereby empower any attorney of any court of record within the United States or elsewhere to appear for me and after one or more declarations filed, confess judgment against us as of any term for the above sum, with costs of suit and attorney's commissions of six per cent., for collection, and release of all errors, and without stay of execution, and inquisition and extension upon any levy on real estate is hereby waived and condemnation agreed to and the exemption of personal property from levy and sale on any execution hereon is also expressly waived and no benefit of exemption is claimed under and by virtue of any exemption law now in force or which may hereafter be passed. Witness our hands and seals. Steve Kurtz. [Seal.]" That the defendant, by its agents and servants, while acting within the scope of their authority, had "previously written on the back" of said single bill as follows: "For value received we hereby guarantee the payment of this note at maturity. [Signed] Hagerstown Brew'g Co., by Philip Hermann, Pres." And the plaintiff accepted the single bill with said indorsement thereon in part payment for his stock of goods, etc., and delivered said goods to Kurtz, but Kurtz did not pay said single bill, and that the defendant, after due notice thereof, has also failed to pay the amount due thereon. The averments of the ninth count are the same in reference to the single bill payable 30 months after date.

The defendant filed two pleas, first, that it never promised as alleged, and, second, that it never was indebted as alleged, and demurred to the sixth, seventh, eighth, and

ninth counts of the declaration. The plaintiff joined issue on the pleas, and on the 6th of October, 1910, upon the suggestion and affidavit of the defendant, the case was removed to the circuit court for Allegany county. That court overruled the demurrers to the sixth, seventh, eighth, and ninth counts of the narr., and on the same day the defendant filed its third and fourth pleas to those counts and its fifth plea to the declaration. By the third plea the defendant says that "it was incorporated in the year 1898 under the provisions of the general laws of the state of Delaware for the purpose of brewing, manufacturing, and making beer and other kinds of malt liquors, and for the sale, transportation, or other disposition of the products of said business, and these are the only powers given to it by its certificate of incorporation, and that it has not the power to guarantee the obligations of other persons except for a valuable consideration moving to the said defendant, and that the said alleged promise or guaranty of the said defendant on said promissory note was wholly without consideration and is ultra vires on the part of the defendant and void and unenforceable by a suit against the defendant." The fourth plea alleges that the indorsements were made without the authority of the defendant and have not been ratified by it, and the fifth plea, which on motion of the plaintiff was not received, says that the plaintiff "is and has been a resident of the state of Pennsylvania since before the execution of the alleged promissory notes sued on and indorsements thereon, and that the alleged cause of action arose in the state of Pennsylvania, and did not arise in the state of Maryland, and the subject of the action is not and has never been situated in this state, and that the defendant is and has been a nonresident of the state of Maryland since before the execution of the alleged promissory notes sued on and indorsements thereon, and that both plaintiff and defendant are nonresidents of the state of Maryland, and that the plaintiff has no right of action in this court." The plaintiff joined issue on the fourth plea, and filed six replications to the third plea. The court below sustained a demurrer to the first and fifth replications, and issue was joined on the second, third, fourth, and sixth replications, which deny the averments of the plea that the promises of the defendant were made without consideration and were ultra vires, and allege that they were made for valuable considerations "moving to the defendant," and that the certificate of incorporation did give the defendant power to guarantee the obligation of others, etc. During the trial of the case the defendant reserved seven exceptions, the first six of which relate to rulings on the evidence, and the seventh to the granting of the plaintiff's

first, third, and fifth prayers, and the rejection of the defendant's first, second, third, fifth, sixth, ninth, tenth, and eleventh prayers and a modification of its eighth prayer.

[1] The defendant's fifth prayer presents its contention that a nonresident of this state cannot sue a foreign corporation in the courts of this state on a contract made in some other state. That was undoubtedly the law prior to the Act of 1908, c. 240, except where the subject of the action was situated in this state; but section 67 of that act declares that "any person or corporation, whether a resident or a nonresident of this state, may sue any foreign corporation regularly doing business or regularly exercising any of its franchises therein for any cause of action." This language is very broad and clear, and the right of a nonresident to sue a foreign corporation in the courts of this state is no longer confined to cases in which "the cause of action has arisen, or the subject of the action shall be situated in this state," as was the case under section 411 of article 23 of the Code, which was expressly repealed by the Act of 1908.

[2] The appellant insists, however, that section 67 of chapter 240 of the Acts of 1908 was repealed or modified by the later act of 1908, c. 309, which provides that "any corporation now chartered by the laws of this state, which shall transact business therein, shall be deemed to hold and exercise franchises within this state, and shall be liable to suit in any of the courts of this state on any dealings or transactions therein, and also shall be liable to suit in any of the courts of this state, on any controversy which may arise between such corporation and any resident of this state." This act is practically section 409 of article 23 of the Code of 1904 with the additional provision for controversies between such corporations and residents of this state. It was never suggested that section 409 of the Code so modified the provisions of section 411 as to confine the jurisdiction of our courts to suits against nonresident corporations on transactions in the state; on the contrary, it was repeatedly held that, under section 411, they had jurisdiction also in cases where "the subject of the action" was situated in this state (*Cromwell et al. v. Royal Canadian Ins. Co.*, 49 Md. 382, 33 Am. Rep. 258; *Universal Life Ins. Co. v. Bachus*, 51 Md. 31), and there is no more reason for holding that chapter 309 of the Act of 1908 repeals or modifies section 67 of chapter 240 than that section 411 of the Code was restricted or limited by section 409. Chapter 309 does not expressly repeal chapter 240, and if allowed the effect contended for by the appellant, it would take away the jurisdiction of our courts in cases of suits by non-residents against foreign corporations where the subject of the action is situated in this

state, which was expressly provided for in section 411 of the Code, and included in the terms of chapter 240. The argument of counsel for the appellant that to allow corporations regularly doing business in this state to be sued by nonresidents on any cause of action would impose great additional labor upon the courts and extra burdens upon the taxpayers of this state would be entitled to some weight if the terms or meaning of the act were obscure or uncertain; but here the language is clear and does not admit of any doubt as to its meaning. It expressly provides that a foreign corporation regularly doing business or exercising any of its franchises in this state may be sued by any person or corporation, *resident or nonresident*, on any cause of action, and the evidence in this case shows that the appellant was "regularly doing business" in this state, and had an office, if not its main office and chief place of business, in Hagerstown. Moreover, as the act of 1908 has been in force for nearly four years, and as this is the first time the question has been raised in this court, it would seem that the apprehensions of the appellant are not well founded.

[3] Plaintiff's third prayer instructed the jury that there was "no legally sufficient evidence" in the case to show that the indorsement of the single bills sued on was beyond the corporate powers of the appellant. The certificate of incorporation was not offered in evidence, and the ground of the demurrer to the sixth, seventh, eighth, and ninth counts of the declaration, and of the appellant's objection to this prayer, is that it was incumbent upon the plaintiff to allege and show that the contract sued on was within the corporate powers of the appellant. It is said in 5 Ency. of P. & P. 95: "If the defendant wishes to interpose the defense of *ultra vires* in an action by a corporation against him, he should specially plead it. And, in an action against a corporation, the plaintiff need not set out in his complaint or declaration the capacity of the corporation to make the contract sued on. Where the defense of *ultra vires* is allowable to a corporation, the corporation must specially plead it." In 10 Cyc. 1155, Judge Seymour D. Thompson says: "A general presumption of right-acting attends corporations, the effect of which is to place the burden of proving that a contract made or an act done by a corporation was *ultra vires* upon him who alleges that fact as the foundation of his action or defense." He says further: "Aside from casting the burden of proof upon a party setting up the want of power, this presumption operates in several ways. If the powers possessed by the particular corporation do not appear at all, and are not judicially noticed by the court, then it operates within certain limits to carry with it the general presumption

that the act or contract which is challenged is within its powers; if it has the power to do the given act, or to make a contract of a given nature under prescribed conditions, then the principle operates to create the presumption that these conditions existed in the particular instance. * * * If the corporation itself seeks to avoid its contract on the ground that it was ultra vires, this presumption puts upon it the burden of showing that its articles of incorporation did not authorize the contract." In the case of *Railway Co. v. McCarthy*, 96 U. S. 258. 24 L. Ed. 693, it is said: "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers." See, also, 3 Ency. of Ev. 633, note 12; *Star Brick Co. v. Ridsdale et al.*, 36 N. J. Law, 229; *Elkins v. Camden, etc., R. Co. et al.*, 36 N. J. Eq. 241; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; 1 *Morawetz on Private Corp.* § 324. But in this case we are not required to go to the extent of the rule thus broadly stated, either in disposing of the demurrer or the objection to the prayer, and we must not be understood as holding that in every case, regardless of the nature of the contract or the character of the corporation, the act of the corporation relied on will be presumed to be within its corporate powers. In each of the counts demurred to the plaintiff alleged that the contract declared on was executed by the defendant by its agent and servant while acting within the scope of his authority. As no agent of a corporation is authorized to make an ultra vires contract, these averments were in effect that the defendant had the power to make the contract and that it was executed by its duly authorized agent. The defendant's third plea admits that it was authorized to guarantee the obligations of other persons "for a valuable consideration moving to" it, and where it is admitted that contracts like the one in question are not outside of the powers of the corporation, and that they may be made by it under certain conditions, it will be presumed, in the absence of proof to the contrary, that those conditions existed. Besides, in this case, all the evidence tends to show that the single bills were indorsed by the defendant in consideration of the promise of Kurtz to sell its beer.

[4] The evidence in the case further shows, or tends to show, that the plaintiff was the owner of a wholesale liquor business in South Fork, Pa., and that he agreed to sell the same to Steve Kurtz for \$7,700 and to take in payment therefor \$2,500 cash and 10 single bills, 9 for \$500 each and 1 for \$700, to be signed and sealed by Kurtz and indorsed by the Hagerstown Brewing Company (appellant) guaranteeing their payment;

that the appellant, by its president and general manager, in consideration of the promise of Kurtz to sell the beer of the appellant, agreed to and did guarantee the payment of the single bills, all of which were paid by Kurtz as they became due, except the two sued on in this case, which Kurtz and the appellant have failed and refused to pay; that Kurtz continued in business for about eight months, and during seven months of that time purchased beer from the appellant at the rate of about one car load every two weeks; that the directors of the appellant did not meet more than once a year; and that Philip Hermann, its president and general manager, had full charge of all the business of the company.

By plaintiff's first prayer the jury were told that if they found from the evidence that Philip Hermann was the president and general manager of the defendant, and that while so acting he executed the contracts indorsed on and guaranteeing the payment of the single bills offered in evidence, and further found that in consideration of the execution of said contracts Kurtz promised to sell no other beer than that manufactured by the defendant, and further found that the plaintiff parted with his property upon the faith of said indorsements, then their verdict should be for the plaintiff, unless the jury further found that Hermann had no authority to execute such contracts, and that there was no evidence in the case legally sufficient to show such want of authority. Plaintiff's fifth prayer instructed the jury that if they found that the defendant's business, at the time of the indorsement of the single bill sued on, was the manufacture and sale of beer, that Hermann was the general manager and president of the defendant, and that it was his duty as such to sell defendant's beer, that said Hermann indorsed defendant's name on said single bills for the purpose of promoting the sale of defendant's beer, and did thereby effect the sale of large quantities of its beer, and that said single bills were still overdue and unpaid, their verdict should be for the plaintiff.

In addition to the contentions of the appellant already referred to, it urges, as further objections to these prayers: First, that the burden was on the plaintiff, and that he failed to show that Hermann was authorized to bind the appellant by the indorsements; and, second, that assuming that there was evidence tending to establish Hermann's authority, the prayers should have left it to the jury to find that he was authorized to make the contracts.

It is stated in the defendant's third plea that the appellant was incorporated under the "General Laws of the state of Delaware for the purpose of brewing, manufacturing, and making beer and other kinds of malt liquors and for the sale, transportation, or other disposition of the products of said business," and that it had the power to guaran-

tee the obligations of other persons "for a valuable consideration moving to" it, and it is not therefore necessary to consider the question whether a brewing company is authorized to guarantee the payment of the obligations of a customer in order to promote the sale of its products, for it is admitted, as we have said, by the plea that the appellant had the power to do so for a valuable consideration. The only question to be determined is whether where such a contract is executed by the president and general manager of a company on its behalf and in its name, and the contract is within the powers of the corporation, it will be presumed that he was duly authorized to make it.

In *National State Bank v. Vigo County Bank*, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330, the court said: "When a contract is made in the name of a corporation by the president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation until it is shown that the same was not authorized or ratified." In the case of *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 332, 27 N. W. 524, it is said: "In the absence of any provision to the contrary contained in the charter of a corporation, it will be presumed that its president, secretary, and treasurer have the authority to make all necessary contracts in transacting the ordinary business of the corporation, within the legitimate scope, object, and purpose of its organization." In the case of *Smith v. Smith et al.*, 62 Ill. 493, speaking of the president of the corporation, the court said: "He being the legal head of the body, where an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body." And in *Patterson v. Robinson et al.*, 116 N. Y. 193, 22 N. E. 372, the court held that the contract was one which the board of directors had the power to authorize their president to make, or to ratify after it had been made, and that therefore the burden was on the plaintiff to show that the contract was not authorized or ratified by the directors. In *Thompson on Corporations*, vol. 2, § 1576 (2d Ed.), the learned author, after stating that "the governing principle with reference to the general power of a manager is that where he has the actual charge and management of the business, by the appointment of or with the knowledge of the directors, the corporation will be bound by his acts and contracts which are necessary or incident in the course of the business, without other evidence of actual authority," says: "The reason for this rule is that the corporation, by the very fact of the appointment of such manager, holds him out to the public as the person authorized to bind it by contracts necessary in the prosecution of its business. It has been said that the very use

of the word 'manager,' when applied to the officer, conveyed the idea to the ordinary mind that to one thus named had been committed the management of the affairs of the corporation; and to hold that one dealing with the person so held out must, before the corporation can be held liable for his acts, show affirmatively that it had authorized them, would often result in great hardship." In the case of *Equitable Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. 808, the general agent of the appellant employed the appellee as general manager of its business, and he was afterwards dismissed from the service of the appellant and brought suit to recover for breach of contract. The suit was defended on the ground that the general agent and state agent had no authority to employ a general manager, and in disposing of that question Judge Bryan says: "The officers making this contract for services were designated as defendant's general agent and state agent, and would naturally be understood by the public as having the power to employ persons to assist in the prosecution of its work. * * * It was impossible for the plaintiff to know in what way the powers of the officers in charge of the business of the defendant were limited by by-laws or private instructions. They were held out to the public as having general authority, which would comprehend the contract in question, and what they have done within the scope of this authority is, and ought to be, binding on the defendant." In the case at bar the contract sued on was executed in the name of the appellant by its president and general manager, and for the purpose of promoting the very business for which the company was incorporated, and in which it was engaged. It was not made to assist Kurtz, or to advance any private interest of the agent of the company, but was executed in order to accomplish the end for which the company was organized, and the appellant received the benefit of it. The entire management and conduct of the business were apparently intrusted by the directors to the president and general manager of the company, and we think the contract in question, having for its only purpose and object the sale of the beer of the company, was clearly within his implied authority.

[5] What we have said disposes of all of the rejected prayers of the defendant except its sixth prayer, which, in so far as it is free from objection, is fully covered by its eighth prayer as modified and granted by the court.

[6] The evidence referred to in the first exception was not admissible on cross-examination; there being no reference to the matter to which it relates to the examination in chief.

[7] The second and third bills of exception each include more than one exception to rulings on the evidence, and, under the rule which requires each ruling to be presented by a separate bill of exception, those exceptions will

not be considered. *Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264; *Baltimore & Ohio R. R. Co. v. Reuter*, 114 Md. 687, 80 Atl. 220.

[8] The fourth exception is to the refusal of the court below to admit in evidence the by-laws of the appellant, and we think there was no error in this ruling. It was impossible for the plaintiff to know in what way the powers of the president and general manager of the appellant in charge of the business were limited by by-laws or private instructions. *Equitable Endow. Ass'n v. Fisher*, supra. In the case of *Smith v. Smith et al.*, supra, the court, speaking of the by-laws of a company, said: "But those are private and only accessible to the officers of the company. Strangers to the company cannot be bound by the rules adopted for the government of the company—and persons not officers of the company cannot be required to know the provisions of their by-laws."

[9] The fifth and sixth exceptions are to the rejection of evidence offered by the defendant to show that the plaintiff, before Kurtz sold his business in August, 1908, requested Hermann not to interfere with the sale by Kurtz, and promised that if he did not do so, and the single bills in question were not paid out of the proceeds of such sale, he would release the defendant from any liability on them. This evidence was not admissible for the reason that the defendant insisted that Hermann was not authorized by it to make any such contract with the plaintiff.

It does not appear from the record in what way or to what extent the court below modified the eighth prayer of the defendant, and we cannot, therefore, pass upon the exceptions to the modification of the prayer.

Finding no reversible error in any of the rulings of the court below, the judgment appealed from will be affirmed.

Judgment affirmed, with costs.

CITY OF PHILADELPHIA, to Use of DAGNEY, v. NEILL et al.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

MUNICIPAL CORPORATIONS (§ 347*)—PUBLIC IMPROVEMENTS—ASSIGNMENT OF CONTRACT—LIABILITY UNDER BOND.

Where a city contractor gives a bond to pay for all labor and materials furnished under the contract, and being unable to perform assigns the contract to another who agrees to complete it and pay the contractor one-half of the profits, the assignee cannot maintain an action against the surety for labor and material furnished by him.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the City of Philadelphia, to the use of John K. Dagney, against A. M. Neill

and Samuel M. Hyneman. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. W. Smithers and Edgar W. Lank, for appellant. Charles H. Edmunds and M. J. O'Callaghan, for appellee.

PER CURIAM. A. M. Neill entered into a written contract with the city of Philadelphia for the grading and paving of certain streets, and executed and delivered to it a bond with the Lincoln Savings & Trust Company as surety thereon; the condition of which was that he would pay for all labor and materials furnished to him in connection with the performance of his contract. Finding himself unable to perform it, Neill on August 10, 1910, assigned it to John Dagney, who, in consideration of its assignment to him, undertook to perform it and to pay to Neill one-half of all profits that might accrue from it. Dagney furnished labor and materials to the amount of \$3,380, and this action has been brought by his administrator to recover that sum on Neill's bond. Neill's assignment to Dagney of his contract with the city was, as the learned trial judge correctly held, "upon terms of quasi partnership." The bond was not given to indemnify the contractor against his own default, but this, in effect, is the use which the appellant would make of it.

Judgment affirmed.

GIBSON v. JOHNSON.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF CHANCELLOR.

On bill for an accounting of royalties, where the issue turns on an alleged oral agreement set up as a defense, finding on sufficient evidence that there was no such agreement will not be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Robert L. Gibson against Eldridge R. Johnson. Decree for complainant, and defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

John G. Johnson and Horace Pettit, for appellant. Ernest Howard Hunter, for appellee.

PER CURIAM. By the terms of his written agreement of June 14, 1901, with Jones and Gibson, the appellant is liable for the royalties claimed by the appellee. To relieve himself from this liability he averred, in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fourteenth paragraph of his answer, that Gibson, on behalf of himself and Jones, when he executed the contract of August 5, 1903, with the Gramophone & Typewriter Limited, granted it "a license to have the said sound boxes, the subject-matter of said agreement, manufactured as theretofore, in the United States by the said Victor Talking Machine Company, at Camden, N. J., free of all royalty, and without any further consideration, or royalty whatsoever." The finding of the learned chancellor below is that this averment was not established by the evidence; that there was no oral contract for such a release of royalties by Jones and Gibson; and that no such release appears in either the written contract itself or in the letter of Trevor Williams, managing director of the Gramophone & Typewriter Limited, to J. Broad, of Cheston & Sons, its solicitors, dated July 30, 1903, giving instructions upon the basis of which the agreement of August 5, 1903, was prepared.

After reviewing all the evidence in the case, we have not been persuaded that error was committed by the court below in failing to find the essential fact averred and relied upon by the appellant, and the decree is therefore affirmed, with costs.

LEUTEN BRICK CO. v. KILLEN.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. EVIDENCE (§ 441*)—INVALIDATING WRITTEN AGREEMENT.

An affidavit of defense in an action on a written contract for goods sold and delivered which merely sets up a prior parol agreement at variance with the written contract, without any offer to prove that the parol terms were omitted by fraud, accident, or mistake, and simply avers that defendant was too busy to read the written contract presented to him by the clerk of the plaintiff and took the clerk's word that it contained the agreement which had previously been made, without any averment that he could not read, or that he had no opportunity to read, or that the clerk had outlined certain facts to him as contained in the paper, or did any other thing to mislead or deceive him, is insufficient.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.*]

2. PLEADING (§ 8*)—ALLEGATIONS IN GENERAL—CONCLUSIONS OR MATTERS OF FACT.

In an action on a written contract for goods sold and delivered, an averment in an affidavit of defense that the plaintiff accepted something in payment of its claim is an averment of a conclusion, and insufficient to prevent a summary judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of assumpsit by the Leuten Brick Company against James D. Killen for goods sold and delivered. From an order discharging rule for judgment for want of defense,

plaintiff appeals. Reversed and record remitted, with directions to make the rule absolute, and enter judgment for plaintiff.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Henry A. Hoefler, for appellant. Leon H. Folz and Stanley Folz, for appellee.

MOSCHZISKER, J. The plaintiff sued upon a written contract under seal between it and the defendant, dated April 29, 1910. By the terms of this contract the plaintiff agreed to furnish bricks for a building operation of the defendant at stipulated prices, in quantities as ordered by the latter, and the defendant agreed, *inter alia*, to pay \$2,400 in the form of six promissory notes dated as of the last delivery of the bricks and payable in 90 days thereafter, and to give as collateral six properties subject to certain mortgages, which properties were to be held in trust by a trust company, and in the event of the nonpayment of the notes at maturity to be conveyed to the plaintiff as collateral security for the \$2,400 debt. The plaintiff averred that the houses were so conveyed to its nominee, and that subsequently, after notice to defendant, they were sold at public auction; but that, instead of anything being realized from the collateral, the settlement showed a deficit of \$2,308.

[1] The defendant filed an affidavit of defense in which he denied that the bricks were purchased under the aforesaid written contract, and averred that they were furnished in pursuance of an oral agreement made February 1, 1910, with Robert Paschall, general manager of the plaintiff company, whereby \$2,400 of the account was to be paid by the conveyance to the plaintiff of the equities in the houses in question. The defendant in his affidavit admits signing the written contract sued upon, but attempts to evade his liability thereunder by averring that his signature "was procured fraudulently through artifice and misrepresentation"; that "some time in June, 1910, after the plaintiff had entered upon the performance of its oral contract, and a large part of the brick work of the operation had been completed, for which it had supplied all the bricks under said contract, one Mr. Wallace, a clerk in the employ of the plaintiff corporation, called on the defendant, * * * and stated that he had a paper * * * which the company wished him to sign. The defendant at the time was busily engaged in a matter with one of his foremen which preoccupied his mind, and requested that the paper be left with him, and that, if it was all right, the defendant would sign it, and return it to him the next day. Thereupon Wallace told the defendant that the paper in question simply contained the arrangement and agreement he had made with Paschall, and that

the company would like to have it in the shape of a writing, so that it might be filed away for future reference. Upon the faith of this explanation as to its contents, the defendant attached his signature to the paper * * * without reading it or having it read to him. The defendant avers that he executed the said agreement in the manner and under the circumstances stated upon the faith and in the belief that the statement made by William Wallace was true, that he never would have signed said agreement if the contents thereof had been correctly stated to him," and "that afterwards, upon completion of the operation, the defendant procured a conveyance to be made of the premises * * * to Edward Atkins, president of the plaintiff corporation, which requested the conveyance to be made to said Atkins instead of to the plaintiff. The defendant averred that the plaintiff accepted the said conveyance in full payment of its claim of \$2,400 under said contract and that said Edward Atkins now holds, and that he has ever since held the said premises for the benefit of the plaintiff." The court below held the affidavit of defense sufficient and discharged the rule for judgment, from which order the plaintiff has appealed.

A comparison of the written contract and the alleged oral agreement shows identical terms, except in the important particular, that by the former the properties were to be collateral for the \$2,400, and, according to the latter, they were to be taken "in absolute payment thereof." The defendant did not deny the delivery of the bricks or the correctness of the prices charged, but attempted to set up the defense that the bricks were not delivered under the written contract because that document was procured by fraud, and that the properties had been accepted by the plaintiff in full payment of the \$2,400. The averments in the affidavit do not bring this case within *Gandy v. Weckerly*, 220 Pa. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434, 123 Am. St. Rep. 691, and like cases, dealing with broken promises which served as inducements to the signing of written contracts. In substance the defense is a clear attempt to impeach a written instrument by showing a prior parol agreement at variance with it, without a proper offer to prove that the parol terms were omitted by fraud, accident, or mistake. The substance of the averment is simply that the defendant was too busy to read the written contract and took the word of a clerk that it "contained the arrangement and agreement which he had made with Paschall." The defendant does not say that he could not read, that he had no opportunity to read the paper before he signed it, that the clerk outlined certain facts to him as contained in the papers which were not there, or did any other overt thing to mislead or deceive him. It was the duty of the defend-

ant to read the paper before he signed it, and the mere general statement of the clerk as to its contents did not relieve him from this obligation or constitute such an inducing cause at the time of the execution of the contract as would bring this case within the line of authorities to which we have adverted. It may well be that the paper, according to the understanding of Paschall, did represent the agreement which the defendant had made with the plaintiff, and, in the absence of the averment of facts showing or tending to show fraud, accident, or mutual mistake, the defendant, by placing his signature to the paper, must be held to have adopted that understanding as his own, and prior oral agreements were merged in the written contract. *Greenfield's Estate*, 14 Pa. 489; *Penna. R. R. Co. v. Shay*, 82 Pa. 198, 203; *Hicks v. Harbison-Walker Co.*, 212 Pa. 437, 441, 61 Atl. 958; *Rinker v. Aetna Life Ins. Co.*, 214 Pa. 608, 611, 64 Atl. 82, 112 Am. St. Rep. 773; *Waslee v. Rossman*, 231 Pa. 219, 231, 80 Atl. 643; *Bright v. Siggins*, 2 Pa. Super. Ct. 106; *Lewis v. Dunlap*, 5 Pa. Super. Ct. 625; *Youngstown Electric Light Co. v. Poor District*, 21 Pa. Super. Ct. 95; *Schmitz v. Roberts*, 26 Pa. Super. Ct. 472.

[2] The averment "that the plaintiff accepted the said conveyance in full payment of its claim of \$2,400" is materially faulty in that it fails to state any date or particulars. To say that one "accepted" something in full payment is merely to aver a conclusion. If the defendant desired to stand upon this defense, it was his duty to give the facts upon which it was based, so that the court might determine whether such facts, if proved, were sufficient to justify the conclusion. The conveyance referred to by the defendant is evidently the same one which the plaintiff avers, and which the written contract shows, to have been a transfer of the properties as collateral. Under the circumstances, we feel that the affidavit of defense was insufficient, and that the judgment should have been entered for the plaintiff.

The assignment of error is sustained, and the record is remitted to the court below, with directions to make the rule absolute and enter judgment for the plaintiff.

LYLE v. ARMSTRONG et al.

(Supreme Court of Pennsylvania. March 4, 1912.)

1. MORTGAGES (§ 578*) — FORECLOSURE — REVIEW — DISCRETION OF TRIAL COURT — REFUSAL TO SET ASIDE SALE.

An appellate court reviewing an order refusing to set aside a sheriff's sale will not consider statements as to the value of the property, unless there is clear proof of an abuse of discretion in dealing with the question of inadequacy of price.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1655; Dec. Dig. § 578.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—37

2. MORTGAGES (§ 529*)—FORECLOSURE—SETTING ASIDE SALE—DISCRETION OF COURT.

On a rule to set aside a sheriff's sale, where the plaintiff in execution, who was also a mortgagee, bid in the property for \$2,500 and defendant alleged that it was worth \$85,000 to \$100,000, and plaintiff admitted it to be worth \$50,000, but alleged that including the judgment with interest and costs, delinquent and current taxes, and municipal liens, the total costs would be \$41,800, and there was no offer to show that any one had offered sufficient to pay the mortgage, and no allegation was made that any one was misled by the description in the advertisements, the court did not abuse its discretion in refusing to set aside the sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.*]

Appeal from Court of Common Pleas, Philadelphia County.

Rule by Franklin L. Lyle against William Lynn Armstrong, real owner, and another, to set aside a sheriff's sale. From an order refusing to set aside the sale, defendants appeal. Affirmed.

The facts are stated in the opinion of the Supreme Court.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

E. Clinton Rhoads, Maxwell H. Kratz, Paxson Deeter, and John C. Bell, for appellants. Alex. Simpson, Jr., and I. Hazleton Mirkil, for appellee.

POTTER, J. [1] This is an appeal from the refusal by the court below to set aside a sheriff's sale of real estate. Inadequacy of price, and insufficiency of description in the advertisements were alleged as reasons for setting aside the sale. In considering an appeal of this kind, we will not consider statements respecting the value of the property sold, unless there is clear proof of an abuse of discretion by the court below, in dealing with the question of inadequacy of price. *McKee v. Kerr*, 192 Pa. 164, 43 Atl. 953; *Light v. Zeller*, 195 Pa. 315, 45 Atl. 1055.

[2] Appellant relies upon the case of *Yost v. Coyle*, 226 Pa. 458, 75 Atl. 721, 134 Am. St. Rep. 1069; but there the circumstances were held to be unusual. The sheriff's advertisements failed to show that the width of the rear of the lot sold was more than double the width of the front, and the area was incorrectly stated as about 4,000 square feet, while the actual quantity was about 6,000 square feet. It also appeared that the description in the advertisements did not follow that in the levy, as required by a local act of assembly in force in Allegheny county, where the proceedings took place. The court below refused to set aside the sale for these reasons, coupled with inadequacy of price. But this court was persuaded that the misdescription of the property was such as to plainly mislead bidders, and we therefore held that the discretion of the court below was not properly exercised. The general rule is undoubtedly set forth correctly in West-

moreland Guarantee Bldg. & Loan Ass'n v. Nesbit, 21 Pa. Super. Ct. 150. In that case the court below had discharged a rule to set aside a sheriff's sale, taken on the ground that the representative of the plaintiff in the execution had forgotten to attend the sale and bid on the property, which had consequently sold for an inadequate price. The order was affirmed by the Superior Court; Orlady, J., saying (at page 153): "We are not merely to substitute our view of a discretionary act for that of the court below, but, under the clearly defined decisions, are to examine the record, fortified by the presumption that the court below has properly discharged its discretionary duty." In the present case we find that it was averred in the petition that the property was sold to plaintiff for the sum of \$2,500, with an allegation that it was worth from \$85,000 to \$100,000. But the plaintiff was the mortgagee, and, while admitting that the property was worth the sum of \$50,000, the answer avers that calculating the amount of the judgment, with interest and costs, delinquent and current taxes, and municipal liens filed against it, the total cost to him would be at least \$41,800. There was no allegation in the petition that any offer had been made to purchase the property for an amount sufficient to pay the mortgage. Nor was there any allegation that any one was misled by the description in the advertisements. The criticism of the descriptions evidently did not impress the court below, and it does not appeal to us. Certainly we cannot say that there was any abuse of discretion by the court below in refusing to set aside the sale upon that account. In the depositions which were taken in support of the rule and against it, there was considerable conflicting testimony, as to the value of the property, the character of the buildings, and as to the effect of the alleged faulty descriptions in the advertisements. There was ample evidence to warrant the court below in finding for the plaintiff upon the questions in dispute. We find in the record nothing to indicate that the court below in any way abused its discretion in discharging the rule to set aside the sale. As was pointed out in *Ritter v. Getz*, 161 Pa. 648, 29 Atl. 112, it is only in extreme cases that we undertake to interfere with the result of the exercise of discretion by the court below in confirming or setting aside sheriff's sales; and this is not such a case.

The order is affirmed.

LYLE v. ARMSTRONG et al.

(Supreme Court of Pennsylvania. March 4, 1912.)

1. MORTGAGES (§ 441*)—FORECLOSURE—SERVICE OF PROCESS.

The only effect of failure to serve process on the real owner on a scire facias sur mortgage is to authorize him to make any defense

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to a petition for writ of possession by the purchaser at sheriff's sale that he might have made against the scire facias.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1300; Dec. Dig. § 441.*]

2. MORTGAGES (§ 529*) — FORECLOSURE—SETTING ASIDE SALE—IRREGULARITIES.

Objections to the validity of a sheriff's sale on the ground of inadequacy of price and insufficiency of description are not properly interposed as a defense to a petition for writ of possession, but should be raised by motion to set the sale aside; the acknowledgment of the sheriff's deed curing all irregularities in the proceedings.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.*]

3. MORTGAGES (§ 544*) — FORECLOSURE — RIGHTS OF PURCHASER — WRIT OF POSSESSION—DEFENSE.

On a petition for writ of possession by a mortgagee who has bought in at a sheriff's sale in foreclosure, a claim against him for money damages on the ground of misrepresentations is not available as a defense.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1568-1577; Dec. Dig. § 544.*]

4. MORTGAGES (§ 572*) — FORECLOSURE—REVIEW — PRESENTING QUESTIONS IN TRIAL COURT—PLEADING.

On appeal from an order granting a writ of possession for land purchased at mortgage foreclosure under Act April 20, 1905 (P. L. 239), the contention that the court erred in entering judgment on an amended petition without allowing appellant to file an additional answer will not be sustained, where the amendment merely introduced the record of the foreclosure proceedings, no objection was made to its allowance and no exception taken, and the record showed no offer to file an additional answer.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1649; Dec. Dig. § 572.*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition by Franklin L. Lyle against William Lynn Armstrong, real owner, and another, for writ of possession. From an order awarding the writ, James I. Comly appeals. Affirmed.

The facts are stated in the opinion of the Supreme Court.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHISKER, JJ.

E. Clinton Rhoads, Maxwell H. Kratz, Paxson Deeter, and John C. Bell, for appellant. Alex. Simpson, Jr., and I. Hazleton Mirkil, for appellee.

POTTER, J. [1] The proceedings in this case were under the Act of April 20, 1905 (P. L. 239), which provides a method by which a purchaser of real estate at a judicial sale may obtain possession. The petition in the present case follows the requirements of the statute. It describes the property, avers petitioner's title, and, by an amendment allowed by the court, the entire record under which the title was acquired was made part of the petition. It avers that this appellant, James I. Comly, was in possession of the premises, and that due notice was given to

him, and that he refused to yield possession. In his answer the respondent denied that the petitioner was the owner of the premises, on the ground that the sheriff's sale was ineffective to give him title as against respondent, because appellant was the real owner by an unrecorded deed at the time the scire facias was issued; that this fact was known to the petitioner, and that respondent was not made a party to the suit or served with process. It is admitted that service was made on the real owner as shown by the recorded title.

The only effect of failure to serve process upon the real owner is to permit him to make any defense against the purchaser at the sheriff's sale that he might have made against the scire facias. *Gelston v. Donnon*, 44 Pa. Super. Ct. 280.

[2] The respondent also averred that the sheriff's sale was void because of inadequacy of price, coupled with insufficient advertisements. That question has been determined adversely to his contention in *Lyle v. Armstrong*, 83 Atl. 577, in which an opinion has just been filed. It should be noted, however, that questions relating to the validity of a sheriff's sale, upon the ground of inadequacy of price and insufficiency of description, are to be raised by a motion to set the sale aside, and are not properly to be interposed as a defense to a demand by the purchaser for possession. *Shearer v. Pepper*, 155 Pa. 501. 26 Atl. 658. The acknowledgment of the sheriff's deed cures all irregularities in the proceedings. *Mencke v. Rosenberg*, 202 Pa. 131, 51 Atl. 767, 90 Am. St. Rep. 618; *Jackson v. Gunton*, 26 Pa. Super. Ct. 203.

[3] As a defense to the mortgage, appellant contended that plaintiff had violated an agreement to release certain portions of the mortgaged premises. But the answer admits that the written agreement was to release "such portions of the ground and for such consideration as will be satisfactory to the mortgagee." If there was any prior verbal agreement, as was claimed, it would be merged in the written contract. This proceeding is simply for the possession of the land, and any claim for money damages on the ground of misrepresentations by the mortgagee would not be available as a defense here.

[4] In the second assignment of error, appellant charges that the court below erred in entering judgment on the amended petition without allowing him to file an additional answer. The amendment merely introduced the record of the foreclosure proceedings, and no objection was apparently made to its allowance, nor was any exception taken. The record shows no offer to file an additional answer. In the third assignment of error, appellant suggests that, under the judgment of the court below, he was deprived of property without due process of law, and in violation of the fourteenth amendment of the Constitution of the United States. This idea seems to have been abandoned upon the ar-

gument, as no grounds for the assignment are indicated. We find nothing in the record to justify the suggestion. This case was heard upon petition and answer, under the eighth section of the act of 1905, and the court entered judgment in behalf of the petitioner, and awarded a writ of possession. In its action in this respect, we see no error.

The assignments of error are dismissed, and the judgment is affirmed.

PAGE v. MOORE.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. JUDGMENT (§ 199*)—ON TRIAL OF ISSUES—JUDGMENT NON OBSTANTE VEREDICTO.

The court cannot enter a judgment non obstante veredicto, where it could not give binding instructions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. BANKRUPTCY (§ 304*)—ADMINISTRATION OF ESTATE—ACTION BY TRUSTEE—QUESTION FOR JURY.

Where, in an action by a trustee in bankruptcy to recover the value of bonds, wrongfully taken by the bankrupt from defendant, defendant contends that he had taken the bonds to deliver them to their owner, to whom, he alleged, they had been previously assigned, and the evidence is conflicting as to whether there was a valid consideration for the assignment, the case is for the jury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. § 304.*]

3. CONTRACTS (§ 113*)—REQUISITES AND VALIDITY—LEGALITY OF CONSIDERATION.

An agreement by a contractor to pay bonds to an architect for services in overseeing his work, or for securing the award, would be illegal.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 521-541; Dec. Dig. § 113.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass by Howard W. Page, trustee in bankruptcy of Moore & Co., Incorporated, against William G. Moore for the alleged misappropriation of bonds belonging to the bankrupt's estate. From a judgment for plaintiff, defendant appeals. Affirmed.

From the record it appeared that on January 14, 1907, William G. Moore, Russell B. Smith, and Harry T. McDevitt, who were engaged in a contracting business under the firm name of William G. Moore, entered into a contract with Bridgman Bros. Company to erect for the latter on Fifteenth street, south of Washington avenue, Philadelphia, a three-story and basement factory building, under the direction of Milligan & Webber, architects. The cost was to be \$62,200, to be paid the contractor partly in cash, partly in promissory notes, and partly in bonds secured by a second mortgage on the property. The bonds were to be 14 in number, of a value of \$7,000, being half of a total cost of \$14,000, 28 for \$500 each. The 14 bonds were to be deposited with the Merchants' Trust

Company of Philadelphia, to be delivered to the contractor at various times, upon certificates of the architects that the work had been completed to the extent fixed by the contract for such deliveries.

On June 14, 1907, after work on the building had been commenced and was in progress, the partners in the firm of William G. Moore incorporated themselves in the state of New Jersey under the firm name of Moore & Co., Incorporated, and all the contracting business of the firm, including the unfinished contract with Bridgman Bros. Company, was transferred to the corporation. The building, which was in course of erection, fell down in the early part of July, 1907, and it was necessary practically to rebuild it. Prior to the accident, William G. Moore had received from the trust company, on certificates from the architect, 12 of the 14 bonds. He also received from the architects, the day before the collapse of the building, a certificate entitling him to the remaining 2 bonds. This was not presented by him before the accident, and he did not receive the last 2 bonds until July 22, 1908, a year later.

On June 5, 1908, Howard W. Page was appointed, by the court of common pleas No. 2 of Philadelphia county, receiver for Moore & Co., Incorporated, and subsequently, that corporation having been adjudicated a bankrupt, he was first made receiver and then trustee in the bankruptcy proceedings. While receiver in bankruptcy, Mr. Page entered into a contract of settlement with Bridgman Bros. Company, who had claimed a large offset to the contract price, under their contract with William G. Moore, because of the delay in the completion of the work, due to the collapse of the original building. By this settlement mutual releases were to be given, and the receiver was to be paid \$2,010 in cash and the two bonds for \$500 each still in the hands of the trust company. William G. Moore, the defendant, was an active agent in effecting the settlement, and when it was completed received both the cash and the two bonds from the trust company. The cash he turned over to the receiver by advice of his attorney.

After Mr. Page was appointed receiver on June 6, 1908, he sent his representative to the office of Moore & Co., Incorporated, in the Drexel building, Philadelphia, to take possession of the assets of the company. The defendant, William G. Moore, who was president of the company, took from the safe ten bonds of the Bridgman Bros. Company, gave eight of them to the receiver's messenger, and retained two himself, saying that they belonged to the architect. It was to recover the value of these two bonds and the two subsequently received by defendant from the Merchants' Trust Company, all of which he refused to deliver to plaintiff, that the present suit was brought.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Henry P. Brown and D. Howard Evans, for appellant. Thomas Raeburn White, for appellee.

POTTER, J. In this action the trustee in bankruptcy of Moore & Co. sought to recover the value of four bonds, which, it was alleged, were wrongfully taken from the bankrupt by the defendant and converted to his own use. The defendant contended that he had taken the bonds for the purpose of delivering them to their owner, Frederick Webber, to whom he alleged they had previously been assigned. The controversy turns upon the correct interpretation and the legal effect to be given to a letter written by the defendant to Mr. Webber on December 29, 1906. The subject-matter of the letter is as follows: "I am about to erect a four-story factory building for Bridgman Bros. at 15th and Washington avenue. The payments will include \$7,000 in second mortgage six per cent. three year bonds against this property, indorsed by Bridgman Bros. individually. I hereby agree to assign to you irrevocably \$3,000 of these bonds." Counsel for appellant contend that this letter constituted an equitable assignment of the bonds to Webber. The trial judge construed the letter to be sufficient in form to constitute an equitable assignment of the bonds, but submitted to the jury the question whether there was a valid consideration for such assignment. There was testimony on behalf of defendant tending to show that Webber had secured certain subcontracts for the firm of William G. Moore on better terms than the firm could have secured them for itself, and that, in recognition of his service in this respect, the firm had agreed to give him the bonds referred to in the letter. The trial judge instructed the jury that, if they found that Webber did render such services, that fact would constitute a good and sufficient consideration for the bonds. The verdict of the jury was, however, against the contention of the defendant in this respect. We do not agree with the view of the trial judge that the letter from Moore to Webber, in itself, constituted an assignment of the six bonds in question. *Henderson v. Jennings*, 228 Pa. 188, 77 Atl. 453, 80 L. R. A. (N. S.) 827, is cited in support of that contention. There it was agreed that a mortgage was to be given as part consideration for a building contract; and it was held that the contractor might assign his interest in it before it had been executed, or was to be delivered under the terms of the contract. But it should be noted that one particular mortgage was the thing sold in that case. In the present instance the alleged assignment covers 6 bonds out of 14, without specifying any particular or specific bonds. Nor was the wording of the contract in the present tense. It was not, "I hereby assign," but, "I hereby agree to as-

sign." There was much, therefore, to support the contention of counsel for appellee that the letter was but an executory contract, and was not an assignment of the specific bonds in controversy. But appellant had the benefit of the ruling in his favor upon this question, and cannot complain of it here. We need not, therefore, give this point further consideration.

[1] The only error alleged in the assignments is the refusal of the trial judge to give binding instructions, or to enter judgment non obstante veredicto for the defendant. As the establishing of facts material to the issue depended upon oral testimony, it would have been error if the court had taken the case from the jury. *Second National Bank v. Hoffman*, 229 Pa. 429, 78 Atl. 1002; *Fry v. National Glass Co.*, 219 Pa. 514, 69 Atl. 56. Where the court could not have given binding instructions, it cannot enter judgment non obstante veredicto thereafter. In *Dalmas v. Kemble*, 215 Pa. 410, 412, 413, 64 Atl. 559, 560, Mr. Chief Justice Mitchell said that under the act of April 22, 1905 (P. L. 286) the court "is to treat the motion for judgment as if it was a motion for binding directions at the trial. * * * If it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction, then there can be no judgment against the verdict now."

[2, 3] In the present case there was a conflict of evidence. The consideration suggested by defendant for the assignment of the bonds was questioned at the trial. It was shown that Webber was the architect of the building and the agent of the owner; and, as such, it was his duty to award the contract, and to see that the building was erected in accordance with the plans and specifications. He awarded the contract to appellant. Obviously an agreement by a contractor to pay bonds to an architect for services in over-seeing his work, or for securing the award, would be illegal. The circumstances called for inquiry by the jury. It was also shown that upon another occasion, when testifying before the referee in bankruptcy, appellant had stated that the agreement was that this \$3,000 was to be paid to Webber on account of his services as architect. In the present case appellant testified that this former evidence was given under a misapprehension. But his testimony was for the jury. It also appeared that in proceedings before the referee in bankruptcy Webber had stated, under oath, that the bonds alleged to be assigned in the letter were given to him on account of services rendered as architect. It is not pretended that the transfer of bonds for such a consideration by the contractor would have been proper. There was also some evidence that defendant at first made claim to the bonds under an assignment to himself; and it appeared, also, that two of the bonds were entered in the investment

account of Moore & Co., Incorporated, and remained there until the appointment of a receiver. All this was inconsistent with the claim that the bonds were the property of Webber, or that they were so considered, prior to the bankruptcy. It is clear, therefore, that the evidence was conflicting as to the real consideration for the assignment of the bonds. That the evidence offered upon the part of the plaintiff was, if credited by the jury, sufficient to support the verdict, we have no doubt.

Counsel for appellant also urge that the appellee is precluded from assailing the validity of the alleged assignment from Moore to Webber by the fact that in his statement of claim he averred that the defendant, after taking and converting the bonds to his own use, "used them in the payment of an obligation personally owing by him to one Frederick Webber, who had done certain work for him," etc. The record does not show that the fact, or effect of this averment, was raised in the court below. But, at any rate, the averment goes no farther than to charge that defendant used the bonds to pay his own obligation. It does not in any way admit the validity of the claim of Webber to the bonds as against Moore & Co., Incorporated. In his testimony defendant alleged that when the bonds were delivered to Webber they were the property of the latter, as he had become the owner by reason of the alleged assignment in the letter, made some time previously. The essential question, then, presented for determination upon the trial was whether, at the time when the bonds were delivered to Webber, they belonged to him, or were the property of the bankrupt estate. The verdict of the jury determined that question in favor of the estate, and thereby fixed the liability of the defendant. The burden was upon appellant at the trial to sustain his right to the bonds which he had taken; and the verdict shows that he failed to establish that right to the satisfaction of the jury.

We find no merit in the assignments of error. They are dismissed, and the judgment is affirmed.

JAMISON v. CUMBERLAND COUNTY.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. HIGHWAYS (§ 118*)—CONSTRUCTION—DAMAGES.

Where a township road is reconstructed by the state highway department under Act May 1, 1905 (P. L. 318), after the passage of Act June 8, 1907 (P. L. 505), which amends the former act by eliminating the provision for assessment of damages resulting from a change of grade, the county is not liable for damages resulting.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 346-355, 362, 380; Dec. Dig. § 118.*]

2. HIGHWAYS (§ 115*)—CONSTRUCTION—DAMAGES.

That proceedings for the reconstruction of a township road under Act May 1, 1905 (P. L. 318), were commenced prior to the enactment of June 8, 1907 (P. L. 505), eliminating the right to recover for a change of grade, does not entitle an adjoining owner to damages from such reconstruction actually made after the enactment of the latter statute since no liability attaches till the actual physical change of grade occurs.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 358-370, 372, 373; Dec. Dig. § 115.*]

Appeal from Court of Common Pleas, Cumberland County.

Action by Rebecca Jamison against Cumberland County. From a judgment of the superior court reversing a judgment of the court of common pleas for plaintiff, she appeals. Affirmed.

Argued before FELL, C. J., and BROWN. MESTREZAT, STEWART, and MOSCHZISKER, JJ.

J. W. Wetzel and Conrad Hambleton, for appellant. S. B. Sadler and John C. Bell, Atty. Gen., for appellee.

MOSCHZISKER, J. [1] The appellee correctly states the question involved to be, "Is a county liable for damages resulting from a change of grade of a township road reconstructed by the State Highway Department after the passage of the act of June 8, 1907?"

The road which figures in this case was laid out and opened many years ago. In 1906, upon application of the supervisors of Pennsboro township, the commissioners of Cumberland county presented a petition to the State Highway Department praying for the improvement and reconstruction of this road as provided in the act of May 1, 1905 (P. L. 318). Subsequently the necessary surveys were made and a contract for the work was entered into by the State Highway Department as authorized by the act, but the actual physical change of grade in front of appellant's property did not take place until many months after the passage of the act of June 8, 1907 (P. L. 505) which expressly amended the act of 1905 so as to eliminate a provision for the assessment of damages resulting from a change of grade. Nevertheless the court of common pleas decided that, under the constitutional provision that municipal corporations shall make compensation for property injured by the construction or enlargement of their highways, the plaintiff was entitled to recover for damages suffered from this change of grade and entered judgment accordingly; this judgment was reversed by the superior court, and the case is here on appeal from that tribunal.

The facts have been twice before the superior court (Jamison v. Cumberland Co., 39 Pa. Super. Ct. 335; Id., 48 Pa. Super. Ct. 32), and on the last appeal, in an opinion by Porter, J., the question here involved is cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rectly answered in the negative, the whole subject is amply and ably covered, and the positions taken are fully sustained by the authorities there cited and explained. The answers to most of the contentions of the appellant are to be found in the following excerpt from that opinion: "The road with which we are now dealing was one of the general system of highways of the commonwealth, a township road, the property of the commonwealth, and the burden of keeping it in repair has been by law imposed upon the township. The county in its corporate capacity had nothing to do with it save the authority conferred by the act of 1905 to assist the commonwealth and the township by contributing 12½ per cent. of the cost of making it an improved highway. When the road was originally laid out as a highway many years ago, the county had nothing whatever to do with it except to pay damages and expenses in compliance with the general law of the state. The taking was by the state by right of eminent domain in the manner provided by its laws, through the agency of the judiciary. The 6 per cent. allowance for roads embraced in all the original grants from the proprietaries and the commonwealth made the allowance of compensation for the land then taken a matter of grace on the part of the Legislature and not of constitutional right. * * * The road having been opened, it was within the discretion of the supervisors of the township to change the grade of the highway from time to time as the exigencies of public travel required. Had the supervisors of the township in which this road was located, without the intervention and assistance of the State Highway Department, made the same change in the grade of the highway, this plaintiff could not have asserted a constitutional right to claim compensation for the alleged injury to her property resulting from such change in grade. * * * Any taking of, or injury to, property authorized by the acts of 1905 or 1907 involves an exercise of the right of eminent domain by the state in its sovereign capacity, acting through one of its executive departments. The statute conferred upon counties no privilege to take private property in connection with the improvement of a township road, nor did it give to a county any control over or right in such road before, during, or after the completion of the improvement. The road was a township road before the improvement was undertaken; the statute enacted in its twentieth section that the road should after the improvement be known as a 'state highway,' but it also provided that it should be the duty of the authorities of the township in which the road was situated, after the improvement was completed, to keep the road in repair, and provided that the supervisors of the township might apply directly to the State Highway Department and receive aid for the maintenance of the same. The statute, as amended, does allow compen-

sation for property actually taken in improving a road under its provisions by the State Highway Department, but that, as is shown by the authorities above cited, was a matter of grace and not of constitutional right. The fact that the statute made the county the paymaster in the first instance for property thus taken by the State Highway Department did not constitute the county a corporation 'invested with the privilege of taking private property for public uses' within the meaning and spirit of the constitutional provision, nor did it vest parties whose property was not actually taken with the constitutional right to demand consequential damages for injuries alleged to have resulted from change of grade. * * * The county of Cumberland was not invested with the right to take private property for public use in the making of the improvement in question, the road was not and did not become a work, highway, or improvement of the county or over which the county had control, and the constitutional provision in question has no application to this case." This leaves little more to be said upon the subject.

The commonwealth of Pennsylvania has entered upon the systematic development of a series of state highways, and this the acts of 1905 and 1907 were intended to carry out. While the construction of these acts concerns all the people, the rights of the individual particularly affected are the matter of prime importance to be determined here, and we have examined and considered the case from this point of view. The acts represent a new scheme of highway building undertaken directly by the state, whose subdivisions merely act to put into operation the machinery of the commonwealth and as its agents and the paymasters of part of the cost of such improvements. The statutory provisions that the State Highway Department may "contract jointly with the county and township or townships in which said highway lies to carry out the recommendations of the State Highway Commissioner," and that no work shall be authorized "until the written agreement of the commissioners of the county and the * * * township or townships, * * * to assume their respective shares of the cost * * * shall be on file in the office of the State Highway Department," mean that in each instance a record of the undertaking shall be thus made up for the benefit of the state and the respective localities through which the road passes; these provisions do not in any sense contemplate a contract in which the property owners along the line of the improvement can claim any special beneficial interest, nor do they impose an obligation upon the counties to respond in damages for consequential injuries resulting from a change of grade in the making of the improvement. The work is done directly by the state, and the act expressly provides that every contract for such improvement "shall be made in the name of the

commonwealth of Pennsylvania and shall be signed by the State Highway Commissioner * * * and approved * * * by the Attorney General." The state directly, not the county or townships, exercises the power of eminent domain, and injuries suffered by property owners are attributable to the state and not to the county. Although the latter contributes a small percentage of the cost, roads reconstructed under these acts do not become county roads; and, while in a certain sense the counties are quasi municipal corporations, the constitutional provision relied upon by the appellant cannot be applied to impose liability in a case such as this where no injury has been caused through the exercise of a right or the performance of a duty imposed upon the county.

[2] The fact that the improvement had its inception and the contract for the work was let under the act of 1905, prior to the amendment of 1907 eliminating the right to recover for a change of grade, will not serve to help the appellant, as no liability attached or right vested until the actual physical change of grade occurred. *Ogden v. Philadelphia*, 143 Pa. 430, 22 Atl. 694; *Plan 166*, 143 Pa. 414, 22 Atl. 669; *Jones v. Bangor Boro*, 144 Pa. 638, 23 Atl. 252; *Clark v. Philadelphia*, 171 Pa. 30, 33 Atl. 124, 50 Am. St. Rep. 790; *Howley v. Pittsburgh*, 204 Pa. 428, 54 Atl. 347.

The assignment of error is overruled, and the judgment of the superior court is affirmed.

KEENE HOME v. STARTZELL.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. EXECUTION (§ 76*)—ISSUANCE—AFFIDAVIT OF OWNERSHIP—"WRIT."

Where judgment is entered on a warrant of attorney accompanying a bond and mortgage after the mortgagor has parted with the title to the real estate, a writ of execution thereon is not a writ within Act April 23, 1903 (P. L. 261), providing that the plaintiff in any writ to charge particular land with the payment of a particular debt running with the land shall file with his præcipe an affidavit setting forth who are the real owners of the land charged, and the affidavit is not required in such case.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 171; Dec. Dig. § 76.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 7530-7532.]

2. JUDGMENT (§ 773*)—LIEN—TIME OF TAKING EFFECT.

A judgment on a bond and warrant of attorney accompanying a mortgage creates a lien on the mortgaged premises, whoever may be the owner at the entry of the judgment, and the lien relates back to the date of recording the mortgage, and a sale on the judgment discharges the lien of the mortgage.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1333; Dec. Dig. § 773.*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition by the Keene Home against Edward Startzell to deliver possession. From the judgment awarding possession, Charles E. Griffith and another appeal. Affirmed.

Ferguson, J., stated the facts to be as follows in the court below:

"This is a citation to deliver possession to a purchaser at sheriff's sale under the act of April 20, 1905 (P. L. No. 239). The citation was directed to Anna M. Griffith as the person in possession who has filed an answer, as has also Katherine L. Dallas who was permitted to intervene. The petition for citation avers that the petitioner acquired title by purchase at a sheriff's sale held in August, 1910; that the sale was upon a writ of venditioni expons issued upon a judgment entered against Edward Startzell on a bond and warrant of attorney in a proceeding in which the Keene Home, a corporation, was plaintiff; that the bond and warrant of attorney were for the same debt as that secured by an indenture of mortgage of the real estate executed by the said Startzell to Robert Pitts and by assignments, the said mortgage became vested in the said Keene Home. The petition further avers that Anna M. Griffith came into possession through a title derived from the said Startzell and refuses to deliver possession to the petitioner. The answers filed by Anna M. Griffith and Katherine L. Dallas deny the averments of the petition, but an examination of the answers discloses that the denial is not such a denial of the facts alleged in the petition as an assertion of a conclusion of law that the petitioner did not acquire title by the sheriff's sale referred to. The answers further set up that Anna M. Griffith is not in possession of the premises, but that Katherine L. Dallas acquired title thereto in May, 1909, and is the owner, and that Charles E. Griffith, the husband of Anna M. Griffith, is now the occupant of the premises under a verbal lease from the said Katherine L. Dallas. They also aver that Edward Startzell was not the owner of the premises at the time the judgment was entered upon the bond and warrant, and that no notice was given to Katherine L. Dallas, Anna M. Griffith, or Charles E. Griffith of the proceedings upon the bond. The respondents therefore pray that a trial by jury be awarded to determine the question of fact raised by the petition and answers.

"The placing of the petition and answers upon the list for argument is an admission on the part of the petitioner that all relevant facts averred in the answers are true, and an admission by the respondents that all facts averred in the petition and not denied in the answers are likewise true. It is conceded by both sides therefore that the following facts are fixed: The bond and warrant upon which judgment was entered accompanied a mortgage of the real estate.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Edward Startzell, the defendant, had parted with the title before the judgment was entered. Katherine L. Dallas was the holder of the fee, subject to the mortgage at the time the judgment was entered. No notice of the execution was given to Anna M. Griffith, Katherine L. Dallas, or Charles E. Griffith; and Charles E. Griffith is now occupant of the premises under a verbal lease from Katherine L. Dallas."

The court refused the prayer of the petition on the ground that Anna M. Griffith was not in possession, but gave petitioner leave to amend, whereupon an amended petition was filed for a citation upon Charles E. Griffith, one of appellants, to which petition answers were filed by both appellants denying the title of the petitioner, or the validity of the sheriff's sale, setting forth that Katherine L. Dallas, the real owner, had had no notice whatever of the proceedings, and had not been made a party thereto, as required by Act July 9, 1901 (P. L. 614), and Act April 23, 1903 (P. L. 261), and that the premises were occupied by Charles E. Griffith under verbal lease from Katherine L. Dallas.

The court entered judgment of possession on this petition and answers against Charles E. Griffith, to which judgment an exception was taken and filed, and from which judgment this appeal is taken.

Argued before BROWN, MESTREZAT, ELKIN, STEWART and MOSCHZISKE, JJ.

C. W. Van Artsdalen, for appellants. John G. Johnson and Kinley J. Tener, for appellee.

PER CURIAM. The real estate which is the subject of this controversy was sold at sheriff's sale upon an execution issued on a judgment entered upon a bond and warrant accompanying a mortgage. When the judgment was entered, Startzell, the mortgagor and the obligor in the bond, had parted with his title to the property, and it was sold by the sheriff without notice to the owner of it. The contention of the appellants is that no title passed to the sheriff's vendee, because of a failure to comply with the following provision of the act of April 23, 1903, P. L. 261: "The plaintiff in any writ of ejectment, in any writ of summons to recover upon a ground-rent deed, or to recover any sum charged upon real property by will or deed, in any writ of scire facias sur mortgage, or in any writ to charge particular land with the payment of a particular debt running with the land, or some person on his behalf, shall file with his praecipe an affidavit setting forth, to the best of his knowledge, information and belief, who are the real owners of the land charged, or in the action of ejectment are claimants thereof, as the case may be; and all such persons shall be made parties to the writ, which shall then be served by the sheriff as follows."

[1] A judgment entered upon a bond and warrant of attorney accompanying a mort-

gage creates a lien upon the mortgaged premises, no matter who may be the owner of them at the time of the entry of the judgment. The lien of such judgment relates back to the day the mortgage was recorded, and a sale upon it discharges the lien of the mortgage. *Morris v. Campbell*, 186 Pa. 589, 40 Atl. 1014, 65 Am. St. Rep. 880.

[2] When Dallas, the appellant, took title, she had record notice that the mortgage which bound her property had been accompanied by a bond upon which judgment might be entered at any time against Startzell, the obligor in it, without notice either to him or to her, for neither was entitled to such notice. After the judgment was entered, no writ was issued to recover any sum charged upon the property, or to charge it with the payment of any particular debt running with it. Neither the *fi. fa.* nor *vend. ex.* charged the land with the mortgage debt. It was so charged by the entry of the judgment, and the writ of execution subsequently issued thereon was clearly not a writ within the intendment of the act of 1903.

The court below correctly so held, and the judgment for the petitioner below, for possession of the property, is affirmed.

BENDER et al. v. PENFIELD.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. LIMITATION OF ACTIONS (§ 125*)—COMPUTATION OF PERIOD—COMMENCEMENT OF ACTION—AMENDMENT.

An amendment will not be allowed after a cause of action against the executor of a decedent's estate for the decedent's negligence has been barred by limitations by making the person described as executor defendant individually as the sole devisee under the will of decedent; the fact that the party so introduced individually happened to be the legal representative of the estate originally represented being of no consequence.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 542; Dec. Dig. § 125.*]

2. LIMITATION OF ACTIONS (§§ 124, 127*)—COMPUTATION OF PERIOD—COMMENCEMENT OF ACTION—AMENDMENT.

A new cause of action cannot be introduced or new parties brought in or new subject-matter presented or a new vital or material defect in the pleadings corrected after the statute of limitations has become a bar.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 541, 543-547; Dec. Dig. §§ 124, 127.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass for personal injuries by Oscar Bender, by his next friend and father, Joseph Bender, and by the latter individually, against Anne W. Penfield, formerly Anne M. Weightman Walker, sole devisee under the last will and testament of William Weightman, deceased. From an order refusing to take off nonsuit, plaintiffs appeal. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Bernard Harris, for appellants. Frank P. Prichard and James Wilson Bayard, for appellee.

STEWART, J. At the institution of this action process by summons went out against the estate of William Weightman, deceased. It was returned served, but upon whom does not appear. The circumstance is immaterial, since a general appearance for the estate followed. Two years after the action had been begun an amendment was allowed, whereby the name of defendant was changed so as to read Anne W. Penfield, formerly Anne M. Weightman Walker, surviving executor of the estate of William Weightman, deceased. Later on a rule was made absolute changing the name of defendant to Anne W. Penfield, formerly Anne M. Weightman Walker, sole devisee under the last will and testament of William Weightman, deceased. To this last amendment exception was taken. The case was proceeded with, resulting in a judgment of nonsuit for insufficiency of evidence, which the court refused to take off. From this later order we have this appeal. Were we to concede that plaintiffs' evidence established a prima facie case of negligence, a reversal of the judgment on that point could avail the plaintiffs nothing, and we therefore make no inquiry into that feature of the case.

[1] The judgment entered is clearly right for jurisdictional reasons. The amendment by which this appellee was made a defendant in the action was without authority of law. The action had been brought against the estate of a decedent. The amendment, bringing upon the record the appellee as the legal representative of the estate, was entirely proper. It introduced no new party, since in the event of recovery the judgment would simply be *de bonis testatoris*; but by the second amendment the appellee, against her protest, was introduced upon the record to defend not in her representative but in her individual capacity, and had judgment been obtained it would have been *de bonis propriis*. No truer test can be applied in determining whether a proposed amendment involves a change of parties to the action. If it may involve in personal liability one who was not made a party originally, the amendment, if objected to, should be disallowed, for no one may be held to answer except as required by due process. The negligence here charged was that of the estate of William Weightman. By the first amendment, acquiesced in, that estate was in court to answer through its legal representative, such representative being in court in no other capacity. By the second amendment another and wholly different party, in substitution of the one originally proceeded against, was

charged with liability for the alleged negligence, and that, too, after right of action against such party had been lost by lapse of time. The fact that the party so introduced individually happened in this case to have been the legal representative of the estate originally complained against is a matter of no consequence. The rule admits of no exception based upon such accidental circumstance. Had the legal representative of the Weightman estate been some other than the appellee, it could not be for a moment contended that an amendment could properly be made bringing such party upon the record as a defendant. The principle of the rule applies in the one case as directly as in the other. As was said by this court in *Garman v. Glass*, 197 Pa. 101, 46 Atl. 923, in discussing the question of amendments under the statute: "Rights of action in different capacities even though in the same individual, cannot be mixed and interchanged in this way."

[2] In the present case the right of action against the appellee was lost by expiry when this amendment was made, and a new action against the appellee would have been unavailing in face of the statute of limitations. The only purpose of the amendment was to involve the appellee in a liability from which the law had discharged her by making her an original defendant in an action brought in time but against another party. This was without warrant in law. The appellee in her individual capacity was never for a moment in court in connection with this case before the amendment was made, and the court was therefore without jurisdiction as to her. "It has been many times decided that a new cause of action cannot be introduced, or new parties brought in, or a new subject-matter presented, or a vital and material defect in the pleadings be corrected after the statute of limitations has become a bar." *Le Bar v. R. R. Co.*, 218 Pa. 261, 87 Atl. 413. In the case in which this appears the authorities in support are cited, and further reference to them is unnecessary.

Sufficient cause for the nonsuit appearing, the appeal is dismissed at the cost of appellant, and the judgment is affirmed.

FRENCH v. HARDING.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. CORPORATIONS (§ 149*)—STOCK—TRANSFER—BONA FIDE PURCHASERS.

A bona fide purchaser for value and without notice of stock issued by a corporation as paid up is not liable thereon, either to the corporation, corporate creditors, or other persons, though the stock was not actually paid up as represented.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CORPORATIONS (§ 149*)—STOCK—TRANSFER—BONA FIDE PURCHASERS.

One who in good faith and without notice purchases corporate stock certificates in the open market is protected as a bona fide purchaser, the stock being deemed paid up, though there is nothing on the face of the certificates stating that they are paid up.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

3. JUDGMENT (§ 822*)—FOREIGN JUDGMENT—CONCLUSIVENESS.

In an action by a receiver of a foreign corporation against a resident stockholder on an assessment authorized by a decree of a court having jurisdiction of the affairs of the corporation, the stockholder cannot question findings of insolvency and as to the grounds of the assessments, but he can set up defenses personal to himself involving his rights as bona fide holder of the stock.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496; Dec. Dig. § 822.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Thomas E. French, ancillary receiver of the Agnew Company, against J. Horace Harding. From a judgment of the superior court reversing an order of the common pleas making absolute rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Head, J., filed the following opinion in the court below:

"This appeal comes from an order or decree of the learned court below making absolute a rule for judgment for want of a sufficient affidavit of defense. As, in the view we take of the case, it must go back to be tried according to the course of the common law, we follow the approved practice of the appellate courts in indicating, as briefly as we may considering the nature of the question involved, the reasons why we have determined the affidavit to be sufficient to protect the defendant from a summary judgment.

"The Agnew Company was a corporation of the state of New Jersey, with a capital stock of \$250,000 divided into 5,000 shares of the par value of \$50 each. Upon a proper proceeding begun in the Court of Chancery of that state, having jurisdiction of the affairs of insolvent corporations, it was determined that the said corporation was insolvent; that its outstanding indebtedness, bonded and otherwise, equaled or exceeded the amount of its capital stock; that all of the shares of the said stock had been originally issued by the corporation without its receipt of anything therefor from the parties to whom it was originally issued; that it was necessary, in order to pay its debts, that an assessment equal to the full par value of the stock be levied against all the stockholders; that J. Horace Harding, the present defendant, was then the owner of 10 shares of said stock; and that the receiver, who had been previously appointed, be authorized to levy such an assessment and to

proceed to collect the same from the respective stockholders. Basing his right to recover on this decree of the New Jersey court, the plaintiff, the duly appointed receiver, brought this action in the county of Philadelphia to recover from the defendant the amount of such assessment with interest and costs.

"By way of defense the defendant set up that at the time of the institution of said proceedings, and before and since, he was and has remained a citizen of the state of Pennsylvania; that at no time was he served in the state of New Jersey with any process from the said court; that he never appeared therein in person or by counsel, and at no time and in no way submitted himself to the jurisdiction of that court; that he had no knowledge of such proceedings other than that conveyed to him by notices through the mails addressed to him at his place of business in the city of Philadelphia and there received by him; that he was not an original subscriber to the stock of said company, nor was he one of the parties who promoted it, who received any stock from it, or had any knowledge of the manner in which the said stock was issued, or of the affairs of the corporation at that time, or of any fraud or wrongdoing perpetrated by those who organized or promoted the said corporation or originally received the certificates representing its capital stock; that in the ordinary course of business, in the city of Philadelphia, he bought for a valuable consideration 10 shares of the said stock through his broker who was making sale of an automobile for him, and who, with his consent, accepted the 10 shares in part payment of the purchase price of his car; that, having thus acquired his stock in the open market, for a valuable consideration, without any knowledge that it had been illegally or fraudulently issued, or would be subject to call or assessment by the corporation or its receiver, he was not legally liable to pay such an assessment as had been directed by the New Jersey court, and that, notwithstanding its decree, he had a right to his day in court and to make defense on the grounds indicated. As already stated, the learned court below entered a summary judgment against him without any opinion indicating the grounds for such action.

"We may say in the outstart that we think the facts upon which his defense is predicated are fairly and sufficiently averred in his affidavit. The argument of the learned counsel for the appellee attacking the affidavit in this respect we do not find to be convincing. We shall consider the question in two aspects: Do the facts averred indicate a legal defense to the plaintiff's claim? Is such defense here available in the face of the decree entered by the New Jersey court, or would its acceptance amount to a collateral attack on that decree?

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] "1. From 1 Cook on Corporations, § 50, where may be found a general discussion of this question, supported by many notes and citations, we quote the following: 'A bona fide purchaser, for value and without notice, of stock issued by a corporation as paid up, cannot be held liable on such stock in any way, either to the corporation, corporate creditors or other persons, even though the stock was not actually paid up as represented. * * * The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed "paid up" in his hands, and he is protected as a bona fide purchaser, even though there is nothing on the face of the certificates stating that they are paid up. This can now be laid down as the established rule. It is based on sound public policy, favoring as it does the transfer of personal property and the quasi negotiability of stock and discountenancing secret liens and constructive notice.' The principle thus deduced by the learned author has been clearly stated and followed in the decisions of the courts of last resort of a number of the states of the Union as well as in England. In *Finletter v. Appleton*, 195 Pa. 349, 45 Atl. 1063, a bill was filed by the receiver of an insolvent corporation against the company and its stockholders to compel the payment of unpaid subscriptions to its capital stock. The bill averred in detail the manner in which the stock had been originally issued in violation of law, and without the receipt by the company of any value therefor. It further averred that certain persons, who became the appellees in the reported case, were at the time of the filing of the bill the owners of certain shares, having received them by transfer from those to whom they were originally issued. "The appellees demurred on the grounds that the bill disclosed that they were not original subscribers to the stock or promoters of the company, but were purchasers of the stock in the market; * * * and that the bill fails to aver that they purchased the stock with notice of the fraud alleged in the bill, or were not purchasers hereof for value.' The demurrer was sustained. In affirming the decree, Mr. Justice Mestrezat, speaking for the court, said: 'The bill in this case shows that the defendants are owners of, but not the original subscribers to, certain full paid shares of stock. There is no allegation that they are not holders for value or holders with notice of the fraud alleged in the bill. It is conceded that they purchased their stock in the open market. As shown by the pleadings, therefore, the defendants are not responsible to the plaintiff for any unpaid subscriptions on the stock now held by them, and hence can safely rest upon their demurrer.' We must therefore conclude that the affidavit disclosed a legal defense.

[3] "2. That the New Jersey court had complete jurisdiction of the insolvent corporation, and its affairs is not and cannot be denied. Its findings and decree, therefore, made within the limits of that jurisdiction in disposing of the affairs of the corporation, cannot be collaterally attacked in the courts of this state. The defendant is therefore concluded by the decree in so far as it determines the fact of insolvency; the extent of the indebtedness of the insolvent corporation; that its capital stock was issued to the original stockholders in violation of law and without the payment of any money therefor; that an assessment equal to the par value of the stock was necessary to enable its receiver to pay its debts; that this defendant, with the other persons named in the decree, were the holders of the shares of such stock named in the decree; and that the receiver was authorized to proceed with the collection of such assessment. All of these matters were necessarily determined in ascertaining the status of the corporation to its creditors and stockholders, and, in so far as these determinations affected the individuals holding the stock, the court was acting within its jurisdiction because it was dealing with them only as a class, qua stockholders, and in this sense and in this respect they were within the jurisdiction.

"But the defendant as an individual was never within the jurisdiction of that court. No judgment in personam against him could therefore be entered by that court. If this were not true, no citizen of any state could with safety buy in the open market shares in the capital stock of a corporation of a distant state, because he would be compelled at all times to go to that distant state to defend or else be liable to have a personal judgment entered against him. An examination of the decree of the New Jersey court leads us to the conclusion that it does not purport on its face to amount to a personal judgment against this defendant that he pay to the receiver a particular sum of money. Decrees like the one before us are of not infrequent occurrence, and we think there is a consensus of opinion, indicated by all of the decisions, that there still remains to the individual stockholders, when sued in the courts of his domicile in a case like the present one, the right to make any defense personal to himself. That is to say, a defense which cannot be made by the entire body of stockholders as a class, with whom alone the court was dealing, but by him as an individual, such as minority, lunacy, payment, or any other defense arising out of the particular circumstances incident to his personal acquisition of the stock.

"In this state the courts of Dauphin county are vested by statute with jurisdiction over the affairs of certain insolvent corporations, and decrees determining the facts of insolvency, that the indebtedness amounts to

a certain sum, that an assessment of a fixed amount is necessary, and authorizing receivers to proceed to collect such assessments from the stockholders, have been frequently made. In *Capital City Mut. Fire Insurance Co. v. Boggs*, 172 Pa. 91, 33 Atl. 349, a case of that character, Mr. Justice Mitchell used the following language: 'The order of the Dauphin county court is conclusive upon the validity and the amount of the assessment, but it does not touch the liability of the defendant to pay. It could not do so, as he has not been heard and therefore cannot be concluded as to defenses which are personal to himself.' In *Wood v. Live Stock Insurance Co.*, 154 Pa. 157, 26 Atl. 103, the Supreme Court, in touching upon this aspect of the case then before them, said: 'In view of what has been said, the remaining specifications do not require discussion. There is nothing in either of them that would justify a reversal or modification of the decree. Appellants and other policy holders are not concluded by the decree from defending on any ground that is personal and peculiar to themselves, respectively.' The same doctrine is recognized in our own case of *Brown v. Spackman*, 29 Pa. Super. Ct. 638.

"In determining the limitations of the fundamental principles that full faith and credit must be given by the courts of every state to the proper judgments of the courts of another state, the decisions of the courts of the United States must be regarded as of the very highest authority. A brief citation from two of such cases will suffice. In *Rood v. Whorton* (C. C.) 67 Fed. 434, the United States Circuit Court for the Eastern District of Wisconsin thus defined the limitations of a decree of the character of the one now under consideration: 'It is true, as held in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, and in *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262, that, in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporation matters, and such a decree is not open to collateral attack, as the stockholder is to be deemed privy to the proceedings touching the body of which he is a member. But this rule applies only so far that he cannot question the findings of insolvency and the foundations of an assessment upon the stockholders. Upon any question of individual liability in which are involved his rights as a bona fide holder, or in respect to his special holding of stock, a stockholder is entitled to his day in court, and cannot be bound by any ex parte adjudications of liability. There is no adjudication affecting the defense interposed by this defendant, and he is not liable upon his shares of stock.' In *Great Western Telegraph Company v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L.

Ed. 986, we quote the following language from the opinion of the court: 'The whole effect of the order of assessment being to fix the amount which any stockholder under his contract of subscription should pay and to authorize the receiver to bring suits for the same, but not to determine whether the present defendant or any other particular stockholder was liable for anything. The Iowa court, by sustaining the defense of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled.'

"The doctrine of this case was recognized and followed in the very latest utterance of this court on the subject, *Newton's Estate*, decided at the recent March term, and not yet reported. That was an action by a receiver against a stockholder to recover an assessment authorized by a decree of a court having jurisdiction of the affairs of the corporation. The defendant interposed the plea of the statute of limitations. To determine the validity of this plea, it became necessary to inquire into the nature and effect of the assessment and the decree of the court authorizing it; for, if that decree had the effect of a judgment against the defendant, his plea must have been unavailing. Speaking for this court, Henderson, J., said: 'The order authorizing the assessment was not a judgment. * * * It was conclusive evidence of the necessity for making the assessment and bound the stockholders without personal notice to that extent, but the stockholder sued had the right to set up any defense which he might have to an action on the contract, among which defenses is the plea of the statute of limitations.' *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

"As the record now stands, we are of opinion that the affidavit filed exhibited a sound legal defense, and that a judgment, founded on such a defense, would not be a collateral attack on the validity of the decree of the New Jersey court nor a denial, to the judicial proceedings of the courts of that state, of the full faith and credit to which they are entitled.

"Judgment reversed and a procedendo awarded."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCH-ZISKER, JJ.

Henry Spalding and David N. Fell, Jr., for appellant. H. B. Gill, for appellee.

PER CURIAM. The majority of the court concur fully in the views expressed by the learned judge of the superior court in his opinion reversing the judgment against the defendant for want of a sufficient affidavit of defense, and on that opinion the judgment of the superior court is affirmed.

METZGER v. CRAMP & CO.

(Supreme Court of Pennsylvania. Feb. 12, 1912.)

1. MASTER AND SERVANT (§ 332*)—DEATH OF SERVANT—ACTIONS—QUESTION FOR JURY.

In an action against a general contractor for causing the death of an employé of a subcontractor, evidence *held* to present a case for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.*]

2. MASTER AND SERVANT (§ 321*)—DEATH OF SERVANT—DUTY OF MASTER.

A general contractor is under the duty to provide a reasonably safe place to work for employé of a subcontractor engaged in the general prosecution of the work, as well as for his own employé.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1273; Dec. Dig. § 321.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Barbara Metzger against Cramp & Co. for causing the death of plaintiff's husband. From a judgment for plaintiff, defendant appeals. Affirmed.

At the trial it appeared that the defendants were the general contractors for the erection of a school building, and that Waldman & Co. were the subcontractors for the painting of the building, and that they employed John M. Metzger, plaintiff's husband. The accident happened on February 26, 1907. The deceased fell while attempting to proceed along a passageway which had been previously protected by a guard rail, but which had been left unprotected at the time of the accident by the removal of the rail at the instance of the general contractor, without notice to the deceased or other workmen employed in the locality.

The court charged in part as follows:

"Gentlemen of the Jury: On the afternoon of February 26, 1907, Mr. Metzger, the husband of the lady who is here as plaintiff, met with a fatal accident. He fell through a hole, to describe it colloquially, which was in a flooring on what appears to have been the top story of the Manual Training School, at Broad and Jackson streets, in this city. Above that flooring was a ceiling, as I remember, the roof, but he was up there on that story at work. He had been sent up by some one who was authorized to give him the order, and, according to the testimony (which, however, is entirely for you to believe or not to believe under your oaths), he had not been up there before. Judging from what Mr. Clark has said, it was the first time that he had been up there. It is for you to determine that. It is an important point, however, and therefore I leave it to you for careful consideration.

"That floor was peculiarly constructed. It was not meant, according to the evidence, as a floor all over the space. It was meant largely as the support of glass which was to

throw light below, and it was not intended that so much of it as was covered with the glass should be used as a floor. According to the testimony of Mr. Newkirk (and, of course, it is for you to say whether or not you believe that), the glass was not meant to hold a person. It was not meant that the space of that floor, as I have called it, should be used as a floor. It was meant to let the light through from above down to the room below.

"There was, however, constructed across that space a running way, as they call it, which was to be used by persons who wanted to move across the floor. That was two feet six inches wide, and it ran from the north wall or side of that building down to the south wall or side, and it was that which was put there for the use of persons who were going to that part of the structure and who were obliged to move about up there.

"It appears that on the afternoon in question Mr. Metzger was lawfully going up there to do some painting, and, when he emerged from the stairway which carried him from below up to that place, he emerged through a door apparently fronting directly upon that running way, so that desiring, as he did, to go across that space to get to the other side of the building, the other wall, there was the running way for him to use. Had he been accustomed to the place, had he worked there before, and if you find such to be the fact now, there was indicated to him the way he was to go to get across to the other side and do his work, but if he was unfamiliar with the place, and if that was the first time he had been there, it may be that you would find that the fact that the boardwalk was there was not sufficient notice to him that he must not go across the other way over these spaces. These spaces were none of them glazed as we understand now. The plan offered in evidence indicates that all but two of them shown on the plan were glazed, but it turns out that none of them were glazed, and they were covered with cheesecloth in a business precaution to protect the lower part of the building in a certain way, in order that certain varnishing or painting might be done there in an atmosphere that was proper for such work.

"The Messrs. Cramp put up that building, and they constructed that flooring and passageway that I have described to you. Now the question for you to determine is whether they furnished in this manner a safe place, a reasonably safe place, for Mr. Metzger to work in, and, in order to answer that question, you will bear certain points in mind. It is conceded that they put the running way there 30 inches wide, and that had he used that running way the accident would not have happened. It is conceded that the spaces for light that I have described to you were then empty and covered with cheese-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cloth, and were not safe for use in walking. It is also conceded that they were none of them glazed, but that they were all covered, as I have already said to you, and it would be your right to infer (but I leave it to you) that cheesecloth is a slim fabric, almost unsubstantial, and not capable of holding the weight of a human being. It is conceded, too, that Cramps had put a guard rail along the running way on either side, so as to protect a person using that running way from going inadvertently over to either side falling over on the glass or into the holes.

"Now you have that condition of things. This guard you find was at the time of the accident down. It had been removed, and one of the witnesses has testified to you where he saw it lying after the accident. If you find these to be the facts, then you may find evidence of negligence in the defendants for which they should answer to the plaintiff in this case, unless, in addition to these facts, you find that Mr. Metzger was careless as he entered upon that work. He appears to have reached that floor way, to have entered upon this space immediately in front of the running way. If he had taken that running way and gone across on it, the accident would not have happened. Was it his duty under those circumstances to select that running way and not to step into this open space through the cheesecloth that was there? It has been said to you by one of the witnesses that that cheesecloth was sagging, was not drawn taut, and that there was an indication around the edge of it of the framework there which it covered. Was it the duty of Mr. Metzger to look about him, and to determine that it was not caution to avoid the running way and do as he did? If you find that to be so, then you will find that there was provided by these defendants a reasonably safe passageway to go across, and that by reason of Mr. Metzger's inadvertence or want of attention he hastily stepped on the wrong place, avoiding that passageway, and so incurring the damage. That would be what in law is called contributory negligence, and it would preclude your finding a verdict against the defendants."

Verdict and judgment for plaintiff for \$3,500. Defendant appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. W. Smithers, for appellant. Michael Francis Doyle, for appellee.

ELKIN, J. [1] This suit was brought to recover damages for injuries resulting in the death of the husband of appellee by reason of the alleged negligence of appellant. At the trial all questions of fact upon which the right to recover depended were submitted to the jury, and there is no assignment of error as to the manner of the submission.

Binding instructions in favor of the defendant were asked and refused, and subsequently a motion for judgment non obstante veredicto upon the whole record was filed and overruled. Appellant contends that he had discharged every duty owed decedent, and that the evidence did not warrant a submission of the case to the jury. The two assignments of error raise this single question. If the undisputed facts were as stated in the argument of counsel for appellant, it would have been error to submit the case to the jury, but we do not so read or understand the testimony. The material facts were in dispute, and this raised an issue which it was the province of the jury to determine. It is argued for appellant that reasonable care was all that was required of him, and we agree that this was the proper measure of his duty, but whether he exercised reasonable care under the circumstances was a question of fact for the jury. The place was dangerous, and must have been so regarded by the general contractor because he had undertaken to provide a measure of safety by the erection of a guard rail at the place where the accident occurred. At the time of the accident the guard rail was missing. It had been removed, and, as a result of this removal, decedent no doubt was misled as to the real conditions. It is contended that it was not the duty of the contractor to follow the employes of a subcontractor around in the prosecution of their work and give notice of every transitory peril. As a general proposition of law this is true, but we are not prepared to say that the negligence complained of comes within the rule of our cases relating to transitory dangers.

[2] It was the duty of the contractor to provide a reasonably safe place to work, not only for his own employes, but for the employes of a subcontractor, who were engaged in the general prosecution of the work. There may be, and no doubt there are, cases in which a general contractor is not required to exercise the same degree of care for the protection of the employes of a subcontractor as for his own, but no such question arises in the case at bar. The guard rail would in all probability have prevented the accident, and whether appellant was negligent in removing it without notice to those employes whose duties required them to work at that particular place, was under all the circumstances a question of fact for the jury. The unglazed sash frames covered with cheesecloth proved to be a veritable death trap, and we cannot escape the conviction that it was the duty of the contractor to properly guard such a dangerous place as a protection to workmen necessarily engaged in the performance of their duties. At least this was a question for the jury under the circumstances. We cannot agree that the decedent assumed the risk as an incident of his con-

tract of employment, or that he was so clearly guilty of contributory negligence as to require that the court should so declare as a matter of law. The negligence of the defendant as well as the alleged contributory negligence of the decedent were questions of fact for the jury. We find nothing in the record to warrant a reversal.

Judgment affirmed.

MERCANTILE LIBRARY CO. OF PHILADELPHIA v. FIDELITY TRUST CO.

(Supreme Court of Pennsylvania. Feb. 12, 1912.)

1. DEEDS (§ 100*)—CONSTRUCTION—GENERAL RULES.

The words of a grant are to receive a reasonable construction, according to the intention of the parties; but, in ascertaining their intention, courts will look into the circumstances under which the grant was made.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.*]

2. EASEMENTS (§ 58*)—GRANT—CONSTRUCTION AND OPERATION.

Where an adjoining owner, for the purpose of widening a passageway owned by a market company along its property, opens a strip of land, 10 feet wide, for the common use and privilege as a street or passageway for both parties, their successors and assigns, and for 40 years 21 feet of the widened passageway remained as a cartway, a successor in title of the grantor will not be permitted to construct a pavement with a curb elevated several inches above the cartway and covering the 10-foot strip, though, during later years, a pavement had been constructed on the strip on a level with the cartway.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 121-127; Dec. Dig. § 58.*]

3. EASEMENTS (§ 51*)—GRANT—CONSTRUCTION AND OPERATION.

Where a 10-foot strip adjoining a passageway owned by a market company has been granted to the company by an adjoining owner, successors in interest of the grantor will not be required to remove from a pavement, maintained for several years on the strip on a level with the passageway, a grating, doors, etc., which had not obstructed the right of passage.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112; Dec. Dig. § 51.*]

4. EASEMENTS (§ 44*)—GRANT—CONSTRUCTION AND OPERATION.

One who grants a right of way over his land conveys nothing but the right of passage, and reserves all incidents of ownership not granted.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by the Mercantile Library Company of Philadelphia against the Fidelity Trust Company, trustee for the Methodist Episcopal Orphanage under the will of Joseph M. Bennett, deceased, for an injunction. From a decree for defendant, plaintiff appeals. Modified.

Ralston, J., filed an opinion in the court of common pleas which was in part as follows:

"First. The fire escape projects about 4½ feet from the building and overhangs the alley. The permanent structure extends down to the second floor, and is connected with the ground by a movable ladder, which is ordinarily kept hoisted up to the second floor, but may be lowered to the ground in case of necessity. This structure in no way interferes with the use of the alley as a street or passageway. It is built entirely over the 10-foot addition to the alley, and is therefore over land owned by the defendant, but subject to the easement of passage. In *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845, the owner of the building upon which the fire escape was fastened was not the owner of the ground of the alley over which it projected, and had, as such owner, no right of passage in the alley. It was therefore held that he was a trespasser, and had no right to maintain the fire escape, even although the use of the easement was not materially impaired. In *Mershon v. Walker*, 215 Pa. 41, 64 Atl. 403, the defendant had no title to the soil of the court over which the fire escape projected. The court said that it was impossible to distinguish the case from *Schmoele v. Betz*, supra, and, on the authority of that decision, ordered the structure to be taken down. In that case the defendant had no rights at all in the alley, and could not use the fire escape without using the alley; therefore the structure was ordered to be removed, without regard to whether or not it obstructed the alley. In *Mershon v. Walker*, the court said that, while the plaintiffs have standing to complain of any obstruction to or interference with the free and full exercise of the privileges they have in the surface of the court, they cannot have any with respect to any invasion by others above or beneath the surface, not affecting them.' These cases might be distinguished on this ground, if the Supreme Court had not said they were indistinguishable. In *Patterson v. Railroad Co.*, 8 Pa. Co. Ct. R. 186, Thayer, P. J., said: 'So long as he does not materially impair the use of the easement, such as it was, granted, the owner of the soil may erect such structures in or over or beneath the way, as he chooses.' See, also, *Stevenson v. Stewart*, 7 Phila. 293. In *Schmoele v. Betz*, referring to these two cases, the Supreme Court said: 'In both cases the owner of the fee had granted a right of way over the premises, retaining the ownership of the soil; and it was held that the grantee could not enjoin him from building over the alley, if it did not interfere with the use of the way. But those are not the facts in this case.' In the present case the owner of the soil has built over its own land. It has a right to use the alley, so that the use of the fire escape throws no unlawful burden upon the way. The fire escape

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is not an obstruction of the use of the alley, and in no way interferes with the plaintiff's right of passage. Therefore the court will not order it to be removed.

"Second. When the fence at the rear of the Chestnut street lot was moved 10 feet to the south, it is not quite clear from the testimony what was done with the space. It seems to have been paved in some way; but the weight of the testimony is, and it is so found as a fact, that no sidewalk, elevated above the level of the cartway, was built until 1903. The building at 1019 Chestnut street was erected in 1882, and there was a paved way for 10 feet back of it; but it does not appear from the testimony that it was a sidewalk, as distinguished from the cartway. The building which covers the lot Nos. 1015 and 1017 Chestnut street was erected in 1903, and at that time the present sidewalk was built. It extends over the entire space of 10 feet north of the buildings 1015, 1017, and 1019 Chestnut street, has a curb, and is elevated above the level of the cartway from $2\frac{1}{2}$ to $5\frac{1}{2}$ inches. Whether or not this is an obstruction of the plaintiff's right of way will depend upon the construction of the grant. The defendant's predecessor in title threw out and opened the northernmost 10 feet of his lot, in order to connect it with the existing 16-foot wide street or passageway, for the purpose of widening it to 26 feet. A street is a public thoroughfare, and consists of a cartway for animals and vehicles and sidewalks for the use of pedestrians. The sidewalk is included in the general term 'street.' Bouvier's Law Dic. tits. 'Street,' 'Sidewalk.' In the present case the 'street' is not a public thoroughfare, but a private way; nevertheless, as the parties used the word, it is not unreasonable to conclude that they intended the way to have all the attributes of a 'street,' except that it should not be open to the public. This construction is strengthened by the fact that the plaintiff, or its predecessors in title, constructed a sidewalk of the width of 5 feet upon their side of the alley, showing that they understood that the 'street' was to consist of the usual cartway and sidewalks. It is proper, therefore, that the defendant should be permitted to build a sidewalk upon its side of the way. It seems unreasonable, however, that it should occupy the entire space of 10 feet, which was granted for the purpose of widening the street. The defendant's sidewalk should be cut down to the same width as the plaintiff's namely, 5 feet; but, as that cannot be done without interfering with the doors and openings which the defendant has built to facilitate entrance to and exit from its cellar, the court will order the sidewalk to be reduced to a width of 6 feet, which will sufficiently widen the cartway, without subjecting the defendant to an unreasonable loss, which ought not to be im-

posed upon it, as the plaintiff permitted it to build these structures without objection.

"Third. In the rear of each of the lots, the defendant has made excavations, which extend north under the 10-foot strip about $3\frac{1}{2}$ feet, and east and west almost the entire breadth of the lots. These are covered with iron gratings flush with the pavement of the sidewalk, and were put in at the time when the buildings were erected; that is, the one in the rear of 1019 was built in 1882, and those in the rear of 1015 and 1017 in 1903. Besides these gratings, there are in the rear of 1015 and 1017 Chestnut street excavations under the sidewalk, which are reached by iron doors. These doors open upward, and when closed are level with the sidewalk. Under them are lifts, which are used for raising and lowering freight out of and into the cellars. In *Mershon v. Fidelity Ins., Trust & Safe Deposit Co.*, 208 Pa. 292, 57 Atl. 569, similar gratings were ordered by the court to be removed. In that case both the plaintiff and defendant had an easement of passage in a court, 'with or without horses, cattle, carts and carriages;' either had title to the soil of the court. The defendant had no right to excavate under the court and change its condition from what it had been before. In the present case the defendant is the owner of the ground, and has a right to excavate under the street, so long as it does not obstruct the plaintiff's right of passage. As the alley in question is a 'street' with sidewalks, the ordinary structures common in the sidewalks of the city, such as area-ways and cellar doors, are not necessarily and per se unlawful obstructions. Similar openings, with gratings and doors, exist in the plaintiff's sidewalk; and no objection was made to the defendant's structures until six years after they were built. This would seem to show that the parties intended to use the sidewalks in the ordinary way that other sidewalks in the city are used. Neither the gratings nor the cellar doors, when closed, interfere in any way with the passage of pedestrians over the sidewalk. The cellar doors, when open, would, of course, obstruct the sidewalk; but it has not been shown that they are kept open for unreasonable periods of time. They therefore constitute only such an obstruction as is incidental and reasonably necessary to the use of the sidewalk for business purposes.

"Being of opinion that the fire escape, the gratings, and the cellar doors do not interfere with nor obstruct the plaintiff's rights in the street, the court will not order them to be removed, but will order the defendant's sidewalk to be reduced to the width of six feet."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

George Henderson and Alex. Simpson, Jr., for appellant. A. U. Bannard and John McConaghy, Jr., for appellee.

ELKIN, J. This bill was filed to compel the removal of certain alleged obstructions to the free and uninterrupted use of a passageway, created by an agreement in writing between private parties. The assignments of error are numerous; but the legal questions involved, with which we are primarily concerned, are few and not difficult of solution. Our first inquiry must necessarily relate to the construction of the agreement of 1864. What rights and privileges were granted by this agreement, and what kind of use in the passageway did the parties intend to be enjoyed?

[1] The words of a grant are to receive a reasonable construction, and one that will accord with the intention of the parties; but, in order to ascertain their intention, courts will look into the circumstances under which the grant was made. *Connery v. Brooke*, 73 Pa. 80.

[2] Love, the predecessor in title of appellee, covenanted with the predecessor in title of appellant to "forthwith throw out and open the northernmost 10 feet" of a certain lot of ground, to be connected with a 16-foot wide passageway belonging to the adjoining owner, with whom he covenanted "for the purpose of widening the said passageway [that is, the 16-foot passageway] at that part to the width of 26 feet for the common use, and privilege as a street or passageway of him, the said Thomas C. Love, his heirs and assigns, and of the Franklin Market Company aforesaid, their successors and assigns, and his and their respective tenants and occupants." There can be no doubt that the parties intended by their agreement to make a passageway for their common use 26 feet in width; nor is this construction questioned by either side of the present controversy. Indeed, each side accepts this view as the proper interpretation of the agreement, but insists that when the covenant is so understood it sustains their respective contentions, although widely at variance. The differences between the parties grow out of the kind of use authorized to be made of the passageway. Appellee, the successor of Love in title, has construed the covenant to give it the right to construct a pavement with a curb elevated several inches above the cartway, and covering the entire 10 feet upon which the easement was originally imposed. If this interpretation be sustained, it means the denial of the right of appellant to use any part of the 10 feet for cartway purposes.

Taking into consideration the circumstances under which the agreement was made, such a construction would, in our opinion, do violence to the intention of the parties. The Market Company, one of the original

parties to the agreement, dedicated 16 feet to the common passageway, while the other party only dedicated 10 feet. If it should now be determined that the party who dedicated the 10 feet to the passageway has the right to construct a curb and pavement elevated several inches above the cartway, so as to occupy the entire strip of ground thus dedicated, no practical advantage would result to the Market Company or those succeeding to its title. It seems perfectly clear that the purpose of the Market Company in entering into the agreement was to secure a wider passageway for the use of its patrons, and to afford more convenient access to its place of business. It is scarcely conceivable that the Market Company gave Love the right to make use of its 16 feet of ground as a passageway for the benefit of himself and tenants, and that in return it was to receive no substantial benefit in the use of the 10 feet of ground dedicated by Love to the common use of both parties.

Again, if the intention of Love was simply to construct an elevated pavement upon his 10 feet of ground, there was no necessity for him entering into an agreement with the adjoining owner to effectuate this purpose. He had the right to do this without consulting the wishes of any one. It is evident that both parties entered into the agreement for purposes mutually beneficial: and this could only mean that the common passageway should be widened by the additional 10 feet. Nor is it open to doubt that the passageway thus widened was for a long period of years used as a cartway for horses and wagons, as well as a means of access for persons. The parties themselves, in effect, placed this construction upon their own agreement by the use made of the passageway. It is true that in later years a pavement was constructed upon the 10-foot strip of ground; but this pavement was level with the cartway, and answered both purposes until it was elevated at the time about which complaint is here made. Under these circumstances, we are constrained to hold that the parties intended the passageway mentioned in their agreement to be used as a means of access for horses, wagons, vehicles, and persons, and that this right is interfered with by the elevated pavement, about which complaint is made. The pavement should be lowered to the level of the cartway, in order to carry out the intention of the parties. We think this was the agreement of the parties, and that it is controlling here. In this view of the case, it is not necessary to discuss what constitutes a street, or what rights and privileges abutting property owners have generally in public thoroughfares.

Appellee contends that it should have the right to maintain a pavement with curb elevated above the cartway on the 10-foot strip of ground, because appellant, or its predecessor

sors in title, constructed a 5-foot wide pavement at the other side of the passageway. If the facts warranted it, this argument would have strong equitable grounds to rest upon. But, under the facts as found, and the evidence is all to this effect, there existed at the time the agreement of 1864 was entered into on the side of the Market Company property a raised curbed sidewalk 5 feet wide. This sidewalk was a part of the 16 feet dedicated to the common use of both parties by the agreement in question. The covenant must be understood to apply to the physical conditions then existing on the ground. The Market Company gave 16 feet, or 11 feet of cartway, while Love only gave 10 feet, which was a less number of feet than the Market Company set apart for cartway purposes. The parties were familiar with the conditions on the ground; and, if Love intended to reserve the right to construct a raised pavement on the 10-foot strip of ground, he should have done so in his agreement. He did not do so; and for a period of 40 years, and, perhaps, more, no attempt was made to construct a pavement raised above the cartway on his side of the passageway. We think this clearly shows that the parties either intended that the easement should be superimposed upon the physical conditions then existing on the ground, or that these conditions, in view of the subsequent acts of the parties, should be considered in determining the intention of the parties under the agreement. In either view the conclusion is the same, and the 10-foot strip of ground must be regarded as an addition to the passageway, which we have said means a passageway for every purpose contemplated by the agreement. Certainly, a raised pavement with a curb narrows the passageway and seriously interferes with some of the uses intended to be enjoyed.

There is nothing in the agreement which defines what kind of a passageway shall be maintained; and we can see no good reason why the appellee may not, if it chooses, construct a pavement as part of the passageway and on a level with it, so that it may serve as a convenience to pedestrians, as well as for cartway purposes. The parties themselves made such use of the passageway for many years, and there is nothing in the agreement to deny them this right.

[3] The other legal question involved is of a different character. Appellant contends, not only that the pavement should be lowered to the level of the cartway, but that the gratings, doors, fire escape, and other alleged obstructions should be removed. The learned court below refused to so decree, and we have concluded, after full consideration, upon the facts as found, that the proper conclusion was reached. We do not agree that the case at bar in this respect is ruled by *Schmoele v. Betz*, 212 Pa. 32, 61 Atl. 525, 108 Am. St. Rep. 845, *Mershon v.*

Walker, 215 Pa. 41, 64 Atl. 403, and other cases relied on by appellant. In each of the cases cited to sustain this contention, the party against whom complaint was made was not the owner of the fee upon which the easement was imposed. This is a material fact, and one which must be taken into consideration in properly determining the rights of the parties in such cases.

[4] In this commonwealth the rule always has been that the owner of land, who grants a right of way over it, conveys nothing but the right of passage, and reserves all incidents of ownership not granted. In a very recent case (*Duross v. Singer*, 224 Pa. 573, 73 Atl. 951) this court reiterated the rule by making use of the following language: "The grant of a fee, subject to an easement, carries with it the right to make any use of the servient soil that does not interfere with the easement, and this right cannot be abridged by words used in the granting clause, unless the intention to limit the estate is clearly expressed, or is a necessary implication from the words used." In 1864, when the agreement in question was entered into, Love was the owner of the fee in the 10-foot strip of ground, and he only granted the right of passage over it. He retained all other incidents of ownership, and his successors in title have the undoubted right to the enjoyment of the fee in every way that does not materially impair the use of the easement. If there had been, or if there shall hereafter be, any substantial interference with the use of the passageway, it would be the duty of courts to give relief. But in the case at bar the learned court below, sitting as a chancellor, has found as a fact that there has been no substantial interference with the use of the passageway, either by the gratings in the pavement, or by the doors, or by the fire escape, or by the excavations under the pavement. All of the obstructions complained of are upon the property of appellee, and have been constructed as an incident of ownership in the fee. The owner of the servient soil has the right to make use of his property as he chooses, if, by so doing, he does not substantially interfere with the easement. The learned court below has found as a fact that there was no substantial interference with the use of the passageway, and we must accept this finding as binding upon us. In this connection, counsel have submitted, since the argument of the case, a photograph, intended to show recent conditions of a fire escape, for the purpose, no doubt, of indicating a substantial interference with the use of the easement; but we must take the record as it comes to us from the court below, and cannot undertake to decide this appeal upon facts not considered by the chancellor.

We have concluded that the decree should be modified by requiring appellee to lower the curb and pavement to the level of the

cartway; but in all other respects the decree to stand as entered, so long as conditions remain the same.

Decree modified as above indicated, and, as modified, it is affirmed. Costs to be divided equally between the parties.

EBERT v. MISHLER.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

EASEMENTS (§ 29*)—EXTINGUISHMENT.

A conveyance to the owner of an adjoining tract of a strip of land 5 feet wide, fronting on a street and extending back to an alley a distance of 120 feet, contained a provision that the strip should be used as an addition to the width of a passageway belonging to the grantee and not for any other purpose, and that it should be used at all times as an open thoroughfare. It was thereafter used in that manner by both owners. Nineteen years later the grantor's successors agreed with the grantee's successors to permit the latter to build over the grantor's line 2 feet for a distance of 59 feet; the grantor's successors to have the use of the wall on paying one-half its cost. It was agreed that a passageway 5 feet wide through the building should be kept open for the use of the other owner. The buildings erected in accordance with this agreement were burned down 9 years afterwards, and in the course of reconstruction the subsequent owner attempted to close up the 5-foot passage. *Held*, that the easement created by the original deed was not extinguished by the subsequent agreement, and the closing of the passage should be enjoined.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 76; Dec. Dig. § 29.*]

Appeal from Court of Common Pleas, Blair County.

Bill in equity by John W. Ebert against Isaac C. Mishler for an injunction. From a decree for defendant, plaintiff appeals. Affirmed.

Shull, P. J., specially presiding filed the following opinion:

"Plaintiff, under bill filed, seeks to compel defendant to remove a certain fence which obstructs ingress and egress to his building, and to keep open perpetually an alley or way across said defendant's premises to a width of 25 feet extending from Eleventh avenue in the city of Altoona to an alley in the rear, a distance of 120 feet. And by cross-bill filed, the defendant seeks to enjoin the plaintiff Ebert from obstructing, interfering, or using in any way a five-foot way in said lot, and prays further that the rights therein, as well as to a party wall, be defined.

"Findings of Fact.

"(1) The plaintiff, John W. Ebert, by deed dated September 6, 1888, became the owner in fee simple of the S. W. part of the N. E. half of lot No. 11, in the city of Altoona, Blair county, Pa., fronting 20 feet on Eleventh avenue and extending back 120 feet to Eleventh alley.

"(2) That, at the time of filing the bill, the

defendant was the owner in fee of lots Nos. 9 and 10 fronting on said Eleventh avenue, 100 and 120 feet in depth, together with and including 5 feet front of lot No. 11 extending back to Eleventh alley, subject, however, to a reservation appearing in finding No. 3.

"(3) Adolphus Roush, the predecessor in title of the lands owned by plaintiff, together with the additional 5 feet or a total of 25 feet by deed dated August 21, 1869, conveyed to the Altoona Hall and Market Company, then owner of lots Nos. 9 and 10, five feet fronting on Eleventh avenue and extending back said width to Eleventh alley, a distance of 120 feet, which said deed contains a reservation in *hæc verba*: 'It is, however, agreed that the said described piece of ground shall be used as an addition to the street or alley of the Altoona Market Company, and not for any other purpose, and that the same shall be used as an open thoroughfare at all times between Virginia street and the alley northwest'—said Virginia street being hereafter designated as Eleventh avenue.

"(4) That, at the time of the conveyance of the said five feet mentioned in the preceding paragraph or finding, there was an open way upon lot No. 10, about 20 feet in width, through which the respective owners of lots No. 11 and Nos. 9 and 10 had access by entrance at the sides to the buildings erected on the said several lots. Said alley or way being used by both parties as a means of ingress and egress and for loading and unloading articles of merchandise, etc., at the side entrance of their respective buildings, which said use continued to the date of the agreement, hereafter referred to in the fifth finding of fact.

"(5) On the 7th day of September, 1888, an article of agreement was made between Wm. W. Roush, defendant's predecessor in title, and John W. Ebert, the present plaintiff, wherein it was agreed, *inter alia*, that said Roush, who was about to commence the erection of a brick building upon his said lot, may build his wall a distance of two feet over the line of said Ebert—that is, so as to occupy two feet in width of said Ebert's ground and extending back from Eleventh avenue a distance of about 59 feet—and that the remaining portion of said wall shall be built 18 inches beyond the said Ebert side of the line dividing said properties, extending 61 feet from the wall above mentioned, back to the alley. It is further agreed that the said J. W. Ebert, his heirs and assigns, shall have the right and privilege at any time of joining to the said wall, and building into the same along the whole length or any part of the length thereof, any building he may desire or have occasion to erect on his said lot, and to use and enjoy the said wall or any part thereof as a wall of the building or buildings so to be erected, and to sink the joists of such building or buildings

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

into the wall aforesaid, provided, however, and on the express condition, that before proceeding to join any building to the said wall the said Ebert shall pay to the said Roush the one-half part of the cost of the said wall, or so much thereof as shall be joined or used as aforesaid.

"It is further agreed that the said Roush shall provide and have, and leave open at all times, a passageway 5 feet in width in and through his said building so as to give said Ebert equal privileges and passageway to and from each story of his said Ebert's building, and extending back a distance of about 57 feet from Eleventh avenue, to be at all times kept open for the use of both parties to this agreement and any occupant of the premises of either of the parties to this agreement or their assigns. In case either party should make sale of their property, the intention of this agreement is that this hallway shall remain open perpetually for the equal use of both properties unless the owners mutually agree to make a change.

"(6) Pursuant to this agreement said Roush constructed a brick wall on the lines designated under said agreement of September 7, 1888—that is to say, upon the two feet of Ebert's land back a distance of 57 feet, and for the remaining distance upon the 18 inches of his own land—to which wall the plaintiff attached his building, having made compensation in accordance with the terms of the said agreement. And said Roush, under the provisions of said agreement, erected upon the said five-foot passageway a stairway leading to and as a means of ingress and egress to his own building, which was erected upon and over said five-foot alleyway, and also for the use of plaintiff to reach the second and third stories of his said building.

"(7) That said hallway and stairs were used by both parties and their several and respective tenants and occupants from the time of its construction in 1888 or 1889 to the 14th day of June, 1907, when the entire structure or building on the premises of defendant's predecessor in title, together with a portion of plaintiff's building, was destroyed by accidental fire.

"(8) That subsequent to said fire plaintiff removed his share or half of the party wall using the material thereof and re-erected his building wholly upon his own lands; the front portion extending back 57 feet, being within the 2 feet allowed originally for said party wall, and the remaining portion was built up to the line of defendant's lot.

"(9) The defendant erected a high board fence inclosing entirely his lot, including the five feet designated as an alley, passage, or hallway.

"Discussion.

"The acts of the parties fairly disclose the intention of the parties under the reservation of the deed of 1869, and the interpre-

tation which was placed by them upon the agreement entered into on the 7th day of September, 1888. Both parties and their tenants enjoyed the several rights and privileges thereunder for a period of almost 20 years. There seems to have been no conflict of rights until the buildings were razed by a fire on the 14th of June, 1907. After this fire, plaintiff called upon defendant's agent and manager, making inquiry relative to rebuilding the premises, but, receiving no definite reply, he erected a three-story building upon his own land and served a notice upon defendant not to inclose the 25 feet used by the parties under the agreement of 1869. The plaintiff, however, disregarding said notice and relying upon his rights under the agreement as changed and modified by the agreement of 1888, inclosed his entire premises with a high board fence.

"Plaintiff now insists under his bill filed that the parties are restored to their original rights as they existed under the agreement of 1869, while defendant urges that the easement created under the agreement of 1869 was extinguished by the subsequent agreement of 1888, and that, the fire having effaced the party wall, the latter agreement has lost its force and is now void and of no effect. We cannot subscribe wholly to either of these contentions. The purpose of the parties under the agreements clearly was to economize space where lands were so valuable as in that portion of the city; each making contribution or surrender of rights and privileges in consideration of advantages to be mutually derived. This spirit of the agreement must be kept constantly in view in determining the rights of the parties, because in the covenant it was stipulated that the alley or passageway to the extent of 5 feet in width and 57 feet in length, extending from Eleventh avenue, was to remain open perpetually for the equal use of both properties unless the owners mutually agree to make a change.' There is no evidence of any mutual agreement to make any change, and no act has been shown by the evidence to destroy or nullify its terms. While it may be conceded that the agreement of 1888 was substituted for that of 1869, it did not absolutely extinguish the easement except in so far as it was in direct conflict therewith. The reservation of the right of way necessary for ingress and egress to the building on lot No. 11 was kept in view with an eye single to the right of such access. The plaintiff's contention that by deed of August 21, 1869, conveying the 5-foot alleyway with the limitation thereon, a servitude was imposed upon the other 20 feet of open roadway fails of its purpose when it appears that the grantee did not have title to said 20 feet until October 15, 1869. But a more potent reason is found in the fact that no grant is shown to have been made by the owner of that fee and the fact that both par-

ties mutually assented to the 'five feet which has been heretofore used as a passageway.' Even if it be conceded that the grant was to 'be used as an addition to the street or alley,' the owner of the easement may abandon it to relieve the servient estate of the incumbrance. 10 Am. & Eng. Enc. Law (2d Ed.) 434. If the owner of a dominant estate authorizes the owner of a servient estate to do upon the servient estate that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. Washburn on Easements & Servitudes (4th Ed.) 726. While it clearly appears that the ancient way to the market house upon lots Nos. 9 and 10 was to be abandoned as absolutely useless and unnecessary to both the premises under the new conditions, and the rear end of the 5-foot passageway had been rendered valueless, this in no way affected the 57 feet in the front so essential to both premises for ingress and egress which had been substituted and used for a long period by both parties. This was essential under the changed conditions for both parties, as the alimentary canal to the human body or the door to the fire box in the locomotive. It seems clear that for the mutual advantages of each to the other all rights, whether of servient or dominant tenement, in fee or by easement, was abrogated by the agreement of 1888 except as to the passageway 5x57 feet which was to be and remain open perpetually for the use of both parties unless the said parties mutually agree to a change. Neither party under the agreement, which provided only for a passageway or hallway, could call upon the other to erect a stairway, but the plaintiff has the undoubted right to the use of said plot or alleyway 5x57 feet as an entrance to his building, and may construct such means of access to his second and third stories as he may deem expedient, but may not call upon defendant for contribution. The defendant is prohibited from interference with the use of the alleyway, for such was the servitude impressed upon it by the parties under the deed as modified by the agreement. Should the defendant rebuild or erect a new structure upon his lot covering to the line prior to 1869, the alley or passageway of 57 feet may be utilized for a stairway and entrance provided he constructs such stairway as will afford convenient access to the plaintiff's building now erected upon his premises, restoring thereby to the plaintiff his full rights under the spirit, true meaning, and intention of the parties to the agreement of 1888.

"There was no manifest intention of the plaintiff to abandon his right or easement in that portion of the passageway, as a means of access to his said premises, as argued under the authority of *Stokoe v. Singers*, 8 Ellis & Bl. 31. Conceding that he re-erected his building without regard to a

present side entrance, such act would not show an abandonment in face of the notice wherein he asserts a right not only to that to which he is actually entitled, but also to a greater right or privilege. The less would be included in the greater. The claim to the full 25 feet of the original alley or passageway from street to alley includes the right in the smaller or restricted entrance.

"We come then to the rights of the parties under the agreement and the laws of the commonwealth relative to the division or what is here referred to as the party wall. A party wall is a division wall erected between two adjoining estates belonging to different persons for use of both estates, or, as defined by Washburn on Easements & Servitudes (4th Ed.) 611, 'a wall built at common expense and in which each have acquired a common right therein.' The wall in the case at bar was built on the lands of both parties, the front end or portion of the wall on lands of plaintiff a distance of 59 feet, and the rear end of 61 feet upon lands of defendant's predecessor in title, each making contribution and each together using the same in common until the buildings were destroyed by fire. What, then, is the status of the parties? We are cited to section 4 of the act of April 10, 1849 (P. L. 600), which provides that, 'In the conveyance of houses or buildings, the rights to and compensation for the party wall built therewith shall be taken to have passed to the purchaser, unless otherwise expressed, and the owner of the house for the time being shall have all the remedies in respect to such party wall as he might have in relation to the house to which it is attached.' This act has been held to apply to any wall made such by statute, prescription, or agreement (*Voight v. Wallace*, 179 Pa. 520, 36 Atl. 315), and the purpose of the act as stated in said cited case 'was intended to prevent the inconvenience and injustice resulting from the title to the wall being in one person and the right to compensation outstanding and a secret claim in the hands of another.' In other words, the act was to prevent a condition such as arose in *Dannaker v. Riley*, 14 Pa. 435, where the right of the first builder to compensation was considered a personal right and did not pass with the land to the purchaser. In *Knight v. Beenken*, 30 Pa. 372, it was held that the right or interest should pass by the conveyance, and such interest should be in law what it was in fact, 'an interest in the realty and not a mere personal right.'

"But it is clear that this act and the authorities cited relate to a party wall, in its technical sense, under the statutes, and not to the ordinary division or partition wall created for convenience between adjoining owners of property. Such rights which are purely statutory do not exist at common law. *List v. Hornbrook*, 2 W. Va. 340. A division wall may, however, be a party wall, not only

by statute, but also by agreement. *Ritter v. Sieger*, 105 Pa. 400. We must then look to the agreement of 1888 between the parties and determine whether or not a party wall exists by contract and what may be required of each thereunder. It is herein provided that whereas Roush is about to commence the erection of a brick building, and that he may build his wall a distance of 2 feet over the line of said Ebert back a distance of 59 feet, and the remaining portion of the said wall shall be built 18 inches beyond the said Ebert side of the dividing line, a distance of 61 feet, and that Ebert shall, after compensation, sink the joist of his said building into said wall. But it will appear under the agreement that, while provision is made for the perpetual maintenance of the hallway, no such agreement is made in reference to the wall, nor is any provision made for its repair or reconstruction in the event such repairs or rebuilding may become necessary. No right has run by prescription and, in the absence of such contract, it is to be assumed that none was intended by the parties, for only that which is expressed or fairly implied under the agreement can prevail. The easement of support by means of a common party wall which belongs to adjoining buildings ceases with the state of things which created it, and when the wall is accidentally destroyed, or is so much decayed as to require a rebuilding from the foundation, neither may call upon the other for its restoration unless it was so agreed at the time of its erection. *Bonney v. Greenwood*, 96 Me. 335, 52 Atl. 786. And where one owning an easement in a wall which forms a side of his building after the destruction of the wall and building erects a new building on a different foundation, he thereby abandons and extinguishes the easement. *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. 533.

"The buildings were destroyed by a fire without cause by either party, and, where houses having a party wall are accidentally destroyed by fire leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part of his ground. *Hoffman v. Kuhn*, 57 Miss. 746, 34 Am. Rep. 491. There is no implied obligation which will enable either to maintain an action against the other for neglect or refusal to repair or reconstruct. *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716. 'When the wall has been destroyed by the elements, there being no agreement to build a second wall, neither party is under obligation to join the other in doing so, and the law would imply no such obligations.' *Washburn on Easements & Servitudes* (4th Ed.) 614; *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376. These authorities would seem to indicate that the division or partition wall is wholly eliminated from the controversy as neither the agreement of 1888 provides for reconstruction or contribution therefor, nor

is there any evidence tending to show since the destruction of the buildings that either party obligated himself to a reconstruction or for contribution in the event of a rebuilding by the other party. The plaintiff having rebuilt wholly upon his own land, the defendant must, if he desires to rebuild, likewise erect wholly upon his land within the lines as shown between the properties prior to the deed of 1869.

"Conclusions of Law.

"(1) That the second or subsequent agreement of September 7, 1888, did not annul or extinguish the grant in its entirety contained in the deed of 1869, but so modified, reformed, and changed the same to conform to the new conditions, restricting the area or size of the passageway for ingress and egress of both parties and their several occupants of the respective buildings.

"(2) That defendant has no right or authority to inclose or maintain closed that portion of the plot conveyed by deed of date August 21, 1869, which fronts on Eleventh avenue 5 feet, and extends back a distance of 57 feet, reserved for an alley, passageway, or hallway. Nor has the plaintiff any easement rights to or interest in any other portion of defendant's lands.

"(3) That by agreement of September 7, 1888, for considerations therein named, the rights of the parties were merged, and by the fire of June 14, 1907, the division wall was obliterated, either party then having the right to decline to build, or, rebuilding a division wall, may build upon his own lands without reference to the former rights in the division wall erected under the said agreement of 1888."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

R. A. Henderson, for appellant. Wm. S. Hammond and O. H. Hewit, for appellee.

PER CURIAM. These appeals are from a decree entered on bill and cross-bill defining the rights of adjoining owners of land to an easement. They give rise to many questions of interest that have been elaborately and ably argued, but the crucial question in the case is whether the agreement of 1888 extinguished the easement created by deed in 1869. We concur in the conclusion reached by the learned judge of the common pleas that it did not, and that its only effect was to define and restrict the use of the passageway. Whether under a strict construction of the deed the easement created by it was personal to the grantor and limited to his life is of slight importance in view of the construction placed upon it by the owners of the dominant and servient tenements. For a period of nearly 40 years they construed the covenant as running with the land, and, with

this understanding of their rights, negotiations were entered into for their mutual advantage and money expended and buildings erected. It is now too late to call it into question.

The decree is affirmed.

BOWLING et ux. v. ROBERTS et al.
(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. HIGHWAYS (§ 184*)—INJURIES BY AUTOMOBILE—NEGLIGENCE—EVIDENCE.

In an action against the owners of an automobile to recover damages for personal injuries from the fright of a horse, the question as to the identity of the machine *held* for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. HIGHWAYS (§ 184*)—INJURIES BY AUTOMOBILE—EVIDENCE—BURDEN OF PROOF.

In an action against the owners of an automobile to recover for personal injuries from the fright of a horse caused by the alleged negligence of the driver of the automobile, the burden is on plaintiff to prove whose machine was responsible for the accident, but he is only required to produce such evidence as will satisfy the jurors of its identity.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

Moschzisker, J., dissents.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Ernest P. Bowling and Lorena, his wife, against William T. B. Roberts and others. From an order refusing to take off a nonsuit, plaintiffs appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Harry D. Westcott, for appellants. Ruby R. Vale, for appellees.

MESTREZAT, J. We think it was error to enter a compulsory nonsuit in this case. The controlling question for determination was the identity of the automobile which caused the accident resulting in injury to the plaintiffs, and we think there was sufficient evidence to submit to the jury on that question.

In 1907 the defendants were engaged in developing property and selling lots at Pitman Heights, a half mile from the borough of Pitman Grove, Gloucester county, N. J. There was a farmers' picnic at Alcyon Park, near Pitman Grove, on August 7 and 8, 1907, and on the occasion it appears that a White Steamer automobile was used for carrying prospective purchasers of building lots at Pitman Heights from the railroad station at Pitman Grove to the Heights. It was also used in carrying persons between Pitman Heights and Alcyon Park, a mile distant, and from the railroad station to Alcyon Park. The automobile was a large one, and

was decorated with bunting and streamers upon which the defendants' name and "Pitman Heights" appeared in large letters. The car was accompanied by one Sands, whom the jury might well have found was in charge of the defendants' business in selling lots at Pitman Heights. Pamphlets advertising the lots were distributed from the car on its trips around Pitman Grove. Robert Mitchell, a colored man, in the employ of William T. B. Roberts, a member of the defendant firm, was the chauffeur who operated the car which was seen at various times during the picnic on the highways in the vicinity of Pitman Grove, accompanied by Sands, distributing advertising materials.

Mr. and Mrs. Bowling, the plaintiffs, and their infant child, were at the farmers' picnic at Alcyon Park on August 8th, and left for their home about 4:30 p. m. of that day. They drove out Holly avenue to Pitman Grove, thence along Broadway to Pitman avenue, and were driving on the latter highway, about 100 yards west of the old Woodbury road which crosses Pitman avenue, when an automobile turned from the road into the avenue and approached the plaintiffs' wagon. The plaintiffs' horse became frightened, ran away, threw the occupants of the wagon out, and injured the plaintiffs severely. The plaintiffs claim that it was the defendants' automobile decorated and used by them on that day for advertising purposes which frightened their horse and caused the accident. The automobile was running rapidly, and as it neared the plaintiffs' wagon it increased its speed, and sounded the horn frequently. The chauffeur made no attempt to stop, although signaled to do so by Mr. Bowling. The plaintiffs testified that the automobile was a large one, and was decorated with flags and bunting, that the bunting was "all flopping down the sides and flags on it," and that there was a "lot of bunting and flags fluttering all over it, just like a mass of bunting." There were four or five persons in the car. Replying to appellants' counsel, Mr. Bowling testified that the day of the accident was a "big day" at Alcyon Park, and further: "Q. Teams generally were decorated with bunting and other things because of that fact, were they not? A. I didn't see any. They don't decorate on that day."

Alcyon Park is about one-half mile west of Pitman Grove, Pitman Heights where the defendants' lots were located is about the same distance east of Pitman Grove, and the place of the accident is about one-half mile in a southwesterly direction from Pitman Grove. It will thus be seen that these distances are short, and that an automobile could cover them in a very few minutes. If the automobile which caused the accident was being used by defendants' employé in their business at the time, they are responsi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ble if the party operating it was negligent and caused the accident resulting in the plaintiffs' injuries. It is immaterial who the chauffeur was. The liability of the defendants in this action, therefore, depends upon whether the plaintiffs produced sufficient evidence to warrant the jury in identifying the automobile which caused the accident as the one which was being used by Sands in the defendants' business on that day. In determining the question the difficulty in identifying an automobile traveling at such rapid speed must not be overlooked. If the evidence is believed, the chauffeur gave no heed to the plaintiffs' signal to stop the machine, but accelerated his speed and sounded his horn frequently until he had passed the plaintiffs' wagon. Of course, the plaintiffs' attention was directed to their horse in order to prevent an accident. They manifestly gave the best and only description of the machine that any one could give under the circumstances. This description, with the other facts in the case, we think, was sufficient to warrant the conclusion by the jury that it was the Roberts automobile that frightened the plaintiffs' horse. The decorations on this machine corresponded to a certain extent, at least, with those on the Roberts machine in use by the defendants on that day. Both were covered with "a lot of bunting and flags fluttering all over the machine, just like a mass of bunting." A machine thus decorated would attract attention, and would be noticed wherever it went. Mr. Bowling says that he saw no other machine decorated with bunting in the community on that day. Of course, this is not conclusive of the fact, but it is some evidence for the jury. The Roberts machine was a large one, so was the one that caused the accident, and, from the description given by the witnesses, the decorations of the two machines may well be regarded as similar. It would be difficult for the plaintiffs to describe more accurately than they did the automobile which frightened their horse. To require a plaintiff under such circumstances to testify to the number or give a minute description of the machine which caused the accident would frequently defeat a meritorious cause of action. It cannot be expected, and therefore it is not required.

[2] While the burden is upon the plaintiff in such cases to prove whose machine was responsible for the accident resulting in his injury, and he must identify it to the satisfaction of the jury, he is not required to do an impossible thing, but only to produce such evidence as will satisfy the minds of 12 intelligent jurors of the identity of the machine. This might be done by showing the similarity between the peculiar and unusual decorations on the Roberts' machine and those on the machine which frightened the plaintiffs' horse, and the plaintiffs might

thus make a prima facie case which the defendants would be called upon to answer. Had the plaintiffs' horse been frightened by another team approaching from the opposite direction, they could easily have identified the driver and the conveyance, but, as suggested above, the rapidity with which an automobile travels, and especially the speed at which this one was going, would prevent a more specific identification than that given by the plaintiffs.

[1] It may be that on the trial of the cause the defendants' testimony may be so clear and conclusive that the court would be justified in directing a verdict for the defendants. As the case now stands, however, the testimony points to the machine causing the accident as the one in use by the defendants at the time in their business in promoting the sales of their lots at Pitman Heights. If this be true, and all the evidence in the case satisfies the jury of the fact, the defendants must successfully meet the question of negligence or respond in damages for the plaintiffs' injuries.

In their printed argument, appellants' counsel do not confine themselves to the facts disclosed by the testimony introduced on the trial of the cause. Had they done so, the testimony taken on the former trial, but not offered in the present case, would not have been referred to, and the apparent conflict between the facts as stated by counsel and the testimony would probably not have occurred. It may be suggested that on the next trial the plaintiffs' case should be, as manifestly it can be, more fully developed. The relative position of the different places involved in the case and the distances from each other should at least be approximately shown.

The judgment is reversed with a *procedendo*.

MOSCHZISKER, J., dissents.

COMMONWEALTH v. REED.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

1. CRIMINAL LAW (§ 1129*) — APPEAL — ASSIGNMENTS OF ERROR.

It is bad practice in an assignment of error to quote two distinct sentences in the charge separated by a page and a half of printed matter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

2. HOMICIDE (§ 152*)—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF.

Where on trial for murder a felonious homicide by the use of a deadly weapon is established, there is a presumption of murder in the second degree, and the burden is on defendant to reduce the grade of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 279-283; Dec. Dig. § 152.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. HOMICIDE (§ 286*)—TRIAL—INSTRUCTIONS—INTENT.

On a trial for murder, an instruction that it is not necessary to find that defendant went to the house where the act was committed with the intent to kill, that, if he formed the intent to kill with a mind capable of forming that intent an instant before he pulled the trigger, he was guilty of murder in the first degree, was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.*]

4. CRIMINAL LAW (§ 656*)—TRIAL—INSTRUCTIONS.

On a trial for murder, a contention that the trial judge erred in quoting to the jury testimony as to threats by defendant before the killing without telling them that the testimony was specifically denied by defendant will not be sustained where the judge charged, "I am not saying that these things are so; what I am saying to you is that that is the testimony of the commonwealth; consider if this testimony is true, and, if it is true, does it show that he had a specific intent to take life. You will consider all of this evidence and determine whether or not the testimony of these witnesses is the truth," and also charged the jury to remember not only the testimony of the commonwealth, but especially the testimony of the defendant himself, notwithstanding the circumstances under which he testified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.*]

5. CRIMINAL LAW (§ 1129*) — APPEAL — ASSIGNMENTS OF ERROR.

Assignments of error criticising the charge in general terms, but quoting no part of it *ipsisimis verbis* in the specifications, will be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.*]

Appeal from Court of Oyer and Terminer, Franklin County.

William Reed was convicted of murder in the first degree, and appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John W. Hoke and Irvin C. Elder, for appellant. D. Edward Long, Dist. Atty., for the Commonwealth.

POTTER, J. It appears from the record in this case that William Reed was tried in the court of oyer and terminer of Franklin county for the murder of Sarah E. Mathna. The latter was employed as a domestic in Weistling Hall, the administration building of the Forestry Academy located on the state reservation at Mont Alto, Franklin county. Although married to another man, she had lived from September, 1909, to August, 1910, with Reed, but on the latter date they had separated, and the following November she obtained a position in the Forestry Academy where she had previously been employed. On the morning of May 9, 1911, while she was grinding coffee in the kitchen of the administration building, Reed came in. They talked together for about a quarter of an hour, being alone, when Reed

drew a revolver and shot her three times; the last bullet which penetrated near the heart causing her death. Reed was arrested and indicted for her murder, and on the trial in September, 1911, was convicted of murder of the first degree.

Counsel for appellant are to be commended for the faithful but temperate manner in which they have discharged their duty. The record does not, however, disclose anything which would justify a reversal of the judgment of the court below. The direct testimony as to the shooting was that of Reed himself. He testified that he went to the Forestry Academy, where Mrs. Mathna was employed, for the purpose of getting from her some pictures and papers of his which she had. He asked her for them and she went upstairs, got them, and brought them down to the kitchen. She then took them all, except one big one, walked around to the range, and put them in the fire. He was standing two or three steps from her and told her that he would not stop much to slap her for putting those things in the stove. Then she raised up the coffee mill and told him she would knock his head off if he did not get out of there. She was cross the whole time he was there. He happened to have a revolver and started to shoot for the purpose of scaring her, not with any intention of hitting or hurting her. He had been drinking that morning and was not sober. If he had been sober he would not have done it. He did not intend to harm her at all; just to scare her. He could only recall firing two shots and could not see where the third shot came from. She ran from the room. He did not follow her. He did not remember leaving the house. Afterwards he looked at his revolver and saw three loads had been fired, but could not account for more than two. He had heard a noise like a bump on the floor or some one opening a door as he left the room, and he thought afterwards he might have hurt her. He decided to give himself up and was on his way to the squire's office for that purpose when he met the constable who took him into custody. The commonwealth alleged that the shooting was due to jealousy, and offered testimony mainly of declarations by the accused, both before and after the shooting, to show premeditation. Counsel for appellant did not attempt to secure an acquittal, but contended for a verdict of voluntary manslaughter.

[1] Eighteen assignments of error have been filed; all of them to the charge of the court. In presenting the first assignment, two disconnected sentences were taken which, as actually found in the charge, are separated by a page and a half of printed matter. This is bad practice. It is unfair to the trial judge and has frequently been condemned. *Commonwealth v. Eckerd*, 174

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Pa. 137, 34 Atl. 305; *Brinton v. Walker*, 15 Pa. Super. Ct. 449.

[2] The objection to the portions of the charge quoted is without merit as they merely placed the burden of proof on the defendant to reduce the grade of the murder with which he was charged from second degree to manslaughter. This was in accord with the rule recognized in the recent cases of *Commonwealth v. Greene*, 227 Pa. 86, 75 Atl. 1024, and *Commonwealth v. Chapler*, 228 Pa. 630, 77 Atl. 1013, that where the evidence has established a felonious homicide, committed by the use of a deadly weapon upon a vital part of the body of the deceased, there is a presumption of murder of the second degree, and the burden is on the defendant to reduce the grade of the crime. In *Commonwealth v. Gibson*, 211 Pa. 546, 60 Atl. 1086, it was said per curiam: "Legal malice as an ingredient of murder is presumed from the use of a deadly weapon against a vital part of the body." In *Commonwealth v. Eckerd*, 174 Pa. 137, 149, 34 Atl. 305, 306, Mr. Justice Mitchell said: "The intent to take life, fully formed, is presumed from the use of the weapon, and certainly where as in this case it was fired three times."

[3] The second assignment of error is to the following extract from the charge: "It is not necessary that you find that he went to the house with the intent to kill; if he formed the intent to kill with a mind capable of forming that intent an instant before he pulled that trigger, he is guilty of murder of the first degree." This instruction was proper under the authorities. In *Keenan v. Commonwealth*, 44 Pa. 55, 56 (84 Am. Dec. 414), Chief Justice Lowrie said: "Our reported jurisprudence is very uniform in holding that the true criterion of the first degree is the intent to take life. The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed. An intent distinctly formed, even for a moment before it is carried into act, is enough." In *Green v. Commonwealth*, 83 Pa. 75, Chief Justice Agnew referring to the case of *Commonwealth v. Drum*, 58 Pa. 9, repeated the language used by him in that case as follows (83 Pa. 80): "If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know beforehand (though the time be short) the use to be made of it, there is time to deliberate and premeditate." In *Commonwealth v. Krause*, 193 Pa. 306, 308, 44 Atl. 454, 455, Mr. Justice Fell said: "The nature of the weapon (a revolver) and the manner of its use (firing five shots, two of which were fatal) indicated an intention to kill." In *Commonwealth v. West*, 204 Pa. 68, 70, 53 Atl. 542, 543, it was said per curiam:

"We are all clearly of the opinion that the ingredients of murder in the first degree exist in this case. The fatal shot was fired from a deadly weapon and was directed against a mortal part. There was sufficient evidence, if believed by the jury, of deliberation and premeditation. The first shot did not kill but only disabled the officer. Between it and the time of firing the second and fatal shot ample time elapsed to enable the prisoner to form a conscious design to kill and to carry it into effect. As said by Judge Rush in *Commonwealth v. Smith*, 'No time is too short for a wicked man to form in his mind his scheme of murder and to contrive the means of accomplishing it.'"

The third and fourth assignments allege error in portions of the charge containing instructions as to the deductions to be drawn from the evidence as to the use of a deadly weapon and as to the rules governing the proof of intent to kill. There was no error in these instructions, as they are justified under the authorities already cited.

In the fifth, sixth, seventh, eighth, and ninth assignments of error complaint is made of portions of the charge as tending "to unduly affect and prejudice the jury against the defendant." These parts of the charge, however, are fair statements of the evidence and accurate presentations of the law.

We do not find any basis for the tenth assignment of error which complains that the trial judge misstated to the jury the testimony of the defendant as to his recollection of the number of shots he fired. The language quoted seems to state correctly the testimony of the defendant in this respect.

[4] In the eleventh and twelfth assignments of error it is alleged that the trial judge quoted to the jury testimony as to threats made by the defendant prior to the killing without telling them that the testimony was specifically denied by the defendant. But an inspection of the charge shows that, immediately after repeating this testimony, the trial judge said: "I am not saying that these things are so; what I am saying to you is that that is the testimony of the commonwealth; consider if this testimony is true, and, if it is true, does it show that he had a specific intent to take life? You will consider all of this evidence and determine whether or not the testimony of these witnesses is the truth." And after a few sentences he says further: "Remember not only the testimony of the commonwealth, but remember especially the testimony of the defendant himself, notwithstanding the circumstances under which he testifies. Weigh all the evidence on both sides. Give each its due weight."

[5] In the thirteenth, fourteenth, fifteenth, and sixteenth assignments of error the charge is criticised in general terms, but no part of it is quoted ipsissimis verbis in the

specifications as required by rule 27. These assignments will therefore be disregarded.

In the seventeenth assignment it is averred that the court erred in not instructing the jury that they must be convinced of the defendant's guilt beyond a reasonable doubt. It appears, however, that in the sixth and seventh points submitted by defendant for charge the court was asked to give the jury instructions on the subject of reasonable doubt. These requests were both affirmed without qualification. In the seventh point the jury were told that the mind of each juror "must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a verdict of guilty."

In the eighteenth assignment it is alleged that the court erred in failing to call the attention of the jury to the defendant's specific denial of any intent to kill. There was no specific request for such an instruction, but it does appear that the trial judge twice said to the jury in charging on the subject of intent that "the prisoner says that he shot to scare her." And that as noted above he charged the jury to "remember especially the testimony of the defendant himself."

The judgment is affirmed, and it is ordered that the record be remitted to the court of oyer and terminer of Franklin county, that the judgment may be executed according to law.

SLOAN v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. Feb. 10, 1912.)

1. APPEAL AND ERROR (§ 1197*)—DISPOSITION OF CAUSE—REMAND TO TRIAL COURT.

Where a judgment non obstante veredicto is reversed on appeal and the record remitted with directions to enter such judgment as law and right may require, the case stands as though no proceedings had been taken in the trial court after the rendition of verdict, and the trial court may take such action as in its judgment law and right require.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4666, 4667, 4669-4671; Dec. Dig. § 1197.*]

2. APPEAL AND ERROR (§ 1099*)—REVIEW—SUBSEQUENT APPEAL—PRESUMPTIONS.

Where the trial court ordered a new trial unconditionally after reversal of a judgment non obstante veredicto, the Supreme Court on another appeal will assume that this was done in the exercise of a sound discretion with a view to accomplish the ends of justice, and will not review such action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by John J. Sloan against the Philadelphia & Reading Railway Company. From an order making absolute rule for new trial, plaintiff appeals. Affirmed.

See, also, 80 Atl. 366.

On the motion and rule the following opinions were filed:

"Sulzberger, P. J. Judgment for defendant n. o. v., entered by this court, was reversed by the Supreme Court, with direction that judgment be entered for the plaintiff. The defendant thereupon prayed the Supreme Court to modify its judgment, and the following order was made: 'And now, June 13, 1911, so much of the judgment heretofore entered as renders judgment on the verdict for plaintiff is now reconsidered and rescinded, and the record is remitted, with directions to the court below to enter such judgment as law and right require.'"

"On the interpretation of this order a conflict arises. The plaintiff moves for judgment on the verdict; the defendant moves for a new trial. The dispute hinges on the construction of the direction 'to enter such judgment as law and right require.' If the word 'judgment' is to be understood in its proper legal sense, it means here a judgment on the verdict. The entry of such a judgment would comply with the direction of the Supreme Court, in so far as it would be in accordance with 'law.' The order, however, is 'to enter such judgment as law and right require.' We are all of opinion that the verdict is unjust, and 'right' would require us to set it aside. Where law and right (equity) are thus in conflict, a judgment in accordance with both is impossible, and it is therefore reasonable to assume that the word 'right' is used here as a mere synonym for 'law,' and that judgment should be entered on the verdict for the plaintiff.

"This I take to be the meaning of Hughes v. Miller, 192 Pa. 365, 43 Atl. 976. The worst that can be said against this construction is that the system of trial by jury, like all other human institutions, is imperfect. There have been three trials of this case. Presumably, at the last trial, the defendant presented all the evidence at command, and a new trial would not add to it. If we now enter judgment on the verdict, the defendant has his appeal, wherein he may take advantage of any reversible error committed. The disadvantage suffered by him in consequence of our erroneous judgment n. o. v. is entirely eliminated, and he stands just where he stood. His present position is, therefore, in effect, that we fell into error in discharging the rule for new trial, and that we should now cure it by rescinding that order, reinstating the rule, and making it absolute.

"There are, it is true, dicta which says that, when the court is dissatisfied with the verdict, it shall set it aside over and over again, until a jury can be found which shall adopt the court's standard for judging facts. This, however, cannot be considered a principle of law. The jury is the constitutional tribunal for finding facts, and, though the court's supervision of it goes far, it can

scarcely be held to override it completely. When therefore a reasonable number of trials has been held, regard must be paid to the propriety and necessity of ending litigation, in justice as well to the parties in the cause as to other parties who, having an equal right to have their cases tried, are not to be barred by the perpetual intrusion of one case as an obstacle.

"The entry of judgment for the plaintiff would not hurt the defendant. It has had its fair opportunity here, and would have another chance on appeal, and, though none of us is satisfied with the verdict, I think that there ought not to be a right to an unlimited number of new trials.

"I would therefore enter judgment for plaintiff on the verdict. My Brethren, however, in an opinion filed this day, have resolved that the order of the Supreme Court leaves us free to grant a new trial. In accordance with the majority opinion, it is now directed that the order discharging the rule for new trial is vacated, and the rule for new trial is made absolute."

"Wiltbank, J. I am of the opinion that the order heretofore made discharging the rule for a new trial should be vacated, the rule reinstated, and thereupon made absolute. It is my conclusion that the record of the Supreme Court, and of this court, discloses our duty thus to act. The judgment entered by us for the defendant non obstante veredicto was erroneous, and we are directed to review the proceedings upon the last trial, and thereupon to enter such judgment as law and right require. Our refusal of a new trial to the defendant was not because the plaintiff was entitled to recover, but it was because we deemed it according to law to afford the defendant the readier and more complete relief of a final judgment in his favor. In this we exceeded our power; but, had we not gone so far, it cannot be disputed that we should and would have granted a new trial. Such, obviously, would have been imperatively our duty. The discharge of the rule was therefore matter of form. Our adhering to that action at this stage would not eliminate the disadvantage suffered by the defendant under our error, nor would he stand just where he stood when we condemned the verdict against him. His prospect of the new trial is greater here than it would be were we to send him to the Supreme Court, which tribunal, as I understand the authorities, exercises its power only in cases of the clearest error on the trial. Our entry, being merely formal, concluded nothing as matter of substance. It was a step necessary to the orderly framing of the record for the proper dismissal of the action in this court, or for the due presentation of the record to the appellate tribunal. This view of the case is, I think, beyond dispute. We had unanimously determined that two verdicts had been contrary to the evidence, viewed with regard to

its substance and effect, and also with regard to the credibility of the witnesses. This is declared to be still the unanimous opinion of the court. I submit that it would not be according to law and right that we should violate precedent and now sustain the claim of the plaintiff, to subject the defendant to a pecuniary charge which the proofs did not warrant.

"As I understand the contention of the plaintiff, this view is not arguable, because we are under the peremptory mandate of the Supreme Court to enter judgment for the plaintiff pursuant to the discharge of the rule for a new trial. It is contended that we have no discretion, but that it is our duty to affirm, without modification, our previous order, and to enter judgment accordingly.

"But the order relied upon embodies no prohibition of other action should we deem such to be according to law and right. In prescribing 'such judgment,' it implies more than one judgment as within our power in the exercise of our discretion, and that judgment must be such as is determined by us according to the law of the case. We are not bound immovably by a formula involving the injustice of a negation of our three determinations against the claim of the plaintiff to adjudge a claim lawful, when we have recorded and still record that it is otherwise.

"This view does not bear unduly upon the plaintiff. It does not determine the merit of his case, nor deprive him of a remedy. He may still go to the country on the issue raised by the pleadings. The proceeding will not be affected one way or the other by what has heretofore passed in the cause; and it is of essential right that the defendant should have an appeal to another jury. The cases cited are to this effect. *Hughes v. Miller*, 192 Pa. 365, 43 Atl. 976; *Hardoncourt v. Iron Co.*, 225 Pa. 379, 74 Atl. 243.

"The rule for a new trial is reinstated, and the same is hereby made absolute. In this our Brother Barratt concurs."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Augustus Trask Ashton, Victor Frey, and Maurice V. Daniels, for appellant. Wm. Clark Mason, for appellee.

PER CURIAM. [1] Where on an appeal from a judgment non obstante veredicto, the judgment is reversed, and the record remitted with directions to the court below to enter such judgment as law and right require, the case then stands as though no proceedings in the court below had been taken after the rendering of the verdict; and it is for the court below to take such action with respect to the verdict as in its judgment law and right require. It follows that it may either direct judgment on the verdict, order a new trial on refusal of plaintiff to accede to a reduction in amount of the verdict, or

order a new trial irrespective of any such condition. Within these limits the verdict is in the power of the court.

[2] In this case a new trial was ordered unconditionally. We must assume that this was done in the exercise of a sound discretion by the court, with a view to accomplish the ends of justice, and the action is therefore not reviewable.

The appeal is dismissed at the cost of appellant.

MacDERMOTT et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

MUNICIPAL CORPORATIONS (§ 819*)—OBSTRUCTION OF STREETS.

In an action for injuries to a boy by alleged defects in a street crossing, evidence that the city had provided a safe crossing a short distance away, and that a new crossing in process of building was obstructed, held insufficient to sustain a finding that a defined path had existed at the point in question for such length of time that the city should have guarded against the dangers thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Frank N. MacDermott, by his father and next friend, and another, against the City of Philadelphia. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

George Demming, for appellants. James J. Breen, Asst. City Sol., Joseph A. Dolan, and Michael J. Ryan, City Sol., for appellee.

MOSCHZISKER, J. This was an action of trespass brought by William J. MacDermott, as the father and next friend of Frank N. MacDermott and in his own behalf, against the city of Philadelphia, to recover damages for the injuries to the son alleged to have been due to the negligence of the defendant.

In the spring of 1908 the city of Philadelphia entered upon the construction of a new concrete bridge to replace an old one on Columbia avenue between Thirtieth and Thirty-First streets. At this point Columbia avenue runs east and west at right angles with Thirty-First and Thirty-Second streets, and there is a double-track railway operated upon it; the east-bound track being upon the south side of the roadbed. In the course of the work it became necessary to place machinery, tools, and building materials for use in and about the construction of the bridge on the cartway or roadbed of Columbia avenue between the curb on the

north side and the southern or east-bound railway track between Thirty-First and Thirty-Second streets, which resulted in the closing of that portion of the street to all traffic. Among the material thus deposited was a large quantity of grout or small stones used in concrete work, in piles 2½ or 3 feet high along the north side of the east-bound track. On July 18, 1908, at about 5 o'clock in the afternoon, the plaintiff, Frank N. MacDermott, a boy about 13 years of age, attempted to cross Columbia avenue diagonally from Thirty-First street on the north to Patten street on the south (the latter being a small street between Thirty-First and Thirty-Second streets running south from and at right angles with Columbia avenue). After leaving the sidewalk on the north side of the street, he climbed up on one of the piles of stone, and, seeing a car approaching eastward, he stood there to allow it to pass. Immediately after the front part of the car had passed him, the stones gave way beneath his feet, he slid under the car, and the wheels passed over his legs, causing the injuries complained of. It was testified that both sidewalks on Columbia avenue were kept open for the use of pedestrians, and that persons desiring to cross that street at this point had walked over these stones, their travel making a sort of path or footway across the same.

The trial judge entered a nonsuit, which the court in banc refused to take off, and the plaintiff has appealed, assigning, first, that the court below erred in refusing to take off the judgment of nonsuit, and, next, that error was committed in refusing evidence offered to prove that certain changes had been made in the street after the accident.

In entering the nonsuit the trial judge, *inter alia*, said: "The entire street on Columbia avenue from Thirty-First to Thirty-Second was shut off to traffic. Cars on one track, the east-bound track, were permitted to go through, but nothing else was permitted to pass there. No vehicles of any kind were permitted on the street. The north side of the street was blocked, probably from Thirty-First street to nearly Thirty-Second with piles of crushed stones extending from very near the curb all the way over the first car rails. * * * So far as appears, the crossing at Patten street was obstructed—that is, the crossing at the end of Patten street for that street does not cross Columbia avenue—if there was a crossing there, and there is no testimony to show that there was, but the crossing at Thirty-Second street appears to have been open and perfectly safe. * * * The city is, of course, bound to keep its streets and sidewalks in a reasonably safe condition. The sidewalks of the street were apparently perfectly safe. The city has the right to shut off the street when

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

necessary to make repairs. * * * In such cases it is impossible for pedestrians to cross the street haphazard as they are accustomed to do at other times. In this instance there was nothing illegal in the city permitting the stone to be piled on the street, nothing illegal in the street being closed to traffic. Therefore what the city omitted to do I do not see. I see no negligence on the part of the city, and therefore grant the motion for a nonsuit."

A reading of the testimony satisfies us that the position taken by the trial judge was justified, and that the court below committed no error in refusing to take off the nonsuit. The testimony was too vague and indefinite to sustain a finding that a defined path or way over the pile of stones had been created or existed for such a length of time that the city was bound to have taken notice and guarded against its dangers. The breach averred and complained of in the statement of claim was that the city had failed in its duty to keep the street in proper and safe condition, and had permitted a continuous pile of "small stones, dirt, sand and other materials to be placed on and over the roadbed without any prohibition or warning, necessitating a crossing or passage of said material by persons crossing said Columbia avenue, and inviting its use and crossing over the same to children and persons of immature mind and judgment. So that * * * when said plaintiff * * * attempted to pass over the same, * * * by reason of the negligent and improper manner in which said material was placed and piled, * * * it suddenly gave way beneath him, precipitating him under a passing trolley car. * * * " The theory of the defined pathway seems to have been an afterthought, and, as we have already said, the evidence was not sufficient to sustain it. The city was not bound to anticipate the possibility that some one might leave the open sidewalk which it was maintaining and make a diagonal crossing of the street over the pile of stones, when it had left at least one safe crossing a short distance away at Thirty-Second street. The municipality was engaged in a public undertaking and the street, except the sidewalk, was closed to traffic. It provided a safe way to cross, with but little or no inconvenience to pedestrians, and its duty to the plaintiff was no higher in this respect than to others. The circumstances do not bring the present case within the line of authorities dealing with the responsibility of defendants guilty of exposing an invitation to danger to the playful fancy of children. The first specification of error is overruled. It only remains to say that we see no error in the ruling complained of in the second specification, and that is likewise overruled.

The judgment is affirmed.

MALONE v. STEWART et al.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

PRINCIPAL AND SURETY (§ 194*)—CONTRIBUTION.

Where sureties on separate bonds and for varying amounts, for completion of a building, are compelled to complete it, if one has paid more than his share, he may compel contribution from the others, though there are at the time pending certain contested claims out of the construction of the building.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605-623; Dec. Dig. § 194.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Edwin B. Malone against Amelia Stewart and Patrick S. Smith. From a decree overruling demurrer to bill, defendants appeal. Affirmed.

Sulzberger, P. J., filed the following opinion in overruling a demurrer to the bill upon which, after hearing, there was a decree in favor of the plaintiff:

"The Stewart Contracting Company contracted with the city of Philadelphia to build a schoolhouse, and gave bonds for faithful performance with the Title Guaranty & Surety Company as surety. Before assuming the suretyship, the latter demanded counterbonds in the sum of \$70,000. Edwin B. Malone, the plaintiff, executed one of these for \$10,000, and the defendants, Amelia Stewart and Patrick S. Smith, each executed one of the said bonds for \$30,000. The Stewart Contracting Company abandoned the work before completion, and the three countersureties, to save themselves from loss, jointly agreed to finish the work. At this point the controversy arises.

"The plaintiff contends that the loss by the contractor's default should be finally adjusted by charging each of the countersureties his proportion thereof, as fixed by their bonds to the surety. The defendants, on the other hand, maintain, in support of their demurrer to the bill, that on the face of the bill itself it appears that no contract relation existed between the plaintiff and defendants establishing as between themselves any proportionate liability, that the averments of the bill show that the plaintiff and defendants jointly agreed to complete the work, and that the legal inference from this state of facts is that their interests were equal. They further contend that, as the plaintiff paid one-third of the outlay hitherto made and each of the defendants also paid one-third thereof, such payment is in law a mutual ascertainment of their true relations at the time, and a waiver of any contract theretofore made or of any other relation subsisting between them. As additional grounds of demurrer it was urged that there are pending and undetermined certain contested claims arising

out of the building of the schoolhouse, and that no bill can lie until all such shall have been finally determined, and that, therefore, the bill must be dismissed.

"In *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270, decided in 1800, it was held that if A., B., and C. became bound as sureties for D. in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds. Lord Chief Baron Eyre based his conclusion on the view that 'the bottom of contribution is a fixed principle of justice, and is not founded in contract.' The reasoning and the judgment in that case have not been disturbed or questioned. Indeed, in *Craythorne v. Swinburne*, 14 Ves., Jr., 160 (decided in 1807), Lord Eldon (page 169), stated that he argued the former case and had been much dissatisfied with the judgment, but had since been convinced that the decision was upon right principles. It follows that, when the Stewart Contracting Company abandoned its work, the plaintiff and defendants were, as between each other, cosureties responsible to the surety in the proportions of one-seventh, three-sevenths, and three-sevenths.

"At this point they jointly agreed to reduce the loss by agreement between themselves to finish the work. This agreement was not in writing, and may have included no other specific terms than those set forth in the bill. These were, in substance, that the money required for completing should be raised by procuring from the defaulting contractor its four promissory notes to the order of plaintiff and defendants and having them discounted by a bank for the defendant, Smith. These notes were for the amounts of \$1,500, \$4,500, \$3,500, and \$3,000, respectively, and their proceeds were properly applied. The notes were not paid at maturity, because the defendants refused to admit that the plaintiff was liable only for one-seventh, but insisted that he was liable for one-third. To prevent judgment and execution, he, under protest to defendants, paid one-third, or \$4,349.20, to the bank, and the defendants each paid the same amount. As the whole amount paid in settlement of the promissory notes was \$13,047.60, it would follow on the principle laid down that the plaintiff was liable only for one-seventh thereof, viz., \$1,863.94. As he actually paid \$4,349.20, he claims that he has thus far exceeded his true share by \$2,485.26, which he may rightfully call upon his cosureties to pay to him. At the time when the cosureties undertook to complete the building, they were not partners, and did not intend to create a partnership. They were mutually engaged in the one purpose to reduce their loss, and this purpose rested on the fact that they were cosureties. It was quite possible at that moment to enter into an agreement whereby the unequal pro-

portions established by the cosuretyship should be altered and the losses should be borne in equal thirds. No such agreement, however, can be inferred from the bill, and, if it ever was made, the defendant must set it forth by answer. In the absence of such an averment, the legal presumption is that the status of the three cosureties remained unchanged, and that the completion of the work was not a separate business enterprise, but a mere mode of protecting themselves in regard to their cosuretyship.

This disposes of the main point of the demurrer.

"The contention that the payment of one-third by the plaintiff warrants a legal inference that the old proportions of the cosureties were changed seems to be without force. The question is one of fact and not of law.

"The final contention that the bill is premature is equally untenable. That the plaintiff has paid more than his one-seventh is clearly averred. The contention of the defendants that the existence of additional claims against the cosureties which are contested and have not yet been decided exempts them from present contribution is based on the idea that a present decree could only be partial and that equity will not favor a multiplicity of suits. Their inference is unwarranted. The decree can be so moulded that all litigation will end with it, though, of course, subsequent motions or orders may have to be made. In any event, the fact that the defendants may be held to further liability hereafter is no equitable reason why they should subject their cosurety to indefinite delays in reimbursing him for what he has already paid on their account. In no event can these pending claims reduce the defendants' liability. They can only increase it.

"The whole subject has been treated with thoroughness by Sir R. S. Wright, J., in *Wolmershausen v. Gullick*, L. R. 2 Ch. Div. (1893) 514. After reviewing all the authorities, he comes to the conclusion (page 529): 'I think I can declare the plaintiff's right, and make a prospective order under which whenever she has paid any sum beyond her share she can get it back, and I therefore declare the plaintiff's right to contribution, and direct that upon the plaintiff paying her own share, the defendant Gullick is to indemnify her against further payment or liability, and is by payment to her or to the principal creditor or otherwise, to exonerate the plaintiff from liability beyond the extent of her own share. The plaintiff must have liberty to apply in chambers and generally to apply.' This case was cited with approval in *Shepherd v. Bray*, L. R. 2 Ch. Div. (1906) 235. In this country, too, we are not without respectable authority. In *Ferrer v. Barrett*, 57 N. C. 455, decided in 1859, it was held that a surety, upon the principle of *quia timet*, may file a bill against a countersurety to enforce his (sure-

ty's) exoneration, though he may not have paid the debt. We are aware that there are jurisdictions in which this doctrine has not been fully accepted, but there is no case which goes as far as the defendants here ask us to go. In *Gourdin v. Trenholm*, 25 S. C. 362, the court put its decision on the express ground that *Trenholm* had at the time of suit brought not paid more than his proportionate share of the debt, and in *Washington v. Norwood*, 128 Ala. 383, 30 South. 405, it was held that 'the right of action for contribution at law or in equity accrues when one surety pays more than his share of the common liability.' These are the leading cases that are usually cited against our view. To hold that when, as in this case, a surety has actually paid more than his share, he may proceed against his cosureties, is quite consistent with these authorities.

"The only ground on which the extreme doctrine contended for by the defendants could be based would be that the surety first sued owes a duty to his cosureties to stand in the breach, to defend all suits, and to pay out his own moneys in order that they may be freed from annoyance and loss. As they all stand on an equality, the existence of such a duty on his part and a correlative right on theirs is purely inconceivable.

"We think that none of the defendants' grounds of demurrer can be sustained.

"The demurrer is overruled with leave," etc.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Theodore F. Jenkins and J. Washington Logue, for appellants. Preston K. Erdman and Edwin O. Michener, for appellee.

PER CURIAM. The facts in this case are not in dispute, and the law applicable to them was correctly stated in the opinion of the learned president judge of the court below overruling the demurrer to the bill. On that opinion the decree is affirmed, with costs.

STOFFAL v. JARVIS et al.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

HUSBAND AND WIFE (§ 14*)—DEED TO MARRIED WOMAN.

Where, in partition, land is held in common by a married woman and others, and her share is conveyed to her and her husband for the purpose of making a division of the property, she and her husband did not hold by the entireties, but according to her real interest in the land.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 71-89; Dec. Dig. § 14.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by John Stoffal against Washington

Jarvis and others. Judgment for plaintiff for two-thirds of the property in dispute, and both parties appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

J. W. Kraus and R. S. Martin, for appellant Stoffal. Frank W. Jarvis, for appellees Washington Jarvis and others.

BROWN, J. Though the facts in this case seem to be somewhat involved, there can readily be evolved from them an intelligent statement from which it will clearly appear that the court below was right in entering judgment for the plaintiff for but two-thirds of the land in controversy. He claimed the whole of it, and the defendants two-thirds of it. Both have appealed from the judgment, but they respectively got just what belongs to them.

Samuel Cowan at the time of his death was the owner of a tract of land in Baldwin township, Allegheny county, containing 84 acres and 146 perches. He died intestate in 1849, leaving to survive him a widow and three daughters, Jane, Margaret, and Harriet. Jane married John Stoffal; Margaret, Daniel B. Bennett, and Harriet, David Jarvis. Their mother released her dower interest in the estate of their father, and the three daughters held the land as tenants in common until April 23, 1866, when Mrs. Stoffal conveyed her undivided third to Daniel B. Bennett and David Jarvis, as tenants in common. On May 7th of the same year Jarvis and his wife, for the nominal consideration of \$1, executed a quitclaim deed to Bennett and his wife, for all their interest in 51 acres and 17 perches of the land of which Cowan had died seised, and on the same day Bennett and his wife executed a similar deed to Jarvis and his wife for all their interest in the remaining 33 acres and 129 perches. The land in controversy is part of this tract. These two deeds were acknowledged on the same day, and both were recorded on October 29th following. The three daughters of Cowan died some time prior to the institution of this suit. Mrs. Stoffal left to survive her four children; Mrs. Bennett, a husband, and one daughter, and Mrs. Jarvis, her husband, but no children. The plaintiff is a son of Mrs. Stoffal, who, since the death of his mother and aunts, has acquired the interests of his brothers and sisters and the daughter of Mrs. Bennett in the property in dispute.

At the time of the interchange of the quitclaim deeds Jarvis and Bennett each owned in his own right an undivided sixth in the entire tract, having acquired the same from Mrs. Stoffal. The quitclaim deeds simply transferred the interest of each of the two daughters of Cowan from the whole farm and confined it to a portion of the same, that of Mrs. Jarvis being confined to the 33 acres

and 129 perches, and that of Mrs. Bennett to the 51 acres and 17 perches. There was sufficient from the face of the deeds to put a purchaser upon notice that they represented an amicable partition of the premises by the two daughters, and the court below correctly so held. The recital of title in each of them is that the interest conveyed had descended to the daughters of Samuel Cowan under the intestate laws, and the uncontradicted testimony of Bennett was that the deeds had been executed and interchanged for the purpose of making a division of the farm between his wife and Mrs. Jarvis. It is, therefore, quite clear that Jarvis and his wife and Bennett and his wife did not hold by entireties, as is contended by the defendants, but according to their actual respective interests in the land. What was said in *Stehman v. Huber*, 21 Pa. 260, fits the case: "When land is held in common by a married woman and others, and they all join in a partition, and her share is conveyed to her and her husband, the law looks at the character of the transaction, rather than at the form of the conveyance, in order to define her interest, and considers the share as still hers; a divided share being substituted for an undivided one."

Upon the death of Jarvis there was notice on the record that the only interest he had in the real estate which is the subject of this controversy was an undivided third, composed of one-sixth which had been deeded to him by Mrs. Stoffal, and one-sixth deeded to by him Mr. and Mrs. Bennett, and that his wife was seised of an undivided two-thirds, one-third having come to her directly from her father and the other one-third by the deed from Bennett and wife. This was the situation at the time the interest of Jarvis was sold under an order of the orphans' court for the payment of his debts, and the purchaser acquired only his interest in the land. Upon his death his tenancy in the undivided two-thirds ceased, and, the same not having been held by him and his wife by entireties, the right of possession thereto vested in the plaintiff.

Both appeals are dismissed, and the judgment is affirmed.

In re JEWELL'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. TAXATION (§ 897*)—COLLATERAL INHERITANCE TAX—AMOUNT.

Under Act May 6, 1887 (P. L. 79), where a testator died in 1876, leaving real property to his daughter for life, with remainder over, and she died in 1910, the remaindermen are liable only for the collateral inheritance tax on the value of the estate when they come into actual possession on the death of the life tenant.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 897.*]

2. STATUTES (§ 121*)—SUBJECTS AND TITLES —COLLATERAL INHERITANCE TAX.

Act May 6, 1887 (P. L. 79), "An act to provide for the better collection of collateral inheritance tax," is not unconstitutional on the ground that its title fails to give sufficient notice of the provisions of section 3, relating to time for payment of the tax.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 127, 128, 132, 173, 174; Dec. Dig. § 121.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the Estate of Leonard Jewell, deceased. From a decree dismissing appeal from a collateral tax appraisal, Claudius Buchanan Jewell and others appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

E. O. Michener, for appellant. J. Lee Patton, for appellee.

MOSCHZISKER, J. The testator died in 1876, owning certain real estate in the city of Philadelphia, which he devised to a daughter for life, with remainder over. The life tenant died in 1910. The questions are: (1) Must the remaindermen pay collateral inheritance taxes on the value of their estates in this property as of 1876, plus interest at 6 per cent., or on its value at the time they entered into possession in 1910? (2) Is the act of May 6, 1887 (P. L. 79), unconstitutional because of defect in title?

[1] The third section of the statute in question reads as follows: "In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers, liable to the collateral inheritance tax, to take effect in possession, or come into actual enjoyment after the expiration of one or more life estates, or a period of years, the tax on such estate shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate, by the termination of the estates for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner as aforesaid: Provided, that the owner shall have the right to pay the tax at any time prior to his coming into possession, and, in such cases, the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years: And provided further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid. * * *

The act was before this court in *Coxe's Estate*, 193 Pa. 100, 105, 44 Atl. 256, 257, and, after quoting its third section, we said: "It is desirable * * * to consider the plain meaning of the foregoing words.

* * * The act says: 'The tax on such estate shall not be payable, nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate.' If the tax shall not be payable until that event, it does not arise; it has no beginning; and hence the commonwealth has no title to it, and cannot demand its payment until the estate itself 'comes into actual possession' of the person entitled. And such coming into actual possession must be 'by the termination of the estates for life or years.' And, again, in the same direction, it is positively provided that 'the tax shall be assessed upon the value of the estate at the time the right of possession accrued to the owner aforesaid.' That is, although the estate in remainder may have had a definite value at the time of the death of the testator, * * * it is not that valuation that is to be the test of the tax, but the valuation of the estate at the time it comes into possession. This is the plain, actual, common-sense meaning of the words we are considering, and this meaning is not at all impaired by the language of the proviso: * * * 'Provided that the owner shall have the right to pay the tax at any time prior to his coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years. * * *' [193 Pa. 111, 44 Atl. 260.] We are clearly of the opinion that the tax * * * will not become due and payable until (after the expiration of the life estates), * * * and that is the value of the property as it will then appear to be that must constitute the basis upon which the tax must be declared."

After considering all the prior legislation and the numerous cases called to our attention in the most excellent paper book of counsel for the appellant, we are not convinced of any error in the construction placed upon the act of 1887 in the case just referred to. It is true that in *Coxe's Estate*, the decedent died after the act of 1887; but the statute by its express terms applies not only to future devises, but also to those already made, "in all cases where there has been a * * * devise," are the words used. The question of the tax or the amount to be retained by the commonwealth upon the transmission of decedents' estates is peculiarly for the lawmaking power of the state. No authority has been cited to us, and we know of no rule or principle, which forbids the Legislature to make changes in the statutory law affecting the time or manner of assessing an inherited estate, and incidentally to affect the sum of the tax to be paid, at any time before the estate comes into the actual possession of the person liable for the tax prior to an actual payment thereof. *Cooper's Estate*, 127 Pa. 435, 17 Atl. 1094, simply deter-

mined that the debts of the decedent, chargeable against his real estate because of a deficiency in personal assets, should be deducted from the value of the real estate in determining the clear value of the estate that passed from the decedent to the person liable for the tax; but the report shows that the appraisal in this case was made "as of the ninth day of July, 1884," which was the date of the death of the last tenant for life.

The third section of the act of 1887, taken as a whole, clearly shows that the Legislature intended to make a change in the law as to the time for fixing the value of estates in remainder; and that the purpose was to affect all such estates then subject or to become subject to the payment of collateral inheritance taxes. Under the act, the death of the testator, as theretofore, establishes the right to the tax; but it does not become due and collectible until the remainderman enters into "actual possession * * * by the termination of the estates for life or years"; and when he so enters he must pay the tax upon the value at that time. On the whole, no hardship is worked by this provision; for, as suggested in *Coxe's Estate*, supra, at page 110, in many instances the value of the real estate may greatly depreciate after the death of the proprietor, and thus affect the value of the estate of the remainderman when it comes into his actual possession. The act tends toward equality and uniformity, in that it makes each person pay the tax upon the value of the estate which he actually takes into his possession; that this was the intention of the Legislature, and that it had the right so to enact, we entertain no doubt.

[2] But the appellant contends that "the act of 1887, as to its third section, if it does attempt to alter the law as it existed prior to its passage, as to estates in which collateral inheritance taxes are already accrued and could be paid, is unconstitutional, in that the title does not give any notice of any such intention; nor is it broad enough to cover any such action of the Legislature." The statute is entitled, "An act to provide for the better collection of collateral inheritance taxes." It makes no change in the tax itself; and the section in question deals with the time when, under given circumstances, such tax shall be due, collectible, and payable, and, in this connection, when and how the value of the estate taxed shall be fixed. There is nothing in the title to mislead; and it gives fair and reasonable notice to any person subject or liable to become subject to the payment of a collateral inheritance tax that its provisions might affect him (that is, notice sufficient to put such a person on inquiry), and this is all that is required. *Allegheny County Home's Case*, 77 Pa. 77; *Mauch Chunk v. McGee*, 81 Pa. 433; *Campbell's Registration*, 197 Pa. 581, 47 Atl. 860; *Commonwealth v. Clymer*, 217 Pa. 302, 66 Atl. 560; *Commonwealth v. Moore*, 2 Pa. Super.

Ct. 162; Commonwealth v. Jones, 4 Pa. Super. Ct. 362; Commonwealth v. Beatty, 15 Pa. Super. Ct. 5. We have considered all the authorities cited by the appellant to support his contention, but feel that they do not rule the present case.

The assignments of error are overruled, and the judgment of the court below is affirmed.

BERSTEIN v. PHILADELPHIA ELECTRIC CO.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

ELECTRICITY (§ 19*)—ACTION FOR INJURIES—QUESTION FOR JURY.

In an action against an electric light company for injuries from an electric shock caused by a broken electric wire hanging from the fuse box and imbedded in a pile of coal in which plaintiff was shoveling, evidence held to present a case for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass for personal injuries by Louis Bernstein against the Philadelphia Electric Company. From an order refusing to take off nonsuit, plaintiff appeals. Reversed, and venire de novo awarded.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Thomas D. Finletter and Joseph W. Shannon, for appellant. R. Stuart Smith and Charles E. Morgan, for appellee.

STEWART, J. The house in which plaintiff received his injury was provided with the usual facilities for electric lighting. When the plaintiff succeeded to its occupancy, because he did not desire that kind of lighting, the electric current was cut off by a disconnection in the fuse box on the inside cellar wall about five feet from the floor. The wires were introduced into the house through the front cellar wall at a point about four feet from the floor, and, as originally constructed, passed directly to the fuse box. So long as this continued, with wires properly insulated, there was absence of all danger, but, by some means or other, the actual cause being undisclosed, one of the wires leading into the cellar and thence to the fuse box had been broken at a point about four inches from the inner wall, and so much of this wire, in length about three feet, was hanging from the fuse box with the broken end embedded in a pile of coal upon the cellar floor. At the time of the accident this pile of coal was some 18 inches from the fuse box, and, since the loose wire was 3 feet in length, it must have extended a considerable distance into the coal. The coal had been stored in that particular

place a month before the accident, but was reduced in quantity by use. The night of the accident, plaintiff, while shoveling coal into a bucket for use above stairs, was injured by a shock in consequence of his shovel coming in contact with the broken wire. The negligence complained of was failure on part of the defendant company to properly protect its wires and maintain proper and safe insulation of the same. The court below directed a nonsuit, which it afterwards refused to take off, on the ground that, it not appearing in the evidence when the break in the wire occurred, the defendant could not be charged with notice of the defect, and that, therefore, there was no proof of negligence on its part. The learned trial judge in his opinion filed clearly recognizes the duty resting on defendant of inspection and safe maintenance of wires placed as was this. Among other things he says: "If it had been shown that the wires were in this condition for an appreciable length of time, long enough to charge the company with constructive notice, then, it being their duty to inspect and to keep their wires in order, the jury might find that they had neglected their duty." This was a correct statement of the law. So much of these wires within the house as led from the point of entrance in cellar wall to the fuse box, where the disconnection was made, was as much part of the defendant's system as any other. It appears that it was quite as practical to make the disconnection outside the cellar as within. The company having elected to maintain live wires within the cellar, it was charged with the same duty of proper maintenance with respect to these as rested upon it with respect to wires outside. If regard be had exclusively to the testimony of the witness, plaintiff's wife, who alone testified to the appearance of the broken wire the day after the accident, we would be inclined to the same view of the case as that taken by the learned trial judge. That testimony is not only lacking in precision of statement, but, accepting it to mean all that appellant contends that it clearly implies, it furnishes no sufficient data from which anything better than a mere conjecture could be derived as to when the break in the wire occurred. The wire to her had a rusty appearance. This circumstance in itself certainly could not warrant the inference that it had broken because of its rusty condition, much less would it warrant an inference as to the time when the break occurred. This, however, was not all. The testimony of the witness is to be considered in connection with the circumstances shown. The coal pile had been in the cellar for a month, gradually diminishing in size, of course, as the coal was used. Reduced as it was, it was yet necessary in order to reach the end of the wire to shovel

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

away the coal. Through the bed of the coal the wire was seen emitting sparks in a way that gave to the pile the appearance of burning coal. It would not be an unreasonable inference, in the absence of any other explanation, that the wire had been broken by what had happened in connection with the storing of the coal. How otherwise could the loose wire which did the damage have been so embedded in the coal? The coal had been stored, as we have said, a month before the accident. Certainly it was a circumstance tending to show that the break related back to that time, and with the testimony of the witness as to the rusty appearance of the wire, we think it was sufficient evidence to carry the cause to the jury on the question of constructive notice to the defendant.

The judgment is reversed, and a venire de novo awarded. .

In re FOX'S ESTATE.

Appeal of YARDLEY.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 490*) — COMPENSATION — TESTAMENTARY PROVISIONS.

A bequest to one named as executor is presumably a bounty, and not compensation for services to be rendered, unless it appears, expressly or by clear implication, that the testator intended that the legacy should be in lieu of commissions.

[Ed. Note.—For other cases, see *Executors and Administrators*. Cent. Dig. §§ 2078, 2081, 2088; Dec. Dig. § 490.*]

2. EXECUTORS AND ADMINISTRATORS (§ 490*) — COMPENSATION — TESTAMENTARY PROVISIONS.

Where a testator leaves an estate of \$800,000 and appoints four executors, three of them being his sons, and gives to each of the executors who shall enter upon their duties as such \$5,000 absolutely, they are not entitled to commissions or compensation in addition to the legacies.

[Ed. Note.—For other cases, see *Executors and Administrators*. Cent. Dig. §§ 2078, 2081, 2088; Dec. Dig. § 490.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the Estate of Henry C. Fox, deceased. From a decree sustaining exceptions to adjudication, Horace Yardley appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Alex. Simpson, Jr., and James S. Alcorn, for appellant. John G. Johnson and Maurice Bower Saul, for appellee.

MESTREZAT, J. There is but one question in this case, and it is a narrow one and of easy solution.

Henry C. Fox died on March 1, 1910, leaving to survive him four children and the

children of a deceased son. He left a large estate, the balance for distribution shown by the account being more than \$800,000, the residue of which he divided into five equal parts, three of which he gave to his three sons, one to the children of his deceased son, and the remaining part to a trustee for his daughter. The fifth clause of the will is as follows: "I give and bequeath to each of the executors named in this will, who shall enter upon their duties as such executors, the sum of five thousand dollars absolutely. I also give and bequeath the sum of five thousand dollars to my daughter Adaline C. Rommel absolutely." The testator appointed his three sons and his friend, Horace Yardley, executors of the will, and the four executors qualified and administered the estate.

In the account filed, the executors claimed commissions of \$26,212.43 as compensation for settling the estate, in addition to the \$5,000 bequeathed each of them by the testator. The auditing judge allowed the commissions; but on exceptions filed by the trustee of Mrs. Rommel the court in banc held that the legacies bequeathed to the executors were in lieu of their commissions for administering the estate. The correctness of this ruling is the only question in the case.

[1] A bequest in a will, made to one who is appointed executor, is presumed to be a bounty, and not compensation for services to be rendered in settling the estate, unless it appears, expressly or by clear implication, that the testator intended that the legacy should be received by the executor in lieu of his commissions. If the will discloses that it was the intention of the testator to reward the executor for his services by the legacy, it is conclusive on the executor; and if he accept the position and administer the estate by virtue of his appointment as executor he must accept the reward for his services named in the will. Of course, this does not apply to administrators with the will annexed. They are entitled to reasonable compensation for their services, regardless of any declaration made by the testator in his will fixing commissions for administering the estate. They hold the office by virtue of the law; while an executor is appointed by the will.

[2] We are at a loss to see any substantial ground on which the appellant in this case, one of the executors, has the right to claim commissions in addition to the \$5,000 legacy given him by the testator. The language of the fifth paragraph of the will is unambiguous and plainly declares the purpose of the legacy bequeathed to each of the executors. It is given to the executors, and not to the individual persons. The gift is to them in their representative capacity, and not to them as individuals. There are two condi-

tions attached to the gift: The legatees must be the executors named in the will, and they must enter upon their duties as such executors. Both conditions must be complied with before the parties are entitled to the legacies. Until the executors enter upon their duties, they are not entitled to the bequest. If they or either of them decline to accept the office, those declining are not entitled to the legacy. In other words, if the executors refuse to act as such, they are deprived of the legacy. This we think, makes it manifest that the testator intended that the legacy should be received as compensation for the legatees acting as executors in the settlement of the estate. If such was not the intention, we can see no purpose in the language used by the testator. He could have bequeathed the legacies to the four legatees without restrictions or conditions, he could have simply bequeathed to them \$5,000, which would have carried out the purpose which the appellant alleges he had in making the bequest. There was certainly no necessity for his attaching to the gift any condition whatever, if it was the intention to make it a simple gratuity or bounty.

It is argued by the appellant that if the testator intended the gift to be in lieu of commissions or in full for services he would have said so. It is true that the scrivener who prepared the will could have used language which would have prevented any contest over this paragraph of the will; but he did not do so. The language, however, is sufficiently clear to leave no doubt whatever that if the persons named as executors did not accept the office and enter upon its duties they would be deprived of the legacy. This clearly points to but one purpose of the testator, and that is that the individuals named in his will as executors should not receive the legacies given them, unless they administered his estate. Nor is there anything in the contention that such was not the intention of the testator, because three of the executors might refuse to administer, or, having administered, might die, and the remaining one would only receive, \$5,000 for his services, which would be entirely inadequate. That contention is fully met by what was said in Harper's Appeal, 111 Pa. 243, 2 Atl. 861, that it must be presumed that the testator considered the contingency of the death or resignation of some of the executors when he fixed the compensation to be paid to each of them.

It appears from the finding of the learned auditing judge that the reasonable commissions allowable to the executors would approximate the sum given them as legacies. In view of the fact that the residuary estate was equally divided between all of the testator's children, it cannot be presumed that the testator intended to give the three sons double commissions, which would be the

effect of their receiving the legacies in addition to the commissions claimed. The testator's purpose was to make his children equal in the distribution of his estate, and this was accomplished by giving the daughter \$5,000, which was bequeathed the sons as compensation for performing their duties as executors. The legacy of \$5,000 is given to the daughter in the same paragraph of the will in which the sons are each given \$5,000 when they enter upon their duties as executors.

There is nothing in any other part of the will which gives any countenance to the contention that the legacies given to the executors were not to be in lieu of commissions; while the explicit language of the fifth paragraph, in which the legacies are bequeathed, leaves no doubt that such was the intention of the testator.

The decree is affirmed. •

MUTUAL TRUST CO. v. STERN.

(Supreme Court of Pennsylvania. Feb. 26, 1912.)

1. BILLS AND NOTES (§ 483*)—ACTIONS—PLEADING.

An affidavit of defense, in an action on a promissory note setting up that the plaintiff, a trust company, violated its agreement to renew the note, but not averring that the plaintiff's executive officer, who was alleged to have made the agreement, had any authority to do so, was insufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1534; Dec. Dig. § 483.*]

2. BANKS AND BANKING (§ 108*)—POWERS—REPRESENTATION BY OFFICERS—DISCOUNTS.

The discounting of commercial paper cannot be delegated to a single officer of a bank, but is the function of the directors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 262-264; Dec. Dig. § 108.*]

3. CORPORATIONS (§ 388*)—POWERS AND LIABILITIES—DISCOUNTS—ESTOPPEL TO DENY POWER.

In an action by a trust company on a promissory note which the company had discounted, the defendant, having received the proceeds of the discount, cannot set up the defense that the act of the bank in discounting the note was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.*]

4. PLEADING (§ 348*)—JUDGMENT ON PLEADING.

In an action on a promissory note, where the affidavit of defense is otherwise insufficient, the court may enter judgment against defendant, notwithstanding an allegation setting up that defendant was not liable for protest fees, since there was no indorser on the note.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of assumpsit by the Mutual Trust

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Company against Bernard Stern on a promissory note. From an order making absolute a rule for judgment for want of sufficient affidavit of defense, defendant appeals. Affirmed.

Rule for judgment for want of a sufficient affidavit of defense.

In addition to the averments of the affidavit of defense set forth in the opinion of the Supreme Court, there were, *inter alia*, the following averments:

"Defendant is advised and believes that in no case can he be held liable for the protest fees of this note, inasmuch as there was no indorser other than the maker, and the protesting of said note was an unnecessary expense and charge to the defendant. * * *

"The defendant is advised that the action of the plaintiff in discounting the defendant's note as aforesaid was in direct and distinct violation of the Constitution and laws of this commonwealth; and that said plaintiff company is prohibited by the law from doing a banking business; and that the discounting of the note in suit was against public policy; and that the contract, in pursuance of which this note was discounted by the plaintiff, was also against public policy; and that the plaintiff cannot in law recover upon the note so discounted in accordance with this agreement even if the defendant had not the legitimate and equitable defense herein set forth."

The court made absolute rule for judgment for want of a sufficient affidavit of defense.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZIS-KER, JJ.

A. S. Ashbridge, Jr., for appellant. Charles H. Edmunds, for appellee.

MESTREZAT, J. This is an action of assumpsit brought on a promissory note made by the defendant, payable to himself, and by him indorsed and delivered to the plaintiff company. The defendant filed an affidavit in which he sets up two defenses: (a) The plaintiff company violated a contemporaneous parol agreement for the further discounting of his paper; and (b) it was acting beyond its corporate powers in discounting the note in suit.

[1] The learned court below held the affidavit insufficient and entered judgment against the defendant for want of a sufficient affidavit of defense. The affidavit avers that the plaintiff, through its executive officer, entered into an oral agreement to discount the defendant's note for \$2,000 and to discount the notes of other persons; and that it was agreed between the plaintiff and the defendant that any notes so discounted should be from time to time renewed as they matured by payment of 5 per cent. on the face value of the notes by giving a new note for the balance. This averment is insufficient to prevent judgment. The note in suit was discounted by the board of directors, the au-

thority duly authorized to make the discount. Prima facie the plaintiff's executive officer, alleged to have made the oral contract to renew and further discount the defendant's paper, had no authority to make the contract, and there is no averment in the affidavit of defense that he had such authority.

[2] The discounting of commercial paper is a function of the directors of a bank and cannot be delegated to a single officer. *Bank of United States v. Dunn*, 31 U. S. 51, 8 L. Ed. 316; *Stewart v. Huntingdon Bank*, 11 Serg. & R. 267, 14 Am. Dec. 628. The averment that the plaintiff agreed to extend the time of payment and renew the discounted notes is insufficient in not stating with whom the agreement was made, or that the party who made the alleged agreement was invested with the authority by the bank to make it. It is not sufficient for the defendant to aver generally an agreement between him and the plaintiff corporation to renew the paper. He must set out the facts so that the court, and not he, may determine the existence of the agreement.

[3] The defense of *ultra vires* to the note in suit cannot be sustained. It is rather singular that it should be interposed under the facts of this case to defeat a recovery on the note. The defendant received the money and has applied it to his own use. He now alleges that the plaintiff company had no authority to make the loan in suit, and avers the wholly inconsistent defense that in pursuance of its agreement the company must continue to exercise powers which it does not possess by renewing the note in suit and making additional loans aggregating \$4,000. If the plaintiff had no authority to discount the note in suit, it clearly cannot renew the note or grant an additional loan. Aside from this consideration, however, the defendant, having received the money on the discounted note, is not in a position to question the authority of the plaintiff to make the loan or to discount the paper. The defendant has received the benefit of the contract, and he cannot now deny the authority of the plaintiff to make it. Having the proceeds of the note in his pocket, neither the law nor common honesty will permit the defendant to avail himself of the plea of *ultra vires*. In *National Bank v. Matthews*, 98 U. S. 621, 629 (25 L. Ed. 188), Mr. Justice Swayne, announcing the uniformly accepted doctrine on this subject, says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains." Under the facts of this case, the state, and not a private party dealing with the com-

pany, may call the latter to account for exceeding its corporate powers.

[4] The matter of the protest fees is de minimis. The plaintiff having withdrawn in the court below the small item from its claim, it was eliminated from the claim, and hence the rule was properly taken for judgment for want of a sufficient affidavit of defense. The averment of damages sustained by the defendant by reason of the alleged misconduct of the plaintiff is too general and indefinite to require consideration.

The judgment is affirmed.

ULRICH v. McTAGUE.

(Supreme Court of Pennsylvania. Feb. 26, 1912.)

PLEADING (§ 348*)—JUDGMENT ON PLEADING.

An attorney at law, suing for professional services in procuring the incorporation of a borough, is not entitled to judgment for want of a sufficient affidavit of defense, where he does not aver in his statement of claim that the person who brought him the petition for incorporation was authorized by defendants to employ him as an attorney, or that defendants in any way recognized him as acting for them as attorney; the mere fact that they were petitioners for the incorporation not being sufficient to impose upon them liability for the attorney's fees.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

Appeal from Court of Common Pleas, Schuylkill County.

Action of assumpsit by John O. Ulrich against John McTague. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

William Wilhelm, for appellant. John F. Whalen, for appellee.

PER CURIAM. This action was brought by plaintiff against a large number of people to recover for services as an attorney at law in procuring the incorporation of the borough of Coal Dale in Schuylkill county. The court discharged a rule for judgment for want of a sufficient affidavit of defense against such of the defendants as filed an affidavit, and the plaintiff took this appeal.

The statement avers that "the said petition [for the incorporation] was brought to the said plaintiff by Condly C. Gallagher, one of the persons who signed said petition and made oath to the truth of the allegations contained therein, and requested the plaintiff, on behalf of himself and all other persons who signed or caused to be signed said petition, to act as the attorney for the said petitioners for the purpose of procuring the decree of incorporation as prayed for in said

petition." It is not averred or alleged in the statement that Gallagher was authorized by the defendants to obtain the plaintiff's services or employ him as an attorney in procuring the borough charter, nor is it averred that the defendants in any way recognized him as acting for them as an attorney in the matter. In the absence of such averments, there can be no liability which would sustain a judgment against the defendants. The mere fact that the defendants were petitioners for the incorporation is not sufficient to impose liability for attorney fees for professional services in securing the charter. A plaintiff must aver in his statement a cause of action before the defendant can be required to deny his liability, and judgment cannot be entered for want of a sufficient affidavit of defense if the statement discloses no cause of action against the defendant.

The order discharging the rule for judgment for want of a sufficient affidavit of defense is affirmed.

EARLEY v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

MUNICIPAL CORPORATIONS (§ 821*)—TORTS—DEFECTS IN STREETS—QUESTION FOR JURY.

Where there is evidence, in an action against a city for injuries caused by the caving in of a street, that the street was in the control of an independent contractor, it is proper to submit to the jury the question whether the city or the contractor had failed in the performance of a duty to the plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass by Patrick Earley against the City of Philadelphia for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

The opinion of the Supreme Court states the case. Verdict and judgment for defendant. Plaintiff appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Augustus Trask Ashton and Victor Frey, for appellant. W. O. Wilson, Asst. City Sol., and Michael J. Ryan, City Sol., for appellee.

PER CURIAM. As the appellant was driving over one of the streets of the city of Philadelphia it caved in, and the wagon in which he was seated fell into the excavation to a depth of eight or ten feet. For the injuries sustained he brought this action, which resulted in a verdict for the defendant. Whether the caving in of the street was due to the negligence of the city or to that of an independent contractor was submitted to the jury as a question of fact for them; the instructions being that, if they

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

should find that the city was not in control of the street at the time of the accident, there could be no recovery, but that, on the other hand, if it was in control, and had failed in the performance of a duty to keep the street safe for travel, it would be liable to the plaintiff. The court could not have instructed the jury that the relation between M. & J. B. McHugh and the city was merely that of master and servant.

After a review of all the evidence in the case, we have not been persuaded that any of the assignments of error call for a reversal of the judgment, and it is therefore affirmed.

In re GUENTHOER'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. STATUTES (§ 141*)—AMENDMENT—REPUBLICATION OF AMENDED STATUTE.

Act April 1, 1909 (P. L. 87), amending Act April 8, 1833 (P. L. 315) § 1, relating to the descent and distribution of the estates of intestates, is not violative of Const. art. 3, § 6, requiring a republication of laws revived, amended, extended, or conferred, since the act first mentioned refers to the general law in force at the time of its passage, and not to any special or particular statutes, and the constitutional requirement therefore has no application.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 209; Dec. Dig. § 141.*]

2. STATUTES (§ 141*)—AMENDMENT—REPUBLICATION OF AMENDED STATUTE.

Where an amending statute makes reference to the law generally governing the particular subject, and not to any specific act or part thereof, the reference means the law at the time the emergency arises, and there is no distinction between acts referring to procedure, and acts affecting substantive rights.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 209; Dec. Dig. § 141.*]

3. WILLS (§ 801*)—WIDOW'S ELECTION—EFFECT.

Act April 1, 1909 (P. L. 87), giving widows a preference of \$5,000 in distribution, applies as well to the estates of testates, where the widow elects to take against the will, as to the estates of intestates.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2077-2090; Dec. Dig. § 801.*]

4. STATUTES (§ 115*)—SUBJECTS AND TITLES—DESCENT AND DISTRIBUTION.

Act April 1, 1909 (P. L. 87), giving widows a preference of \$5,000, is not unconstitutional as being inadequate in title, though construed as applying to estates of testates, where the widow elects to take against the will, since in such case the \$5,000 is treated as a part of the intestate's estate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 150, 151; Dec. Dig. § 115.*]

5. WILLS (§ 801*)—RIGHTS OF WIDOW—ELECTION AGAINST WILL—EFFECT.

That portion of a testator's estate which a widow receives on election to take against her husband's will comes to her by virtue of the statute as estate of an intestate, and not as the estate of a testate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2077-2090; Dec. Dig. § 801.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Joseph Guenthoer, deceased. From a decree dismissing exceptions to an adjudication, Jacob Guenthoer appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

Alex. Simpson, Jr., for appellant. John Monaghan and David Phillips, for appellee.

MESTREZAT, J. Joseph Guenthoer died on December 18, 1909, leaving a widow and collateral heirs but no issue. He executed a will dated September 5, 1907, which was duly probated, and by which he gave his entire estate to his brother Jacob Guenthoer, and appointed his brother Otto Guenthoer executor, to whom letters testamentary were granted December 27, 1909. The executor filed his account by which it appeared that the balance in his hands for distribution was \$4,497.37. The widow presented a petition to the orphans' court averring, *inter alia*, that she had elected to take against her husband's will; that under the Act of April 1, 1909 (P. L. 87), she was entitled to real or personal estate or both to the aggregate value of \$5,000 in addition to her widow's exemption, and, in addition thereto, to one-half of the remaining real estate for life and of the remaining personal estate absolutely; that the decedent was not seised of any real estate at the time of his death; that under the provisions of said act the petitioner had selected the articles and cash set forth in the annexed inventory and appraisal; and prayed the court to approve the inventory and appraisal, and to decree that said articles and cash be set apart for her use and benefit. The court directed the petition to be filed. Subsequently at the audit of the executor's account, the auditing judge held that the widow was entitled, under the act of 1909, to the sum of \$5,000 out of the decedent's estate, and awarded the balance in the hands of the accountant, which was less than \$5,000, to the widow as prayed for in her petition. Exceptions were filed to the adjudication by Jacob Guenthoer, the legatee, which were dismissed by the court *in banc*, and a decree was entered confirming the adjudication. From that decree Jacob Guenthoer has taken this appeal.

The appellant contends that the act of 1909 applies to the estates of intestates, and not to the estates of testates where the widow elects to take against the will, and that if applied to the latter it would be unconstitutional, as it does not refer to such estates either in its title or body, and would violate article 3, § 6, of the Constitution, which provides that "no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. but

so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." It is therefore claimed that as Joseph Guenthoer died testate, disposing of his estate by will, the act of 1909 has no application, and that the widow, although taking against the will, is not entitled to \$5,000 out of the decedent's estate.

[1] In disposing of the question raised by this appeal it will be necessary to refer to and consider the prior legislation affecting the estates of decedents. The Act of April 8, 1833 (P. L. 315; 2 Purd. 1994), is entitled "An act relating to the descent and distribution of the estates of intestates." That act directs how the real and personal estate of an intestate decedent shall be divided, after the payment of his debts and which had not been sold or disposed of by will. Where he leaves a widow and issue, the widow is entitled to one-third part of the real estate for life and to one-third part of the personal estate absolutely. Where he left a widow and collateral heirs but no issue, she was entitled to one-half part of the real estate for life, and to one-half part of the personal estate absolutely. Section 11 of the Act of April 8, 1833 (P. L. 249; 1 Purd. 1275), relating to last wills and testaments, provides that "a devise or bequest by a husband to his wife of any portion of his estate or property, shall be deemed and taken to be in lieu and bar of her dower in the estate of such testator, * * * provided, that nothing herein contained shall deprive the widow of her choice either of dower, or of the estate or property so devised or bequeathed." The eleventh section of the Act of April 11, 1848 (P. L. 536; 1 Purd. 1276), provides that the eleventh section of the Act of April 8, 1833, just referred to, "shall not be construed to deprive the widow of the testator, in case she elects not to take under the last will and testament of her husband, of her share of the personal estate of her husband under the intestate laws of this commonwealth; but that the said widow may take her choice, either of the bequest or devise made to her under any last will or testament, or of her share of the personal estate under the intestate laws aforesaid." Subsequently the Act of April 20, 1869 (P. L. 77; 1 Purd. 1278), was passed, section 1 of which provides that, where the decedent shall leave a will and the widow elects not to take thereunder, "she shall be entitled to such interest in the real estate of her deceased husband as the widows of decedents dying intestate are entitled to under the existing laws of this commonwealth."

Such was the statutory law of the state regulating the estates of decedents when the Act of April 1, 1909 (P. L. 87; 5 Purd. 5621), was passed under which the widow of Joseph Guenthoer, deceased, claimed \$5,000 out of his estate. The act is entitled "An act to amend section one of an act entitled 'An act

relating to the descent and distribution of the estates of intestates,' passed and approved April 8, 1833, defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate." The act disposes of the real and personal estate of a decedent, after payment of his debts and which shall not have been sold or disposed of by will, and contains a general repealing clause. It makes no change in the portion of the estate which goes to the widow where there is surviving issue. Where, however, the intestate leaves no issue but a widow and collateral heirs, article 2, § 1, provides: "Where such intestate shall leave a widow, and collateral heirs or other kindred, but no issue, such widow shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition to the widow's exemption as allowed by law; and if such estate shall exceed in value the sum of five thousand dollars, the widow shall be entitled to such sum of five thousand dollars absolutely, to be chosen by her from the real or personal estate, or both; and, in addition thereto, shall be entitled to one-half part of the remaining real estate, for the term of her life, and to one-half part of the remaining personal estate, absolutely: Provided, that the procedure for appraising and setting apart the said five thousand dollars in value of property shall be the same as provided in section five of the act of assembly, approved April fourteenth, one thousand eight hundred and fifty-one, relating to widows' exemptions."

In support of his position, the learned counsel for the appellant contends that the widow of a testate, electing to take against his will, is entitled only to such part of the testator's estate as was given her by the intestate laws in force at the time of the enactment of the acts of 1848 and 1869, on the principle that if an act adopt the provisions of a preceding act, an amendment or repeal of the latter will not extend, limit or repeal the former. The rule of construction, suggested by counsel, is uniformly recognized and enforced. If a statute specifically adopts a former statute or particular provisions of a former statute by reference to its title or otherwise, such statute or particular provisions thereof become a part of the adopting statute as though written therein, and are enforced by virtue of the adopting act; but it does not include any subsequent amendment or modification of the prior statute or its particular provisions, unless expressly so declared or is clearly implied.

[2] While this general rule of statutory construction is well settled and recognized by judicial decisions as well as by text-writers, yet it is equally well established as a rule of statutory construction that where the reference in an adopting statute is to

the law generally which governs the particular subject, and not to any specific act or part thereof designated in the adopting act, the reference means the law at the time the exigency arises as to which the law is to be applied. We have frequently recognized this distinction and applied the rule that, where the reference in an adopting statute is to the law generally upon any subject, the adopting statute means the law in force on the subject at the time it is invoked. In *re Vernon Park*, 163 Pa. 70, 29 Atl. 972; *Kugler's Appeal*, 55 Pa. 123. The learned counsel for the appellant apparently concedes that the latter is the proper rule of construction where the act adopts a prior procedural statute, but not a statute affecting substantial rights. We do not agree that such distinction is tenable, and have been cited to no authority that supports it. The numerous cases cited by the learned counsel for the appellant do not sustain his position. They are clearly distinguishable on the ground that the adopting act referred to a special or particular statute or to a special or local law or to a particular section or provision of another act. On reason there can be no distinction between acts relating or referring to procedure and acts affecting substantive rights. When an adopting statute refers generally to the law affecting substantive rights, it evidently means that it is to be the law in effect at the time its provisions are invoked. It is the law, whatever it may be at the time the facts require its application, that the adopting act means to declare shall regulate the subject to which it relates. If, on the other hand, the adopting act declares as the law of the state any specific statute or part thereof, it is equally manifest the Legislature intends that the specific provisions thus adopted, and they alone, shall be the law in such cases. When therefore the adopting act declares generally that the law relating to any particular subject, and not a specific act, local or general, shall be the law regulating the subject, the legislative intent is that the adopting act refers to the law in force at the time when it is invoked. We think that this rule of construction applies whether the former act is procedural or affects substantive rights. It has been so held in other jurisdictions. *Jones v. Dexter*, 8 Fla. 276; *Harris v. White*, 81 N. Y. 532.

[3] Therefore a widow who elects to take against her husband's will is entitled under the acts of 1848 and 1869 to take under the intestate laws in force at the time of the death of her husband.

We recognize the principle urged by the appellant that a statute will be so construed as to interfere as little as possible with the right of a person to dispose of his property as he pleases, and that it will not be presumed that the Legislature intends to alter an existing law beyond the immediate scope of the amending act. We fail, however, to

see wherein these rules can be invoked to sustain the position of the appellant. The Legislature has authority to determine the course of descent in case of intestacy and in whom the property of an intestate shall vest at the time of his death. Such authority has never been questioned, and it is universally exercised by the Legislatures of the states of this Union. Nor is there any natural or inherent right in any person to make a testamentary disposition of his property. The authority to make a will is statutory. The Legislature, subject to constitutional provisions, may declare that the owner of property may dispose of all or any part of it by will, and to the exclusion of his widow or his issue. In the exercise of the same authority, the Legislature may declare that no person shall dispose of any part of his property, and that after his death it shall descend or vest in any person or persons which it may designate. Such power is lodged with the Legislature, and it has uniformly exercised it. We have an illustration in this state. While the Wills Act of 1833 permitted every person of sound mind to dispose of his property by will, it excepted from its provisions married women and infants under the age of 21 years. It was not until 15 years later that our Legislature, recognizing the injustice of depriving a married woman of the right to make a testamentary disposition of her own property, authorized her by the act of 1848 to dispose of it by will, executed in a prescribed form, and it was not until 54 years after "any person of sound mind" was clothed with legislative authority to "dispose by will of his or her real estate" by the act of 1833 that the Legislature, by the statute of June 3, 1887 (P. L. 332), enacted that a married woman might dispose of her property by will "in the same manner as if she were unmarried." The age of testacy, however, remains as it was fixed by the act of 1833, and every person in this state, irrespective of sex, intelligence, or the value of the property, who is under the age of 21 years, is without authority to dispose of an estate by will.

Exercising the power reposed in it, the General Assembly has, by the legislation above referred to, regulated the disposition of estates left by testates as well as intestates. It is seen that by the Wills Act of 1833 the widow cannot be deprived of her dower in the estate of her husband by any will he may make; that by the act of 1848, the widow electing to take against the provisions of her husband's will is entitled to her share of the personal estate under the intestate laws; and that by the act of 1869, in case of her election to take against the will, she shall be entitled to such interest in the real estate of her deceased husband as widows of intestate decedents are entitled to under the existing laws of the commonwealth. The effect of this legislation is manifestly to declare that, at the option of the

widow, a testator dies intestate as to that portion of his estate to which she is entitled under the several statutory provisions. Had the Legislature made such a declaration in terms, its intention could not be plainer nor more apparent. As to part of his estate, therefore, such decedent dies testate, and as to the other part of his estate, by the express declaration of the statutes, his widow takes her share under the intestate laws, and necessarily he dies intestate.

We must assume that the Legislature knew at the time of the passage of the act of 1909 the status of the legislation on the subject with which it dealt. It knew that where an intestate left a widow and collateral heirs but no issue the widow was entitled to a certain portion of his estate. It also knew that where a decedent died testate and his widow elected to take against his will that she was entitled to her share of the personal estate under the intestate laws, the effect of which was that the decedent died intestate as to that portion of his estate. It was in the light of this legislation that the act of 1909 was passed to amend the act relating to the descent and distribution of the estates of intestates. It dealt with and included estates which were taken by widows by virtue of the intestate laws of the commonwealth, whether there was a total or partial intestacy. It did not intend to make a distinction between widows whose husbands died without wills and those who elected to take against their husbands' wills, thereby creating a partial intestacy. There was certainly no intention on the part of the Legislature in passing the act of 1909 to make a distinction, and to give the widow of a husband dying intestate \$5,000 more than the widow who elects to take against her husband's will and, therefore, under the intestate laws. Such distinction does not clearly appear by the act of 1909, and hence it will not be presumed that the Legislature intended it. The purpose of the act of 1909 was simply to give to the widow of a decedent who died without issue the sum of \$5,000 in addition to that part of his estate given her by the intestate act of April 8, 1833. We have construed the provisions of that act applying to such widows, and held that on her election she had the right to take the portion of the decedent's estate given her by that statute. In dealing with the subject and in increasing the amount to which a widow under such circumstances would be entitled, the Legislature presumed that the same interpretation would be given the similar provision of the act of 1909, and that a testator would be regarded, as the statute declares, as dying intestate as to that part of his estate which his widow elects to take against his will. The General Assembly therefore correctly dealt with the \$5,000 as a part of an intestate's estate, and not as a part of a testate's estate.

[4] There is no merit in the contention that the act of 1909 offends article 3, § 6, of the Constitution. It applies to the estates of intestates and to that part of the estates of testates as to which the decedent dies intestate. As suggested above, that portion of a testator's estate which the widow elects to take against her husband's will comes to her by virtue of the statutes, not as the estate of a testate and as such devised or bequeathed to her, but as an estate of an intestate.

[5] By the express provision of the act of 1848, she takes under the intestate laws of the commonwealth, and hence as to that portion of the estate her husband necessarily dies intestate. The title of the act of 1909 is therefore germane to the subject of the body of the act, and does not offend the Constitution.

The decree of the court below is affirmed.

In re DEEGAN'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

WILLS (§ 801*)—WIDOW'S ELECTION—EFFECT.

Act April 1, 1909 (P. L. 87), giving widows a preference of \$5,000 in distribution, applies as well to the estate of testates, where the widow elects to take against the will, as to the estates of intestates; and the act is constitutional.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2077-2090; Dec. Dig. § 801.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Michael Deegan, deceased. From a decree dismissing exceptions to an adjudication, Joseph Deegan appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Edmund Randall and M. J. McEnery, for appellant. Frank G. Sayre and Charles H. Sayre, for appellee.

MESTREZAT, J. The question raised on this record involves the interpretation of the Act of April 1, 1909 (P. L. 87), and is determined by the decision in the estate of Joseph Guenthoer, 83 Atl. 617.

For the reasons stated in the opinion filed herewith in that estate, the decree of the court below is affirmed.

In re McFILLIN'S ESTATE.

Appeal of LUCAS.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. WILLS (§ 524*)—CONSTRUCTION—BENEFICIARIES—TIME OF DETERMINING.

Where a will directs that in a certain event the estate shall go, after the expiration of a particular interest, to testator's heirs and next of kin, or to those who would take under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the intestate laws, it is understood to mean the persons who would have taken at testator's death, and not at the time appointed for their taking, unless a different intent is plainly manifested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

2. WILLS (§ 524*)—CONSTRUCTION—BENEFICIARIES—TIME OF DETERMINING.

Where a will leaves one-fourth of the residuary estate in a spendthrift trust for testator's son for life, and at his death without issue to pay the principal to persons entitled as testator's next of kin, the next of kin referred to are determined as of the date of testator's death, and not the date of the death of the life tenant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of James McFillin, deceased. From a decree dismissing exceptions to the adjudication, Deborah C. Lucas appeals. Affirmed.

From the record it appeared that James McFillin died on April 10, 1905, leaving two children, Deborah C. Lucas and James W. McFillin. The latter died on April 23, 1911, intestate, unmarried, and without issue. The material paragraph of the will was as follows:

"And the other full equal fourth part or share thereof I give, devise and bequeath unto my executors hereinafter named in trust to hold, invest and from time to time reinvest the same, collect the income and profits thereof and pay the said income and profits to my son James W. McFillin during his life but free and discharged of his debts, liabilities and engagements and free from the right of anticipation; and upon the decease of my said son upon the further trust to divide, distribute and pay the said part or share to and among the children of my said son equally share and share alike the issue of any of his deceased children who may be living at the time of his decease shall take the same share as their parent would have taken if then living; and upon the further trust in the event of my said son dying without leaving any children or the issue of any deceased child living at his decease to divide, distribute and pay the said part or share to such person or persons who shall be entitled thereto as my next of kin under the intestate laws of the state of Pennsylvania."

The account of Bernard F. McFillin and James F. Lucas, trustees under the will of James McFillin, having been filed and called for audit, the auditing judge awarded one-half of the one-quarter of the estate held in trust for James W. McFillin to Deborah C. Lucas individually and the remaining half to Deborah C. Lucas, administratrix of James W. McFillin, deceased, holding that the persons who were to take the principal of the fund held in trust for James W. Mc-

Fillin were the next of kin of James McFillin at the time of his death, and not his next of kin at the time of the death of James W. McFillin, which was fixed as the time of distribution. Exceptions were filed on behalf of Deborah C. Lucas, who claimed the whole fund as testator's next of kin at the time of distribution.

The court below on October 28, 1911, filed an opinion dismissing the exceptions and confirming the adjudication.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Bernard Gilpin, for appellant.

PER CURIAM. [1] The thoroughly settled rule of construction is that, where a testator directs that in a certain event after the expiration of a particular interest the estate shall go to his heirs or next of kin, or to the persons who would take under the intestate laws, he is to be understood as meaning the persons who would have so taken at the time of his death, and not at the time appointed for their taking, unless a different intent is plainly manifested in his will. Buzby's Appeal, 61 Pa. 111; Stewart's Estate, 147 Pa. 383, 23 Atl. 599; Fitzpatrick's Estate, 233 Pa. 33, 81 Atl. 815.

[2] Nothing in the will before us shows a clear intent of the testator that his next of kin were not those who were such at the time of his death, and the decree is therefore affirmed with costs.

GIBBONS et al. v. GIBBONS et al.
(Supreme Court of Pennsylvania. Feb. 12, 1912.)

WILLS (§ 686*) — CONSTRUCTION — CREATION OF TRUSTS.

Where a will left the residuary estate to the executors in trust to pay the income to testator's wife for life, and, at her death, to pay the income to his five children, share and share alike, and to the issue of any deceased child, with the proviso that on the decease of either of testator's children without issue, but leaving a husband or wife surviving, the trustees should pay one half of the deceased child's share of the rents and profits of the residuary estate to the surviving husband or wife during his or her natural life, and the remaining half to the remaining children, and the issue of deceased children, and the gift of income to husbands and wives was revoked by codicil, the corpus of the estate was to be held in trust until the death of the last surviving child, and the grandchildren are not entitled to partition until such event happens.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631-1637; Dec. Dig. § 686.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Michael J. Gibbons and another, to the use of Sebastian A. Rudolph and others, against Charles J. Gibbons and others for partition. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZSKER, JJ.

Clarence E. Kuemmerle and William D. Neilson, for appellants. Alfred N. Keim and Carroll R. Williams, for appellees.

ELKIN, J. In *Gibbons v. Connor*, 220 Pa. 395, 69 Atl. 820, this court held that a valid active trust was created by the will of Michael Gibbons, deceased, and that the intention of the testator to thus protect his estate for the benefit of his children should prevail. The opinion in that case written by the present Chief Justice made no reference to grandchildren, for the very good reason that the rights of children alone were involved in that controversy. The court simply passed upon the question then before it and nothing more. It is now earnestly contended that what was there said as to children has no application as to grandchildren. In support of this position, it is argued that the ground of our former decision was that the testator intended to protect the estates of his children from the incidents of curtesy and dower, which would have resulted from a vesting of the corpus of the estate in his children, and that the intention to thus guard the shares of grandchildren nowhere appears. The answer to this argument is that the protection of the estates of children from the incidents of curtesy and dower was not the only reason for declaring the trust in question active and valid. It was a potential reason, and it was so expressed, but it was not the exclusive ground upon which the decision rested. The corpus of the estate is to be held in trust until the death of the last surviving child, when it will be distributed to the persons entitled to take under the will. This means that the trust estate must be held as an entirety to the end of the trust period, and that it cannot be divided or partitioned at the instance of one or more ultimate beneficiaries before the trust has terminated. It must not be overlooked that we are dealing with the estate of the testator, who had the right to choose the objects of his bounty, and to impose such conditions as he deemed wise or expedient to protect his benefactions, provided always that the conditions or limitations are not unlawful. It has already been determined that the trust created by the will of the testator in the present case was a valid exercise of testamentary power, not only as a protection to one child, but to each of the five children. No child could do what is now undertaken to be done by the representative of grandchildren. It is difficult to see how a grandchild, a more remote object of the testator's bounty, should have higher rights than his children, who are the immediate beneficiaries. In all such cases the intention of the testator must necessarily be the guide to courts in the inter-

pretation of testamentary provisions, and this intention will be allowed to prevail so long as the purpose to be served is a lawful one. In the present case the purpose for which the trust was created is lawful, and no policy or rule of law has been contravened by the disposition which the testator made of his property. The trustee has active duties to perform, and the time has not yet arrived for a distribution of the corpus of the trust estate. The beneficiaries are entitled to receive, and will receive, their respective portions of the income during the existence of the trust, and we think this was the manifest intention of the testator. The bill for partition was prematurely filed, and was properly dismissed.

Decree affirmed, at cost of appellant.

BANK OF NORTH AMERICA v. PENN MOTOR CAR CO.

(Supreme Court of Pennsylvania. Feb. 26, 1912.)

1. FRAUDULENT CONVEYANCES (§§ 132, 133*)—TRANSACTIONS INVALID—RETENTION OF APPARENT TITLE.

A vendee or pledgee, who takes title to personalty without taking possession thereof, takes the risk of the integrity and solvency of his vendor or pledgor when the rights of subsequent bona fide purchasers, or of levying creditors, arise.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 407-424, 425; Dec. Dig. §§ 132, 133.*]

2. BANKRUPTCY (§ 142*)—ADMINISTRATION OF ESTATE—RIGHTS OF TRUSTEE—FRAUDULENT CONVEYANCES.

Where a bank loans money to the owner of automobiles, taking title to the automobiles as security for the loan, but permits the automobiles to remain in the borrower's possession for a time, but a few days before the institution of bankruptcy proceedings against the borrower takes possession by writ of replevin, the trustee in bankruptcy has the right under Act Cong. June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), amending Bankrupt Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), to take possession of the machines.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 222; Dec. Dig. § 142.*]

3. BANKRUPTCY (§ 142*)—ADMINISTRATION OF ESTATE—RIGHTS OF TRUSTEE—FRAUDULENT CONVEYANCES.

The trustee in bankruptcy has the same right during the four months immediately preceding the filing of the petition in bankruptcy to take possession of automobiles seized under writ of replevin by one who made a loan to the bankrupt, which an unsatisfied execution creditor would have had if he had issued an execution and levied on the automobiles while they were in the possession of the bankrupt.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 222; Dec. Dig. § 142.*]

Fell, C. J., and Brown, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Bank of North America against the Penn Motor Car Company. From

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an order dismissing exceptions to a referee's report, plaintiff appeals. Affirmed.

From the record it appeared that the action was one in replevin instituted against the Penn Motor Car Company, a few days before its bankruptcy, to obtain possession of 18 motor cars of the alleged aggregate value of \$23,080. Of these 11 were taken by the sheriff upon the writ and delivered to the appellant. One was claimed by Oscar Isenberg et al., trading as the Roman Automobile Company, who gave security and retained it. The others were returned as eloiigned. The National Security Bank and the Tradesmen's Trust Company then intervened; each claiming title to some of the motor cars which had been delivered to the appellant. Subsequently, William S. Miller intervened first as receiver, and then as trustee in bankruptcy of the Penn Motor Car Company, claiming title to all the motor cars which had been replevied by the appellant. By agreement the case was referred to Richard S. Hunter, Esq., as referee, who took testimony and filed his report, finding that as against all the interveners except William S. Miller, as receiver and trustee in bankruptcy of the Penn Motor Car Company, the appellant was entitled to possession of the cars in question; but that the title of the trustee in bankruptcy was superior to that of the appellant. He also found the value of the cars delivered to the appellant to be \$10,368.51. Upon exception he reduced this valuation to \$9,978.51, but refused the appellant any further relief. The court below, upon the argument on the exceptions, affirmed the referee's report without opinion.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

John G. Johnson and James Wilson Bayard, for appellant. Henry N. Wessel, Francis C. Adler, and Alfred Aarons, for appellee.

ELKIN, J. [1] This case was tried without a jury under the Act of May 14, 1874 (P. L. 166). The referee has found all the material facts and has clearly and comprehensively stated them in his report. The questions involved have received most intelligent consideration, and the reasons given for the conclusion reached are indicative of a thorough understanding of the legal principles upon which the rights of the parties depend. The contract entered into between the appellant bank and the motor car company was a perfectly proper one, binding upon the parties according to its terms. Under the contract appellant held title to the automobiles as a pledge in the nature of collateral security for the loans negotiated by the motor car company with the bank. The situation of the parties, the scope and character of their business relations, and the nature of their transactions, clearly indicate

that it was the intention of the parties to pledge the motor cars as a security for moneys advanced by the bank to pay for cars purchased by the motor car company from the manufacturers. In this respect the case is clearly within the rule of *Western National Bank v. York Silk Manufacturing Company*, 225 Pa. 442, 74 Atl. 244. The bank held title to the automobiles under the agreement and as against the motor car company had the right to take possession of them with or without the aid of a writ of replevin. As to creditors, the situation is different, and contracts, valid as between parties, are frequently declared invalid as to creditors. This position is not questioned by either party, and both sides agree as to the general principles of law applicable to cases of this character. While in later years the courts have recognized exceptions to the rule as laid down in *Clow v. Woods*, 5 Serg. & R. 277, 9 Am. Dec. 346, the exceptions having become as well established as the rule itself, that case has stood as an authority in Pennsylvania from that time to the present. The rule there announced is that a sale of personal property, leaving the vendor in possession and without doing anything to indicate a change of ownership, is fraudulent as against creditors. The decision was put upon the ground that it would be dangerous to the public to countenance such transactions. It may be conceded—indeed, it must be—that the rigor of this rule in later years has been somewhat relaxed; but the rule itself still remains the law of our state. When a vendee, or a pledgee, takes title to personal property, without taking possession of it, he takes the risk of the integrity and solvency of his vendor, or pledgor, when the rights of subsequent bona fide purchasers, or of levying creditors, arise. *White v. Gunn*, 205 Pa. 229, 54 Atl. 901. Appellant does not deny the rule, but insists that it should not be applied to the facts of the present case.

[2] It is contended that the rule does not apply because, a few days before the motor car company was adjudged a bankrupt, appellant took possession of the cars in dispute, which under its contract it had the right to do, even without seizure by writ of replevin, and that having possession when the bankrupt proceedings were instituted, no matter by what process obtained, the case at bar is distinguished from *Clow v. Woods* and all the cases that have followed it. Such a distinction can be made, and the argument in support of it has merit, but we are not prepared to say, and for the purposes of the case at bar it is not necessary to finally say, that such a distinction should be made. Primarily, this is a controversy between the trustee in bankruptcy, representing the creditors of the bankrupt estate, and the bank claiming title to the automobiles as pledgee. The rights of creditors, the question of preferential liens, and the rules of

procedure, under the bankruptcy laws, must necessarily prevail. The bankruptcy act of 1898 provides, *inter alia*, "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt. * * *" The act contains many other provisions relating to liens created and transfers of property made for the purpose of giving a preference after insolvency has become known and within the four months' period. For the purposes of the present case we do not deem it necessary to discuss or determine whether what was done by the parties constitutes a preferential transfer of property within the meaning of the act. This is primarily a question for the federal courts, and, as we do not deem it vital in the determination of the rights of the parties here involved, it may be passed without further discussion. It may also be conceded that in the present case there was no levy, or judgment, or attachment, or other lien obtained through legal proceedings against the bankrupt within four months prior to the filing of the petition in bankruptcy. It is doubtful, to say the least, whether taking possession of the motor cars by means of a writ of replevin constitutes the obtaining of a lien upon which the act has placed the seal of its disapproval. But the courts have uniformly taken the view that these provisions of the act were intended to prevent preferences and to secure equality in the distribution of bankrupt estates. This has been the underlying thought of all the courts called upon to interpret the bankruptcy act of 1898, and we think it has an important bearing upon the effect to be given the amendment of 1910. This amendment added to section 47 of the original act the following clause: "And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

[3] The manifest purpose of the amendment was to enlarge the rights, remedies, and powers of a trustee in bankruptcy, and it had the effect of vesting in the trustee the

rights, remedies, and powers of a judgment or other creditor having a lien, and of an unsatisfied execution creditor without a lien at the time of instituting bankruptcy proceedings. In other words, the trustee was given the power to assert every right which such creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy. If a judgment creditor had issued an execution and levied upon the automobiles while they were in the possession of the motor car company, his rights would have been superior to those of the pledgee, and they could have been sold as the property of the pledgor in satisfaction of the debt of the levying creditor. As to the motor cars in dispute here, the rights of the parties must be determined as they existed during the entire four months period. If appellant had obtained a judgment on the notes held by it and had issued execution thereon within that period, all proceedings thereunder would have been deemed null and void when the insolvent company was adjudged a bankrupt. It is difficult to see how, upon any equitable or legal grounds, it should occupy a more advantageous position because it caused a writ of replevin to be issued a few days before the petition in bankruptcy was filed, and after it must have known of the insolvency of its debtor. When the insolvency became known, each creditor did what he could to protect his own interests, and no blame can attach to any one for so doing; but, as we view it, appellant did not act soon enough to take the property of the bankrupt out of the grasp of general creditors. The purpose of the original bankruptcy act, as well as the amendment of 1910, was to enforce equality of distribution among all the creditors, to strike down secret liens, and to avoid preferential transfers of property, and as we read the decisions of the federal courts the conclusion is irresistible that they so understand and construe the law. This general purpose of the acts would be defeated if the contention of appellant should be sustained in the present case. While the rights of appellant could be asserted under its original contract against the motor car company, they cannot prevail against the general creditors of the bankrupt under the circumstances of this case.

Judgment affirmed.

FELL, C. J., and BROWN, J., dissent.

STATE v. PENNER.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. STATUTES (§ 241*) — PENAL STATUTES — CONSTRUCTION.

A penal statute must be strictly construed, and the court may not apply it to cases which are not within the obvious meaning of the language thereof, giving that language such meaning which the ordinary reading thereof warrants.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.*]

2. INTOXICATING LIQUORS (§ 131*)—ENTERING PLACE WITH INTENT TO BUY LIQUORS AT UNLAWFUL HOURS — STATUTES — OFFENSES.

Gen. St. 1902, § 2701, as amended by Pub. Acts 1903, c. 78, and by Pub. Acts 1905, c. 19, punishing every person who, with intent to purchase liquor, enters any place in which liquors are "licensed to be sold or exposed for sale, during the hours in which it is unlawful for such place to be open" for the sale of liquors, or who shall purchase liquors in such place during prohibited hours, etc., applies only to places licensed for the sale of intoxicating liquors within section 2700, and does not extend to unlicensed places.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 140, 161; Dec. Dig. § 131.*]

Appeal from Criminal Court of Common Pleas, Fairfield County; James F. Walsh, Judge.

William West Penner was convicted of entering a place with intent to buy spirituous and intoxicating liquors at unlawful hours, and with being found in such place, and he appeals, alleging error in overruling a demurrer to the information and to the charge of the court. Reversed. .

John J. Phelan, of Bridgeport, for appellant. Elmore S. Banks, Pros. Atty., and Albert J. Merritt, both of Bridgeport, for appellee.

RALPH WHEELER, J. The information charges, in substance, that on the 8th day of October, 1911, William West Penner, not being the proprietor of the place at No. 646 Main street, in the town of Bridgeport, where spirituous and intoxicating liquors were then exposed for sale, did, with intent to purchase intoxicating liquor, enter said place at certain hours, during which it was unlawful for said place to be open for the sale of such liquors or to expose the same for sale, and was found in said place during said hours. Nothing is said of license of the place or proprietor in the information.

The finding shows that no license for the sale of intoxicating liquors at said place, No. 646 Main street, in the town of Bridgeport, had been issued by the county commissioners of Fairfield county prior to October 8, 1911; that the accused at the time and between the hours stated in the information entered said place with the intent to purchase intoxicating liquor, and was found in said place dur-

ing said hours; and that he was not the proprietor of such place, nor an officer or other person visiting such place for the purpose of ascertaining if the law was being violated therein.

There is no section of the statutes which provides for the punishment of a person who enters a place where intoxicating liquors are sold or are exposed for sale with the intent to buy liquors, or who is found in such place, unless it be section 2701 of the General Statutes as amended by chapter 78 of the Public Acts of 1903, and as further amended by chapter 19 of the Public Acts of 1905. It is not suggested that the defendant is amenable under any other statute. The sole question, therefore, presented upon the record, is, Does section 2701 of the General Statutes as so amended apply only to places licensed for the sale of intoxicating liquors therein, or does that section apply to unlicensed places as well as to licensed places? As amended, section 2701 reads: "Every person, who with intent to purchase intoxicating liquors shall enter any place of any kind or description in which spirituous and intoxicating liquors are licensed to be sold or exposed for sale, during the hours in which it is unlawful for such place to be open for the sale of spirituous and intoxicating liquors, or who shall purchase intoxicating liquors in any such place, or of the proprietor of any such place, or of any of his servants or agents, either in such place or elsewhere, during such hours, and every person who shall be found in any such place during such hours, shall be fined not more than seven dollars; provided, that this section shall not apply to the proprietor of such place, nor to his servants, nor to officers or other persons who may visit such place for the purpose of ascertaining if the law is being violated therein."

[1] There are certain general rules in relation to the construction of penal statutes which are to be observed. They are to be construed strictly. The courts will not apply them to cases which are not within the obvious meaning of the language employed by the Legislature. To ascertain such intent the primary rule is that the statute is to receive that meaning which the ordinary reading of its language warrants. 26 American and English Encyclopedia of Law, pp. 568, 598, with notes. No act is a violation of a penal statute, unless it falls within the fair import of its language. Such statutes are not to be extended beyond the fair import of their language. They are always to be strictly construed for the benefit of the citizen. Nothing more is to be deduced from the words than they expressly warrant, and they are not to be extended by implication. In the construction of such a statute the question is, not what the Legislature actually meant to say, but what is the meaning of what it did say. Daggett v. State, 4 Conn.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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60, 10 Am. Dec. 100; *State v. Brown*, 16 Conn. 57; *Stoddard v. Couch*, 23 Conn. 242; *State v. McMahon*, 53 Conn. 413, 5 Atl. 596, 55 Am. Rep. 140; *Camp's Appeal*, 80 Conn. 274, 68 Atl. 444; *State v. Hurlbut*, 82 Conn. 232, 72 Atl. 1079; *State v. Faatz*, 83 Conn. 300, 76 Atl. 295.

[2] The words "exposed for sale" used in the statute are connected with the word "licensed" precisely as the word "sold" is so connected. The words could be transposed and made to read, "licensed to be exposed for sale or sold," and mean the same thing—no more and no less. Licensed places only are referred to. If the statute was intended to extend to unlicensed places, the word "licensed" could easily have been omitted, and the statute have been made to include all places where intoxicating liquors are exposed for sale and which are unlawfully open. Indeed, very much of the language employed in the statute might easily and more conveniently have been omitted had that been the intent of the statute. The words "during the hours in which it is unlawful for such place to be open for the sale of intoxicating liquors" clearly enough imply that the reference is to places where intoxicating liquors may, during certain hours of the day, be lawfully exposed for sale and sold. The same implication is contained in the language "or who shall purchase intoxicating liquors in any such place, or of the proprietor of any such place, or of his servants or agents during such hours." Licensed proprietors and their servants and agents are intended. This section (2701) is really a supplement to section 2700, which immediately precedes it. Section 2700 reads: "Every person licensed to sell spirituous and intoxicating liquors, and the servant or agent of any such person, who shall, between eleven o'clock at night and five o'clock on the following morning, keep open any place, apartment, store or room, where such liquors are sold, exchanged or given away, shall be subject to the penalties," etc. Section 2700 having thus provided for the punishment of any licensed person or his servant or agent who keeps open his place between certain hours, section 2701 then provides for the punishment of any person who enters the place where such licensed person or his servant or agent is violating the law by keeping it open at such unlawful hours.

It is suggested by counsel for the state that in the language of the statute in relation to the granting of licenses to suitable persons to sell or exchange intoxicating liquors in suitable places the word "expose" is not employed. That is true; but the exposure of such liquors is necessarily implied in the language used. The language is simply the expression of such necessary implication, and is common in ordinary conversation. Upon the conceded facts and the statute under which

the information is drawn, the defendant is not guilty.

There is error, and the judgment is reversed. In this opinion the other Judges concurred.

LOCKE v. KRAUT.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. EVIDENCE (§ 112*)—RELEVANCY—VALUE OF SERVICES.

On an issue as to what price was agreed upon for masonry work, testimony as to the reasonable value of the work was properly admitted to enable the court to determine which contention was probably true.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 134, 254-258; Dec. Dig. § 112.*]

2. EVIDENCE (§ 99*)—"RELEVANT" FACTS.

One fact is relevant to another, when, according to the common course of events, the existence of the one taken alone or in connection with the other renders the existence of the other certain or more probable.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 123, 137-143; Dec. Dig. § 99.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6062.]

Appeal from Court of Common Pleas, Fairfield County; Howard B. Scott, Judge.

Action by Thomas Locke against Nathan Kraut. Judgment for plaintiff, and defendant appeals. Affirmed.

Action to recover a balance claimed to be due the plaintiff on a contract to perform certain mason work for the defendant at an agreed price. Judgment rendered for the plaintiff for \$345.88.

Robert G. De Forest, of Bridgeport, for appellant. Joshua Meltzer and Henry E. Shannon, both of Bridgeport, for appellee.

WHEELER, J. [1] The sole question in the case relates to the admissibility of certain evidence introduced by the plaintiff on the trial. It was agreed on the trial that there was an agreed contract price for the work, and that such contract price should govern. The plaintiff contended that the contract price was \$1,600, if a certain brick wall shown on the plans should not be built, with an addition of \$250 if it should be built. The defendant contended that \$1,600 was the price agreed upon, including the brick wall, and that \$250 was to be deducted from the \$1,600 if the brick wall was not built. The brick wall was eliminated. The plaintiff entered upon and completed the performance of his contract, and the damages claimed were for the balance due on the contract price.

There were only three persons present when the price was agreed upon—the plaintiff, the defendant, and his son. The plaintiff testified in accordance with his contention as related above. The defendant and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

his son testified in accordance with the defendant's contention as stated, and the defendant's claim was also supported by the testimony of a disinterested witness, who testified that, soon after the contract had been made, he heard the parties in conversation agree that \$1,600 was to include the price of the brick wall, if it was built.

The plaintiff offered the testimony of three expert witnesses as to what the work in question was reasonably worth, so as to enable the court to determine which contention was probably true. The experts gave their estimates as to what the work was reasonably worth to do, based on their own judgment and calculation of the scope and compass of the work after an inspection of the plans and specifications. There was no claim in the pleadings of a reasonable compensation for said work. The defendant objected to any such testimony being offered to prove the claim of the plaintiff as to what the contract and agreed price for said work actually was, upon the grounds that such testimony was wholly irrelevant to the issue, incompetent, and entirely remote. The court overruled said objection, and admitted the evidence for the purpose for which it was offered, and the defendant duly excepted.

It appears from the finding that the court was satisfied by the expert testimony that \$1,600 was a reasonable price for a contractor to offer to perform the work for, if the brick wall was not to be included, and that a contractor could not carry out a contract to include the brick wall at the price of \$1,600 except at a loss. The court upon all the evidence decided that the price agreed upon was \$1,600, with the brick wall eliminated, and the judgment includes the \$250 in dispute.

The defendant claims that the sole question at issue was the agreed contract price, and that it made no difference what the work was reasonably worth to do. It is clear that the evidence objected to may have determined the judgment rendered. The probability or improbability of the truth of the statement of any witness in a trial of a case is always a proper consideration for judge or jury. Sometimes a statement may be so intrinsically improbable as to justify an inference of its falsity or of a mistake. Its character may be such, in connection with other relevant testimony in relation to the existing circumstances, as to require its rejection as unworthy of credit. The presumptions or inferences which arise from the usual conduct of men under the circumstances of a given situation are always to be noted. Scarcely any case can be determined upon the direct testimony. If the contention of one of the parties to any transaction is such as would be unusual and unreasonable under the circumstances attending it, such contention ought not to obtain ready or full

credit. The motives or purposes which usually more or less control men in their dealings with each other furnish a pretty sure and often the only criterion of the truth of the statements they may make in relation to the transaction in which they have been engaged. The actual or market value of an article would influence the buyer to obtain it for not more than that amount, and a serious difference between the actual value and the price alleged to have been agreed upon would discredit the claim of the party making the allegation.

Substantially all the authorities appear to support the proposition that the market value of any article may be received to show the probable price agreed upon. 1 Wigmore on Evidence, § 392, and cases cited in note. There would seem to be no good ground for holding that the reasonable price for a contractor to offer to perform a work should not be admissible as tending to show the probability or improbability of the alleged agreed price. This court has heretofore said that, unless excluded by some rule or principle of law, any fact may be proven which logically tends to aid the trier in the determination of the issue. *Belden v. Lamb*, 17 Conn. 441; *Plumb v. Curtis*, 66 Conn. 166, 33 Atl. 998.

[2] One fact is relevant to another, when, according to the common course of events, the existence of the one taken alone or in connection with the other facts renders the existence of the other certain or more probable. *State v. Blake*, 69 Conn. 76, 36 Atl. 1019. The actual value of services may be shown in an action on a contract of employment, where there is a direct conflict of evidence as to the agreed rate of payment. *Richardson v. McGoldrick*, 43 Mich. 477, 5 N. W. 672. On an issue as to whether or not a contract was made as claimed, any evidence which tends to render that fact probable or improbable is relevant, provided, of course, the evidence is not otherwise objectionable. 3 *Encyclopedia of Evidence*, pp. 516-518; *Trull v. True*, 33 Me. 367; *Nickerson v. Gould*, 82 Me. 512, 20 Atl. 86; *Upton v. Winchester*, 106 Mass. 330.

There is no error. In this opinion the other Judges concurred.

HOWE v. RAYMOND et al.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

APPEAL AND ERROR (§ 969*)—DISCRETIONARY RULE—ORDER OF PROCEEDINGS.

Error cannot be predicated upon the court's ruling permitting one of the parties to begin the introduction of evidence and open and close the argument, where there is not a clear abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848; Dec. Dig. § 969.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Action by Thomas Howe against George C. Raymond and others. Judgment for plaintiff, and defendants appeal. No error.

Joseph T. Fanning and Donald G. Perkins, both of Norwich, for appellants. Hadlai A. Hull and Charles Hadlai Hull, both of New London, for appellee.

PER CURIAM. This action has been before this court upon a former occasion. 74 Conn. 68, 49 Atl. 854. The issues presented are there stated. Our examination of the evidence received upon the present trial, which differs in material particulars from that presented upon the former, fails to disclose that the trial judge, who heard all the evidence and saw all the witnesses, including Reynolds, who was not present upon the former occasion, was in error in refusing to set aside the verdict.

The ruling of the court which permitted the plaintiff to begin in the introduction of evidence and to open and close the arguments was one which ordinarily, at least, rests in the discretion of the court. The rule upon the subject is merely a regulation for the dispatch of business, and we have never predicated error upon the nonobservance of it, and ought not to except in a clear case of an abuse of discretion calculated to do distinct injustice to a litigant. *Scott v. Hull*, 8 Conn. 296, 303; *Weed's Appeal*, 35 Conn. 452, 453; *Young v. Insurance Co.*, 59 Conn. 41, 44, 22 Atl. 32. There is not a case which falls within the exception.

There is no error.

OLMSTEAD v. OLMSTEAD.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. DIVORCE (§ 240*)—ALIMONY—DISCRETION OF COURT.

The amount of alimony to be awarded a wife obtaining a divorce is within the discretion of the court within the limit fixed by Gen. St. 1902, § 4556, authorizing the court to assign to a wife obtaining a divorce a part of the husband's estate not exceeding one-third, and the court in exercising its discretion must consider the value of the estate of the husband, his income, age, health, and earning capacity, and the age, health, station, and separate estate of the wife.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.*]

2. DIVORCE (§ 240*)—ALIMONY—DISCRETION OF COURT.

Where the trial court granting a divorce to a wife found that the value of the husband's real and personal estate was \$11,000 and that \$3,500 was a reasonable portion to be assigned to the wife as alimony, the court on appeal could not disturb the judgment, in the absence of anything to show that the court did not consider all the facts, including the fact that the wife had an estate worth \$8,000 which the

husband had conveyed to her during the marriage.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.*]

Appeal from Superior Court, Fairfield County; William S. Case, Judge.

Action for divorce, alimony, and the custody of a minor child, by Ida L. Olmstead against Fernando C. Olmstead. From a judgment for plaintiff, defendant appeals. Affirmed.

William H. Cable and Spotswood D. Bowlers, both of Danbury, for appellant. Ives & Keating, of Danbury, for appellee.

RORABACK, J. This was an action for divorce on the ground of adultery. The plaintiff, in addition to a divorce, claimed the custody of two minor children and alimony; one of the children having become of age before the trial in the court below. The defendant in his answer denied the adultery and as a special defense set up condonation. The court found the allegations of the complaint to be true, granted the divorce to the plaintiff on the ground of adultery, gave her the custody of the minor child, and found that \$3,500 was a reasonable portion of the defendant's estate to assign to the plaintiff as alimony. The superior court also found that, "at the time of the bringing of this action, the defendant was the owner and possessor of certain real and personal estate of the value of at least \$11,500." The facts are not in dispute. The error claimed is that the record discloses that the amount of alimony is excessive and that the judgment in that respect should be set aside.

[1] Section 4556 of the General Statutes, in effect when this action was commenced, provides that: "The superior court may assign to any woman so divorced part of the estate of her husband, not exceeding one-third, may change her name, and may order alimony pendente lite to be paid to the wife in any complaint or cross-bill for divorce pending in such court upon such terms and conditions as it shall deem advisable." In estimating the statutory allowance which may be made in actions like the present one, there is no inflexible standard. Within the limitation fixed by statute, the amount to be allowed is a matter within the discretion of the superior court. It should be regulated by a number of circumstances that may be considered. Among these is the amount of the estate of the husband, his income, his age, health, and earning capacity; the age, health, station, and separate estate of the wife. While the trial court in making a determination as to the allowance to the wife is bound to consider these and other relevant circumstances, yet it is nevertheless clothed with a wide discretion. *Stapleberg v. Stapleberg*, 77 Conn. 81, 38, 58 Atl. 233.

[2] The defendant contends that it appears from the record that the superior court, in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

estimating the allowance made to the plaintiff, erred in not properly regarding certain important facts in reaching the conclusions complained of. The facts which the defendant points out in his reason of appeal are as follows: That an action has been pending against the defendant in the superior court of Fairfield county for about six years in which he contends that the alleged claim is groundless; that there is a cloud upon the title of a portion of the defendant's real estate; and that it also appears that the plaintiff has property of the value of about \$8,000, which the defendant conveyed to her during their married life. It cannot be fairly said that it appears from the record that all of these matters were not fully considered and passed upon by the court below in making an allowance to the plaintiff. The finding does not disclose in detail how these various items were regarded by the trial court in reaching its decision. The court found that the value of the defendant's real and personal property was about \$11,000, and that \$3,500 is a reasonable portion of the defendant's estate to assign to the plaintiff. This amount does not exceed the limit fixed by statute. We cannot interfere with this decision unless it affirmatively appears that there is an abuse of the discretion reposed in the superior court. This does not appear.

There is no error. The other Judges concurred.

TOWN OF NORWALK v. PODMORE et al.
(Supreme Court of Errors of Connecticut.
June 13, 1912.)

**EMINENT DOMAIN (§ 9*)—POWER TO PROCEED
—STATUTES—CONSTRUCTION.**

16 Sp. Laws, p. 490, which gives a committee power to construct a bridge in the town of Norwalk and to acquire the necessary lands, etc., gives the committee power to institute a proceeding as agents of the town to condemn the necessary land.

[Ed. Note.—For other cases, see Eminent Domain, Conn. Dig. §§ 27-34; Dec. Dig. § 9.*]

Appeal from Superior Court, Fairfield County; William S. Case, Judge.

Application by the Town of Norwalk to assess damages sustained by Kate H. Podmore and others through a taking of lands for bridge and park purposes. Judgment dismissing the application, and applicant appeals. Reversed and remanded.

John J. Walsh, of Norwalk, for appellant. John C. Chamberlain, of Bridgeport, and Leo Davis, of Norwalk, for appellees.

THAYER, J. This is an application by the town of Norwalk for the appointment of a committee to assess the defendants' damages for land taken for bridge and park purposes. The land taken is within a layout of the bridge and park referred to in an act of the Legislature entitled "An act

concerning a new Washington street bridge and park in the town of Norwalk and the issue of bonds therefor." Special Laws, 1911, p. 490. The application was brought by the bridge construction committee as agents and committee of the town, and alleges that the town, acting by them as its agents and committee, has been unable to agree with the defendants as to the damage sustained by them by the layout of the bridge and park, within which the defendants' land is included and for which it is required. A motion to dismiss the application, upon the ground that the only authority to make such an application is vested in the selectmen of the town, and that the bridge construction committee possess no power in the matter of condemning land for the uses of said bridge or its approaches, was granted by the judge to whom the application was made.

The only question raised by the appeal is whether the bridge commissioners have the power to act as agent for the town in a proceeding of this character to take land for the bridge or its approaches. That they have such power where the land taken is for the park is not questioned.

The act in question empowers the town of Norwalk to construct an expensive draw-bridge, with approaches thereto, over Norwalk river in place of an existing bridge and to acquire and own the land therefor; also, to establish, lay out, improve, and maintain a park, and to acquire and own the land therefor, being land which is described in the act and which adjoins the bridge and its approaches. It is provided in section 2 that "in case the town of Norwalk cannot agree with the claimants or the owners of land or buildings within the limits of the layout of said bridge, or the approaches thereto, as finally adopted, or said park, or can agree with some and not with others, as aforesaid, said town may proceed to condemn the land or buildings within said layout and said park in accordance with the provisions of the statutes relating to the condemnation of lands for highway purposes."

Section 5 provides that the "bridge construction committee and their successors, shall be the sole agents and committee of the town * * * with full power to construct said bridge and its approaches * * * and may acquire, for the use of the town or for the use of the contractor, lands or rights for a deviation bridge for the temporary accommodation of travel. * * * And said committee shall be the sole agent of the town for acquiring the property and the rights for said park * * * and may sell and dispose of the present bridge and draw, and all buildings on land acquired for said bridge or park, and, subject to the provisions of the act, may prescribe the form and conditions of said improvement bonds provided for by the act to determine the rate of

interest which they shall bear, and may sell the same, depositing the proceeds thereof with the treasurer of said town and may make payment, out of the proceeds of said improvement bonds, from time to time, by its orders upon the town treasurer, for any of the expense of said work * * * and may authorize and perform all things incidental to said work; and the orders of said committee upon the treasurer of the town shall be honored and paid by said treasurer as though the same were made by the selectmen of said town, and all powers of the selectmen concerning said bridge or said park, or the appurtenances thereof, or the issue of said bonds, are hereby suspended until said public works are completed under the direction of said bridge construction committee, and open for public use."

The seventh section provides that "said bridge construction committee shall, during its continuance in office, * * * have sole control of all litigation by or on behalf of or against the town, concerning all matters connected with the construction and maintenance of such bridge, deviation bridge, park, and docks, the issue and sale of said bonds, and the payment of all obligations of the town concerning the construction and maintenance of the same, or any of them, and concerning all liabilities of the town relative thereto, to the exclusion of all other authorities and of all other officers or agents of the town."

Section 9 reads: "Said bridge and park are hereby declared to be of public use and necessity, and the said new bridge is hereby established and laid out according to the layout of the same heretofore made by the selectmen of the town, now on file in the town clerk's office, and the said park is hereby established and laid out with the boundaries herein described."

It thus appears that, at the time the act was passed, a layout for the bridge in question had already been made and was established by the act as being of public use and necessity, and that the park was also established with the boundaries stated in the act. It was a large public improvement, the act authorizing an issue of bonds to the amount of \$250,000 by the town to pay for it. It was not an ordinary work of the town, such as falls within the usual duties of its selectmen, but was extraordinary and not likely to be completed within the official term of the existing board of selectmen. The act expresses the purpose to remove this entire matter relating to the bridge and park from the agency of the selectmen and place it in charge of a special committee which is named in the act.

Selectmen in laying out a highway act as agents of the law, but in proceedings to determine the amount of the town's liability for the land taken they act as agents of the town. *Mallory v. Huntington*, 64 Conn. 88, 101, 20 Atl. 245. The Legislature, by the sec-

tions of the act quoted, took away from the selectmen, and suspended, all their powers to act for the town of Norwalk concerning the bridge or park until the work shall be completed and open for public use. What remained to be done after the act was passed was to acquire title to the land within the layouts and construct the contemplated works. It is true that the power to acquire land for the new bridge is not in terms given to the bridge committee, while power to acquire land for the park and for the deviation bridge is; but they were appointed sole agent and committee for the town to construct the bridge and its approaches and given power to authorize and perform all things incidental to the work. The acquiring title to the land was incidental to the other work, for the latter could not proceed until the land was acquired. It is said that, as the power to institute proceedings to acquire title to the land is not expressly given to the committee, it remains with the selectmen, and that they were the proper parties to make this application. But all their powers concerning the bridge or the park or the approaches are expressly suspended and thus taken away. It seems clear that the legislative intent was to give to the committee the powers thus taken from the selectmen.

It is said that in condemning land for highway purposes the General Statutes make it the duty of the selectmen to make the application for appointment of the committee, and that, if there is nothing in the act in question which takes their powers away and confers them upon the committee, the power remains in the selectmen. We think, as already indicated, that the act takes away this power from the selectmen and confers it upon the committee. For the ascertainment of damages for the taking of land, the public statutes provide a different process where the land is taken for a park from that provided where it is taken for a highway; the former case being governed by Public Acts of 1907, c. 121, and General Statutes, §§ 4109, 4110; and the latter by General Statutes, § 2054. The applications are to be made to different tribunals. By the provisions of section 2 of the act now under consideration, the application in both cases is to be made as in the case of taking land for highways, thus avoiding two proceedings, where, as in the present case, a defendant's land is taken in part for park and in part for highway purposes.

With full powers given to the committee to conduct the litigation after the application has been made, no reason appears why the power to make the application should be left in other hands.

There was error in dismissing the application, and the cause is remanded for further proceedings according to law. The other Judges concurred.

MESSINGER v. NEW YORK, N. H. & H. R. CO.(Supreme Court of Errors of Connecticut.
June 13, 1912.)**1. MASTER AND SERVANT (§ 190*)—FELLOW SERVANTS—OPERATION OF RAILROAD—EMPLOYÉ IN CHARGE OF REPAIR GANG.**

An employé of a railroad company and those under his charge engaged in repairing tracks are fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

2. MASTER AND SERVANT (§ 137*)—ACTIONS FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

Where a fellow servant in charge of plaintiff's intestate, a track repairer on track 2, whose duty it was to give notice of an approaching train or engine on tracks 1 and 4, left the men for a short time, warning them to be on their guard against traffic on track 1, which was used during the repair of track 2, his conduct as to plaintiff's intestate killed by an engine on track 2 was not negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

3. MASTER AND SERVANT (§ 198*)—FELLOW SERVANTS—OPERATION OF RAILROADS—ENGINEER AND TRACK REPAIRER.

An engineer was a fellow servant of a track repairer, whose contract of employment included his own responsibility for the negligence of his fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

4. MASTER AND SERVANT (§ 137*)—ACTION FOR INJURIES—NEGLIGENCE OF FELLOW SERVANT.

An engineer backing his engine down upon a track repairer without ringing his bell was negligent, and that this method of backing his engine was the one customarily used at that point did not alter the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

5. MASTER AND SERVANT (§ 137*)—FELLOW SERVANTS—RAILROADS—NEGLIGENCE OF MASTER.

A railroad company which knowingly permits an engineer to run his engine in a reckless manner, liable to cause injury to others, is itself guilty of negligence in failing to use reasonable care to guard against the habitual negligence of such employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

6. NEGLIGENCE (§ 119*)—ACTION FOR INJURIES—PLEADING AND ISSUES.

In an action for personal injuries, a ground of negligence not set out in the complaint is not in issue.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

7. MASTER AND SERVANT (§ 265*)—ACTION FOR INJURIES—PRESUMPTIONS—PERFORMANCE OF DUTY.

Where a railroad towerman acts on telegraphic or general orders from some one in charge of the track and the operation of engines at that point, the presumption is, in the

absence of evidence to the contrary, that he did his duty and acted within his orders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.*]

8. MASTER AND SERVANT (§ 198*)—FELLOW SERVANTS—DUTY OF MASTER.

Whether a towerman acted directly for the master or through the order of one acting for the master, the duty involved in the control of tracks and switches was that of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

9. MASTER AND SERVANT (§ 159*)—FELLOW SERVANTS—EXTENT OF RULE.

The fellow-servant defense is available only against the personal negligence of a fellow servant, but is never against injuries resulting from a breach of the master's duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*]

10. MASTER AND SERVANT (§ 112*)—MASTER'S LIABILITY—SALE PLACE TO WORK—RAILROAD TRACK.

A railroad company is bound to exercise reasonable care to give a track repairer a reasonably safe place in which to work, in view of its character and the dangers attendant upon it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 218-223; Dec. Dig. § 112.*]

11. MASTER AND SERVANT (§ 203*)—ASSUMPTION OF RISK—EXTENT.

A servant assumes, as a part of his contract of employment, the risks ordinarily incident to it; but he does not assume extraordinary risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

12. MASTER AND SERVANT (§ 150*)—WARNING TO SERVANT—TRACK REPAIRER—NOTICE.

Where a track repairer was put at work upon a track on which traffic had been suspended, and where he might reasonably have assumed that traffic would not be renewed until the track had been repaired, so that he was at work in a place of safety, the master's failure to give him notice that the track had become dangerous by reason of the resumption of traffic before completion of the repairs was a breach of his duty to furnish a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.*]

13. MASTER AND SERVANT (§ 151*)—WARNING SERVANT—DELEGATION OF DUTY.

The duty of warning a servant of the danger of his place of work must be performed by the master, and cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. § 151.*]

14. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK—EXTRAORDINARY RISK.

A track repairer at work on a track on which traffic had been suspended did not assume the risk of danger from the resumption of traffic thereon before completion of the repairs without notice to him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

15. MASTER AND SERVANT (§ 276*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.

Evidence in an action by track repairer for personal injuries held to show that the master's failure to warn him of the danger of his place of work was either the proximate or a proximate cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

16. MASTER AND SERVANT (§ 201*)—LIABILITY OF MASTER—FELLOW SERVANTS—COMBINED NEGLIGENCE OF MASTER AND FELLOW SERVANT.

The master is liable for an injury resulting from the combined negligence of himself and a fellow servant of the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

17. MASTER AND SERVANT (§ 293*)—ACTION FOR INJURIES—INSTRUCTION—APPLICATION TO ISSUES.

In an action against a railroad for personal injuries, where the master was negligent in failing to furnish a reasonably safe place to work, and this was a proximate cause of injury, an instruction confining the issue to that single ground of negligence without discussing the relation of the fellow servant doctrine to an engineer and towerman was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

18. MASTER AND SERVANT (§ 293*)—ACTION FOR INJURIES—INSTRUCTIONS—AMBIGUITY.

An instruction in an action for the death of a track repairer that defendant was bound to provide him with a reasonably safe place to work, and that if an engine was turned on the track where he was at work without his knowledge, and his own negligence did not contribute to his injury, and the proximate cause was a failure to warn him of the approach of the engine plaintiff could recover, was not objectionable for ambiguity, since it instructed that the jury might find that the assumed facts constituted negligence on the part of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

19. MASTER AND SERVANT (§ 293*)—ACTION FOR INJURIES—INSTRUCTION—INCONSISTENCY.

Nor was the instruction objectionable as inconsistent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

20. TRIAL (§ 194*)—ACTION FOR INJURIES—INSTRUCTIONS—NEGLIGENCE.

Where the court, in an instruction on negligence, determines under a finding to be made by the jury the standard of duty of the defendant master, and does not determine the conduct of the defendant in the case, but leaves it to be found by the jury, the instruction does not invade the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

21. MASTER AND SERVANT (§ 281*)—ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Evidence in an action for personal injuries held sufficient to show that deceased was free from contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.*]

Appeal from Superior Court, Fairfield County; Milton A. Shumway, Judge.

Action by George W. Messinger, administrator of Paul Vasensky, deceased, against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff for \$2,500, and defendant appeals. Affirmed.

Action to recover damages for negligence resulting in the death of plaintiff's intestate.

J. F. Berry, of New Haven, for appellant. Homer S. Cummings and Charles D. Lockwood, both of Stamford, and Adelbert A. Skeel, for appellee.

WHEELER, J. At the close of the plaintiff's evidence the defendant rested. The jury might reasonably have found upon the evidence submitted the following facts, indeed, the record would seem to indicate that any other finding would have been unreasonable:

The defendant operates its railroad at Stamford over four main parallel tracks running east and west, and numbered from north to south 3, 1, 2, and 4. Passenger trains from the east as a rule come in over track 3 at or near the west-bound Stamford station, where the steam engine is cut off and replaced by an electric motor. The engine so cut off runs westerly to a point about 200 feet west of crossovers or switches to the said four tracks, and then backs in an easterly direction, customarily passing by the crossover to track 2, and thence to the railroad yard. The crossovers are within the view of, and under the control of, a towerman located in a signal tower in front of said switches and about 35 feet distant from the crossover at track 2. The towerman determines upon which track to run the engine to the yard, and by levers throws either switch and turns the engine onto either of the four tracks. The act of throwing the switches is the same in kind as the work performed by switchmen upon the ground. The engine if thrown on tracks 3 and 1 would be against traffic, whereas, if on tracks 2 and 4, would be with the traffic. There had been a wreck on track 2 at about the point of the crossover to track 2, necessitating considerable repairs, and compelling a cessation of traffic over track 2 until these repairs had been completed.

The deceased, an employé of defendant, began work with other employés at this point about 4 o'clock on the morning of February 11, 1909. A part of the gang finished their work about 11 o'clock in the morning, and the deceased and Tucker were left to finish the work under the direction of Quinn, an assistant foreman. They worked until 11:30 a. m., when they went to dinner and returned to work at 12:45 p. m. Quinn left these men about five minutes before the accident occurred upon a necessary errand, going near the signal tower, saying to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

men as he left, "Look out on track 1." Track 1 was the only track over which the engines had passed to the yard during the time track 2 had been out of commission and while these men were working there. Track 2 had been repaired just prior to the accident so that trains could have been run over it, but the work of necessary repair had not yet been finished. Shortly before the accident, a train had come from the east over track 3, stopped at the west-bound station, and the engine had been detached and run westerly to a point just west of where the crossover comes into track 3, being about 200 feet from where the men were working, and backed over the crossover to track 2, with the tender ahead at a rapid speed, without ringing the bell or sounding the whistle, and run into the deceased about 1:10 p. m.

Tucker and the deceased were then engaged in tightening the switch bolts at the point of the switch of No. 2 track. Both were kneeling down, with their eyes and attention upon their work. Tucker faced tracks 1 and 3, and the deceased faced away from tracks 1 and 3, and towards the tower, having, therefore his back towards the approaching engine. This was the first engine which had passed over track 2 since the wreck. Tucker facing the approaching engine did not see it go west on track 3, but saw it when it stopped west of the crossover, and expected it would come east, as had been the custom, over track 1. He felt the rail shake, and looked up and saw the engine about 20 feet away, and shouted to the deceased, "Look out, Paul," and barely had time to escape. The deceased did not see the engine go west on track 3, nor see it as it stopped, and did not know of its approach until warned by Tucker when it was too late to escape. The deceased expected, as did Quinn, all engines backing to the east would go on track 1 until the repairs were completed. No one had warned the deceased or Tucker or Quinn that track 2 had been put in commission. The switch was thrown for track 2 some time after Tucker and the deceased returned from dinner. Had there been no unusual noise at the time, they could have heard the switch when thrown. They did not hear it, and did not know it had been thrown, until they saw the engine upon them. Because of the obstruction of the tender the engineer could not see the deceased or Tucker. It was not the custom for the engineer to ring the bell or blow the whistle of the engine when backing it across these crossovers into the railroad yard.

The deceased was an experienced section-man and track walker and knew about the repair of tracks, which was a part of his duties. His work included the point of the accident. In his work of repair upon tracks open to traffic it was his duty to watch for approaching trains, and get out of their way when he saw them approaching.

The substantial errors upon which the appeal rests may be thus summarized: The defendant claims that the only negligence which the plaintiff can rely upon on the evidence is that of fellow servants, for which the defendant is not responsible, and that upon the evidence the deceased was as matter of law guilty of contributory negligence. And therefore it insists the motion to direct a verdict and that to set aside the verdict should have been granted. It further insists that the court's refusal to charge that the plaintiff could not recover for the negligence of Quinn, of the engineer, and of the towerman, or for their combined negligence was error, since they were fellow servants with the deceased, and that the court erred in failing to adequately charge the jury upon whether the negligence proven was that of the defendant, or of persons who occupied the position of fellow servants to the deceased.

The grounds of negligence set forth in the complaint are: (a) The negligence of the defendant in failing to warn the deceased of the approach of the locomotive. (b) The negligence of Quinn in leaving the deceased at work with no one to warn him. (c) The negligence of the engineer in backing his engine upon the deceased without keeping a lookout and without ringing his bell. (d) The negligence of the towerman in sending the engine on track 2 when he knew, or ought to have known, that the deceased was at work on that track.

[1, 2] Assuming the jury to have found the facts as we state them, Quinn was in charge of these men and under our decisions a fellow servant of theirs. A part of his duty was to give them notice of an approaching train or engine on tracks 1 or 4. He had no duty to guard against a train or engine on track 2 while that track was in disuse, since he had no reason to expect the engine to back down on track 2 until the track was again in commission. He had but just left the men, having warned them to be on their guard against traffic on track 1, which was the track upon which engines had backed down during the repairs to track 2. He was away temporarily upon a necessary errand, and we think his conduct could not under the circumstances be held to be negligent or the proximate cause of the injury to the deceased.

[3] The engineer was likewise a fellow servant of the deceased, whose contract of employment included his own responsibility for the negligence of his coservants.

[4] The engineer in backing his engine upon the deceased without ringing his bell was clearly negligent, and this was a proximate cause contributing to the injury to the deceased. That this method of backing his engine was the one customarily used at this point does not relieve his negligence, but rather tends strongly to bring home to his

principal the knowledge of his customary negligence.

[5] A railroad company which knowingly permits an engineer to run his engine in a reckless manner liable to cause injury to others is itself guilty of negligence in failing to use reasonable care to guard against the habitual negligence of its employé known to it. *Furlong, Adm'r, v. N. Y., N. H. & H. R. Co.*, 83 Conn. 568, 78 Atl. 489, 21 Ann. Cas. 937. Such negligence is that of the company, against which the fellow servant doctrine is no defense.

[6] As the complaint does not rest upon this ground of negligence, it was not before the jury, and can afford no support to the judgment. The nature and importance of the work of the towerman, if he in fact has control of the tracks, trains, and engines at this point, differs radically from that of the ordinary switchman. In the mere manual act of throwing the switches their duties are not dissimilar, but the control of the tracks and the determination which to use and which not to use is another sort of duty. It is executive. It corresponds to the duty of the train dispatcher, differing from his in degree, in the complexity of the work, and in the locality covered. It may be from this evidence that the towerman determined the track the engine was to go on, and the absence of evidence, within the power of the defendant, in contradiction of this, or in explanation of the extent and nature of his duties, the jury would have been justified in finding that the towerman had such control of these tracks as to make his determination of the track the engine was to go on a matter involved in the performance of the duty of the defendant master, but we think it better to postpone consideration of this question for another occasion when in all likelihood the evidence may enable us to know the entire range of the towerman's duties and their relation to the operation of the railroad.

[7] If the towerman be not in control of these tracks, but acts on telegraphic, telephonic, or general, order, from some one in charge of the tracks and the operation of trains, cars, and engines at this point, the presumption must be, in the absence of evidence to the contrary, that he did his duty and acted within his order or instructions.

[8] The duty involved in such a control would be the master's. *Darrigan v. N. Y. & N. E. R. R.*, 52 Conn. 285, 307, 52 Am. Rep. 590. It would seem to follow, as the evidence in this case discloses no disobedience of orders, that his act in throwing this switch was done in the performance of the master's duty, and not an act of personal negligence on his part. Whichever conclusion be reached, whether the towerman acted directly for the master, or acted through the order of one acting for the master, the duty involved was the master's.

[9] The fellow servant defense is available against the personal negligence of a coservant. It is never available against the breach of the master's duty.

[10] The legal duty of the defendant company was to exercise reasonable care to give the deceased a reasonably safe place in which to work in view of its character and the dangers attendant upon it. *Worden v. Gore-Meenan Co.*, 83 Conn. 642, 648, 78 Atl. 422.

[11] The servant assumes as a part of his contract of employment the risks ordinarily incident to it. *Belevicze v. Platt Bros. & Co.*, 84 Conn. 632, 637, 81 Atl. 339. Extraordinary risks he does not assume. Had the deceased discovered that a switch bolt was needed on the main track while he was acting as track walker, and proceeded to put in the bolt while traffic on the track remained open, the conclusion must be drawn that the risk of being struck by a train running on this track was one of the ordinary risks incident to his everyday duty.

[12] In this case the deceased was called upon to work upon a track on which traffic had been suspended owing to a wreck. Until the track had been repaired, he might reasonably have assumed traffic would not be renewed. Traffic had been suspended on this track for over nine hours as he knew. He was still engaged in the necessary work of repair. So long as traffic was suspended, the deceased could work safe from the danger of an engine backing upon him on track 2. He could not anticipate this danger before the track was repaired or warning given him. The situation was exceptional. He had been placed at work in a place of safety. Before that could have been made one of danger he was entitled to notice. A failure to give him such notice was a breach of the master's duty to give him a reasonably safe place to work in.

[13] That duty the defendant could not delegate; it must perform. *Rincicotti v. O'Brien C. Co.*, 77 Conn. 617, 621, 60 Atl. 115, 69 L. R. A. 936.

[14] The risk as disclosed by the evidence was an extraordinary one, arising out of an unusual situation, and was one which the deceased did not assume.

[15] That the jury might have found that the failure to so warn the deceased was either the proximate or a proximate cause of the injury to the deceased admits no serious dispute. Though the jury found, as they might, upon the evidence, that this failure to warn combined with the engineer's or the towerman's negligence, one or both, were the proximate causes of the injury to the deceased, and though it be conceded that both of these employés were coservants of the deceased in their acts of negligence, the defendant could not upon this ground escape liability.

[16] The master is liable for an injury which is the result of the combined negligence of himself and a fellow servant of the injured. *Sprague, Adm'r, v. N. Y. & N. E. R. Co.*, 68 Conn. 353, 36 Atl. 791, 37 L. R. A. 638.

[17] The court, in its charge, submitted the case to the jury upon only one of the causes of negligence alleged, viz., the failure of the defendant to warn the deceased of the approach of the engine. Assuming that such failure was a breach of the master's duty to furnish the deceased a reasonably safe place to work, as we hold, and that this was a proximate cause of the injury to the deceased, the liability of the defendant would arise whether the engineer and towerman were coservants of the deceased or not, or whether their negligence co-operated with such a breach of duty on the part of the master. The court, therefore, committed no harmful error to the defendant in ignoring in its charge a discussion of the relation of the fellow servant doctrine to the engineer and towerman and in confining the issue to a single ground of negligence. It is quite clear the defendant cannot complain of the court's limitation of the issue.

[18, 19] The theory upon which the court submitted the case to the jury is stated as follows: "As I stated to you in the outset, the duty devolving upon the defendant in this case was to provide its servants, or Vasensky, a reasonably safe place in which to work. And therefore upon this question I say to you that if you find that track No. 2 upon the 11th day of February, 1909, had not been in use from 4 o'clock in the morning until the injury occurred to the deceased, Vasensky, and that he had been working there all the morning and up to the hour of his injury, and if you find that the engine was turned onto track No. 2 without Paul Vasensky's knowledge, or means of knowledge that it was to be so turned upon said track, and his own negligence did not cause or materially contribute to cause his, Vasensky's, injuries, and you also find that the proximate cause of Paul Vasensky's injuries was the failure to give him warning of the approach of the engine when he himself did not have the means of informing himself and take warning that it was coming, then you may find a verdict for the plaintiff." The assignment of error covering this part of the charge is that it is ambiguous, inconsistent, and calculated to mislead the jury. We do not think this portion of the charge is open to this criticism. If the jury find track 2 had been out of commission, and the deceased knew it and had been working upon it from 4 o'clock in the morning to the time of injury, and the engine had been turned on track 2 without his knowledge or the means of knowledge, the court says, in effect, the jury might find

this constituted negligence on the part of the defendant. The criticism does not reach the point that the court trenched upon the function of the jury, and hence we should not feel justified in finding error upon an unassigned and unclaimed error of this character. But we ought to add that such a criticism, if made in due form, would not, in our opinion, have been well taken.

[20] The court determined, under a finding to be made by the jury, the standard of duty of the defendant master. It did not determine the conduct of the defendant in the case, but left it to the jury to find. And this course accords with our law. *Peltier v. Bradley D. & C. Co.*, 67 Conn. 42, 49, 34 Atl. 712, 32 L. R. A. 651; *Snow v. Coe Brass Mfg. Co.*, 80 Conn. 67, 66 Atl. 881; *Morrissey v. Bridgeport Trust Co.*, 68 Conn. 215, 35 Atl. 1126; *Murphy v. Derby St. Ry. Co.*, 73 Conn. 249, 253, 47 Atl. 120.

[21] There was abundance of evidence from which the jury might have found the deceased was free from negligence. We think the court submitted the issues of negligence, of proximate cause, and of contributory negligence upon this theory of the case in so plain a way that, despite some portions of the charge which do not have the same degree of clearness, the jury could not have been misled and must have found the facts in accordance with the assumptions made in the charge. If so, a verdict for the plaintiff was an inevitable conclusion.

There is no harmful error in the charge, and the motion to set aside the verdict was properly denied. The other Judges concurred.

STATE v. MARESCA.

(Supreme Court of Errors of Connecticut.

June 13, 1912.)

CRIMINAL LAW (§ 274*)—PLEA OF GUILTY—WITHDRAWAL.

Defendant, who was illiterate and had but an imperfect understanding of English, was arrested and brought before a city court on a complaint charging him with assault with intent to kill, and engaged counsel; but, before he had pleaded in the city court, he was arrested on a bench warrant from the superior court on a charge of assault with intent to murder, and arraigned in the superior court, and was asked before the information was read to him if he had or wanted counsel, to which he answered in the negative. No counsel was appointed to represent him, and on being asked whether he pleaded guilty or not guilty after the information had been read to him he pleaded guilty; the questions and answers being in English. Thereupon he was sentenced to confinement in the state prison. *Held*, that defendant was entitled to have the judgment opened to withdraw his plea of guilty and enter a plea of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 633; Dec. Dig. § 274.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Luigi Maresca was convicted of assault

with intent to murder, and he moves to open judgment and sentence, and for permission to withdraw his plea of guilty and enter a plea of not guilty. Motion denied, and he appeals. Error, and proceeding remanded, with direction to grant motion.

Carleton E. Hoadley and Edwin S. Thomas, for appellant. Arnon A. Alling, State's Atty. (Walter M. Pickett, of counsel), for the State.

PER CURIAM. The accused, an Italian, was on the 12th of December, 1911, arrested and brought before the city court of New Haven upon a complaint charging him with the crime of assault with intent to kill. On the 2d of January, 1912, and before the accused was put to plead in the city court, a bench warrant was issued by the superior court, at a criminal term of said court then in session in New Haven, charging the accused with the crime of assault with intent to murder as a second offense. On said 2d of January, the accused was brought before said superior court to plead to said information. Before the information was read to him he was asked by the state's attorney "if he had a lawyer." He answered, "No." The state's attorney then asked him "if he wanted a lawyer." The accused replied, "No; I don't want any lawyer." No attorney of the accused was present, and none was appointed to represent or aid him. The clerk then read the information to the accused, and then said to him: "To this information what is your plea, guilty or not guilty?" The accused replied, "Guilty." These questions and answers were in the English language. The court thereupon sentenced the accused to imprisonment in the state prison for not less than 15 nor more than 25 years.

On the 5th of January, 1912, Hoadley & Thomas, attorneys of New Haven, appeared before said superior court as counsel for the accused, and moved that said judgment and sentence be opened, and that the accused be permitted to withdraw his said plea of guilty, upon the ground, in substance, that the accused answered said inquiries respecting his having or desiring counsel as he did, and pleaded guilty to said information, through a mistake and misunderstanding of the meaning and effect of his answers to the inquiries of the state's attorney and of his plea of guilty. If the accused answered these questions, and so pleaded guilty, without fully understanding the significance and effect of his answers, and of his plea of guilty, the judgment and sentence should, under the circumstances, have been opened, and the accused permitted to withdraw his plea of guilty. In the finding of facts upon the motion to open the judgment, the trial court says that it was satisfied that the accused "had sufficient knowledge of the English language, so that he fully understood the

questions then asked of him, and his replies thereto, and the character and terms of said information as so read to him by said clerk, and of his plea thereto." But there were other undisputed facts which strongly indicate that the accused did not fully comprehend the purpose and significance of the questions asked him, and of his answers given, and the effect and consequences of them, and of his plea of guilty.

The accused was an illiterate Italian, having but an imperfect knowledge of our language. The trial judge can hardly have intended by his finding to say that the accused fully realized the difference between an assault with intent to kill and an assault with intent to murder, or the different punishments which might be imposed for the commission of a first and of a second offense. The answers of the accused regarding his having or desiring counsel were inconsistent with other uncontroverted facts. The accused had counsel, a fact unknown to the court or the state's attorney. He had employed the attorneys, Hoadley & Thomas, to defend him, and had paid them \$100, and their names appeared upon the records of the city court as his attorneys. He had not discharged them. They were engaged in the preparation of his defense. They were not informed that the accused had been taken before the superior court by a bench warrant, nor of his said answers and plea of guilty, until after the accused was sentenced. Had they been notified of the issuance of the bench warrant, they would have appeared before the superior court to defend him.

In view of the serious character of the charge in the information, and its punishment, the trial court, upon the facts and circumstances disclosed by the record, should have granted the motion of the defendant's counsel, and should have opened the judgment, and permitted the accused to withdraw his plea of guilty.

There is error, and the proceeding is remanded, with direction to open said judgment and sentence, and permit the accused to withdraw his plea.

WEED et al. v. HOGE et al.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. CONVERSION (§ 15*)—DIRECTIONS IN WILL—REALTY INTO PERSONALTY.

A will, which directs the executor to sell real estate described and to give specified parts to beneficiaries named, equitably converts the real estate into personalty, and the gift must be deemed one of personalty.

[Ed. Note.—For other cases, see Conversion. Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

2. MORTGAGES (§ 137*)—INTEREST OF MORTGAGEE—PERSONAL PROPERTY.

A mortgage on real estate situated in New York is personal property under the laws of Connecticut and New York.

[Ed. Note.—For other cases, see Mortgages. Cent. Dig. §§ 270-276; Dec. Dig. § 137.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. WILLS (§ 756*)—CONSTRUCTION—"GENERAL LEGACY."

A "general legacy" may be satisfied out of the general assets of testator's estate without regard to any particular fund or property, and a general legacy has no reference to the actual state of testator's property, and it is supposed that testator has sufficient property to procure for the legatee the amount given him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1949-1955; Dec. Dig. § 756.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3071-3073; vol. 8, p. 7670.]

4. WILLS (§ 753*)—CONSTRUCTION—"SPECIFIC LEGACY."

A "specific legacy" is a gift of particular specified things, or of the proceeds of the sale of specified things, or of a specific fund or a defined portion thereof, and it is satisfied by the delivery of the specific property identified as the subject of the gift, and where the same is not owned by testator at his death the legatee takes nothing, for he has no claim on the general assets.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6600-6604; vol. 8, p. 7803.]

5. WILLS (§ 753*)—CONSTRUCTION—"SPECIFIC LEGACY."

A will directing the executors to sell testatrix's property situated in the state and to give a specified part of the proceeds to her husband absolutely creates a specific legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

6. WILLS (§ 570*)—DESCRIPTION OF PROPERTY DEVISED.

Where testatrix owned a mortgage on real estate located on 143d street in New York City, near Riverside Drive, and by her will devised all her title and interest to "certain real estate situated on West 143d street near Riverside Drive in the city * * * of New York, consisting of five lots with building thereon," the will sufficiently described the mortgage to make a valid gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1243; Dec. Dig. § 570.*]

7. WILLS (§ 753*)—CONSTRUCTION—"SPECIFIC DEVISE."

A devise in form of particular lands of which testator is mortgagee only passes the mortgage as that which he must have intended to be the subject of his gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

8. WILLS (§ 753*)—CONSTRUCTION—"SPECIFIC DEVISE."

A will, devising testatrix's right, title, and interest as mortgagee to real estate described, creates a specific gift; her intention being effectuated only by treating her mortgage as the subject of the gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

9. WILLS (§ 753*)—CONSTRUCTION—"SPECIFIC DEVISE."

A bequest of the remainder of testatrix's personal effects, including furniture, bric-a-brac, etc., is specific and can only be satisfied by the delivery to the beneficiary of the particular things described.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

Case Reserved from Superior Court, Fairfield County.

Suit by Edward Franklin Weed and oth-

ers, executors of Louise C. Weed, deceased, against Barbara Louise Hogg and others, for the construction of the will and codicil of the deceased. Cause reserved on an agreed statement of facts for the Supreme Court of Errors. Will construed, and Superior Court advised.

Mrs. Louise C. Weed, late of Darien, dying November 19, 1910, left an estate inventoried at \$59,130.86. Included in the inventory was a piece of real estate in Darien valued at \$35,000, and a bond for \$17,000 secured by mortgage upon real estate located on 143d street, New York City, near Riverside Drive. The remaining items of the inventory consist of cash and securities of the appraised value of \$6,412.56, the contents of a barn valued at \$100, and household furniture and personal effects amounting to a little over \$700 as appraised.

By her will and codicil she gave to three friends or relatives her wearing apparel, a silver service, and certain paintings, engravings, and photographs. She also made gifts of money, amounting to \$16,000, to various persons and objects, one of which was a gift of \$2,500 to her husband, who survived her. Three other provisions in favor of the husband are made in the instrument. One is contained in the tenth paragraph of the will, as follows: "Tenth. I hereby direct my executors hereinafter named to sell and dispose of all my real estate situated in the state of Connecticut, as soon after my death as possible, and I do hereby give and bequeath one twenty-first ($\frac{1}{21}$) part of the proceeds of said sale to the Door of Hope Settlement, located at Tappan, New York, and the remaining twenty twenty-first ($\frac{20}{21}$) part of said proceeds to my said husband, the same to be his absolute property, to him and his heirs forever. And I do hereby authorize and empower my said executors to execute and deliver a proper deed or deeds for the conveyance of said real estate as herein provided for." Another is contained in the fourth paragraph of the codicil, and reads: "Fourth. Whereas, by the tenth clause of my said will, I have left to my husband, Edward F. Weed, twenty twenty-first ($\frac{20}{21}$) of all my real estate situated in the state of Connecticut, and whereas, since the date of said will, I have sold a portion of my property in said state, now therefore, in lieu of such property so sold, I do give, devise and bequeath to my said husband, Edward Franklin Weed, all the right, title and interest that I may have at the time of my decease in and to certain real estate situated on West 143rd street, near Riverside Drive, in the city and state of New York, consisting of five lots with buildings thereon." The third is a gift of "all the rest, residue and remainder of my personal effects, including furniture, bric-a-brac," etc. The will contains a general residuary clause,

and the testatrix's husband and another person are appointed executors without bonds, and with the power of sale of all realty.

No estate specifically bequeathed or devised is needed for the payment of debts or expenses of settlement of the estate.

Galen A. Carter and Warren F. Cressy, both of Stamford, for plaintiffs. Nehemiah Candee, of South Norwalk, for defendants Annie Sczabo and Julia Kotze. John H. Light, of South Norwalk, for defendant Edward Franklin Weed. Nichols C. Downs, of Stamford, for defendant Barbara L. Hoge.

PRENTICE, J. (after stating the facts as above). The testatrix left an estate insufficient to satisfy the benefactions contained in her will. Some of her gifts must fail in part. What ones fall into this class, and the extent of the failure which will attend those which do so, depends upon the character of certain gifts in favor of her husband. In so far as these are specific legacies, the husband will be entitled to take without abatement. In so far as they are general, they must share with the other general legacies which the will contains in such reduction as may prove to be necessary. In so far as any of them are to be regarded as devises and not legacies, they must be dealt with in view of section 295 of the General Statutes, which makes all pecuniary legacies, in the event that the personal estate of the testator is insufficient for their payment, a charge on his real estate not specifically described and devised, unless otherwise directed in the will. Certain of the general legatees challenge, for one cause or another, the right which the husband asserts to take without charge or abatement what is in terms given to him, and thus seek to relieve their situation in the distribution of the estate from the consequences which would result to them if such a right were recognized. Questions are thus presented as to each of the gifts to the husband excepting only the pecuniary legacy of \$2,500.

[1] The gift contained in the tenth paragraph, and the subject-matter of it, is, through the application of the doctrine of equitable conversion, to be regarded as one of personality and not of realty. The conditions which justify the husband in invoking this equitable principle are clearly present. *Emery v. Cooley*, 83 Conn. 235, 238, 76 Atl. 529; *Bates v. Spooner*, 75 Conn. 501, 503, 54 Atl. 305; *Ritch v. Talbot*, 74 Conn. 137, 144, 50 Atl. 42; *Duffield v. Pike*, 71 Conn. 521, 525, 42 Atl. 641.

[2] The only interest which Mrs. Weed had in real estate situated on West 143d street, New York City, was a mortgage interest. This was personal estate by the law of both New York and this state. *Trimm v. Marsh*, 54 N. Y. 599, 604, 13 Am. Rep. 623; *Waterbury Savings Bank v. Lawler*, 46 Conn. 243, 245; *McKelvey v. Creevey*, 72 Conn. 464, 467, 45 Atl. 4, 77 Am. St. Rep. 321.

It follows, from these conclusions: (1) That the questions presented for determination are to be resolved upon the basis that the several gifts to the husband in dispute are legacies; and (2) that section 295 of the General Statutes is not pertinent to their solution.

[3, 4] The fundamental distinction between general and specific legacies is that the former may be satisfied out of the general assets of the testator's estate without regard to any particular fund, thing, or things, while the latter are gifts of particular specified things, or of the proceeds of the sale of such things, or of a specific fund or a defined portion thereof. In the case of the former, there is no intent on the part of the testator to make a specific disposition of particular assets of his estate as such: in the latter case, the intent is that the attempted donation shall be satisfied by the delivery of specific property forming a part of the estate, and so described as to be identified as the subject of the gift, and in no other way. If the specified property is not owned by the testator at his death, the legatee, in the case of a specific legacy, takes nothing. He has no claim upon the general assets. *Brainerd v. Cowdrey*, 16 Conn. 1, 6; *Crawford v. McCarthy*, 159 N. Y. 514, 518, 54 N. E. 277; *Bradford v. Haynes*, 20 Me. 105; *Towle v. Swasey*, 106 Mass. 100, 108; *Page on Wills*, § 768. A general legacy has no reference to the actual state of the testator's property, it being only supposed that he has sufficient property which, being realized upon, will procure for the legatee that which is given him; while in the case of a specific bequest it must be a part of the testator's property itself. *Bothamley v. Sherson*, L. R. 20 Eq. 304. A specific legacy is the gift of something "which a testator, identifying it by a sufficient description, and manifesting an intention that it should be enjoyed or taken in the state or condition indicated by that description, separates in favor of a particular legatee from the general mass of his personal estate." *Robertson v. Broadbent*, 8 A. C. 813.

[5] Tried by this test, the gift of $\frac{20}{21}$ of the proceeds of the Connecticut real estate, contained in the tenth clause of the will, is beyond question specific. A gift of the proceeds of the sale of specific real estate or chattels is specific. *Page v. Lexington*, 18 Ves. Jr. 463, 464; *In re Jeffrey*, L. R. 2 Eq. 68; *In re Martin*, 25 R. I. 1, 54 Atl. 589; *Boston Safe Deposit Co. v. Plummer*, 142 Mass. 257, 261, 8 N. E. 51.

[6] The gift of the testatrix's right, title, and interest in the West 143d street property in New York City, contained in the fourth clause of the codicil, presents two possible questions; one as to the sufficiency of the description of the real estate, and the other as to the adequacy of the language of the gift to carry the mortgage interest which alone the testatrix had.

The property is sufficiently described to establish its identity and satisfy the requirements of a valid gift by will. *Harman v. Gurner*, 35 Beav. 478; *Newton v. Lucas*, 6 Simons, 54; *Gauntlett v. Carter*, 17 Beav. 586; *Martin v. Smith*, 124 Mass. 111.

[7] A devise in form of particular lands of which the testator is mortgagee only passes the mortgage interest as being that which he must have intended to be the subject of his gift. *Clark v. Abbobot*, Barn. Ch. 457, 461; *Woodhouse v. Meredith*, 1 Merivale, 450, 456. The same general principle has been applied where, under like conditions, the testator had in fact only an interest in the proceeds of a sale. *Devenish v. Pester*, 72 L. T. R. (N. S.) 816; *Cooper v. Martin*, L. R. 3 Ch. (1867-68) 47, 55; *In re Glassington*, L. R. 2 Ch. (1906) 305. "The unmistakable reference to the lands as those comprised in the settlement * * * shows a clear intention to dispose of the property to which he was entitled under the trusts of that instrument, and although he mistook the nature of his interest in that property, a gift of it as land, instead of money arising from its sale, does not prevent his interest in it from passing to the person whom he clearly intended should take what he was himself entitled to under the settlement to which he pointedly refers. What, after all, is a devise of lands? It is only a devise of such estate or interest as the deviser has in the land, and prima facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to show that the testator had that particular land in his mind, and if there is nothing else to answer the description." *Devenish v. Pester*, 72 L. T. R. (N. S.) 816, 818.

[8] In the present case the will does not in terms purport to give the land, but the testatrix's right, title, and interest in it. She had no right, title, or interest in any other real estate answering in any way to the description of the will. There is nothing which by possibility could have been intended as the subject of the attempted gift except the mortgage debt and security in question. Her manifest intention can be effectuated only by treating that as the subject of the bequest. Such a bequest is, of course, specific. *Wheeler v. Wood*, 104 Mich. 414, 417, 62 N. W. 577.

[9] The bequest of the rest, residue, and remainder of the testatrix's "personal effects, including furniture, bric-a-brac," etc., follows the gift in earlier paragraphs of a few particularly enumerated articles. As to those not thus disposed of which fall within the description of the testatrix, the bequest is beyond question specific. It was her unmistakable intention that her husband should have the very articles of the kind enumerated of which she should die possessed and that he should have nothing else in substitution for them. Her intent could not be sat-

isfied save by the delivery to her husband of the particular things described forming a part of her estate at her decease, and the gift of them had no relation to her general assets so that they might be chargeable in any event for the delivery of like things or their equivalent. In the following cases it was so held under substantially similar conditions: *Borden v. Jenks*, 140 Mass. 562, 5 N. E. 623, 54 Am. Rep. 507; *Tomlinson v. Bury*, 145 Mass. 346, 14 N. E. 137, 1 Am. St. Rep. 464; *McFadden v. Hefley*, 28 S. C. 317, 5 S. E. 812, 13 Am. St. Rep. 675; *McKidd v. Brown*, 5 Grant's Ch. 633; *Bleeker v. White*, 23 Grant's Ch. 163; *Rudd v. Harper*, 16 Ont. Rep. 422. See, also, to the same general effect, *Platt v. Platt*, 42 Conn. 330, 346. The fact that the descriptive language may include numerous articles does not render the bequest any less specific. *Tomlinson v. Bury*, 145 Mass. 346, 348, 14 N. E. 137, 1 Am. St. Rep. 464.

The superior court is advised that all three of the gifts to Edward Franklin Weed, the husband of the testatrix, concerning which advice is asked, are specific legacies, and that the said Weed is entitled to receive what is thereby given without abatement in favor of, or charge on account of, the general legacies contained in the will.

No costs in this court will be taxed in favor of any of the parties. The other Judges concurred.

KARPENSKI v. INCORPORATED BOROUGH OF SOUTH RIVER.

(Supreme Court of New Jersey. June 8, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 733*)—TORTS—OPERATION OF LIGHTING PLANT.

For the negligent operation of a lighting plant, resulting in injuries to a private person, an action will lie for the recovery of damages against a borough maintaining and operating such plant for supplying light for private use for gain and profit, under the permission to conduct the same given by "A general act relating to boroughs" (Revision 1897) 1 C. S. pp. 239, 244, §§ 28, 31.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549, 1561; Dec. Dig. § 733.*]

(Additional Syllabus by Editorial Staff.)

2. INFANTS (§ 92*)—PLEADING—DESCRIPTION OF PARTIES.

A declaration will not be stricken out under Practice Act (3 Comp. St. 1910, p. 4086) § 110, on the ground that it alleges the next friend of the infant to be the plaintiff, and concludes to the damage of the next friend and not of the infant, where the allegation in the commencement is that the defendant is summoned to answer unto A., by J., his next friend, and thereupon the said A., by J., his next friend, the plaintiff, by K., attorney of the plaintiff, etc., and in the conclusion that the said A., by J., his next friend, the plaintiff herein, through their attorney of record, say

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the said A. has been injured and that an action has accrued to the said A., etc.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 277-281, 285, 288; Dec. Dig. § 92.*]

3. PLEADING (§ 355*) — MOTIONS—STRIKING OUT PLEADING—REDUNDANCY.

A declaration will not be stricken out on the ground of redundancy and prolixity merely because of unnecessary length and minuteness of statement, where it unmistakably sets out the ground of action, which is readily determined.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.*]

Action by Alexander Karpenski, by Joseph Karpenski, his next friend, against the Incorporated Borough of South River. Heard on demurrer and motion to strike out declaration. Demurrer overruled, and judgment entered thereon for plaintiff.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

George S. Silzer, of New Brunswick, and John A. Coan, of South Amboy, for demurrant. J. A. Kiernan, of Elizabeth, for plaintiff.

VOORHEES, J. The plaintiff, an infant, was injured by coming in contact with a live wire maintained by the defendant in its electric lighting system used for public and private lighting, and brings this action to recover damages for the alleged negligence of the defendant.

[2] The defendant has not only demurred to the declaration, but has moved to strike it out under the 110th section of the Practice Act (3 Comp. St. 1910, p. 4086), upon the ground that it alleges the next friend of the infant to be the plaintiff, and concludes to the damage of the next friend and not of the infant, and that it is redundant and prolix, setting up matters not a part of the plaintiff's cause of action. The declaration, in its commencement, contains the following language: "The defendant is summoned to answer unto Alexander Karpenski, by Joseph Karpenski, his next friend, in an action, etc., * * * and thereupon the said Alexander Karpenski, by Joseph Karpenski, his next friend, the plaintiff, by J. A. K., attorney of said plaintiff, complains, etc." It is not perceived that these sentences describe Joseph as the plaintiff. In the face of the specific associated statement that "the said Alexander, being an infant, * * * his father, Joseph, has been appointed to prosecute, etc.," no confusion can arise, in the proper construction of the phrases complained of. Nor is the conclusion defective. It is thus framed: "Wherefore the said Alexander, by Joseph, his next friend, the plaintiff herein, through their attorney of record, say that the said Alexander has been injured * * * and that an action hath accrued to said Alexander, etc." By a fair construction, "Alexander" and "the plaintiff"

are in apposition. On this point *Blowski v. American Enameled Brick & Tile Co.*, 72 N. J. Law, 409, 60 Atl. 1101, is not parallel, where the conclusion was "to the damage of the said plaintiff as guardian and next friend, etc." In these particulars the declaration is not irregular and defective, and so framed that it will embarrass the defendant upon the trial of the action.

[3] The remaining ground of this motion proceeds upon the theory that the declaration is redundant and prolix. It may be admitted that it might be compressed into smaller compass, but the authority to strike out is based upon irregularity or the defective character of the pleading, or when it delays or embarrasses a fair trial. Length and minuteness of statement generally are not bases for such action.

The suit is against the borough and is for injuries happening to the infant, while walking upon a public street, by his coming in contact with an electric light wire maintained by the borough for the purpose of public and private lighting, which was negligently allowed to hang in Whitehead avenue, from the borough's pole close to the ground, charged with a deadly current. The declaration sets up that the borough was incorporated and became possessed of certain powers and rights over the streets; that it had an optional power to erect a plant and supply electric light for public and private use; that it took proceedings by its council to authorize, by ordinances, the erection of a plant, and the purchase of a current to supply not only public but private lighting, and to enter into a contract for the current; that the council had power to fix the rates and prices for the light, and erected a plant; that they had a transformer house on the causeway, within the confines of said borough, and were in the actual charge and control of the wires and appliances running through the borough; that they designated the location of the poles and especially those on Whitehead avenue, where the accident occurred; that they appointed electricians and agents, not statutory; and that the borough entered in and upon the business of conducting an electric lighting plant for pecuniary profit. It is further stated that the defendant solicited patronage and actually supplied current, measuring the same by meters which were regularly inspected, and that bills for the same were presented to the consumers at rates prescribed, and received money from such customers in large amounts in payment for the current furnished and by it ran its plant for gain and profit.

The pleading, while quite inartistically drawn, unmistakably sets out the ground of action, and the pith of it is readily extracted. The averment of a duty does not aid the pleading, but may be treated as surplusage. The motion to strike out will be refused.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] This brings us to a consideration of the demurrer which is principally directed to the fact that the acts of the borough which are alleged to have been negligently performed are acts of a public and governmental nature for which no action can be maintained, and that, although the acts are optional which the statute "A general act relating to boroughs" (Revision 1897, C. S. p. 226), has permitted.

The operation of an electric lighting plant for the furnishing of light to private consumers for gain cannot, in any sense, be the performance of a governmental function. Under a somewhat similar statute in England for the supplying of gas to a city, it was so held, in *Scott v. Mayor of Manchester*, 2 H. & N. 59, s. c. on appeal 2 H. & N. 204, where a judgment for the plaintiff was sustained. Several cases bearing upon this subject may be found cited in *Bisbing v. Asbury Park*, 80 N. J. Law, 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523.

The demurrer will be overruled, and judgment entered thereon for the plaintiff.

SHERIDAN v. LANKERING.

(Supreme Court of New Jersey. June 5, 1912.)

(*Syllabus by the Court.*)

STATUTES (§ 93*)—SPECIAL LAWS—IMPROPER CLASSIFICATION.

The act of April 27, 1911 (P. L. p. 512), which excludes from its operation "those cities where boards of education now consist of less than nine members each," is unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

Quo Warranto by the State, on the relation of John H. Sheridan, against George Lankering. Demurrer to plea sustained.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Merritt Lane, of Jersey City, for relator. John Fallon, of Hoboken, for defendant.

BERGEN, J. The information was filed by the relator in this cause to inquire by what authority the defendant exercises the office of president of the board of education of the city of Hoboken, and it sets out that there was, until January 1, 1912, a board of education in that city composed of eight members, of which one Wilson Taylor was the president, that the term of office of said Taylor as a member of said board has not expired, and that no successor to said Taylor as president has yet been elected by the members of the board of which he is a member; and it then charges that the defendant has since February 1, 1912, usurped, intruded into, and unlawfully held, used, and exercised, and yet doth usurp, intrude upon, and unlawfully use, hold, and exercise, to the exclusion of the said Wilson Taylor, the said

office. To this information the defendant pleads that he was elected by the members of a board of education appointed under the provisions of an act of the Legislature of this state approved April 27, 1911 (P. L. 512), which he claims amends section 38 of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October 1903 (P. L. 1903, 2d Sp. Sess. c. 1). To this plea a demurrer was interposed specifying two grounds: (a) That the act of 1911 under which the defendant justifies does not apply to the city of Hoboken; (b) that the statute is special legislation regulating the internal affairs of towns and counties, and also providing for the management and support of free public schools, which is forbidden by section 7, par. 11, art. 4, of the Constitution of the state. As the second specification is, in our opinion, sufficient to dispose of this cause in favor of the demurrant, the first need not be dealt with. Section 38 of the original act of 1903 provided for the appointment of boards of education by the mayor or other chief executive of each city, to consist of nine persons, and section 39 provided in the alternative for the election of a similar board, the act requiring that the voters of each municipality have submitted to them the question of the acceptance of either plan, and that until acceptance of either by any city the administration of school matters should remain in, and be exercised by, any board of education theretofore having the management and control of the public schools therein. It does not appear that Hoboken accepted either of the alternative plans, and it is not claimed that it did, but, on the contrary, continued the appointment of its board under the act of 1892 (P. L. 82). Such a board was in existence January 1, 1912, when the terms of office of four of its members expired, leaving the relator and three of his associates, one of whom is Wilson Taylor, its president, still in office. The mayor of the city refused to appoint members to fill the places of those whose terms had expired, as required by the act of 1892, but, claiming to act under the amendment of 1911, undertook to create a new board by appointing nine persons of whom the defendant was one, and the new members, assuming to constitute the entire board and ignoring those whose terms had not expired, met and organized by electing the defendant as president of the board of education of Hoboken. The obvious intent of the amending act was the elimination of the popular vote on the question of acceptance or rejection of sections 38 and 39, and the imposition of the new method of selection upon all cities other than those excepted from the provisions of the act. The act of 1911 amends section 38 and repeals section 39, which provided for an elective board, section 40, which pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 33 A.—41

vided for the manner of submitting the question to a vote, and section 241, which prescribes the method of organization of any board elected under section 39; so, if this legislation be constitutional, it is now the only method existing for the appointment of boards of education in cities not exempted from its operation. That the purpose of the act of 1911 is a special, and not a general, provision for the management of free public schools, or for the regulation of the internal affairs of towns and counties, is manifested by the language employed in the opening sentence, which is, "in each city, other than those cities where boards of education now consist of less than nine members each." The class is thus limited to cities having nine members, or perhaps more, in its board of education, but excludes all cities now having a less number, even if such cities should hereafter be entitled to nine or more members. If a city now having less than nine members should lawfully increase its board to nine or more members, it would not come into the class. That classification by such methods is vicious is too well settled in this state to require the citation of all the cases bearing on this question. If classification by numbers answers the constitutional requirement, all of a present or future class measuring up to the numerical qualification must be afforded an opportunity to enter the class, for it rests on the qualities of objects, not on the time when they are obtained. *Stahl v. Trenton*, 54 N. J. Law, 444, 24 Atl. 478.

It may well happen that a city, now excluded, may increase the number of its board members; but, not being now in the class as limited, there would be no method for the appointment of its members under the amended act, for it has been specifically excluded, and although its board of education might hereafter consist of nine members, their appointment would have to be made under the law at present applicable to that now excluded city, and thus in different cities, having the same number of members of its board of education, diverse methods of appointment may exist for which no reason can be given other than a classification created by the act under review, which is unsubstantial, illusory, and contrary to the constitutional prohibition.

The defendant, however, challenges the right of the relator, a private citizen, to question the constitutionality of the act, upon the ground that it is an assault upon the existence of the board of education of the city of Hoboken, a public corporation, and that the existence of the board appointed under the act assailed cannot be lawfully challenged by the relator in these proceedings, because this can only be done by the Attorney General acting *ex officio* where the information undertakes to question the corporate existence of a public corporation, and charges that such is the effect of this infor-

mation because the court, in order to oust the defendant, would necessarily be obliged to determine that the board which elected him president has no legal existence, thereby permitting a private relator to indirectly attack the corporate existence of a board not a party to these proceedings and without an opportunity to defend its corporate existence. In support of this contention, the defendant cites *Holloway v. Dickinson*, 69 N. J. Law, 72, 54 Atl. 529, which holds that an information filed in the name of the Attorney General at the relation of a resident and property owner acting under leave of the court is confined to cases where there exists an office *de facto* or *de jure*, and where the controversy relates to the right of an individual or individuals to hold such office, but that the act under which such proceedings may be taken does not authorize an attack to be made upon the existence of a public corporation by a private relator, and that such an attack must still be conducted by the Attorney General acting as the representative of the state. The present proceeding does not make any attack upon the existence of a public corporation, but calls upon the defendant to show by what authority he is acting as president of a public corporation, not the legal existence of the office itself. The information does not attack the existence of the board of education, but only the right of the defendant to hold the office.

In *Bumsted v. Henry*, 74 N. J. Law, 162, 64 Atl. 475, two members of the excise board of Jersey City filed informations against two members of the board who were appointed by the court of common pleas of the county of Hudson to succeed the relators as excise commissioners, they having been appointed by the mayor, and the question considered and determined was the constitutionality of the act under which the defendants had been appointed. The Supreme Court, holding that the act was unconstitutional, ordered a judgment of ouster, from which a writ of error was taken to the Court of Errors and Appeals, and in that court (74 N. J. Law, 790, 67 Atl. 375) Mr. Justice Swayze, speaking for the court, said: "The information does not attack the existence of the board of excise commissioners; it concedes that and attacks only the right of the defendant to hold the office." So here the information concedes that a board of education exists in Hoboken, and that it is entitled to elect a president, but attacks the right of the defendant to hold the office, because Mr. Taylor, who claims to be president of the board, has been ousted by the defendant claiming to hold under an act which we consider unconstitutional.

In *Hann v. Bedell*, 67 N. J. Law, 148, 50 Atl. 364, approved by the Court of Errors and Appeals in the case last above cited, the relator, who was a citizen of the city of

Camden, filed his information to test the right to office of a board of excise commissioners, the defendant in the proceeding having been elected under an act providing therefor (P. L. 1884, p. 133), while by a supplement to that statute approved in 1892 (P. L. 29), it was provided that the members of such a board should be appointed by the court of common pleas. The respondents objected to the proceedings, claiming that the right of the respondents to hold their offices could not be called in question at the instance of a private person, because it attacked the legal existence of the board of which they were members. The court held, in an opinion written by Chief Justice Gummere, that the defendants misapprehended the effect of the procedure because the legality of the board of excise commission was not questioned, but the right of the incumbents to sit in that board as its members.

In the present proceeding the question raised is whether the defendant is the legal president of the board of education of the city of Hoboken, and his right to that office depends upon whether the body who have undertaken to elect him to that position have been properly selected, so as to become entitled to induct him into the office of president. The General School Act, previous to the amendment of 1911, provides for a board of education in every city, and it also provides for the method of the selection of its members. The act of 1911, which is challenged, provides for a different method of selecting the officers to serve as members of the board of education, and fixes the number. It is the method of selection and not the corporate existence of the board of education which this information assails, and, if the relator is correct in his position, it does not destroy the office, but determines that the defendant has been unlawfully selected.

We are of opinion that the act of 1911 (P. L. 512), is not a constitutional enactment, and affords no support to defendant's claim to the office he now asserts to hold by virtue thereof.

The relator is entitled to judgment on his demurrer to defendant's plea.

STATE v. DE GERALMO.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—ALIBI.

The defendant, being on trial for the crime of attempting to commit a rape, offered considerable testimony tending to prove an alibi, and at the close of the case requested the court to charge "that, if reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it," to which the court responded, "I will

charge you that the evidence must satisfy you of the defendant's guilt beyond a reasonable doubt." *Held*, that this was not a legal compliance with the request; the court not having dealt with the subject-matter of the request in any part of its charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

2. CRIMINAL LAW (§ 834*)—INSTRUCTIONS.

Where a request to charge calls for the application of a correct legal principle, is applicable to the testimony, and clearly material to defendant's case, he is entitled to have it distinctly charged in such way as not to leave room for misapprehension or mistake by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

Error to Court of Quarter Sessions, Union County.

Vincenzo De Geralmo was convicted of an attempt to commit rape, and brings error. Reversed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

William R. Wilson, of Elizabeth, for plaintiff in error. C. Addison Swift, for the State.

BERGEN, J. The defendant was convicted of an attempt to commit a rape, and brings the record here for review under section 136 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1862). Many causes are specified as ground for reversal, but it is only necessary to consider one of them.

The case made by the state was that a man entered the room of the complaining witness at night whose face she did not see, and the evidence of his guilt rests upon her subsequent identification of him through his voice, and an odor of garbage about his clothes while he was in the room, it being shown that he was a garbage collector, and upon a comparison of finger marks found upon one of the posts of a portico by which the guilty person ascended from the ground to the window of her room, a duly qualified expert, having compared the admitted finger prints of the defendant with those found on the post, testifying that in his opinion the impressions were made by the same hand. In addition to this, it was shown that a cap left in the room by the guilty party resembled a cap sometimes worn by the defendant. This was substantially the state's case. The defendant was called as a witness in his own behalf and denied the charge, saying that he was at home on the night in question and went to bed about 8:30, remaining there all night, and was not out of his bed until about 6 o'clock the next morning. If this was true, then he has established an alibi.

[1, 2] Defendant's wife testified that she occupied the bed with her husband; that she was awakened two or three times dur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing the night, the last being about 1 o'clock, to look after a sick child; and that her husband was in bed each time, but after that she slept until 4 o'clock, when aroused by an alarm clock, and her husband was still there. There was other testimony tending to sustain the evidence of an alibi. With the case in this condition, the court charged the jury, after referring to some of the evidence, that, if the defendant was not present when the crime was committed, it would be a good defense, but did not instruct the jury that, if this evidence raised a reasonable doubt of defendant's guilt, he was entitled to the benefit of it, whereupon the defendant requested the court to charge "that, if reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it." The court in response said, "I will charge you that the evidence must satisfy you of the defendant's guilt beyond a reasonable doubt." If the request was proper, it certainly was not charged by what the court said, and amounted to a denial of it. The request was a correct statement of the law. The setting up of an alibi as a defense to a crime does not change the presumption of innocence or relieve the state of its burden to establish defendant's guilt beyond a reasonable doubt, and if the evidence relating to the alibi considered alone, or in connection with all the other evidence, leaves a reasonable doubt of guilt in the minds of the jury, they should not convict. Even if the evidence be insufficient to satisfy the jury that the accused was not present, it cannot be rejected, but should be considered with the other evidence in the case, and therefore we think that the defendant was entitled to have the jury distinctly instructed that, if a reasonable doubt was created by the evidence relating to the alibi, even if it did not conclusively establish it, he was entitled to the benefit of such a doubt. It is not a compliance with the request made in this case to simply charge that the jury must be satisfied by all the evidence of defendant's guilt beyond a reasonable doubt, for that ignores the concrete proposition of law presented which defendant was entitled to have applied. The charge of the court on this branch of the case, after stating that the defense was that defendant was not present when the crime was committed, was: "You have heard the various witnesses offered on his behalf. You have heard the testimony of his friends who came from Jersey City, as to their being at his house on the afternoon of that day, and that he was there with them, and, of course, that is not a complete alibi to this charge, but is evidence as to his movements. You have heard the testimony of defendant's wife and of Luciano and his wife, going to show that the defendant was in that house all night; that is, the night on which it is alleged this crime was committed." Man-

festly, this charge, which was all the court said on this subject, submitted nothing to the jury, if it did that, but the extent to which defendant had been able to establish his defense that he was not present when and where the crime charged was committed, and in no way instructed the jury concerning the evidential effect of the testimony regarding the alibi in creating a reasonable doubt as to the conclusiveness of defendant's presence when the crime was perpetrated, the burden of proving which was upon the state, and was not shifted by the proposed defense. The impression left upon the jury must have been that the evidence tending to show the absence of the defendant could not be given effect unless it outweighed that which tended to show his presence, and it is quite like the situation condemned in *State v. McQueen*, 69 N. J. Law, 522-531, 55 Atl. 1006.

The request in the present case contained a correct statement of the law, was applicable to the testimony, and clearly material to the defendant's case, which he was entitled to have distinctly charged, and in its refusal he suffered a manifest wrong and injury.

"One of the most important duties of the court is to declare the law applicable to a case to the jury when requested so to do. This should be done in such a way as not to leave room for misapprehension or mistake." *Roe v. State*, 45 N. J. Law, 49.

We are of opinion that the defendant was entitled to have the legal proposition requested distinctly charged, and that this was not complied with by the court, unless the legal effect was substantially covered by its charge to the jury. *Aldrich v. Peckham*, 74 N. J. Law, 711, 68 Atl. 345; *Mellon v. Victor Talking Machine Co.*, 77 N. J. Law, 670, 73 Atl. 494, and a careful examination of it shows that the precise point raised by the request was not adverted to by the court in any part of its charge.

Therefore the defendant is entitled to have this judgment reversed, and a new trial granted, and it is so ordered.

SHILLINGSBURG v. GREENWICH TP.
(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 491*)—ASSESSMENT—ADDITION OF OMITTED PROPERTY.

The county boards of taxation are bound to keep a record of their proceedings, and the addition of alleged omitted property to the duplicate of assessments for taxes requires the action of the board, which is not complied with by a direction to its secretary, given by one of its members, to add omitted property without proof by record or otherwise that such was the determination of the board.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 874, 875; Dec. Dig. § 491.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TAXATION (§ 482*)—ASSESSMENT—OMITTED PROPERTY.

In case such board adds to the duplicate omitted property, it must give to the owner immediate notice thereof and of the time and place of the next meeting of the board, and the entry of omitted property on the tax list is not a binding assessment without proof of such notice.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 854–857; Dec. Dig. § 482.*]

Certiorari by William Shillingsburg against the Township of Greenwich to review a tax assessment. Assessment set aside.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Harrison H. Voorhees, of Camden, and William A. Logue, of Bridgeton, for prosecutor. Walter H. Bacon, of Bridgeton, for defendant.

BERGEN, J. This writ seeks to review a tax assessment laid in 1910 upon five oyster boats belonging to the prosecutor. The facts appearing are that prosecutor resides in Camden, N. J., where the boats were assessed for taxation in 1910, and taxes paid; that the boats are used for planting and gathering oysters in Delaware Bay on the shore of the state of Delaware; that they are used in the months of May and June in each year for planting oysters; that on each Friday or Saturday nights during these months they return to Greenwich to get supplies and remain over Sunday; that May 20, 1910, they came to the dock at Greenwich, arriving about 4:30 p. m., and were tied to the wharf, but were not assessed by the assessor of the township; that Harry B. Bamford was employed by the county board of taxation to go to Greenwich on May 20, 1910, to see whether the boats were there and waited until after 4:30 p. m. when the boats came in; that he reported the result of his observations to the chairman of the county board of taxation; that the assessment was inserted in the assessor's duplicate about September 1, 1910, by the secretary of the county board under directions from the president; that no record of this proceeding was made by the county board beyond that contained in the amended duplicate book; that there was no evidence taken by that board of the value of the boats; that no immediate notice was given to the owner of this action, or of the time and place of the next meeting of the board for review thereof.

This prosecutor had a tax of like nature set aside in *Shillingsburg v. Ridgway*, 69 N. J. Law, 113, 54 Atl. 531, upon the ground that there was no proof that the boats were found in Greenwich township on May 20th when the assessment for taxes begins; but in that case Judge Dixon, speaking for this court, said that visible property was tax-

able where found on the 20th day of May, and that case binds this court. Whether boats found in the morning in Camden, and there assessed, can be also assessed in another place to which they may move in the evening of the same day was not decided, and this case does not require its solution, because this assessment and the proceedings thereunder must be set aside for the following reasons: The boats were not assessed by the assessor, but added to the duplicate by the order of the president of the county board of taxation as omitted property, and while section 4 of the act of 1906, Comp. Statutes 5118, authorizes the county board to add any property to the duplicate which has been omitted or overlooked, and to do all things necessary for the taxation of all property, there is no record in this case showing any such action. All that appears is that the president of the board directed the secretary to add to the duplicate what now appears. The president has no such power. It can only be done by the action of the board, and no such action is shown.

[1] This court has held that the proceedings of the county board, it being a special tribunal, must show on its record the necessary facts to give jurisdiction (*Eatontown v. Electric Co.*, 75 N. J. Law, 459, 68 Atl. 342), and the statute creating the county boards of taxation, among other things, declares that "the said board shall keep a full record of its proceedings." P. L. 1906, p. 210, § 3; C. S. 5117, § 37r.

In this case there is no such record, nor does it appear the county board took any action in the matter. All that the testimony shows is that the president, of his own motion, directed the assessment without even the formality of ascertaining the true value of the property assessed.

[2] There is another reason why this assessment is illegal. The power of the county board to add omitted property is based upon the authorization given to the board charged with the revision of taxes by section 28 of "An act for the assessment and collection of taxes" (P. L. 1903, 394; C. S. 5107), which power is conferred upon the county boards of taxation by section 9 of a supplement to the act last mentioned (P. L. 1906, 210; C. S. 5120); but, to make such action legal, immediate notice must be given to the owner of such addition and also of the time and place of the next meeting of the board. The notice prescribed by the statute was not given the prosecutor, and he had no such knowledge of the action of the board as the statute entitled him to have until his boats were advertised for sale.

The assessment and proceedings thereunder will be set aside.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

RAWLINGS et al. v. DUANE H. NASH, Inc.
(Court of Appeals of Maryland. Feb. 2, 1912.)

1. SALES (§ 71*) — CONTRACTS — CONSTRUCTION.

A contract, giving defendant firm the exclusive right to sell plaintiff's harrows in certain territory for one year, and containing an order from defendant for a certain number of them, did not require plaintiff, after delivery of such number, to sell others beyond the reasonable needs of the firm's trade during such period.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189-196; Dec. Dig. § 71.*]

2. DAMAGES (§ 6*) — BREACH OF CONTRACT — DAMAGES.

Where the seller, under a contract for the exclusive sale of agricultural implements in certain territory for a fixed period, violates the contract by refusing to sell a sufficient number of implements to satisfy the requirements of the buyer's business in such territory for such period, the buyer can recover only such resulting loss of profits as can be proved with reasonable certainty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. PRINCIPAL AND AGENT (§ 36*) — SALES AGENCY CONTRACTS — BREACH.

A contract, giving defendants the exclusive right to sell plaintiff's agricultural implements in certain territory for a period ending November 1st, was not breached by plaintiff sending out a notice in the preceding July informing the trade that after November 1st a third concern would sell plaintiff's product in that territory.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 57-58½; Dec. Dig. § 36.*]

4. TRIAL (§ 260*) — INSTRUCTIONS — REFUSAL — MATTER COVERED.

An instruction covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Duane H. Nash, Incorporated, against J. S. Rawlings and another, trading as Rawlings Implement Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Rignal W. Baldwin and William S. Bryan, Jr., for appellants. Henry P. Hynson, Jr., and W. Calvin Chestnut, for appellee.

URNER, J. The appellee corporation is engaged in the manufacture of harrows under a patent which it controls, and the appellant partnership deals in agricultural implements. These parties on August 1, 1909, entered into an agreement in writing by which the company appointed the firm as its agents for the sale of the harrows in Maryland and certain other states for the period of one year commencing November 1, 1909. The agreement contained an order from the firm purchasing absolutely 1,500

harrows at prices listed according to the sizes required, which were to be specified on or before October 15, 1910. The prices for extra coulters, or teeth, were also stated; but as to these there was no specific order in the contract. There were provisions, among others, to the effect that the goods specified in the agreement should be delivered between the dates indicated, unless deliveries were prevented by designated causes, and that it should be the duty of the firm and its subagents to make a judicious distribution of all printed matter furnished and take every opportunity to advertise the implements, by canvassing or otherwise, and to see that all harrows sold were properly set up and started. There was no option reserved to either of the parties for a renewal of the contract, and the appellee appointed another agency, to succeed the appellants, at the expiration of their term, for the exclusive sale of the harrows in the territory mentioned. In pursuance of the agreement referred to, the appellee company delivered to the appellants the 1,500 harrows as stipulated, and upwards of 17,000 coulters, but declined to sell them any in excess of those quantities. In the present suit by the company to recover an unpaid balance due under the contract, the principle question is whether, and to what extent if at all, the defendant firm is entitled to recoup the loss it claims to have suffered in consequence of the plaintiff's refusal to fill additional orders.

[1] The defendants contend that, under the terms of the contract, the plaintiff was bound to deliver all the harrows and coulters ordered by them during the stated period, and they insist that they have a right to recoup in damages the difference between the purchase and customary reselling prices of the goods covered by the orders which the plaintiff rejected. The statement of account upon which the defendants rely agrees with that of the plaintiff in showing an indebtedness of \$7,023.56 for implements and extra parts furnished under the contract; but it claims \$4,574.50 by way of recoupment for profits on unfilled orders for 820 harrows and about 11,000 coulters. The court below accepted the defendants' theory to the extent of holding that their right of purchase under the agreement, during the prescribed period, was not restricted to the quantity specifically mentioned; but, by its own instruction, it limited the recoupment to such damages, if any, as the jury should find the defendants sustained by reason of the failure of the plaintiff to furnish goods "sold by the defendants and ordered by them from the plaintiff" during the year of the contract, and which the latter failed or refused to supply. It was agreed at the trial that the amount which it might be permissible for the defendants to recoup on account of unfilled orders, under the court's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instruction, was \$161.50 (which, according to the evidence, was the profit on about 100 harrows sold in anticipation of the orders being filled), and that this amount, deducted from the bill rendered by the plaintiff, would leave a balance of \$6,862.16 for which the jury would be warranted in giving a verdict for the plaintiff, with interest in their discretion; the right being reserved to the parties to have reviewed in this court the questions involved in the rulings of the court below. The verdict was for the precise amount stated, and the defendants have thus been awarded by way of recoupment all the damages they claim on account of the rejected orders in so far as they would have supplied sales actually effected. In view of the successful assertion of their claim to this extent, the only question we need consider in this connection is whether their contention as to recoupment for damages on account of *prospective* sales should be sustained.

There is nothing in the agreement between the parties which, in our opinion, can be properly construed to mean that the defendants had an option for the purchase of as many of the implements as they might choose to order within the year of the contract. If this had been the understanding of the parties, they would doubtless have employed the very simple terms which would have readily and clearly expressed that intention. As the contract does not contain such a provision, and as the agency which it creates, and upon which the defendants rely, is *for the resale of the harrows within the prescribed time and area*, it is clear that the duty of the plaintiff to sell the implements to the defendants could not be held to extend further than the restricted purposes of such resales required. The defendants therefore were not entitled to purchase from the plaintiff beyond the reasonable needs of their trade existing during the time they were authorized by the agreement to deal in the plaintiff's patented commodity.

[2] If the plaintiff violated the contract by refusing to sell to the defendants a sufficient number of the implements to satisfy the requirements of the business in the localities and for the period specified, the defendants would have an undoubted right to recover for such resulting losses as could be proved with reasonable certainty. In cases like the present, where the contract relates to articles which can be procured only from the party charged with default, and where the purchase is understood to be made for the purposes of resale, the rule is that the vendee is entitled to recover the profits he would have derived from reselling the goods if they had been delivered by the vendor according to the agreement. But this loss must be shown by evidence which does not leave the question open to speculation and conjecture. Note to *Guetzkow v. Andrews*, 52 L. R. A. 219, 223; 35 Cyc. 645;

Liggett Axle Co. v. Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; *Wakeman v. Wheeler & Wilson*, 101 N. Y. 209, 4 N. E. 264, 54 Am. Rep. 676.

It is stated generally in *Lanahan v. Heaver*, 79 Md. 418, 29 Atl. 1037, that: "Wherever it is reasonably certain or apparent that profits would have been realized had the contract been completed according to its terms, and the profits of the bargain are the only thing purchased or contracted for, and are the direct and immediate fruits of the contract, there, though the *amount* of the profits be open to dispute or controversy, still such profits as the evidence shows would have resulted but for the breach of the contract by the defendant are a legitimate element of damages; but whenever it is purely problematical whether any profits would have been realized at all, by reason of contingencies which might never happen there, without regard to any uncertainty as to mere *amounts*, probable profits cannot be recovered, because too speculative, indefinite, and remote."

In the case now before us there is no doubt as to the parties having contracted with a view to the profits to be derived from a resale by the defendants of the implements which the plaintiff agreed to furnish. With respect to the 1,500 harrows for which the agreement specifically provides, and which were duly delivered, the obligation of the plaintiff has, of course, been fully discharged. To the extent, also, to which the defendants made sales in anticipation of additional implements being supplied, their claim of recoupment has been recognized by the instruction of the court and the verdict of the jury. If they are to be accorded a larger measure of recovery, it can only be upon evidence showing with the due degree of certainty that they were prevented from making further sales, within the limited period of the contract, by the plaintiff's refusal to sell them goods reasonably required for that purpose.

The record shows that the defendants had on hand at the expiration of their agency 322 harrows, as against which they had reselling orders for only 52; and there is nothing to indicate that their supply of coulters was not adequate for the year's business. In this situation, with a considerable part of the stock actually furnished the defendants remaining unsold at the end of the contract period, it would be obviously impracticable to determine with any degree of certainty that they were deprived of the benefit of prospective sales by the failure of the plaintiff to make additional deliveries. It is, of course, not suggested that the defendants were entitled to accumulate implements to be sold after the termination of their contractual relations with the plaintiff, and they would certainly not have been justified in withholding from sale the harrows they had on hand while insisting upon a further

supply. If it be assumed that the plaintiff's refusal to fill the extra orders embarrassed the defendants to some extent in their efforts to increase their sales, yet the fact that they were left with so large a stock of the harrows at the end of the season makes it problematical, to say the least, whether they would have sold any in excess of that quantity, even though the plaintiff had fully complied with their demands. It is apparent therefore that if the jury had been instructed, as the defendants proposed by their first and third prayers, to allow by way of recoupment the difference between the prices they were to pay for the harrows and coulters ordered and the prices at which they would have been resold, an award of damages to the defendants must have been altogether speculative. While a party to a contract who has been injured by its violation is entitled to such appropriate damages as he is able to prove with reasonable certainty, it would not be just to permit his recovery to be based merely upon conjecture as to the fact and extent of his loss. This principle has been applied, under varying circumstances, in *Western Union Tel. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 Ann. Cas. 736; *Winslow Elevator Co. v. Hoffman*, 107 Md. 640, 69 Atl. 394, 17 L. R. A. (N. S.) 1130; *Central Trust Co. v. Arctic Ice Machine Mfg. Co.*, 77 Md. 202, 26 Atl. 493; *Crabbs v. Koontz*, 69 Md. 61, 13 Atl. 591; *Clagett v. Easterday*, 42 Md. 628; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; as well as in *Lanahan v. Heaver*, supra.

The second prayer of the defendants proposed to permit recoupment of the "profits which would have been received with reasonable certainty by the defendants from acting as the plaintiff's sales agents" during the contract period. It was intended by this prayer, as we understand, to present the question, which was also raised upon a number of exceptions to the exclusion of evidence, as to whether profits earned by the defendants from the sale of the plaintiff's products, under separate contracts for the two previous years, could be considered for the purpose of estimating the loss alleged to have been sustained under the contract in suit. The contention was made that the refusal of the plaintiff to furnish the additional implements ordered practically destroyed this branch of the defendants' business for the latter part of the contract year, and that in this aspect of the case the defendants' damages could be measured by the profits earned in the preceding periods.

There is a class of cases in which evidence of profits usually earned has been admitted as the basis of recovery for the destruction or interruption of an established business. It has been held by this court that the loss of such profits is a proper measure of damages in cases where, as the result of alterations negligently made by a landlord the

storeroom of his tenant was rendered unfit for occupancy (*Evans v. Murphy*, 87 Md. 503, 40 Atl. 109); where the stock in trade of a store was wrongfully taken in execution (*Strasburger v. Barber*, 38 Md. 103); where by reason of improvements or excavations negligently made on adjoining premises the plaintiff's building was injured to such an extent as to stop temporarily the business he was there conducting (*Shafer v. Wilson*, 44 Md. 268; *Brown v. Werner*, 40 Md. 21); where a physician resumed a practice which he had sold with its good will to another (*Warfield v. Booth*, 33 Md. 63); and where the operation of a distillery was affected by the obstruction of a millrace upon which it was dependent (*Lawson v. Price*, 45 Md. 123). In each of these cases the suit was for interference with an entire and established business which the plaintiff had the right to carry on indefinitely and which had been conducted for such a length of time as to make possible the ascertainment of its profits with reasonable certainty. In the present case such conditions do not exist. The complaint here is simply of the violation of a contract to furnish for a limited time any territory commodities which the defendants might have resold in the course of their general and uninterrupted business as dealers in agricultural supplies. It appears, moreover, that in each of the two preceding years the defendants' purchases from the plaintiff were less than those of which they actually received the benefit under the agreement in controversy, and there is consequently no proper basis of comparison upon which to estimate the prospective profits here claimed. In our judgment this is not a case to which the principle invoked by the defendants is applicable.

[3, 4] The defendants' fourth prayer referred to a notice sent out by the plaintiff in July, 1910, informing the trade that after November 1st the John Deere Plow Company would sell the harrows manufactured by the plaintiff in the territory covered to that date by the defendants' contract. This prayer sought to instruct the jury in effect that if the defendants, during the period of the agreement, in good faith ordered harrows and coulters which they could have sold before the expiration of the agency except for the notice in question, and if the jury should find that the plaintiff refused to furnish the implements so ordered, then the defendants were entitled to recoup the difference between the prices they would have had to pay the plaintiff for the implements and the prices for which they would have been resold. The primary theory of this prayer is that the notice to which it refers was a breach of the plaintiff's implied obligation to refrain from any interference with the defendants' agency during the time for which it was created. In support of this view, it had been proposed in the course of the trial

to ask one of the members of the defendant firm whether the notice sent out by the plaintiff affected the resales; but upon objection the question was disallowed. This ruling was doubtless based upon the conclusion, which we think clearly correct, that no breach of contractual duty could be imputed to the plaintiff merely because it informed the trade that at the date fixed for the termination of the defendants' agreement another dealer would sell the plaintiff's products. As the defendants' agency was not to continue after November 1st, and as the notice plainly indicated that the succeeding agents could not sell before that date, it is evident that this act of the plaintiff could not have prejudiced the defendants' interests. The prayer last referred to could therefore not be regarded as sound in principle, even if the record contained evidence to sustain its hypothesis. The only other instruction requested by the defendants was fully covered by that formulated by the court in lieu of the prayers offered.

There were 57 exceptions relating to the admissibility of evidence. The various questions they raise are answered generally by the views we have already expressed, and a particular consideration of them is obviated by our conclusion that the instruction to the jury, and the agreement as to the amount of profits recoverable, afforded the defendants the full measure of recoupment to which they were entitled under the special circumstances of this case.

Judgment affirmed, with costs.

TURNER v. KING et al.

(Court of Appeals of Maryland. Feb. 2, 1912.)

1. NUISANCE (§ 3*)—SUBJECTS OF PROTECTION—DWELLING HOUSE—NATURE OF INJURY.

The owner of a hotel, which he also used as a residence for himself and family, is not entitled to enjoin the erection of a building on the public square opposite him upon the ground that that building will injure his property because depriving him of shade, where it appeared that he and his guests could not, without crossing the street and going into the public square, enjoy the shade trees, which were over 75 feet away; the injury thus not being such a nuisance as to injure his dwelling house.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.*]

2. COUNTIES (§ 196*) — SUBJECTS OF PROTECTION—UNLAWFUL ACTS OF COUNTY OFFICIALS.

Unless peculiarly injured, an ordinary taxpayer is not entitled to an injunction to restrain the unlawful or ultra vires acts of county or state officials, so that a taxpayer not peculiarly injured is not entitled to an injunction to prevent county commissioners from allowing the erection of a private building in the courthouse square.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

Appeal from Circuit Court, Calvert County; Fillmore Beall, Judge.

Bill by Thomas B. Turner against Isaac N. King and others. From a decree for defendants, complainant appeals. Affirmed.

Argued before BOYD, C. J., and PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

John B. Gray, for appellant. J. B. Bunting, for appellees.

BURKE, J. The appellant is a resident and taxpayer of Calvert county, and is the owner of a hotel in Prince Frederick, in that county, called the Hotel Calvert, in which he resides with his family, and in which he entertains such guests and customers as may present themselves. The ground upon which the hotel is erected borders on the line of a tract of land owned by Calvert county, and which is under the control of the county commissioners of that county. This tract is known as the "courthouse green or lot," and was acquired by the county under the authority of the Act of 1725, c. 11. There is a county road in front of the hotel property of the plaintiff, and across this road at the distance of about 75 feet from the hotel and on the courthouse lot there is a grove of fine shade trees, "affording" as the bill alleges, "shade to the guests of the hotel in summer, and are the only trees which afford any protection to the guests of the hotel in the heated season." On the 25th of April, 1905, the county commissioners of Calvert county leased a part of the courthouse lot to Isaac N. King and Clarence T. Hutchins, their personal representatives and assigns, for a period of 99 years. The lessees covenanted to pay \$1 on the 25th of April in each and every year, and they were granted by the lease the privilege to build and maintain on the leased lot a frame building. This lease was not recorded until the 23d day of May, 1911. The lot leased lies across the county road mentioned, and directly in front of the plaintiff's hotel and in the grove of shade trees referred to. The lessees began the erection of a building upon the lot, and had progressed with the construction to the point of placing the rafters and upper joists in place, when the bill in this case was filed against them and the county commissioners of Calvert county, praying, first, that a preliminary and perpetual injunction be issued against King and Hutchins enjoining them from erecting the building upon the lot so pretended to be leased to them, and restraining them and the county commissioners of Calvert county and each of them from doing any act or thing or exercising any power or authority under or by virtue of said pretended lease; second, that said lease be declared null and void and of no valid force or effect; third, for further and other relief.

The grounds upon which this relief was asked are stated in the eighth, ninth, and

tenth paragraphs of the bill, which are as follows:

"(8) That the erection of said building will practically destroy the shade trees aforesaid and deprive your orator and his guests of the comfort thereof, and will also deprive your orator and other citizens of Calvert county of the use of the ground occupied by said building and the comfort of the shade afforded by the trees in the heated season.

"(9) That the erection of said building will interfere seriously with your orator's reasonable comfort and occasion a material injury to his property by diminishing its value as a dwelling and hotel.

"(10) That the erection of said building will not only interfere with your orator's reasonable comfort and occasion a material injury to his property, but as a taxpayer and citizen of Calvert county he will be restrained from the free use and enjoyment of the property which belongs exclusively to Calvert county and the citizens thereof, and which was bought by the county for public, and not for private, uses."

The answer of the lessees denied that the erection and maintaining of the building would destroy or in any manner injure the shade trees growing on the courthouse lot, or that it would deprive the plaintiff or any one else of the comfort thereof. It averred that the courthouse lot contains about three acres of ground, and that more than two acres thereof are unoccupied or used except as public grounds surrounding the courthouse and other buildings, and that the use of the small lot of ground leased would cause no material inconvenience or injury to the citizens of the county, or materially restrict them in the use of the public grounds. It further denied that the erection and maintaining the building would seriously interfere with the reasonable comfort or occasion a material injury to the plaintiff's property or diminish its value, or materially interfere with the plaintiff's reasonable use and enjoyment of the public grounds or the exercise of his right therein. No answer was filed by the county commissioners. A preliminary injunction was issued on the bill. The lessees moved to dissolve the injunction. This motion was heard upon bill, answer, and testimony, and from the order of the court dissolving the injunction the plaintiff has appealed.

[1] It is settled by a long line of decisions in this state and elsewhere that, "to justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented, a court of chancery does not interfere. It must appear to be a case of real injury, and where a court of law would award substan-

tial damages. *Walter v. Selfe*, 4 De G. & Sin. 323; *Jackson v. Newcastle*, 33 L. J. Ch. 698; *Soltan v. De Held*, 2 Sin. N. S. 159; *Kerr on Inj.* 350. Where, however, such is shown to be the case, the power of the court is clear, and it will interpose by injunction." *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516; *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, 32 Am. St. Rep. 420; *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; *Bona parte v. Denmead*, 108 Md. 174, 69 Atl. 697.

The allegations of the bill that the erection and maintenance of the proposed building would materially diminish the value of the plaintiff's property, and seriously interfere with the reasonable use and comfortable enjoyment of it by him and his family and guests, are wholly unsupported by the evidence. The plaintiff did not testify in his own behalf. None of the shade trees are on his property, and neither he nor the guests of his hotel or his family could derive any benefit from the shade of these trees without crossing the public highway to the courthouse lot, a distance of about 75 feet, where he and they might enjoy the shade in common with all the other citizens of Calvert county.

The testimony is also clear that the proposed building would interfere very little with the public use of the grounds, and that the enjoyment by the public of the shade trees would be but slightly interfered with. The testimony shows that there are three shade trees near the proposed building, one about three feet therefrom, one about eight feet, and the other about ten feet, and that these trees would be injured only to the extent of cutting off a few small limbs to give place to the roof. There is no evidence that the value of the plaintiff's property would be diminished as alleged, and it is shown that no material inconvenience, interference, or discomfort to the public would result from the erection of the building. It is therefore evident that the plaintiff cannot maintain this bill upon the alleged ground that the erection of the proposed building would result in serious damage to his property and to his comfortable enjoyment and occupation of it.

[2] Assuming, without so deciding, that the county commissioners had no power to make the lease, and that the erection of the building upon the public property would constitute a public nuisance, since it appears by the evidence in the case that the appellant would suffer no damage different in kind or degree from that sustained by the public at large, he has no standing in a court of equity to maintain his bill. The rule is well settled that private citizens cannot restrain public wrongs, unless they allege and prove damage to themselves dif-

ferent in character from that sustained by the public generally, nor can taxpayers restrain official acts upon the mere ground that they are ultra vires. *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332; *Crook v. Pitcher*, 61 Md. 510, and other cases.

In *Bryant and Others v. Logan and Others*, 56 W. Va. 141, 49 S. E. 21, 3 Ann. Cas. 1011, taxpayers sought to restrain the use of part of the city park of Petersburg which the defendants had leased from the city. The court held, citing many authorities, that citizens and taxpayers simply as such, stating no special harm to themselves different from that sustained by others, had no standing to file a bill. This is also the Maryland rule. In *Davidson and Others v. Baltimore City*, 96 Md. 509, 53 Atl. 1121, where residents and taxpayers of the city asked for an injunction to restrain the mayor and city council and the board of school commissioners from doing certain things which the plaintiffs alleged to be in violation of law, this court, after sustaining the power of the city to do the things complained of, said: "But, apart from all that has been said, it seems to be clear that the complainants, 'suing, as taxpayers,' have no standing in court to maintain this bill. The charge is that the board of school commissioners are about to change the use of the building from that of the English-German school No. 1 to that of a colored high school. It perhaps may not be difficult to perceive how the establishment and maintenance of a colored school in the building might result injuriously to the property in the immediate vicinity. But the complainants do not charge that their property will be specially injured by the proposed change of use. The scope of the averments of the bill in this respect is that all of the property in the city will be injured, a conclusion very difficult to reach. If the proposed change of use will in fact specially affect the complainants either as to themselves or to their property, it should have been so stated in the bill. That was necessary to complete the jurisdiction of the court. To warrant a court in issuing an injunction in such a case, 'it must be informed by the bill itself, and its accompanying exhibits, of every material fact constituting the case of the plaintiff in order that it may be seen whether there is a just and proper ground for the application of so summary a remedy.' *Lamm v. Burrell*, 69 Md. 274 [14 Atl. 683]. The taxpayer cannot invoke the restraining power of a court of equity unless it be shown by proper averments in the bill that the municipal corporation or its officers are acting ultra vires or assuming or exercising a power over the corporate property or funds which the law does not confer upon them, and that 'such unauthorized acts may affect injuriously the rights and property of the

parties complaining.' *St. Mary's Industrial School v. Brown*, 45 Md. 327. Public wrongs are not to be redressed at the suit of individuals who have no other interest in the matter than the rest of the public. To give them a standing in a court of equity, they must allege and show that by the wrong committed they suffer some special damage, or that they have 'a special interest in the subject-matter distinct from that of the general public.' *Mayor, etc., v. Keyser*, 72 Md. 108, 19 Atl. 706; *Mayor, etc., v. Gill*, 31 Md. 395."

For the reasons stated, the order of the lower court will be affirmed.

Order affirmed, with costs.

FRIZZELL v. SULLIVAN.

(Court of Appeals of Maryland. Feb. 2, 1912.)

1. APPEAL AND ERROR (§ 927*)—DIRECTED VERDICT—REVIEW.

The court on appeal from a judgment on a directed verdict for defendant must assume as true plaintiff's evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. MASTER AND SERVANT (§ 125*)—INJURIES TO SERVANT—NEGLIGENCE.

A building contractor who borrowed a block and tackle to raise a strut into position, and who neither personally nor by his representative on the work inspected the rope which was insufficient for the purpose, and which broke in consequence of dry rot, readily ascertainable by proper inspection before use, was guilty of negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

3. MASTER AND SERVANT (§ 203*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The doctrine of assumption of risk cannot be invoked until the master has performed his duty of supplying his servant a reasonably safe place in which to work or with suitable appliances, taking into consideration the work to be done.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

4. MASTER AND SERVANT (§ 187*)—INJURIES TO SERVANT—"VICE PRINCIPAL."

An employé is a vice principal, whatever his comparative rank, or his authority to command or employ or discharge employes, where he represents the master in the performance of the nondelegable duty to provide suitable appliances for the performance of a coemployé of the work assigned to him (quoting 8 Words and Phrases, p. 7314).

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 422-426; Dec. Dig. § 187.*]

5. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—VICE PRINCIPAL.

A foreman in charge of construction work was directed by the contractor to procure materials necessary for the work, and it was left to him to determine whether appliances provided by the contractor were adequate, with authority to borrow additional appliances. He also had authority to hire and discharge men.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contractor, giving orders to his men, gave them through the foreman. The contractor provided a hoisting apparatus but the foreman borrowed a block and tackle, and while in use the rope, in consequence of dry rot, broke, injuring one of the men. *Held*, that the foreman was a vice principal, and the contractor was guilty of negligence in borrowing and using the defective appliances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 427-435, 437-448; Dec. Dig. § 189.*]

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Walter Frizzell against Charles Sullivan. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

German H. H. Emory and Joseph W. Cox, for appellant. William C. Smith, for appellee.

STOCKBRIDGE, J. At the trial of this case below upon the conclusion of the plaintiff's evidence the court granted a prayer directing a verdict for the defendant, upon the ground that the plaintiff had not produced legally sufficient evidence to show negligence for which the defendant was responsible. In accordance with such direction, the jury rendered its verdict in favor of the defendant, and the plaintiff appealed.

[1] The suit was one to recover damages for personal injuries alleged to have been suffered by reason of the failure of a master to provide suitable implements or machinery to enable the plaintiff, who was a structural iron worker, to properly perform his work, and, in the condition in which the case comes here, the court is bound to assume the truth of the plaintiff's evidence, which on most points is entirely uncontradicted.

There are two questions for this court to pass upon, namely, whether or not there was such negligence as to entitle the plaintiff to recover, and, secondly, in the event of an affirmative reply to the first proposition, whether the negligence was that of the master, or for which he was legally liable, or whether it was the negligence of a co-employé for which there was no liability on the part of the master.

[2] On the first proposition, to wit, negligence, there can be no question. The plaintiff was one of a force of men engaged in the erection of a building in the city of Washington, and employed upon the iron or steel work of the building. On the day of the injury a strut was being raised into position with a block and tackle which had been borrowed for that purpose, when the rope parted, and the strut fell upon and injured the plaintiff. An examination of the rope showed that it was weak and unsuitable for the purpose for which it was being used as the consequence of dry rot, and that de-

fect in it could easily have been ascertained by proper examination or inspection of it before its use began. The evidence also tends to show that there had been no inspection of the rope at all upon the part of the defendant contractor, or those representing him upon the job. This was such palpable negligence that a discussion of the evidence in detail upon this point would be superfluous.

[3] The second question in the case is not as easily disposed of. The first point to be considered is, Was or was not the risk one which was assumed by the employé as an incident to his employment? This must be answered in the negative, because the doctrine of the assumption of risk can never be invoked until after it is shown that the master has performed his full duty towards the servant by supplying him a place reasonably safe in which to perform his work, or with tools and machinery proper and suitable in their character for the work to be performed, taking into consideration the work to be done. This is substantially the rule laid down in this state in such cases as *Eckhardt v. Lazaretto Co.*, 90 Md. 177. 44 Atl. 1017; *Penna. Steel Co. v. Nace*, 113 Md. 460, 77 Atl. 1121.

[4] The question then arises whether the negligence in this case was the negligence of a fellow servant, for which the master is not responsible, or whether it was that of a vice principal rendering the master liable. The difficulty in any given case is to draw the line at which the person whose negligence occasioned the injury ceases to be a coemployé and becomes a vice principal. The trend of modern authorities is to make "the test of liability, not the safety of the place or appliance at the time of the injury, but the character of the duty the negligent performance of which caused the injury." *Soffield v. Guggenheimer Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417. In *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159, 23 Am. St. Rep. 160, it is expressed as follows: "When it is sought to hold the master liable for the act or neglect of his foreman, the question to be considered is whether the negligence complained of relates to anything which it was the duty of the principal to do." And in *So. Ind. Ry. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460, it is said: "The controlling consideration in determining whether an employé is a vice principal is not his comparative rank, or his authority to command nor to employ or discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them." See, also, *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801; *Moore v. Wabash Co.*, 85 Mo. 596; and cases collected in note to *Lafayette Bridge Co. v.*

Olsen, 54 L. R. A. 33, and in 8 Words & Phrases, p. 7314; Hamlin v. Malster, 57 Md. 287; and in the case of Slater v. Chapman, 67 Mich. 523, 35 N. W. 106, 11 Am. St. Rep. 593, where a workman engaged in the erection of a building was injured through the negligence of one having the full control of the erection and of the men, the master was held liable.

[8] The individual whose negligent act was the occasion of the injury in this case was Sam Frizzell, the brother of the plaintiff. Sam Frizzell was the foreman in charge of the work for the defendant. The character of his duties are thus described by the plaintiff himself: "Mr. Sullivan gave my brother Sam Frizzell, the foreman, charge of that work, and he had full charge. If he didn't have materials to do the work sufficient to do that work, he told him to go and borrow it, not only once, but several times to my knowledge, which he did borrow." Sam Frizzell, also, according to the testimony of this witness, was given the authority to hire and discharge men. The plaintiff further testifies that in pursuance of the authority given by Mr. Sullivan the foreman did on several occasions borrow appliances from Brady Bros., boiler makers, who were working near by, and, further, that on the day in question the rope, the parting of which occasioned this accident, was borrowed by Sam Frizzell. This evidence is confirmed by the testimony of the witness Humphries, and it further appears from the evidence of this witness that the defendant Sullivan did not give any orders directly to the men who were employed, but that, in case he desired to have anything done, his directions were given to Sam Frizzell, the foreman. The cross-examination of the witnesses was intended to elicit the fact that the defendant had provided a derrick and a steel cable and a steam hoisting apparatus, and, if this had been used, the accident would not have occurred. It is not entirely clear from the evidence why on this particular occasion the machinery provided by the defendant was not used, whether it was that to employ the defendant's machinery for raising the strut would have occupied more time and that the men were in haste to finish, or whether the machinery, even if it had been used, was not adequate. The preponderance of evidence is to the latter view for the reason that it was testified, without contradiction, that upon the morning following the accident, when the appliances of the defendant had been so shifted into position as to make them available for the raising of this strut, it was still necessary to resort to the use of a block and tackle which were borrowed. It is clear, however, from the testimony, such as has been referred to, that there was a large amount of discretion as to the use of appliances conferred by the defendant upon his foreman, Sam Frizzell;

that it was left entirely to him to determine whether or not the appliances provided by the defendant for doing the work were adequate, and with authority to him to borrow additional appliances whenever in his judgment those of the defendant's providing were insufficient. This was clearly an attempt upon the part of Sullivan, the master, to delegate to his foreman, Sam Frizzell, the selection of proper and suitable machinery or appliances for doing the work in question, and the accident resulted from the negligence of Sam Frizzell in failing to properly inspect the appliances borrowed and used. It is firmly settled law everywhere that the duty of providing such suitable appliances and machinery for the performance of his work is an obligation which the master owes to the servant, and it has been distinctly held in *Manuel v. Cumberland*, 111 Md. 196, 73 Atl. 705, and *Penna. Steel Co. v. Nace*, 113 Md. 460, 77 Atl. 1121, that this duty is not a delegable one. It therefore follows that as between the parties to this suit the foreman, Sam Frizzell, was in position of vice principal, and therefore for his negligent act the defendant Sullivan is liable. The action of the lower court, therefore, in directing a verdict in favor of the defendant was error, and the judgment must be reversed and cause remanded for a new trial.

Judgment reversed, with costs to the appellant above and below.

STORY'S ADM'R v. HALL.

(Supreme Court of Vermont Windsor. May 14, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 537*) —CONVERSION OF FUNDS—EVIDENCE.

That funds were used by an executor to pay his individual debts may be found from the fact that shortly after withdrawing such odd sums as \$1,617.31 and \$1,368.87 those precise sums were applied to his personal obligations, though he had co-obligors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. § 537.*]

2. EXECUTORS AND ADMINISTRATORS (§ 531*) —BONDS—LIABILITY.

Where an executor was also the residuary legatee's executor, a probate decree ordering him to pay over to himself as the residuary legatee's executor a specified amount did not discharge his surety on the bond given in the other capacity, where he filed no inventory or account of the residuary legatee's estate, and subsequently misapplied funds standing in his name as executor in the first capacity to payment of his own personal debts, instead of paying them over to himself under the decree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2406-2430; Dec. Dig. § 531.*]

Exceptions from Windsor County Court; George M. Powers, Judge.

Action by Sarah W. Story's administrator against A. K. Hall. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, and HASELTON, JJ.

William W. Stickney, John G. Sargent, Homer L. Skeels, and Davis & Davis, for plaintiff. William Batchelder and Bert E. Cole, for defendant.

HASELTON, J. In this action the administrator de bonis non of the estate of Sarah W. Story seeks to recover from the defendant Hall, bondsman for Joseph C. Enright as executor of the estate of Henry L. Story. The facts were found by the court. The sum which the plaintiff was entitled to recover, if he could recover at all, was agreed upon. On the facts found the court rendered judgment for the plaintiff for the agreed amount. The defendant excepted. The bond sued on was filed August 1, 1900, on which day the will of Henry L. was admitted to probate. The residuary legatee of Henry L. was his wife, Sarah W. After his death, she made a will in which Enright was named executor. The widow died, and her will was admitted to probate June 9, 1902. November 30, 1903, the probate court rendered a decree setting forth that there was in the hands of Enright, as executor of the will of Henry L., \$8,473.72 in securities and money, decreeing such residue to Enright as executor of the will of Sarah W. to become a part of her estate, and ordering him as executor of the will of Henry L. to pay over and deliver such residue in accordance with the decree. Enright filed in court no inventory of the estate of Sarah W., and filed no account of her estate.

[1] At the time of this decree a part of the residue consisted of a deposit in the Windsor Savings Bank of an amount which, with interest accruing January 1, 1904, amounted to \$1,617.31. This deposit stood in the name of Henry L. Story. On the date last named Enright withdrew this deposit, giving the treasurer of the Savings Bank a receipt signed as executor, and on the same day there was indorsed on a note held by the same bank, and signed by Enright and others, the exact sum of \$1,617.31. The court finds that, if these facts warrant the finding, the Henry L. Story deposit was applied on the note of which Enright was one of the signers. At the time of this decree a part of this residue consisted of a deposit in the Springfield Savings Bank of a sum which, with the interest accruing January 1, 1904, amounted to \$1,368.87. It stood in the name of Enright as executor of Henry L. Story's estate, and on the latter date Enright withdrew that sum by giving the treasurer of the bank an order signed by him as executor of Henry L. Story's estate, and three days later he paid that exact sum on a personal obligation of his to the Windsor Savings Bank. The court finds that, if the evidence is sufficient to support the finding, the \$1,368.87 drawn from the Savings Bank was disposed of by the payment of that

identical sum on Enright's private obligation. At the time of the decree a part of the residue covered by the decree was a deposit in the Ottaquechee Savings Bank, standing in the name of Enright as executor of H. L. Story's estate, of a sum which, with the interest accruing thereon on January 1, 1904, amounted to \$1,322.75. This was drawn out by Enright January 2, 1904. This amount was embraced in a check given by the bank, and this identical check was on the same day deposited in the Windsor Savings Bank to the credit of Enright, or, rather, to that of a firm of which he was a member. At the time of the decree in question, a part of the residue decreed was a deposit in the Bellows Falls Savings Bank standing in the name of Enright as executor of H. L. Story's estate. This deposit, with the semiannual interest added January 1, 1904, amounted to \$828.25. This was not disturbed until June 25, 1904, when by an order signed by Enright, in the character in which the deposit stood, he directed the Bellows Falls Bank to pay the amount of the deposit to the Windsor Savings Bank. Pursuant to the order, a cashier's check, dated July 1, 1904, was sent to the Windsor Savings Bank, and a note executed by Enright upon which was due the sum of \$2,320.13 was paid and taken up. A check for \$1,545.32 in Enright's favor was received by the bank on the same day, and these two checks exceeded the sum due from Enright by \$53.44. The exact sum of \$53.44 was credited to Enright in his account with the bank. The court found that, if the evidence recited warranted the finding, the \$828.25 went in to help pay Enright's note above mentioned.

The defendant objected to the evidence on which this finding was based, and to the evidence on which the similar findings, already referred to, were based, claiming that it was insufficient in each instance to support the finding; that the bare facts recited have no tendency to support the findings; that, at most, they give rise to a mere suspicion or guess. In each instance the court submits the question of the sufficiency of the evidence by saying that, if it is insufficient, it makes no finding as to the disposition of the respective sums drawn from the various banks mentioned. But in each instance the correspondence to a cent of the amount drawn and the amount contemporaneously applied to the benefit of Enright in his private character was strong evidence to sustain the finding of the court. Judicial reasoning upon evidence is not a peculiar and obscure mental process, and the force of the evidence upon which the court based its findings is obvious. *Barney v. Quaker Oats Co.*, 85 Vt. —, 82 Atl. 113, 127. That the precise correspondence of sums of money consisting of dollars and cents and represented by numerous figures may be proof of identity was very recently held. *American Surety Co. v. Gaskill's Adm'r*, 85 Vt. —, 82 Atl. 218, 219. Any

abuse of this process of inference is readily detected, as is seen by reference to *Hammond's Adm'r v. Hammond*, 76 Vt. 437, 58 Atl. 724. There a long account consisting of numerous small items would have been barred by the statute of limitations if a credit of \$1.20 for butter was evidence that the credit went in extinguishment of specific debt items, and was not a general credit. The party interested to claim that the payment was specific found a charge of 25 cents for soda and 25 cents for sugar made about eight months before the credit of \$1.20, and a charge of 70 cents for salt, dated nearly a month after the credit, and claimed that the credit of \$1.20 extinguished these three items aggregating that amount, made during transactions, extending over a period of about nine months, and ending about a month later than the time of the credit. Various combinations aggregating \$1.20 could be made on the debtor side of the account, and there was one debit of exactly \$1.20. The court held that there was no evidence that the butter for which \$1.20 was credited was delivered in payment of any specific items, and that it must be treated as a general credit. The strong good sense of the late Judge Start is well exhibited in his opinion in this case. The combinations relied on were as fanciful as the Baconian cryptogram or as a map of the constellations.

In regard to two of the transactions noted here, it is claimed that there is no finding that the payments in question on Enright's notes were made by him, and it is further claimed that there is no evidence which would support such a finding, and attention is called to the fact that one of the notes had two signers. And it is claimed there is no evidence of knowledge on the part of Enright of the payments on these notes. But the evidence tending to show that the payments were made with money drawn by Enright from the various banks necessarily tended to show that the payments were made by or in behalf of him, and that they were so made is the obvious meaning of the findings. So the facts show, as matter of law, a misappropriation of the funds in question, an appropriation or conversion of them by Enright to his own use.

[2] But the defendant says that, if this is so, it does not tend to establish the liability of the defendant as surety for Enright on a bond given by him as executor of Henry L. Story's estate. The claim is that by the decree of the probate court, with reference to the residue of Henry L. Story's estate, the residue was transferred by operation of law to Sarah W. Story's estate, Enright being executor under the wills of both Henry L. and Sarah W., and it being his part both to pay and to receive. This is the question chiefly argued.

The defendant's argument rests upon the common-law doctrine applicable where an executor is, in a personal or representative

capacity, a creditor of the estate of his testator. In *Woodward v. Lord Darcy*, 1 Plowd. 184, which is entitled, "A report of the opinions of the Justices of both benches," it appears that the question was several times argued. It was claimed on the one hand that, when a creditor takes upon himself an executorship, he consents to remit what was owing him, and besides that an executor cannot pay himself by retaining the debt due him. On the other hand, it was said that it would be a hard case if an executor, by accepting the trust, should lose his debt, and in order to save it must refuse the executorship and disappoint the desire of the testator that the administration should be carried on by his chief friend, whose debt, above all others, the testator must be presumed to have wished paid. It was argued and held by all the judges that such a result would be derogatory to testaments, since it would deter creditors named as executors from acting as such, and that it would be dangerous to the souls of testators because, if a creditor took upon himself the charitable office of executor, a just debt due from the testator would forever remain unpaid. But it was recognized that the executor's right of action was gone because of the character which he assumed, and so it was held that there was a "transmutation of property" by operation of law. Brooke, Chief Justice of the common pleas, author of Brooke's Abridgment, dissented from the conclusion.

In two recent English cases the case in Plowden has been referred to, and a doubt has been expressed in one or both if what is there said about transmutation of assets is more than a statement of an argument. In *re Gilbert*, 1 Q. B. 285 (1898); In *re Rhoades*, 2 Q. B. 352 (1899). Some passages in the case in Plowden are calculated to raise such a doubt. But, on the whole, it must be said that the case expounds with apparent relish both retainer by operation of law and transmutation of assets by the like operation. Everybody present seems to have participated in the decision, for the reporter says of the result reached that "it was the clear opinion of all the justices of the one bench and of the other, except Brooke, who was strongly of opinion against them, and it was the opinion of all the sergeants also, as well as of the rest of them, as of Catline, at last, who was of counsel for the plaintiff," the losing party. Cases in general accord with that of *Woodward v. Darcy* are the following: *Fryer v. Gilbridge*, Hob. 10; *Wankford v. Wankford*, 1 Salk. 299; *Roskelley v. Godolphin*, T. Raymond, 483, 484; *Robinson v. Cumming*, 2 Atk. 409, 411. The doctrine of transmutation of assets by mere operation of law gave, of course, the executor not only a preference, but a compulsory preference, and this was the intended result of it, and this was sometimes said to be the ground of it, and not the fact that the creditor was both the

one to pay and the one to receive. Said Lord Chancellor Parker: "Anybody may make his creditor executor, and then the law gives him a preference; and not only so, but the law allows this executor to give any other creditor in equal degree a preference." *Cock v. Goodfellow*, 10 Mod. 496; 2 Eq. Cas. Abr. 100. It was early said that equity will never assist a retainer. 2 Eq. Cas. Abr. 450, 451. However, for a long time equity was not much adverse to the doctrine, for in 1715 it was said in *Waring v. Danvers*, in chancery, with regard to this matter, that, where a creditor could gain an advantage at law, equity should not deprive him of it, and that he ought to keep it. Here the maxim that the laws favor the vigilant was invoked. In this case the executor had preferred himself and all the other creditors except the orator, and it was held that the orator had no rights in equity. The Master of the Rolls, because the case was so hard a one, at first dismissed the bill without costs, but the matter did not rest there, and costs were afterwards allowed, and on appeal to the Lord Chancellor the decree dismissing the bill with costs was affirmed. *Waring v. Danvers*, 1 P. Wms. 295. Previous to this decision, in the case of *Darston v. Earl of Orford*, the Court of Chancery, following *Joseph v. Mott*, Prec. Ch. 79, had held that a voluntary preference of one creditor by an executor would not stand as against a creditor who had proceeded in chancery and procured an answer to his bill before the preference was made. But this moderate application of the principles of equity was not allowed to become the law, for *Orford* appealed to the House of Lords, where the decree of the Court of Chancery was reversed. *Darston v. Earl of Orford*, Prec. Ch. 188; same case, Colles, 229.

However, the doctrine of retainer by operation of law never obtained in this state. For a long time it was thought that the executor or administrator who had a claim might elect to bring in his claim on his final accounting in the probate court or to present it to the commissioners. Note to *French v. Winsor*, 24 Vt. 402. And it at length became settled that, if an executor or administrator had a claim against the estate which he represented, the claim must be presented to the commissioners, or it was lost, and, if presented and allowed, it stood on a parity with other allowances of debts of the estate equal in degree. *Riley v. McInlear's Estate*, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996. For a time we had a statute providing that if an executor or administrator has a claim against the estate which he represents, the probate court should appoint a special administrator to represent the estate in respect to that claim. Laws of 1888, No. 83; V. S. § 2439. And this statute as modified by an act of 1896, now in force, provides that in case of such claim by an executor, or administrator, the probate court

shall upon request of a person interested appoint a special administrator with reference to such claim. Laws of 1896, No. 43; P. S. 2827. But at common law it was recognized that a legacy is not a debt, and in the case of a legacy to an executor the doctrine of retainer by operation of law did not apply. *Paramour v. Jordley*, 1 Plowd. 539, 543; *Attorney General v. Robins*, 2 P. Wms. 24, 25; *Fretwell v. Stacy*, 2 Vern. 434; *Heron v. Heron*, 2 Atk. 171; *Ashley v. Pocock*, 3 Atk. 208; *Cheney and Smith's Case*, 1 Leon. 216. In such cases the question was whether the executor had in fact made an election.

The defendant relies much upon *Taylor v. Deblois*, 4 Mason, 131, Fed. Cas. No. 13,790, a case in the circuit court decided by Mr. Justice Story sitting as circuit judge. That was a case brought on the bond of an administratrix who was also guardian of children, and in that capacity entitled to distributive shares of the estate which she had administered. It appeared that she had certified to the probate court that she held the distributive shares as guardian, and had obtained from that court a discharge as administratrix, a quietus as it was called. The certificate and quietus were held to show that the funds in question were in her hands as guardian, and that there was no liability on the administration bond. To this extent the opinion has since been regarded as sound law. But the justice was not content to rest the decision upon this ground alone, but invoked the doctrine of retainer by a creditor who is executor, citing the case against Lord Darcy and the case in *Hobart* to which we have already referred, and ignoring the distinction between creditors of a testator and legatees, and saying that there was a transfer from her as administratrix to her as guardian by mere operation of law by way of retainer. But the justice shortly had an opportunity to set himself right, and did so in the case of *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376. There the same person was both administrator of an estate and guardian of children entitled to shares in the estate. The administrator collected assets sufficient to pay those whom he represented in his character as guardian, and it was claimed that, upon a decree of distribution of the estate, the funds passed to him as guardian instantaneously by mere operation of law without any election on his part. But it was held that this was not so. The case was against the sureties on the administration bond, and it was held that some act on the administrator's part constituting an election to hold the property as guardian and not as administrator might justly be insisted on before responsibility was shifted from sureties of one class to sureties of another. It was pointed out among other things that he had not charged himself in his guardian's account, and various cir-

cumstances were pointed out indicating that it was not his intention to pass the funds to the guardianship account; and it was said that, unless his intention was to do that, the court could not direct it to be done. And it was held that the sureties on the administration bond were liable. The remarks made in the course of the opinion are not altogether consistent; for, while the decision was entirely consistent with that rendered in *Taylor v. Deblois*, 4 Mason, 131, Fed. Cas. No. 13,790, there was some attempt to make the decision consistent with the dictum in that case, and that could not well be done. Some time before these decisions of Mr. Justice Story, Chief Justice Marshall, sitting in the circuit court, had had the same question under consideration. There one who united in himself the characters of executor, and guardian of a legatee, had pursued a course which made it clear that he had elected to hold certain assets as guardian and not as executor, and because of his obvious election the Chief Justice held that he was chargeable in his character of guardian. *Alston v. Munford*, 1 Brock. 266, 278, Fed. Cas. No. 267. This case had not been reported at the time of the decisions in Mason's Reports to which we have referred. When the case came to be reported, the learned editor made a note carefully amplifying the views which the Chief Justice had expressed or intimated. The note is this: "The principle seems to be well settled that where an executor or administrator, having assets in his hands, is also guardian of a legatee or distributee, he can elect to hold the share of that legatee or distributee in his character of guardian, and thus exonerate the sureties in the administration bond and charge the sureties in the guardian's bond. But there must be some act from which the election to hold the property in a different character from that in which it was received may fairly be inferred before the responsibility can be shifted from one class of sureties to another." In support of this doctrine, acted upon by the Chief Justice, the editor cites *Taylor v. Deblois*, 4 Mason, 131, Fed. Cas. No. 13,790, and *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, having regard to the decisions in those cases, and disregarding all remarks or intimations, in the opinions therein, that in cases of that sort there could be an automatic transfer of assets by mere operation of law. This note expresses the law as it has generally come to be understood. In *re Scott's Account*, 36 Vt. 297; In *re Gilbert*, 1 Q. B. 285 (1898); In *re Rhoades*, 2 Q. B. 352 (1899); *State v. Whitehouse*, 75 Conn. 410, 53 Atl. 897; *Potter v. Ogden*, 136 N. Y. 384, 33 N. E. 228; *Newcomb v. Williams*, 9 Metc. (Mass.) 525, 534; *Cranson v. Wilsey*, 71 Mich. 356, 39 N. W. 9; *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am.

Dec. 125; *Cluff v. Day*, 124 N. Y. 195, 26 N. E. 306; *Prior v. Talbot*, 10 Cush. (Mass.) 1; *State v. Branch*, 134 Mo. 592, 36 S. W. 226, 56 Am. St. Rep. 533.

The mere decree of distribution did not change the character in which Enright held the assets in question. He filed no inventory of Sarah W. Story's estate, he filed no account as her executor, and did no act manifesting his election to hold the funds in question as assets of her estate. He diverted such assets from their proper channel, and appropriated them to his own use. These facts rebut any presumption of a transfer from one estate to the other in accordance with the order of the court, and, together with the other facts in the case, fix liability upon the defendant on his bond to secure the discharge of the duties of Enright as executor of the estate of Henry L. Story. In *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376, Mr. Justice Story, in reaching the conclusion that the liability of the sureties on the administration bond had not been shifted to the sureties on the guardianship bond, said that he could not but have a strong suspicion that the intention of the administrator was to appropriate the assets to his own use. The equivalent of what was suspected there is here found, and more is found, for the findings show that the executor here did appropriate the funds to his own use, which is a finding both of intent and its accomplishment.

Other questions shown by the bill of exceptions are not here relied on by the defendants, and so are passed without notice.

Judgment affirmed.

STATE v. BOSWORTH.

(Supreme Court of Vermont. Chittenden.

May 22, 1912.)

1. JURY (§ 72*)—SUMMONING—PANEL.

P. S. 1480, provides that, if at any time there is not a sufficient number of jurors in attendance to fill the panel for the trial of a cause, the court may order the sheriff to summon, with or without process, a sufficient number to fill such panel. Section 1481 provides that a county court may order an additional number of petit jurors to be summoned to attend the court at such time, as it directs. When a murder case was called, there remained of the regular panel of undischarged jurors 16, and there were also in attendance 20 men summoned by the sheriff pursuant to the court's direction, several of whom were called into the case and sat after the regular panel was exhausted; all of such jurors having been summoned by post cards by the sheriff three or four days before trial. *Held*, that the court was not bound to summon the additional jurors under 1481, and did not abuse its discretion in summoning the jurors as stated.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 333-347; Dec. Dig. § 72.*]

2. APPEAL AND ERROR (§ 968*)—IMPANELING JURY.

The trial court has a large discretion in impaneling a jury, and its proceedings will not

be reviewed, in absence of prejudice, or violation of some statutory requirement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3843; Dec. Dig. § 968.*]

8. HOMICIDE (§ 282½*) — PUNISHMENT—DISCRETION OF JURY—FIRST-DEGREE MURDER.

P. S. 5695, as amended by Laws 1910, No. 225, providing that the punishment for first-degree murder shall be death or imprisonment for life in the state's prison "as the jury may determine," leaves it to the jury's discretion to determine the penalty without any instructions by the court as to the doctrine of reasonable doubt, presumptions, etc.; the statute not creating subdivisions of the crime of first-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 575; Dec. Dig. § 282½.*]

Exceptions from Chittenden County Court; Alfred A. Hall, Judge.

Arthur Bosworth was convicted of murder, and he excepts. Exceptions overruled.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

John G. Sargent, Atty. Gen., and Henry B. Shaw, State's Atty., for the State. Alfred L. Sherman and Sherman R. Moulton, for respondent.

MUNSON, J. Section 5695 of the Public Statutes, as amended by No. 225 of the Acts of 1910, provides that "the punishment of murder in the first degree shall be death or imprisonment for life in state's prison as the jury may determine." A verdict of murder in the first degree with capital punishment has been found against the respondent. He claims error, in that he was tried by a jury not lawfully impaneled, and not properly instructed as to its duty regarding the penalty. When the case was called, there remained undischarged of the regular panel of jurors 16 men; the remainder having been discharged some time before, when the court supposed that the case would not be tried. There were also in attendance 20 men who had been summoned by the sheriff in compliance with the court's direction, given when it found that the case would be tried, that he summon a sufficient number of judicious men to act as talesmen and fill the panel. After the regular panel had been exhausted, several of the men so summoned were called into the box by the sheriff when directed by the court to call a talesman, six of whom sat in the case. All these stated on voir dire that they had been summoned by a postal card received from the sheriff three or four days before, to appear as talesmen on a day named, which was the day the case came on for trial. The respondent did not exhaust his peremptory challenges.

[1] Section 1480 of the Public Statutes provides that: "If at any time there is not a sufficient number of jurors in attendance to fill the panel for the trial of a cause, the court may order the sheriff or other officer to summon, with or without process, a suffi-

cient number of judicious men of the county to fill such panel." The next section provides that: "A county court, during the term, may order an additional number of petit jurors to be summoned to attend the court at such time as it directs." The respondent contends that if the court thought it necessary, four or five days before the trial, to bring in other jurors, it should have acted under the last section, and thus have given him the benefit of a jury drawn from men who had been selected for jury service in the regular manner.

[2] The respondent does not directly question the doctrine, which has always been recognized in this state, that the trial court has a large discretion in impaneling a jury, and that its proceedings will not be revised unless it appears that the excepting party has been prejudiced, or that some requirement of the statute has been disregarded. *Quinn v. Halbert*, 57 Vt. 178; *State v. Ward*, 60 Vt. 142, 156, 14 Atl. 187. An application of this rule to the case presented will defeat the respondent's claim, unless the statutory provisions above quoted are held to confine the court to a regular drawing whenever the circumstances are such that this method is available.

There is nothing in the language of the provisions as they exist in our present statutes that requires this construction. Nor was there in the language of these provisions as originally enacted. Laws 1779, p. 65 (R. 1787, p. 82), R. 1797, pp. 105, 106, §§ 63, 64. Nor can it be said that this construction is required to bring the provisions into harmony with the main purpose of the law. This argument is precluded by the terms of the statute of 1797, which is now the second of the sections above quoted. It was at first expressly provided that the summoning of additional jurors during the term should be at the discretion of the court, and this language was preserved until the revision of 1839. In other words, it was still within the discretion of the court to finish the term relying on talesmen, instead of bringing in additional jurors by a new venire. The omission in the revisions of the words which expressly left the new procedure discretionary is not to be taken as altering the law. *Brighton v. Kelsey*, 77 Vt. 258, 59 Atl. 833. The same result has been reached in another state on provisions similar to our present statute. *State v. Allen*, 47 Conn. 121.

The respondent asked the court to instruct the jury that they could not add to their verdict the words "with capital punishment," unless they were satisfied beyond all reasonable doubt upon all the evidence in the case that that was the only proper punishment for him, and that in so satisfying themselves they should take into consideration the mental capacity of the respondent as shown by the evidence introduced. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court charged the jury that, in determining whether the verdict should be with capital punishment, they should weigh all the evidence bearing upon that point and all the evidence and circumstances in the case, and proceeded as follows: "Is this a case where leniency should be shown, or did the act, if committed, show such an abandoned and malignant heart that you are satisfied beyond a reasonable doubt that in the discharge of your duty, and under your oath, you should add the words, 'with capital punishment?' This is a matter which rests entirely with you; it is for you and you alone to determine." The respondent excepted to the failure to comply with his request.

At the close of the charge the respondent requested the court to charge, further, that, if a verdict of murder in the first degree should be found, there would be a presumption in favor of the lesser punishment until that presumption was overcome by the evidence in the case. The court declined to add this to the charge, and the respondent excepted to its failure to do so.

It is argued for the respondent that the effect of the provision regarding the penalty is to divide murder of the first degree into two grades, one meriting life imprisonment and the other death; that such a provision necessarily contemplates some distinction by which the classification may be determined; that an important consideration must be the degree of mental capacity possessed by the respondent above that which is sufficient to subject him to criminal liability; and that, when there is evidence of mental inferiority, the jury should be instructed upon this point, and told that they should not return a verdict of death unless they were satisfied beyond all reasonable doubt that that was the only penalty adequate to the case.

[3] It is not necessary to consider the exact phraseology of the first request, nor to inquire whether the charge was a substantial compliance with it. The case can be and should be disposed of on broader ground. We think the respondent's argument, in its bearing upon both requests, misconceives the force of the amendatory enactment. It was not the purpose of the Legislature to create subdivisions of the crime of murder in the first degree, to be ascertained by drawing some line of legal demarcation, and make this classification determinative of the penalty. It was left for the jury to choose the penalty for the case before them in the untrammelled exercise of a just and wise discretion. They are to be governed therein by such considerations as appeal to their own judgment and discretion upon a review of the whole case. The court is not entitled to limit them in the exercise of this discretion by instructions in any form. A duty which the law ordinarily imposes upon the court is in this instance assigned to the

jury, and their rights therein are to be determined with reference to the nature of this special service, and not by the rules applicable to the ordinary functions of the jury. The doctrine of reasonable doubt, and the doctrine regarding presumptions, as legal rules, have no application to this branch of their duty. So the respondent was not entitled to a compliance with his requests.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions.

PAIGE v. McCARTY.

(Supreme Court of Vermont. Windsor. June 10, 1912.)

1. APPEAL AND ERROR (§ 203*)—REVIEW—NECESSITY OF OBJECTIONS.

A ruling on evidence cannot be reviewed, in the absence of an objection taken at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—DEFECTIVE PREMISES—VARIANCE.

In an action for injuries to a servant by falling through a floor in a livery basement, the declaration alleged that the floor broke by reason of rottenness and other imperfections therein. Plaintiff testified that he went down through the floor, through a hole, and defendant, being called for plaintiff, testified that the hole after the accident was a little larger, if anything, than before, and was broken in and smoothed off square where it was rough before. Held, that such proof did not show that plaintiff's injury was solely sustained by stepping through a hole, but sufficiently supported the allegation that the floor was weak and rotten around the hole, and that the defective character of the floor was the cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

Exceptions from Windsor County Court; Eleazer L. Waterman, Judge.

Action by William Paige against J. W. McCarty. Judgment for plaintiff, and defendant brings exceptions. Affirmed.

It appeared that defendant was the keeper of a livery stable, and that plaintiff was in his employ; that in the basement of the stable there were a number of stalls; that at the time of the accident plaintiff was at work cleaning out this basement as defendant had directed; that there was then, and for some time before had been, to the knowledge of defendant, a hole in the floor of one of those stalls; that the basement was so dark that this hole could not be seen without artificial light; that the basement was wired and equipped for electric lights, but defendant did not tell plaintiff this, and the basement was so dark that the electric light fixtures could not be readily seen by one who did not know of their existence; that there was a socket for an electric lamp di-

rectly behind the stall in question, but no lamp in the socket at the time of the accident. Plaintiff testified that he found and turned on one light before the accident; that he placed his wheelbarrow, stepped into the stall in the floor of which was the hole, "and commenced shoveling, and the first I knew I went down through the floor, through the hole," whereby he sustained the injuries of which he complained.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Davis & Davis, for plaintiff. Bert E. Cole and E. R. Buck, for defendant.

ROWELL, C. J. This is case by a servant against his master for personal injuries sustained by reason of the insufficiency of the floor of a basement stable in which he was working.

[1] The objection to the question put to Dr. Miner, asking whether the plaintiff complained of anything when he manipulated his injury that day, is not available, as no ground of objection was stated. The defendant objected to the plaintiff's showing the condition of the floor at the time of trial, unless he showed that it was then in the condition it was at the time of the accident. Thereupon the plaintiff said he would show that by the defendant himself, and then the witness was allowed to state the condition at the time of trial. Later the plaintiff examined the defendant on that subject, and it does not appear that the defendant made any claim that his testimony did not make good the plaintiff's offer, and so the defendant can take nothing by this objection. The defendant's motion for a verdict on the ground of contributory negligence was properly overruled, for the testimony was not sufficiently decisive to make that a question of law.

[2] The declaration alleges that the floor "broke and gave way by reason of rottenness and other imperfections therein." The plaintiff testified that he "went down through the floor, through a hole," clear down to his knee; that he tried to jump, and it threw him over onto the manger; that the floor was so rotten he could put his heel through it anywhere around the hole. The defendant, being called by the plaintiff and asked if there had been any change in the size of the hole when he saw it the day after the accident from what it was when he saw it about a week before the accident, said it was a little larger, if anything, more square, was made bigger when it was broken in, and smoothed off square where it was rough before. The defendant moved for a verdict because there was no evidence tending to support the allegation of the declaration that the "injury was caused by the weakness and insufficiency of the floor,"

which broke and gave way with him, all the evidence being that his injury, if any he sustained, was caused by stepping through a hole."

But it cannot be said that there was no evidence tending to support the allegation, for, though it appears that there was a hole there before and at the time of the accident, yet the testimony tends to show that the floor was very weak and rotten around the hole, and that some of it gave way and the hole made larger by the accident, without which it cannot be said that the accident would have happened. Nor was the plaintiff obliged to prove all he alleged in this behalf. Thus in *Hutchinson v. Granger*, 13 Vt. 386, which was case for flowing plaintiff's land by means of a dam on defendant's land, the declaration alleged that the defendant wrongfully kept and continued the entire dam, which had before been wrongfully built, and kept the gates and sluices therein so shut and closed that the water of the stream was prevented from flowing through the plaintiff's meadow in its natural channel and caused to set back upon and overflow it. The proof was that in summer time, when the water was more than four inches deep on top of the dam, the defendant was bound by a covenant running with the land to open the sluices so as to lower the water to that height if it could be. But the plaintiff had judgment, it being held that he was not bound to prove the full extent of the wrong alleged, but could recover for any, the least, portion of it that caused him legal injury.

Affirmed.

MORGAN v. DEVERANNES et al.
(Supreme Court of Vermont. Chittenden.
June 10, 1912.)

ELECTIONS (§ 194*)—BALLOT—MARKINGS.

Under P. S. 181, providing that, if the board of civil authority is satisfied and decides that any double or irregular markings of the ballot were made to enable it to be identified, such ballot may be rejected, it is not improper for the inspectors of an election to count a ballot marked with double or irregular markings instead of with a cross (X), where it is not impossible to determine the intent of the voter and the inspectors are not satisfied that such markings were made to enable the ballot to be identified.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

Petition for writ of mandamus by Frank E. Morgan against J. E. Deverannes and others. Petition dismissed.

Section 340 of the City Charter reads: "Except when changed or modified by the provisions of this act, or by any legal regulation or ordinance of said city, all provisions of the statutes of this state relating to towns and town officers shall apply to said city and to the several officers thereof corresponding to officers of towns. In such statutes the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

words 'selectmen' and 'board of civil authority' shall include 'city council' and the words 'first selectman' shall include 'mayor.' "

The Public Statutes, section 177, reads: "On receiving his ballot or ballots, the voter shall forthwith, and without leaving the polling place or going outside the guard rail, retire alone to one of the booths not occupied by any other person and prepare his ballot or ballots by making in the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor, and making a cross (X) opposite thereto; or, if he desires to vote for the entire list of candidates in any column, by making a cross (X) in the square over such column; and, if a question is submitted to the vote of the people, by making in the appropriate margin or place, a cross (X) against the answer which he desires to give."

Section 180 provides, among other things, for the return and preservation of spoiled and unused ballots.

Section 181 reads: "If the voter marks more names than there are persons to be elected to an office or if, for any reason, it is impossible to determine the intent of the voter as to his choice for an office to be filled, his ballot shall not be counted for such office. If the board of civil authority is satisfied, and so decides by majority vote of those present, that any double or irregular markings of a ballot were made for the purpose of enabling it to be identified and the vote traced so as to defeat the secrecy and purity of the ballot law, such ballot may be rejected. Said board shall make a record of such rejection and the reason for it or the evidence on which it was based and shall file the same with the ballots counted as provided in section one hundred and ninety. No ballot, without the official indorsement, shall, except as otherwise provided, be deposited in the ballot box; and none but ballots provided in accordance with this title shall be counted. Ballots not counted shall be marked 'defective' on the back thereof and returned and preserved as provided for returning and preserving ballots in the preceding section."

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

A. L. Sherman and H. S. Peck, for petitioner. M. G. Leary, for respondents.

WATSON, J. The charter of the city of Burlington contains no provision requiring the ballots used in a local election to be marked by the voter in any particular manner, nor for the rejection of ballots cast because defective. The relator contends that, under section 340, the general provisions of

the statutes of the state pertaining to ballots to be used in general and in local elections apply. We assume, but do not decide, this to be so, and determine the matter before us on that basis.

Section 181 of the Public Statutes specifies that, unless otherwise provided, no ballot without the official indorsement shall be deposited in the ballot box, and none but ballots provided according to that title shall be counted; but it contains no provision to the effect that no ballot marked otherwise than with a cross (X), as specified in section 177, shall be deposited in the ballot box, nor, if deposited, that it shall not be counted, except when it is impossible to determine the intent of the voter as to his choice for an office to be filled. It does, however, contain specific provision respecting ballots having double or irregular markings thereon. "If the board of civil authority"—in this case the inspectors of election—"is satisfied and so decides by majority vote of those present, that any double or irregular markings of a ballot were made for the purpose of enabling it to be identified and the vote traced so as to defeat the secrecy and purity of the ballot law, such ballot may be rejected," and the board shall make a record of such rejection with the reason for it or the evidence on which it is based, etc.

If possible to determine the intent of the voter as to his choice for an office to be filled, his ballot must be counted, even though it contains double or irregular markings, unless the board or official persons, whose duty it is by law to decide the matter, are satisfied and decide that the double or irregular markings thereon were made for the unlawful purpose specified—certainly a question requiring by statute the exercise of judicial functions in its determination.

One of the ballots in question was marked with a cross (X) in conformity to the provisions of section 177 of the statutes, and consequently was properly counted. The other, instead of being marked in the appropriate margin or place by a cross (X), was there marked by what purports to be two Arabic numerals standing side by side, as if used together to express a number. Undoubtedly this ballot contains what the statute designates as "double or irregular markings." Yet it is sufficient for the determination of the case to say that it cannot be said to be impossible to determine the intent of the voter as to his choice for the office to be filled, and the record does not show that the inspectors of election were satisfied and decided that such markings were made for the purpose of enabling the ballot to be identified and the vote traced so as to defeat the secrecy and purity of the ballot law, without which, as before seen, the ballot could not be rejected.

Petition dismissed, with costs.

CANNEY v. COREY et al.

(Supreme Judicial Court of Maine. June, 1912.)

1. BILLS AND NOTES (§ 116*)—LIABILITY OF PARTIES—PRESUMPTIONS.

In the absence of agreement to the contrary, the parties to a note are presumed to be liable on it according to the legal effect of the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 116.*]

2. ESTOPPEL (§ 78*)—EXISTENCE OF RELATION OF PRINCIPAL AND SURETY.

Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name she would become merely a surety for him, is estopped to deny that he assumed the relation of principal to plaintiff.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

Report from Supreme Judicial Court, Cumberland County.

Action by Mary E. Canney against David W. Corey and Ralph E. Bridges to recover the sum of \$2,548.63 paid by her to the Merchants' Trust & Banking Company of Presque Isle, in satisfaction and discharge of an execution issued on a judgment in favor of said bank against said Corey, Bridges, and Canney. Plea, the general issue filed by the defendant Corey. At the conclusion of the evidence the case was reported to the law court for determination. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, BIRD, and HALEY, JJ.

Payson & Virgin, of Portland, for plaintiff. Ralph E. Bridges, pro se. Symonds, Snow, Cook & Hutchinson, of Portland, and Geo. H. Smith and Charles F. Daggett, both of Presque Isle, for defendant Corey.

WHITEHOUSE, C. J. This case is presented to the law court upon a report of the evidence. The question to be determined is the liability of the plaintiff and of the defendant Corey upon a certain promissory note for \$4,600, dated December 12, 1907, signed by Ralph E. Bridges, the plaintiff's son, and one of the defendants, and on the back by the defendant Corey and the plaintiff Mary E. Canney. The plaintiff claims that she is a surety for Bridges, the maker, and for the defendant Corey, and hence has the right to be fully indemnified by Corey against any liability on the note. On the other hand, Corey claims that he and Mrs. Canney are joint promisors for the accommodation of Bridges, and so as between themselves are cosureties, and each liable for one-half of the note upon the default of the maker.

June 26, 1909, upon demand of the payee of the note, the defendant Corey paid one-half of the amount of it. Subsequently the payee recovered judgment against Bridges, Corey, and Canney for the remaining one-

half of the note, and, after execution thereon had been issued and payment demanded, the same was paid by Mrs. Canney. This suit is brought by her to obtain reimbursement for such payment from the defendant Corey.

[1] It is undoubtedly true that, in the absence of an agreement to the contrary, the presumption of law is that the parties to a promissory note are liable on it according to the legal effect of the instrument, and the burden is on the plaintiff to show that there was an agreement or mutual understanding that Corey should assume the relations of principal as to her.

[2] June 12, 1906, the defendant Bridges gave his promissory note to the defendant Corey for \$4,000 for capital stock of the Carter & Corey Company which he claims he purchased at the solicitation of the defendant Corey. This note was indorsed by Corey, and discounted by the Trust Company at Presque Isle, of which Bridges was treasurer, and thus in a position to grant favors to Carter & Corey Company. Bridges had already prior to that time purchased \$10,000 of that stock at the solicitation, as he says, of Corey & Carter. At that time the defendant Corey was treasurer and a large stockholder of the Carter & Corey Company. The note for \$4,000 was not paid at maturity, but renewed by a note made payable directly to the Trust Company and indorsed by Corey. When this note became due in June, 1907, Bridges wished to borrow \$600 more and to renew the note for \$4,600. From the cash that Bridges had put into the company for all of the stock purchased by him Corey had received a benefit in the increased value of his own large holdings of stock, and he readily consented to indorse a renewal note for \$4,600. But, when this note became due in December, Bridges was not in financial condition to pay it, and Corey well knew it. Corey also knew that he himself was in the position of an original promisor on the note, and, if the bank should refuse to renew it and proceed to enforce collection of the note at that time, he would be obliged to pay the whole of it. There is no evidence in the case that he was not amply able to pay it. He testifies, it is true, that Bridges told him a few days before the maturity of the note that he had received a letter from Barker, the president of the bank, stating that he could not renew the note again without an additional indorser, but the letter is not produced, and Bridges says that the first information he had that the bank would require another indorser came from Corey himself. He says that Corey told him that the president had written to him that it would be satisfactory if Mrs. Canney would indorse the note.

There is no evidence that the bank questioned the financial responsibility of Mr. Cor-

ey. It appears from his testimony that the Carter & Corey Company had carried a large balance in 1907 as depositors in that bank. Corey was deeply interested in having the note renewed with an additional indorser who might relieve him of one-half of the amount of his liability on it. As far as appears in evidence, he was the only one specially interested in having Mrs. Canney indorse the note; but whether he requested the president of the bank to inform Bridges that the note would not be renewed without an additional indorser does not expressly appear, but the evidence warrants the conclusion that the idea of having Mrs. Canney indorse the note was suggested by Corey.

The result was that Bridges arranged for an interview between Mr. Corey and Mrs. Canney. Bridges testifies that Corey then told Mrs. Canney in his presence that "we only needed her name for a short time, for a few months, and that he would have, that he would pay the note, that the note would be paid before it became due June 12, 1908." Mrs. Canney replied that "It was impossible for her to indorse the note, because, if the note wasn't paid at maturity, she couldn't afford to pay, in fact, she didn't have the money to pay it, and to take care of the sickness she had in the family." Mr. Corey seemed a little impatient that she should have any idea that she would have to pay the note. He told her that there was no question of her having to pay the note, that it would be paid, taken care of before it became due, etc.

It is true that Mrs. Canney says in her testimony that Bridges told her, in answer to her continued protests against signing it, that she would not have to pay but half of it in any event, as Mr. Corey's name was on there. And she replied that she could not "afford to pay half of it." Thereupon Mr. Corey repeated that there was no question of her having to pay the note, and said "he would put his name above hers, so she wouldn't be called upon." Upon the strength of this final statement, she appears to have consented to indorse the note.

Mr. Corey does not deny in his testimony that he assured Mrs. Canney that "he would put his name above hers so that she wouldn't be called upon." He knew that she had no knowledge whatever of the previous history of their transactions in regard to this note, and no acquaintance whatever with the law of promissory notes, and that she would believe what he said to her. In making that statement he must be presumed to have intended to create a belief in the mind of the plaintiff that he would so indorse the note as to protect her against any liability to pay any part of it. It was equivalent to an assurance that she was only required to sign as surety for him, as well as for Bridges, and a promise that as to her he would as-

sume the responsibility of a principal. He knew that she so understood it and believed it. If he knew his statement as to the effect of placing his name above hers to be false, he intended to deceive her. He did not know it to be correct, but recklessly stated as a fact what he did not know to be true. In either event, he is estopped to deny that he assumed the relation of principal to the plaintiff, and should in justice be required to pay the full amount of the note.

The certificate must accordingly be:

Judgment for the plaintiff for \$2,548.63, with interest thereon from February 26, 1910.

INHABITANTS OF BOOTHBAY v. E. I. DU PONT DE NEMOURS POWDER COMPANY.

(Supreme Judicial Court of Maine. June, 1912.)

TAXATION (§ 263*) — PERSONALTY — WHERE TAXABLE — PROPERTY "EMPLOYED IN THE MECHANIC ARTS."

Logs and lumber used at a mill for manufacture of boxes for the manufacturer's use in shipping explosives are taxable as personalty "employed in the mechanic arts," within Rev. St. c. 9, § 13, par. 1, in the town where the mill is located.

[Ed. Note.—For other cases, see Taxation. Cent. Dig. § 437; Dec. Dig. § 263.*]

Report from Supreme Judicial Court, Lincoln County, at Law.

Action by the Inhabitants of Boothbay against the E. I. Du Pont De Nemours Powder Company. On report. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and SAVAGE, KING, BIRD, HALEY, and HANSON, JJ.

Tupper & Perkins, of Boothbay Harbor, for plaintiffs. William M. Bradley, of Portland, for defendant.

HALEY, J. This is an action of debt brought by the inhabitants of the town of Boothbay against the defendant for taxes assessed by the town of Boothbay on the personal property of the defendant, consisting of 550,000 feet of logs and 350,000 feet of sawed lumber, situated on the 1st day of April, 1910, in the town of Boothbay.

It is agreed that all preliminary steps necessary to authorize the action had been taken, and that the taxes were legally assessed and committed to the collector, provided said personal property was legally taxable to the defendant in the town of Boothbay.

The defendant, a New Jersey corporation having its principal place of business at Wilmington, in the state of Delaware, on the 1st day of April, 1910, had a mill in the town of Standish, in the county of Cumberland, for the purpose of manufacturing boxes for the shipment of its explosives. For the purpose

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of supplying pine lumber to said mill, suitable both as to quality and dimensions to be there manufactured into boxes, it had bought stumpage in the town of Boothbay, and had caused to be erected a portable sawmill in said town on land leased by it for erecting and maintaining said portable sawmill and for piling and sticking boards, plank, and other lumber. The lease gave the defendant the right to use the shore of the lot leased for the purpose of shipping boards, plank, and other lumber. There was a small amount of hemlock sawed with the pine, and, as the defendant did not use the hemlock in the manufacturing of its boxes, the hemlock was sold for the accommodation of the people of Boothbay, and the pine lumber was shipped to Standish, and there manufactured into boxes by the defendant.

It is admitted that the hemlock was a very small part of the lumber sawed, and no claim was made at the argument that, by selling such small quantity of hemlock, the defendant was engaged in the lumber trade, or that the lumber in plaintiffs' town on April 1, 1910, was employed in trade. The logs and lumber in the plaintiff town in 1910 was also taxed to the defendant in the town of Standish in the year 1910. The question before the court is: Were the logs and lumber taxable in the year 1910 in the town of Boothbay?

It is provided by section 12, c. 9, R. S., that all property within or without the state, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the 1st day of April. The owner (defendant) of the logs and lumber in question not being an inhabitant of the state, the property could not be taxed in plaintiff town, unless section 13 so provides.

It was the intention of the Legislature to provide by the enumerated cases in section 13 for the taxation of personal property not taxable under section 12. To determine under which paragraph of the enumerated cases in section 13 property shall be taxed, it should be ascertained if the property, its condition, and situation are such as are described in paragraph I of said section. If not, are they such as are described in paragraph II, and so on until the property is such as is described in one of the paragraphs of section 13? When it is included within one of the paragraphs of section 13, it is taxable as therein stated, and all similar property similarly situated must be taxed under that paragraph, and cannot be taxed under any other. It being the intention of the Legislature by each paragraph to provide for the taxation of the property therein mentioned, it follows that, when the property is included within the cases mentioned in one of the paragraphs, it shall be taxed under that section and cannot be taxed under any other.

Paragraph I of section 13 is as follows:

"All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April, provided that the owner, his servant, subcontractor or agent, so employing it occupies any store, storehouse, shop, mill, wharf, landing place or shipyard thereon for the purpose of such employment."

It is agreed that the lumber in question was intended for and was used by the defendant at its mill in Standish, and manufactured into boxes used by it to ship its explosives in. The manufacture of lumber into boxes is unquestionably a mechanic art, and is within the meaning of the term as used in paragraph I. If employed in the mechanic arts within the state, where was it so employed? There can be no question but what it was so employed where it was to be manufactured into boxes, namely, at the mill of the defendant at Standish. *Farmingdale v. Berlin Mills Co.*, 93 Me. 333, 45 Atl. 39; *Inhabitants of Bradley v. Penobscot Chemical Co.*, 104 Me. 276, 71 Atl. 887; *Georgetown v. Hanscome*, 108 Me. 131, 79 Atl. 379.

Property employed in the mechanic arts, as this lumber was employed, is not taxable in the town where found on April 1st, if it is so employed in some other town in the state. To render it liable to taxation in plaintiff town (it being employed in the mechanic arts), it must appear that the plaintiff, its servants, subcontractors, or agents so employing the property, occupied for the purpose of the employment of the lumber in the mechanic arts a store, shop, mill, wharf, landing place, or shipyard in plaintiff town. *McCann v. Minot*, 107 Me. 393, 78 Atl. 465.

The logs and lumber in question were taxable under paragraph I of section 13, c. 9, and not under paragraph II, and therefore not taxable in plaintiff town, but in the town where employed in the mechanic arts on April 1, 1910, and the entry must be:

Judgment for defendant.

FOGG v. TYLER.

In re BARTLETT.

(Supreme Judicial Court of Maine. June, 1912.)

BROKERS (§ 33*)—INSOLVENCY—RIGHTS OF CUSTOMERS.

Payment for corporate shares to a stock brokerage firm does not give the buyer priority as to his claim for return of the money on receivership proceedings against the firm before the stock could be secured by the firm, though the firm's balance in the fund in which the payment was deposited never fell below the amount of the payment; the transaction being an ordinary stock sales contract, and involving no fiduciary relation between the parties.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 28; Dec. Dig. § 33.*]

Report from Supreme Judicial Court, Penobscot County.

Bill by Herbert A. Fogg against Linwood C. Tyler. On petition by James M. Bartlett for allowance of a claim as a priority. Petition dismissed.

See, also, 82 Atl. 1008.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Charles J. Dunn, of Orono, for petitioner. Charles H. Bartlett, of Bangor, for defendant. E. M. Simpson, of Bangor, by permission of court, for committee of unsecured creditors.

HANSON, J. On report. Petition for allowance of claim as a priority.

The record shows that prior to April 26, 1911, the petitioner corresponded with Linwood C. Tyler, of the firm of Tyler, Fogg & Co., of Bangor, in relation to the purchase of stocks; that on that day he called at the office of Tyler, Fogg & Co., and "told Mr. Tyler, after some little conversation, that I had decided to take ten shares of the Commonwealth Gas & Electric Company stock, * * * and he very hastily calculated the interest and I made out a check for the amount he stated, which was \$1,004.33, I think, and I didn't have time that evening to get my receipt, for the car came right along. I gave him my check and the next morning Mr. Tyler mailed me a receipt, and stated I had overpaid him seventy-two cents, and enclosed 72¢ in stamps."

The case shows that Tyler, Fogg & Co. had contracted with Messrs. C. D. Parker & Co., of Boston, for 750 shares of the Commonwealth Gas & Electric Company "with the arrangement that they were to carry it and as fast as we desired it, we should take it up from them." Tyler, Fogg & Co. had advertised the stock for sale, and the petitioner says that Mr. Tyler had given him "literature and also written me in regard to the stock. I had looked it up somewhat."

Mr. Tyler, who had charge of stock sales, was called to Boston later in the evening, and did not return until after the fire which destroyed his premises in the great conflagration of April 30, 1911. He returned immediately, and on May 5th received a letter from the petitioner, inquiring when the stock would be delivered. His letter in reply follows.

"Tyler, Fogg & Co., Bankers, Bangor, Maine.

"Dealer in Bonds.

"May 6, 1911.

"Mr. J. M. Bartlett, Orono, Maine.

"Dear Sir: In relation to the delivery of your certificate carrying ten shares of Commonwealth Gas & Electric Co. Preferred Stock, we beg to say that, as soon as we can

get established and our vaults open, we will be in a position to make delivery to you of your certificate carrying the ten shares of stock.

"Our vaults look to be in good shape, and we expect that the contents will be found intact.

"Yours very truly, Tyler, Fogg & Co."

The stock was not delivered. The reasons given by Mr. Tyler for the nondelivery of the stock were that his call to Boston gave him no time in which to order it on April 26, 1911, and the confusion incident to the fire causing delay in re-establishing business quarters and having access to their books and papers after his return, and that later, when delivery might have been effected, he was prevented by suit for the dissolution of the partnership of Tyler, Fogg & Co., and the appointment of a receiver, against whom this petition is filed.

It is admitted that the check was deposited by the firm of Tyler, Fogg & Co., the payees named therein, to the credit of said firm, in the Kenduskeag Trust Company, at Bangor, Me., on the 27th day of April, A. D. 1911, and collected by said bank for the account of said firm, and that ever after to and including the time of the appointment and qualification of the receiver the balance of the account of said firm in said bank was ever in excess of said sum of \$1,003.61, and that said account between said times was not at any time overdrawn, and that the amount of the balance of said account in said bank has come to the possession of the receiver in this cause.

It is further admitted that no certificate for any shares of the capital stock of said Commonwealth Gas & Electric Company have ever come to the possession of said receiver.

It is admitted that Charles H. Bartlett, of Bangor, Me., was appointed as receiver for the partnership of Tyler, Fogg & Co. by decree dated June 6, 1911, and that he qualified as such and entered upon the discharge of the duties on the 9th day of June, 1911, and that on that date he took possession of the assets of the estate of said partnership.

And the petitioner prays (1) that the receiver may be ordered to deliver the stock, if he be in a position to do so; or (2) to return the money paid, amounting to \$1,003.61, and for other relief.

In order to maintain this action, the petitioner must show (1) that the receiver had specific property belonging to him, or (2) that there was a fiduciary relation between the petitioner and Tyler, Fogg & Co. by and through which the latter agreed to procure for the petitioner as his agent 10 shares of the capital stock of said Commonwealth Gas & Electric Company.

In view of the admission that "no certificate for any shares of the Commonwealth Gas & Electric Company have ever come to

the possession of said receiver," it is not necessary to consider the first item in the prayer for relief. The petitioner does not seriously urge its consideration, but does insist that there was a fiduciary relation between the parties, "that the relation between the parties was that of agent and principal, or of trustee and cestui que trust," and cites *Furber v. Dane*, 203 Mass. 108-112, 89 N. E. 227, in support of his contention. In that case the plaintiff was an employé of a firm of stockbrokers. He gave the firm an order to sell for him 20 shares of copper stock, and they sold 15 of these shares for \$757.50, for which sum, upon delivery of the certificate, they received a check in payment, which check they deposited in their general account with the American Trust Company which collected it. Upon the same day the firm gave to its customer a check for his share of the proceeds of the stock sale. On the next day it made an assignment for the benefit of its creditors, and on the following day the check was presented at the bank by the payee named therein for payment. The firm's balance in the American Trust Company at no time after the deposit of the check for \$757.50 fell below that amount. The plaintiff contended that the balance of the account in the bank was affected with a trust in his favor to the extent of the amount due to him. He contended that, when the proceeds of his stock were received by the firm, he became entitled thereto, and that, being able to trace these proceeds into the account and into the balance remaining on deposit at the time of the bank's failure, he showed a trust attaching in his favor to that balance, quoting *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333; *National Bank v. Insurance Co.*, 104 U. S. 54-68, 26 L. Ed. 693; *In re Hallett's Estate*, 13 Ch. D. 696.

The decision of the case turned upon the point that the presentment of the check for payment was not in due season, but with reference to the contention of the plaintiff the court said: "It would be difficult to deny this contention if it appeared that the firm stood in a fiduciary relation to him as to the proceeds of his stock, and that none of the other parties had equities superior to and countervailing his."

After a careful consideration of the testimony we are unable to agree with counsel for the petitioner that the facts in the case support his theory. It is not contended that Tyler, Fogg & Co. agreed to use the identical money represented by the check for the purpose of purchasing the ten shares of stock, and it does not appear that they were acting as agents of the petitioner. It does appear that the petitioner was a voluntary buyer of stock of his own selection, and, so far as the case shows, there was at the moment entire good faith on both sides of the contract. The transaction from petitioner's own showing did not create a trust relation between the petitioner and Tyler, Fogg &

Co. The negotiations were such as ordinarily occur between a buyer and seller in ordinary financial and commercial transactions. Tyler, Fogg & Co. had the stock for sale and wanted to sell. The petitioner wanted to purchase, and did purchase and pay for ten shares of stock, with the knowledge that the stock would not be delivered until some days later. There was no mention of agency, and no language used from which the relation of principal and agent can be inferred. The petitioner stood in the same relation to Tyler, Fogg & Co. as an ordinary buyer in an ordinary commercial transaction where no question of principal and agent is ever raised.

"One having purchased and paid for a specific quantity of an article acquires no title to it until separated from the residue. Until such separation, the claim of the vendee rests in contract, for breach of which the remedy is by action. A purchase of growing crops, though paid for, passes no title against the creditors of the vendee, until possession or delivery be had. Unless such possession or delivery be had, prior to the death of the vendor and to the issuing of the commission of insolvency upon his estate the title is in the administrator in trust for creditors." *Stone v. Peacock*, 35 Me. 385.

In *Downing v. Lellyett* (Court of Chancery Appeals of Tenn. February 8, 1896) 36 S. W. 890, the plaintiff requested a bank to purchase for him certain stock on margins. The bank purchased it, through brokers, and made a draft on the plaintiff for the margins, which was paid. The bank remitted the amount by draft to its correspondent, and sent a check on such correspondent to the brokers, but by reason of the bank's failure the brokers did not obtain the money, and resold the stock. The amount remitted was eventually recovered back by defendant as the bank's assignee.

Held that the transaction between the plaintiff and the bank did not contemplate the purchase of the stock with plaintiff's own money, but by the bank with its own funds, and created the relation of creditor and debtor between them, and not of principal and agent, and that the plaintiff could not recover the amount paid from the defendant's assignee as a trust fund, though traced into his hands. *Akin v. Jones*, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921, is quoted with approval. It is there said: "Any agreement or understanding or course of dealing whereby a bank is not to use the identical money, and is to substitute its own obligation in its stead, destroys all idea of a trust."

It is the opinion of the court that there was no fiduciary relation between the firm of Tyler, Fogg & Co. and the petitioner, and the entry must be:

Petition dismissed, with costs.

IRELAND et al. v. CLARK et al.

(Supreme Judicial Court of Maine. June, 1912.)

1. ANIMALS (§ 27*)—TEAMING CONTRACTS—DUTY TO CONTRACTOR.

Defendants, who employed plaintiffs' team, sleds, and a driver to haul logs, were not bound to furnish them a safe road to team upon where the road was a public highway across a lake.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-78; Dec. Dig. § 27.*]

2. MASTER AND SERVANT (§ 88*)—NATURE OF RELATION—TEAMING CONTRACT.

Plaintiffs, whose team, sleds, and a driver, who might be either one of plaintiffs or some one engaged by them, were employed by defendants to haul logs, bore the relation of contractors and not of employees to defendants, as affecting defendants' duty to provide a safe road to travel.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-152; Dec. Dig. § 88.*]

3. ANIMALS (§ 27*)—LEAVING UNGUARDED HOLE IN ICE.

It was actionable negligence for defendants to leave unguarded a hole cut by them in the ice on a lake across which plaintiffs' team was driven in hauling logs for defendants.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-78; Dec. Dig. § 27.*]

4. CUSTOMS AND USAGES (§ 19*)—EVIDENCE—ADMISSIBILITY.

Evidence of a custom is inadmissible, in the absence of proof of its common prevalence in the community and of the adverse party's knowledge thereof.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 41-43, 45, 46; Dec. Dig. § 19.*]

5. ANIMALS (§ 27*)—INJURY TO HIRED HORSE—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for death of a horse hired by defendants from plaintiffs, and drowned in a hole cut in ice on a lake used as a public highway, whether plaintiffs were guilty of contributory negligence *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 70-78; Dec. Dig. § 27.*]

Exceptions from Supreme Judicial Court, Aroostook County.

Action by Luther J. Ireland and another against Edward L. Clark and another to recover damages for the alleged negligence of the defendants in leaving unguarded a hole cut in the ice on St. Croix Lake, Aroostook county, during a part of the logging season of 1909, whereby the plaintiff lost a horse by drowning. Plea, the general issue. At the conclusion of the plaintiffs' evidence, a nonsuit was ordered and the plaintiffs excepted. Exceptions sustained.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, BIRD, and HALEY, JJ.

Powers & Archibald, of Houlton, for plaintiffs. Harry M. Briggs, of Houlton, Amaziah G. Fenlason, of Ft. Kent, Ira G. Hershey and Charles P. Barnes, both of Houlton, for defendants.

HALEY, J. This is an action on the case alleging negligence of the defendants in leaving unguarded a hole cut in the ice on St. Croix Lake, in Aroostook county, during a portion of the logging season of 1909, whereby the plaintiffs lost a horse by drowning.

During the trial the plaintiffs' counsel asked the witness Sinclair: "Now, I will ask you what the custom among men in the woods who are hauling in regard to cutting holes in the ice was?"

The question was excluded, subject to exception.

At the close of the plaintiffs' testimony, the Presiding Justice ordered a nonsuit, to which the plaintiffs excepted, and bring the case before this court on said exceptions.

The undisputed facts are that on the 23d day of December, 1909, the defendants entered into a contract with the plaintiffs, whereby the plaintiffs were engaged with their team to haul pulp wood for the defendants.

The wood was on the side of St. Croix Lake furthest from the railroad wharf, and the plaintiff Luther, with the team owned by himself and the other plaintiff, hauled the pulp wood (under the contract with the defendants) from the woods through a section called the burnt district and across the St. Croix Lake to the railroad wharf. On the 19th day of January, 1911, the plaintiff Luther J. Ireland saw Mr. Sinclair, who was in the employment of the defendants, cutting a hole in the ice about 20 rods out from the railroad wharf, and about 2 rods from the road across the lake, that was being used by the plaintiffs and others to haul the pulp wood across the lake.

The plaintiff Luther knew that the hole was being cut to obtain water to put upon the road across the lake that was being used by the teams, that it might freeze and make the hauling easier. The next morning, at about a quarter before 6 o'clock, the plaintiff Luther, with plaintiffs' team, and other men with their teams, left their camp to go to work. With the teams they traveled upon the lake about a quarter of a mile toward the railroad wharf, then turned to the right, and started across the lake to strike the road that they had been using for teaming across the lake. It was dark, they had no lantern, and during the night there had been a snow fall of about two inches. They missed the road, and the plaintiff Luther got off the sleds and walked ahead looking for the road. He left a man on the sled to drive the horses, who kept them close to plaintiff Luther's right arm. The horses stepped into the hole cut by Sinclair on the previous day. When they went into the water, they struck the plaintiff Luther, and he "grabbed them, and called for a chain." One of the horses was

saved. The other slipped from his harness and was drowned.

The plaintiff Luther testified that he was not looking for the hole that he saw Mr. Sinclair cutting the day before, that he did not think of the hole that morning. The evidence shows that one of the defendants was told when the hole was cut that it ought to be bushed, and that he told the man to go across the lake and make a lunch hole for the teams and to bush it the next morning.

The plaintiffs claim to recover upon two grounds:

(1) Because the relation of master and servant existed between the plaintiffs and the defendants, and that the master (the defendants) was bound by law to furnish the servants (the plaintiffs) a safe place in which to perform their work, and that the road across the lake was furnished by defendants for the plaintiffs to drive upon, and that the master (defendants) was negligent in causing the hole to be cut so near the road used by the servant's (plaintiffs) team furnished by the plaintiffs, without bushing it, or in some other way protecting it, and that the servant (plaintiffs) did not assume the risk, even if one of them did the day before the accident see the hole being cut through the ice, that they had a right to assume that the defendants had performed their duty and protected the hole, and that, if the hole had been properly protected, the accident would not have happened.

(2) That the lake being a public highway, the plaintiff Luther was lawfully traveling thereon; that the defendants, by cutting the hole in the ice and not bushing it, or protecting it in such a way as to warn travelers, created a nuisance upon the public highway, by reason of which the plaintiffs, without fault on their part, sustained the injury complained of.

[1, 2] First. We do not think the rules of law governing master and servant are applicable to this case. The plaintiffs' team was employed with a driver, either one of the plaintiffs or some one they might employ to haul logs. The plaintiffs furnished the driver, horses, harnesses, and sleds. The defendants were under no obligation to furnish them a safe road to team upon. The St. Croix Lake is a great pond, and a public highway that any one may use to cross in boats, or to travel upon when frozen.

"The authorities, ancient and modern, are all consistent, and point in one direction. Highways, whether on land or water, are designed for the accommodation of the public, for travel or transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in judgment of law." *Veazie v. Dwinel*, 50 Me. 479.

"All streams in the state of sufficient capacity in their natural condition to float boats, rafts, or logs are deemed public highways, and as such are subject to the use of the public." *Veazie v. Dwinel*, 50 Me. 484,

cited with approval in *Smart v. Lumber Co.*, 103 Me. 37, 68 Atl. 527, 14 L. R. A. (N. S.) 1083.

"The true test, therefore, to be applied in such cases is whether a stream is inherently and in its nature capable of being used for the purpose of commerce, for the floating of vessels, boats, rafts, or logs." *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, approved in *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298.

"The right in common to all the citizens to the use of its navigable waters has been established by judicial decisions; and that right is not limited in this state to waters, in which the tide ebbs and flows, but is admitted in lakes and fresh water rivers which are navigable." *Moore v. Veazie*, 32 Me. 343, 52 Am. Dec. 655.

"By the principles of that ordinance of 1641-47, which have been too many times recognized, sanctioned, and declared to be a part of the common law of the state, to be now disregarded, it is a public pond, and the use is free to all, who can reach it without trespassing upon the land of others." *Brastow v. Rockport Ice Co.*, 77 Me. 100.

In *Conant v. Jordan*, 107 Me. 227, 77 Atl. 938, 31 L. R. A. (N. S.) 434, this court again declared that all great ponds in the state, without exception, belong to the public. St. Croix Lake being a public highway, the defendants were not bound, by reason of their contract, to keep the lake, or any part of it, safe, as the master is bound to furnish his servant a safe place to work in. They were under no more obligation, by reason of their employment, to furnish a safe highway than is the merchant who employs a teamster to haul his goods from the depot to his store. The owner or driver of a team has the right to use the highways for the purpose of passage; in winter, this includes the right to travel upon the ice, upon the public highway furnished by nature, viz., those rivers and great ponds that are made by our laws public highways, and if any person creates a nuisance upon the highway on the land, or nature's highways, viz., navigable rivers or great ponds, they are liable to the person who sustains an injury thereby, if in the exercise of due care, but their rights are not regulated by the law of master and servant.

Further, the evidence shows that the defendants hired the team of the plaintiffs, either to be paid for by the day, by the load or by the number of feet of lumber hauled, and the plaintiffs furnished the driver, either one of the plaintiffs or some one they might select. The plaintiffs furnished all the appliances used, horses, sleds, harnesses, and driver, and the law is well settled that, under such circumstances, the relation of master and servant did not exist between the plaintiffs and defendants; that the plaintiffs were contractors, not servants. In the case of *Quarman v. Burnett*, 6 M.

& W. 499, decided in 1846, and which has been followed by the English courts and most of the courts in this country where the question has arisen, the rule was established that where one hires a team or horses of another, together with a driver, to do a particular job or kind of work, the driver is not the servant of the hirer. In that case it appears that the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or a drive, the owner of the horses providing a driver. The driver on one occasion causing injury by his negligence, the owners of the carriage were held not responsible for this injury. And it was further held to make no difference that the owner of the carriage had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses, or that they had always paid him a fixed sum for such drives, or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery where he was accustomed to leave it. Baron Parke in that case says: "Upon the principal 'facti per alium, facti per se,' the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for his misconduct and whose orders he was bound to receive and obey." That person was the owner of the horses, and not any one at whose service the horses and the driver were temporarily placed.

In *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54, Cooley, J., in the opinion states that the doctrine of *Quarman v. Burnett* has been too often and too generally recognized and followed to be questioned now, and that case held that a driver of a team is the servant of the person who is his regular employer and who has the power to direct where and for whom his services shall be given, and to discharge him for misconduct or incompetency, and not of the person who hires the team for a day, although the latter has the right to direct his actions to the extent of indicating where the work was to be done, and may have actually asked for the services of that particular driver.

In *Quinn v. Electric Construction Co.* (C. C.) 46 Fed. 506, the court recognized the rule as laid down in *Quarman v. Burnett*, and held that the driver of a horse and truck who, with them, was selected to perform services for a third party under a contract by his employer to furnish horse, truck, and driver daily for a specified price, was the servant of his regular employer while engaged in such service, and not the servant of the third party.

In *Jones v. Corporation of Liverpool*, L. R. 14, Q. B. D. 895, the corporation owned a water cart, and contracted with Mrs. Dean for a horse and driver, that it might be used in watering the street. The horse belonged to her, and the driver she employed was not under the control of the corporation, otherwise than that its inspector directed him what streets, or what portions of streets, to water. Such directions he was required to obey under the contract with Mrs. Dean for his employment. The carriage of the plaintiff was injured by the negligent driving of the cart, and in an action against the corporation for the injury he recovered a verdict, which was set aside upon the ground that the driver was the servant of Mrs. Dean, who had hired both him and the horse to the corporation.

In *N. Y. Lake Erie Western R. R. v. Steinbrenner*, 47 N. J. Law, 161, 54 Am. Rep. 126, the court approved the doctrine of *Quarman v. Burnett*, and it was held that the hiring of horses to be driven by a driver regularly in the employ of the person from whom the horses were hired did not create the relation of master and servant between the hirer and the driver.

In *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, the court held that a person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering damages against the railroad for injuries suffered from a collision of its train with the hack caused by the negligence of both the engineer of the train and the driver, and cites with approval *Quarman v. Burnett*, and *Jones v. Corporation of Liverpool*, supra.

In the case of *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645, the defendant let to the city of Boston a horse, wagon, and driver by the day. At the time of the injury complained of, they were under the exclusive direction and control of the city as to where to go, where to unload, and what to do in the performance of the work. Suit was brought against the defendant, the owner of the team, for injuries sustained by the alleged negligence of the driver, and the court in its opinion said: "The driver, employed and paid by the defendant, who had the entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was the servant of the defendant in so driving the horses and having them shod, and for the injuries to third persons by his negligence in these respects the defendant was responsible."

The above cases and cases cited in the opinions show that the rule is well established that the person who hires his team or teams to another, which he manages and

drives while engaged in doing the work for which the team is hired, is not a servant of the hirer, but a contractor, and if the driver of the team, not the plaintiff, is employed by the owner of the team, he is not the servant of the hirer, but of his employer, and the relation of master and servant does not exist between the hirer of the team and the driver. The facts in this case bring it within the doctrine of *Quarman v. Burnett*, and the court is of the opinion that the relation of master and servant did not exist between the plaintiffs and the defendants, and that the law applicable to master and servant does not apply in this case.

[3] *St. Croix Lake* being a public highway, the plaintiffs had a right to travel upon it in any way they might choose, if they did not interfere with the rights of others to the use of the lake, in any manner recognized as lawful, and the defendants had no right to cut such a hole in the ice as the evidence shows they caused to be cut, without properly guarding it to protect travelers on the lake, as held by this court in *French v. Camp et al.*, 18 Me. 433, 36 Am. Dec. 728. In that case the court instructed the jury "that the citizens had a lawful right to travel on the river upon the ice, and that if they believed there had been a traveled path, as testified, and that if the defendants cut the ice so near as to render it dangerous to travel there, and that the plaintiff met with the loss of his horse in the manner stated in the testimony, and without any carelessness or fault on his part, but by reason of the cutting of the ice by the defendants, they would find for the plaintiff for the value of the horse so lost." The court held the instruction proper, and stated: "To cut a hole in the center of a road upon the ice, or so near it as to entrap a traveler, is a wanton and unnecessary disturbance of the rights of passage. * * * It is a violation of that great principle of social duty by which each one is required so to use his own rights as not to endanger the rights of others." And the verdict for the plaintiff was sustained.

The same doctrine was recognized in *Woodman v. Pitman*, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342.

The cutting of the hole in the ice by the defendants, and leaving it unguarded, might well have been found by the jury to have been a wrongful act, and, under the facts of this case, to have been a nuisance, and that the damages sustained by the plaintiffs were caused by the wrongful act of the defendants in causing the hole to be cut and left unguarded, and that the defendants were liable therefor, if the plaintiff Luther, at the time of the accident, was in the exercise of due care, and his own negligence did not contribute to the injury.

[4] The exclusion of the question asked

the witness Sinclair was proper, as there was no evidence or offer to prove that the custom was of common prevalence and well known in the community, and that the defendants had knowledge of it. *Dodge v. Favor et al.*, 15 Gray (Mass.) 82; *Collins v. N. E. Iron Co.*, 115 Mass. 23; *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 254, 68 N. E. 232.

[5] It is the opinion of a majority of the court that the question of the plaintiff's due care, and that of whether his negligence, if any, contributed to the injury, were questions of fact that should have been submitted to the jury.

Exceptions sustained.

INHABITANTS OF PERU v. FORSTER'S ESTATE.

(Supreme Judicial Court of Maine. June, 1912.)

TAXATION (§ 263*)—PERSONALTY—"EMPLOYED IN TRADE"—"EMPLOYED IN MECHANIC ARTS."

Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Rev. St. c. 9, § 13, par. 1, as amended by Pub. Laws 1909, c. 4, as personalty "employed in trade," or "in mechanic arts."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 437; Dec. Dig. § 263.*]

Report from Supreme Judicial Court, Oxford County, at Law.

Action by the Inhabitants of Peru against the estate of Charles Forster on an agreed statement of facts to recover a tax assessed by the plaintiff town against the estate of Charles Forster, deceased testate, for the year 1910. Plea, the general issue with a brief statement alleging "that said estate is not liable to a personal property tax in said town." An agreed statement of facts was filed and the case reported to the law court for determination. Case reported. Judgment for defendant.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

L. W. Blanchard, of Rumford, for plaintiffs. Robert Treat Whitehouse, of Portland, and Frank W. Butler, of Farmington, for defendant.

HANSON, J. This case comes up on the following agreed statement of facts:

"Charles Forster died on the 9th day of March, A. D. 1901, in Portland, Me., leaving a last will and testament, which was duly probated in Cumberland county. In accordance with the terms of said will, the property of the deceased was to be held in trust during the lifetime of Annie E. Forster of Portland, Me., Charlotte B. Forster of San

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index.

Diego, Cal., and Maurice W. Forster of Dixfield, Me., they to have the income thereof during their lifetime, and at their decease the principal to go to the heirs at law of said testator. That on the 1st day of April, A. D. 1910, Oscar H. Hersey of Strong, Me., was trustee of said estate, and as trustee the said Hersey carried on the business which was left by the testator consisting of the manufacture and sale of toothpicks. That said estate of Charles Forster owned a toothpick factory in Mexico, in the county of Oxford, near the village of Dixfield. That said estate also owned a lot of land in the plaintiff town next to and adjoining the tracks of the Maine Central Railroad. That on said land was a building used as a storehouse, in which said toothpicks, which were manufactured just across the river, in Mexico, were stored before being shipped away in the general course of business. That on the 1st day of April, A. D. 1910, a large amount of toothpicks were stored in said building to the amount of more than \$5,000 in value. That the said assessors of the town of Peru assessed upon the toothpicks stored in said defendant's storehouse in said town of Peru a tax of \$127.50 for the year 1910.

"No questions are raised as to the regularity of the proceedings in the plaintiff town in assessing the tax, if the defendant is liable for any part thereof.

"The real estate tax has been paid.

"If said estate is liable for the tax assessed on the toothpicks stored in the storehouse in said town of Peru, judgment shall be rendered for the plaintiffs for the amount sued for; otherwise judgment shall be rendered for the defendant."

The plaintiff claims: (1) That the toothpicks stored in the defendant's storehouse in the town of Peru cannot be taxed under the laws of this state in any other town, and, if taxed at all, they must be taxed in the town of Peru.

(2) That the toothpicks are personal property properly taxable in the plaintiff town under the provisions of R. S. c. 9, par. 1, of section 13, as amended by chapter 4 of the Public Laws of 1909, as follows:

"All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided that the owner, his servant, subcontractor or agent, so employing it, occupies any store, storehouse, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment."

The defendant contends (1) that the agreed statement brings the case clearly within the provisions of specification 6 of section 13 of chapter 9, R. S. 1903, which is as follows:

"Personal property held in trust by an executor, administrator or trustee, the income of which is to be paid to any other

person, shall be assessed to such executor, administrator or trustee, in the place where the person to whom the income is payable as aforesaid, is an inhabitant. But if the person to whom the income is payable as aforesaid, resides out of the state, such personal property shall be assessed to such executor, administrator or trustee, in the place where he resides." And (2) that the taxation of trust estates was the subject of a special statutory enactment and was not changed or modified by chapter 4, Public Laws of 1909.

In view of the stipulation, it is necessary to consider the second contention of the plaintiff only. Were the toothpicks in question "employed in trade" or "in the mechanic arts" within the meaning of chapter 9, par. 1, of section 13, as amended by chapter 4 of the Public Laws of 1909?

Counsel places much reliance on *Desmond v. Inhabitants of Machias Port*, 48 Me. 478, where the nonresident occupied a wharf assigned to him by metes and bounds, to which he brought, from his mills in another town, lumber, placed it thereon, and it there remained for several months, awaiting sale or shipment, his right thus to use the premises being by a lease for a fixed, certain and long period of time, and it was held to be an occupancy contemplated by the statute. In that case *Campbell et al. v. Inhabitants of Machias*, 33 Me. 419, is cited, in which *Shepley, C. J.*, in announcing the opinion of the court, remarks "that the design of the statute was to render liable to taxation the property of individuals who so occupy a mill or wharf as that they should be entitled to receive, and not liable to pay mill rent for the lumber from time to time sawed in the one, or wharfage for lumber deposited in the other." And the court adds: "In this view, the statute requires an actual occupancy, implying something more than a mere right to make temporary deposits from time to time, or to pass in common with others, over the wharf, with goods, wares and merchandise or lumber for the purpose of immediate shipment."

In *Farmingdale v. Berlin Mills*, 93 Me. 333, 45 Atl. 39, cited by plaintiff, it was held that logs in a river far from the plaintiff town, but which reached there subsequent to the 1st day of April, and were actually manufactured there, were employed in trade in that town, as defined by the statute, although sales of the product of the mill were negotiated in Portland and shipments made on orders from the Portland office, and cites *Gower v. Jonesboro*, 83 Md. 142, 21 Atl. 846, where it is held that wood piled on a wharf, and which was sold "in small quantities to local parties, but most of it shipped away," was personal property employed in trade, and that the plaintiff was legally taxable in the defendant town.

The facts in the cases cited by plaintiff's counsel are entirely different from the facts

in this case, and the cases cited are therefore not in point. The following cases are in point.

In *Creamer v. Inhabitants of Bremen*, 91 Me. 508, 40 Atl. 555, which was an action to recover a tax paid under protest, the non-resident was the owner on the 1st day of April, 1893, of a quantity of firewood piled upon a wharf and upon the adjacent shore in the defendant town. During the preceding winter the plaintiff had cut and hauled the wood from his own land in the same town. The wood was piled up awaiting shipment during the spring and summer to Thomaston. Held, that under these circumstances the personal property was not taxable to the plaintiff in defendant town by virtue of the provisions of R. S. 1883, c. 6, § 14, cl. 1. This wood, under the above circumstances, cannot be said to have been "employed in trade" in the defendant town. It was not hauled to the wharf to be there sold, nor even to be shipped to the place or different places where the owner might subsequently sell it. It was hauled there for the definite purpose of being shipped from there to a particular place when the river opened for navigation in the spring. It was merely in transit.

In *Hittinger v. Westford*, 135 Mass. 258, where a dealer in ice had in a town other than that in which he resided and had his office, a storehouse in which the ice which constituted his stock in trade was kept, and from which it was delivered on contracts principally made elsewhere, held, that the building in which the ice was kept was not a "store" within the meaning of Gen. Sts. 1860, c. 11, § 12, cl. 1, and that the ice was not taxable to him in that town. "The icehouses were only storehouses, and the comparatively trifling amount of ice which may have been incidentally sold from the icehouses did not change their character into stores. * * * It is obvious from the whole course of legislation that it has been the purpose as a rule to make personal property taxable where the owner is an inhabitant, with certain well defined exceptions, the important one, so far as questions raised in the cases at bar are affected, being, in effect, that if an inhabitant of one town has goods, wares, merchandise, or other stock in trade, in another town, with which he is engaged in trade or business in such other town, such stock in trade is taxable in such other town, not if it is merely kept there, or traded in there, but only in case the owner occupies a store in which he carries on a trade or traffic in such stock in trade as he has there."

In *Inhabitants of New Limerick v. Wat-*

son, 98 Me. 379, 57 Atl. 79, an action of debt to recover a tax assessed for the year 1900, the defendant resided in Houlton, and on April 1, 1900, owned and occupied a starch factory, dryhouses, and a storehouse in plaintiff town. In the season of 1899 the defendant manufactured about 100 tons of starch in his mill, and, not selling the same, he stored the starch in his storehouse to await shipment, and it remained there until after the 1st day of April, 1900. The defendant was in business in Houlton and there had his office, where all his books and accounts were kept, and where all business in connection with the manufacture and sale of starch was transacted. None of the starch was intended for sale in New Limerick, and none was sold there. It was stored there to be shipped as sales were made by the defendant in his office in Houlton, or by correspondence conducted there. It was held that under the circumstances of this case the starch in question was not employed in the mechanic arts, nor employed in trade within the meaning of R. S. 1883, c. 6, § 14, for the purposes of taxation. Held, further, that the defendant did not occupy any store or shop in the plaintiff town for the purpose of the employment of this starch in trade. * * *

While a storehouse may under some circumstances come within the meaning of the word 'store' as used in the statute, it does not in this case, because the defendant's storehouse was not occupied by him for the purpose of employing this starch in trade in plaintiff town. The starch was not in a store for trade, but in a storehouse for storage."

Counsel for plaintiff urges that the amendment was made for the purpose of reaching property which would otherwise escape taxation, because of the alleged uncertainty as to the meaning of the statute. But the amendment, adding the word "storehouse," does not enlarge the rights of the plaintiff in the case at bar beyond what they were before the amendment. The case before us is not to be distinguished in principle from *Inhabitants of New Limerick v. Watson*, supra. It is therefore the opinion of the court that the toothpicks were not "employed in trade" or "in the mechanic arts" in the town of Peru. The storehouse was not a store in the sense in which the word was used by the Legislature. The toothpicks were not placed there for the purpose of employment in trade, or in the mechanic arts, in that town. They had simply reached the first of many stages in the transit to their destination beyond the town of Peru.

The entry must therefore be:
Judgment for the defendant.

SAWYER v. GILMORE, State Treasurer.

(Supreme Judicial Court of Maine. June 6, 1912.)

1. TAXATION (§ 40*)—EQUALITY—SCHOOL TAXES.

Pub. Laws 1909, c. 177, which provides for a general tax assessment for the purposes of the common schools, and which provides for the distribution of the proceeds to the various cities, towns, and plantations, one-third according to the number of persons of school age and two-thirds according to valuation, does not violate Const. art. 9, § 8, which requires taxes to be apportioned equally according to the just valuation of the property assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.*]

2. TAXATION (§ 40*)—EQUALITY—"EQUAL."

That taxation may be equal within the requirement of Const. art. 9, § 8, it is not necessary that the benefits arising therefrom be enjoyed by all the people in equal degree, nor that each person should participate in each particular benefit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.*]

For other definitions, see Words and Phrases, vol. 3, p. 2419.]

3. TAXATION (§ 40*)—EQUALITY.

Inequality of tax assessment vitiates it, but inequality of distribution of the proceeds does not, if the purpose be the public welfare.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.*]

4. CONSTITUTIONAL LAW (§ 70*)—DISTRIBUTION OF PROCEEDS—LEGISLATIVE DISCRETION.

The particular method of distributing the proceeds of taxation rests in the wise discretion of the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—TAXATION—VALIDITY.

Pub. Laws 1909, c. 177, which provides for general state taxation for common school purposes, is not invalid on the theory that, because a town receives back from the state two-thirds of what it has paid to the state, it can relieve itself from local taxation for purposes other than for schools, and can devote the proceeds to the support of paupers, the maintenance of roads, or running expenses of the town, and thereby make unorganized townships contribute toward these local charges, since section 5 forbids the use of the fund for any other purpose than the maintenance of common schools.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—PUBLIC SCHOOLS—TAXATION—CONSTITUTIONAL LAW.

Pub. Laws 1909, c. 177, which provides for a general state tax assessment for common school purposes, does not violate Const. art. 8, which provides that the Legislature shall require the several towns to make suitable provision at their own expense for the support and maintenance of public schools, because section 6 of the act permits sums received from the state under this distribution to be deemed to be raised by the municipalities within Rev. St. c. 15, § 13, as amended by Pub. Laws 1909, c. 128, which provides for municipal taxation for school purposes.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

7. CONSTITUTIONAL LAW (§ 50*)—DIVISION OF POWERS.

The executive and the judicial departments of the state can exercise only the powers conferred by the Constitution, and such as are necessarily implied therefrom, while the powers of the Legislature, broadly speaking, are absolute, except as limited by the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

8. CONSTITUTIONAL LAW (§ 48*)—VALIDITY OF STATUTES.

A legislative act should be held constitutional, unless the Constitution positively invalidates it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

9. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—TAXATION—CONSTITUTIONAL LAW.

Const. art. 8, which provides that the Legislature shall require the several towns to make suitable provision at their own expense for the support of public schools, is mandatory and not prohibitory; there being no remedy on the Legislature neglecting or refusing to legislate.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

10. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—COMMON SCHOOLS—"SUITABLE" PROVISION.

The word "suitable" within Const. art. 8, which requires the Legislature to require towns to make suitable provision for common schools at their own expense, is an elastic term, depending upon the necessities of changing times, and subject to the Legislature's discretion to determine what is suitable.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 7, p. 6780.]

11. SCHOOLS AND SCHOOL DISTRICTS (§ 99*)—TAXATION—CONSTITUTIONAL LAW.

Pub. Laws 1909, c. 177, authorizing general state taxation for common school purposes, is not unconstitutional, because, under the practical workings of the act, the towns of the state are not required to raise a uniform amount per capita.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 233, 234; Dec. Dig. § 99.*]

12. TOWNS (§ 16*)—POWERS—SOURCE.

Towns are mere agencies of the state, and their powers and duties are within the Legislature's control.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 21; Dec. Dig. § 16.*]

13. CONSTITUTIONAL LAW (§ 229*)—EQUAL PROTECTION OF THE LAWS—COMMON SCHOOL DISTRICTS.

Pub. Laws 1909, c. 177, providing for general state taxation for common school purposes, and providing for distribution of the proceeds to the various cities, towns, and plantations, one-third according to the number of persons of school age and two-thirds according to the valuation, does not violate Const. U. S. Amend. 14, which declares that no state should deny any persons within its jurisdiction the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14. CONSTITUTIONAL LAW (§ 209*) — EQUAL PROTECTION OF THE LAWS — PURPOSE OF FOURTEENTH AMENDMENT.

Const. U. S. Amend. 14, which provides that no state shall deny any person within its jurisdiction the equal protection of the laws, was designed to prohibit discriminatory legislation, but so long as all persons subjected to a particular law are treated alike, under like circumstances and conditions, there is no violation of the amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 209.*]

Report from Supreme Judicial Court, Penobscot County, in Equity.

Bill by Herbert J. Sawyer against Pascal P. Gilmore, State Treasurer. On report. Bill dismissed.

Bill in equity brought by Herbert J. Sawyer of Mattaniscotis, an unorganized township in the county of Penobscot, to enjoin the defendant and his successors in office from collecting a tax assessed under the provisions of chapter 177 of the Public Laws of 1909, entitled "An act relating to the common school fund and the means of providing for and distributing the same." Bill dated July 27, 1910. An answer was filed by the defendant. By agreement the case was reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Louis C. Stearns, Taber D. Bailey, and Louis C. Stearns, Jr., all of Bangor, for plaintiff. Warren C. Philbrook, Atty. Gen., and William R. Pattengall, Atty. Gen., for defendant.

CORNISH, J. This bill in equity is brought to enjoin the Treasurer of State and his successors in office from collecting a tax assessed under the provisions of chapter 177 of the Public Laws of 1909, entitled "An act relating to the common school fund and the means of providing for and distributing the same." The plaintiff is a resident of Mattaniscotis, an unorganized township in the county of Penobscot. He is the owner of 12 lots of land in the township, and has one child of school age. The entire state tax assessed against these lots at the rate of 5 mills amounted to \$21.51, three-tenths of which, or \$6.45, was created by the act in question. The amount involved in this suit is not large, but the consequences are of vast importance.

The case comes up on report, and by stipulation the only question raised and to be considered is the constitutionality of the chapter above referred to under the state and federal Constitutions.

Chapter 177 of the Public Laws of 1909, the statute in question, reads as follows.

"Section 1. A tax of one and a half mills on a dollar shall annually be assessed upon

all of the property in the state according to the valuation thereof and shall be known as the tax for the support of common schools.

"Sec. 2. This tax shall be assessed and collected in the same manner as other state taxes and shall be paid into the state treasury and designated as the common school fund.

"Sec. 3. One-third of this fund shall be distributed by the Treasurer of State on the first day of January, annually, to the several cities, towns and plantations according to the number of scholars therein, as the same shall appear from the official returns made to the state superintendent of public schools for the preceding year, and the remaining two-thirds of said fund shall be distributed by the Treasurer of State on the first day of January, annually, to the several cities, towns and plantations, according to the valuation thereof as the same shall be fixed by the state assessors for the preceding year.

"Sec. 4. All of the said fund not distributed or expended during the financial year shall at its close be added to the permanent school fund.

"Sec. 5. All moneys provided by towns or apportioned by the state for the support of common schools shall be expended for the maintenance of common schools established and controlled by the towns by which said moneys are provided, or to which said moneys are apportioned.

"Sec. 6. Sums received by any city, town or plantation from the distribution provided by section three shall be deemed to be raised by such city, town or plantation within the meaning of Revised Statutes, chapter fifteen, section thirteen, as amended.

"Sec. 7. The passage of this act shall in no wise affect the provisions of sections one hundred and twenty-four, one hundred and twenty-five, one hundred and twenty-six and one hundred and twenty-seven of chapter fifteen of the Revised Statutes, or of section two of chapter one hundred and eleven of the Public Laws of 1907."

It is contended that this statute violates section 8 of article 9 of the state Constitution, which reads: "All taxes upon real or personal estate assessed by authority of this state shall be apportioned and assessed equally according to the just value thereof"; article 8 providing that "the Legislature are authorized and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools," and the fourteenth amendment of the federal Constitution, declaring that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

Before entering upon a consideration of

the constitutional questions thus raised, it may be useful to take a brief survey of the laws in force at the time this statute was enacted pertaining to the raising and distribution of money for the common schools of the state.

These schools have received their support from two distinct sources, state aid and direct municipal taxation, the former passing through the state treasury to the treasuries of the several municipalities and the latter through the municipal treasuries alone.

State Aid.

The state aid, since 1872, when the first so-called mill tax was created, has itself been derived from three sources.

First. From the income of the "Permanent School Fund," so called, a fund created by the sale of wild lands appropriated by the state in former years for the support of schools, amounting at the present time to about one half a million dollars, and on this principal the state pays interest at the rate of 6 per cent. R. S. c. 15, § 122.

Second. From one-half of the state tax on savings banks and trust companies. R. S. c. 15, § 122.

Third. From the school mill tax so called, derived from assessing all the property in the state situated in cities, towns, plantations, and unorganized townships, at the rate of one mill on the dollar from 1872 to 1907, and since 1907 at the rate of $1\frac{1}{2}$ mills. R. S. c. 15, § 124; Public Laws 1907, c. 111.

This school mill fund is distributed by the Treasurer of State to the several cities, towns, and plantations, according to the number of scholars therein.

The Legislature of 1909 created by the act in question (chapter 177) an additional revenue by imposing a further state tax of $1\frac{1}{2}$ mills upon all of the property in the several cities, towns, plantations, and unorganized townships of the state at the rate of $1\frac{1}{2}$ mills on the dollar, this fund to be known as the "Common School Fund," and to be distributed by the State Treasurer to the several cities, towns, and plantations of the state, one-third according to the number of scholars therein and two-thirds according to the valuation. The support of common schools on the part of the state under the present plan is therefore derived from (1) the permanent school fund; (2) the savings bank and trust company tax; (3) the school and mill fund; and (4) the common school fund. It is this last which is under consideration here.

Municipal Aid.

The several cities, towns, and plantations have, in addition, been compelled by the Legislature to assist in the maintenance of common schools by municipal taxation. The amount thus required has varied from time

to time. In 1821 it was fixed at 40 cents per capita, inclusive of the income of any incorporated school fund (Statute 1821, c. 117, § 1); changed in 1832 to 40 cents, exclusive of state income or of any state aid (Public Laws 1832, c. 39); 60 cents, exclusive, as in R. S. 1857, c. 11, § 5; changed to \$1, exclusive, by Public Laws 1868, c. 196; 80 cents exclusive of such income, state aid, and of the mill tax from 1872 to 1907 (Public Laws 1872, c. 56, R. S. 1903, c. 15, § 13); 55 cents, exclusive from 1907 to 1909 (Public Laws 1907, c. 111); and since January 1, 1910, 80 cents "exclusive of the income of any corporate school fund, or of any grant from the revenue or fund from the state or of any voluntary donation, devise or bequest" (Public Laws 1909, c. 128), but inclusive of any sums received from the distribution of the common school fund created by the act now under consideration (Public Laws 1909, c. 177, § 6).

It is perhaps unnecessary to add that it has always been and still is within the power of the municipalities to voluntarily raise by taxation such amounts in addition to the required per capita tax as they may deem necessary and proper. *Cushing v. Newburyport*, 10 Metc. (Mass.) 508; *Piper v. Moulton*, 72 Me. 155-166.

[1] Let us now take up the constitutional question involved in this case, and consider what the plaintiff deems the vulnerable points in the act in question. We will discuss them seriatim.

It is not contended that the manner in which this tax is assessed violates any constitutional provision. Section 8 of article 9 of the state Constitution requires that "all taxes upon real or personal estate, assessed by authority of this state shall be apportioned and assessed equally according to the just value thereof." The act under consideration meets this requirement fully. The assessment is laid upon all the property both real and personal throughout the state, in all the cities, towns, plantations, and unorganized townships. No property escapes. No locality escapes. All the property is assessed by the state board of assessors at its just valuation and a uniform rate of taxation, $1\frac{1}{2}$ mills, is laid upon all classes of property. No such objection can be raised to the mode of assessment here as in the statute considered in the Opinion of Justices, 97 Me. 595, 55 Atl. 827, where a discrimination was made between land in incorporated and in unincorporated places. Here there is no discrimination. The apportionment and assessment are equal throughout the state.

Objections, however, are raised to the manner of distribution, and the plaintiff contends that in considering the constitutionality of a statute creating revenue by taxation the method of distribution as well as of assessment should be scrutinized.

1. The first objection is that this act im-

poses an unequal burden of taxation upon the unorganized townships of the state, because, while the fund is created by the taxation of all the property in such townships as well as upon the property in the cities, towns, and plantations, no provision is made for the distribution of any part thereof to such townships, but it is all apportioned among the cities, towns, and plantations. The townships are omitted. In other words, while four subdivisions of the state are made to contribute to the fund, only three are permitted to share in the financial benefits.

This objection, however, is without legal foundation. The Legislature has the right under the Constitution to impose an equal rate of taxation upon all the property in the state, including the property in unorganized townships, for the purpose of distributing the proceeds thereof among the cities, towns, and plantations for common school purposes, and the mere fact that the tax is assessed upon the property in four municipal subdivisions and distributed among three is not in itself fatal.

Doubt arose as to the constitutionality of the original school mill act (chapter 43, of the Public Laws of 1872), which was the first in this state to impose a general tax upon all the property in the state and devote the proceeds to the maintenance of the common schools. Accordingly in 1876, the House of Representatives asked the justices of the Supreme Judicial Court whether the Legislature has the power under the Constitution of the state to assess a general tax upon the property of the entire state for the purposes of distribution for the support of the common schools. The justices answered unanimously in the affirmative. Opinions of the Justices, 68 Me. 582.

Ample ground for the exercise of this legislative power was found in the constitutional provision that "a general diffusion of the advantages of education are essential to the preservation of the rights and liberties of the people" (article 8), and in the "full power" conferred upon the Legislature "to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state" (article 4, pt. 3, § 1). The existence of the power being granted, of the necessity of its exercise the Legislature must be and is the sole judge. The broad ground upon which the validity of the act was upheld is stated in these words: "The tax in question is like that for the support of government. It is for the benefit of the whole people. All the property in the state is assessed according to its valuation. All contribute thereto in proportion to their means. It is a tax for a public purpose, not one by which one individual is taxed for the special and peculiar benefit of another. All enjoy the beneficial results of education, and the better order and government arising therefrom, irrespective of the amounts respectively contributed by each to these most

important objects." While it is true that the opinions of justices given at the request of either branch of the Legislature or of the executive do not have the binding force of decisions in adjudicated cases (95 Me. 566, 573, 51 Atl. 224), yet they carry weight in proportion to the reasons upon which they are based.

[2] The justices in considering the mill tax did not in detail discuss the discrimination against unorganized townships, which share in the contribution but not in the distribution, but that question was necessarily involved in their opinion, because in this respect the Acts of 1872 and of 1909 are identical, and the language quoted above meets and answers it fully. The fundamental question is this: Is the purpose for which the tax is assessed a public purpose, not whether any portion of it may find its way back again to the pocket of the taxpayer or to the direct advantage of himself or family. Were the latter the test, the childless man would be exempt from the support of schools and the sane and well from the support of hospitals. In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree, nor that each one of the people should participate in each particular benefit. Laws must be general in their character, and the benefits must affect different people differently. This is due to difference in situation. As was said in the State Railroad Tax Cases, 92 U. S. 575-612 (23 L. Ed. 663): "Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation is a dream unrealized." But the law recognizes a broader and more unselfish test than this. In a Republic like ours each must contribute for the common good, and the benefits are received not directly in dollars and cents, but indirectly in a wider diffusion of knowledge, in better homes, saner laws, more efficient administration of justice, higher social order, and deeper civic righteousness.

This is the legal and constitutional answer to the plaintiff's claim of inequality, but in this connection it should not be overlooked that the Legislature has, in fact, made wise and generous provision for the education of children in the unorganized townships, more generous in fact than in the case of children in incorporated places. The very fact that these townships have no municipal organization precludes a distribution to them of any share in the school fund by the same method that distribution is made to cities, towns, and plantations. The municipal machinery therefor is lacking. Accordingly by R. S. c. 15, § 94, as amended by chapter 87 of the Laws of 1909, the state either maintains a school for 26 weeks in the year in every unorganized township in which there is more than one child of school age, or provides for

sending the children to schools in adjoining towns or plantations, on condition that the inhabitants of the township pay to the state, a sum equal to 40 cents for each inhabitant. The expense of educating the children in such townships in excess of the per capita tax of 40 cents and of the interest on the reserve school fund in the township is all borne by the state by appropriations from the annual school funds of the state, which include the mill tax fund and the common school fund.

And these appropriations from the annual school funds for use in the township schools have increased as the state funds for school purposes have increased. In 1899 it was \$1,500 (Public Laws 1899, c. 89), increased to \$2,500 by Public Laws 1901, c. 206, to \$5,000 by Public Laws 1903, c. 128, to \$7,000 by Public Laws 1905, c. 45, to \$15,000 by Public Laws 1909, c. 87, and to \$18,000 by Public Laws 1911, c. 29.

So that, when the Legislature of 1909 by the enactment of chapter 177 practically increased the state tax for school purposes from $1\frac{1}{2}$ mills to 3 mills, and doubled the rate on these unorganized townships, it, at the same session by chapter 87, increased the appropriation for the township schools from \$7,000 to \$15,000, a little more than the same ratio of increase would require. It might be added that each of the three school children in the township of Mattamiscontis in the year ending April 1, 1911, received an expenditure of \$53.58, and each scholar on the average in all the unorganized townships of the state received \$19 for school purposes while the amount perscholar throughout the state averaged only \$2.52. The 948 children of school age in the unorganized townships received on the average about eight times as much as the 214,960 children in the cities, towns, and plantations.

In this view of the situation, it is evident that the passage of the common school fund act of 1909 in fact works neither inequality nor injustice so far as the education of children in the unorganized townships is concerned, and, when the Legislature doubled the amount of the school tax which the land of the plaintiff was to pay, it at the same time more than doubled the proportional part of the state fund which could be used for the education of his children. So much for the first contention as to inequality between taxes paid and benefits received.

2. But the plaintiff further attacks the method of distribution as unconstitutional because it is made, not according to the number of scholars, as is the school mill fund, but one-third according to the number of scholars and two-thirds according to valuation, thus benefiting the cities, and richer towns more than the poorer.

[3, 4] But that result is not the test of constitutionality. Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public wel-

fare. The method of distributing the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people, and not with the court. Such distribution might be according to population, or according to the number of scholars of school age, or according to school attendance, or according to valuation, or partly on one basis and partly on another. The Constitution prescribes no regulation in regard to this matter, and it is not for the court to say that one method should be adopted in preference to another. We are not to substitute our judgment for that of a co-ordinate branch of the government working within its constitutional limits. The distribution of the school mill fund of 1872 has resulted in inequality. That distribution has been, and continues to be, based on the number of scholars, thereby benefiting the poorer towns more than the richer, because they receive more than they pay, and in the opinion of the justices before cited that method is deemed constitutional. The act under consideration apportions the newly created common school fund one-third according to the number of scholars and two-thirds according to the valuation as fixed by the state assessors, thereby benefiting the richer towns more than the poorer, producing inequality in the other direction, but we are unable to see why this method is not equally constitutional with the other. Both taxes are assessed for the same admittedly public purpose, both promote the common welfare, and the fact that the Legislature has seen fit to distribute the two on different bases is not fatal to the validity of either. It may be that the two methods taken together produce a more equal distribution than either operating alone. In any event, the Legislature has adopted both methods, and both must stand or fall together.

[5] 3. Nor is there any force in the contention that because the town receives back from the state practically two-thirds of what it has paid to the state, therefore it can relieve itself from local taxation for other purposes than schools, and can devote the proceeds, when received, to the support of paupers, or the maintenance of roads or the running expenses of the town, thereby making the unorganized townships contribute towards these local charges. This is a groundless fear. The very terms of the act prohibit it. Section 5 provides that "all moneys provided by towns or apportioned by the state for the support of common schools, shall be expended for the maintenance of common schools, established and controlled by the towns by which said moneys are provided or to which said moneys are apportioned." It is not for the court to say that this express and mandatory clause will be deliberately nullified or evaded by the towns. This money is raised for a particular purpose, collected by the state for that purpose, paid

over to the towns for that purpose with a specific injunction that it shall be used for that and nothing else. Who has the right to say that that injunction will be violated?

[6] 4. But the constitutionality of this act is assailed on another ground, and that is that section 6 permits sums received from the state under this distribution "to be deemed to be raised by the municipalities within the meaning of R. S. c. 15, § 13, as amended," thereby relieving them pro tanto from raising by municipal taxation for school purposes the not less than 80 cents for each inhabitant required by R. S. c. 15, § 13, as amended by Public Laws of 1909, c. 128.

In this respect this common school fund act of 1909 differs from the school mill act of 1872. The act of 1872 does not afford such relief because the towns are still required to raise their 80 cents per capita tax, and the amount received by the towns from the mill fund is additional thereto. But the act of 1909 permits the amounts apportioned thereunder by the state to the several towns to be applied towards the per capita tax, so that under this act some towns are wholly and others partially relieved from such local taxation. This, it is claimed, contravenes article 8 of the state Constitution, which reads:

"A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people, to promote this important object, the Legislature are authorized and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of the public schools," etc.

What is the fair construction of this clause? What force has it as a part of the organic law of the state?

[7] It is but the restatement of a fundamental and familiar principle to say that the sovereign power is lodged in the people, and that the Constitution, framed and adopted by the people, divides the powers of government into three distinct and yet co-ordinate departments—executive, judicial, and legislative. But it is not always borne in mind that the Constitution operates differently with respect to these different branches. The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of legislation, broadly speaking, are absolute, except as restricted and limited by the Constitution. As to the executive and judiciary, the Constitution measures the extent of their authority, as to the Legislature it measures the limitations upon its authority. *Field v. People*, 2 Scam. (Ill.) 79-81; *Cooley*, Const. Lim. (6th Ed.) p. 104, and cases cited.

"It has never been questioned, so far as I know," says Redfield, C. J., in *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, "that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. This must be conceded I think to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state Legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular state in question."

[8] It follows, therefore, that a legislative act is to be held constitutional unless a positive restriction or limitation or prohibition can be found in the Constitution which renders it invalid. No such limitation or prohibition in regard to the maintenance of the common schools can be found. The argument for unconstitutionality on this ground is this: That article 8, before referred to, makes it the duty of the Legislature to require the several towns to raise a suitable sum by local taxation for the support of common schools; that, acting under that provision, the Legislature from the organization of the state to the present time has fixed the amount at a per capita rate, varying at different times between 40 cents and \$1 as we have before seen; that the practical effect of this act under consideration is to relieve some towns altogether from such local taxation and therefore to pro tanto repeal R. S. c. 15, § 13, and to nullify the constitutional provision. The mathematical result claimed undoubtedly exists. According to the annual report of the state superintendent of schools, 14 of the cities, towns, and plantations in this state in the year ending April 1, 1911, raised nothing locally under the 80 cents per capita statute, the amount received from the state being sufficient to meet the amount so required of them, and, it being "deemed to be raised" under chapter 15, § 13, they avoided the local taxation completely. From the same report it appears that other towns profited so largely by the act that the per capita assessment was reduced from 80 cents to a very small figure, so that of the total amount of \$1,184,439.60 required to be raised by all the cities, towns, and plantations, under R. S. c. 15, § 13, \$542,802, was in fact raised by local taxation, and \$642,378.69, or more than one-half, was contributed by the state under chapter 177 of the Laws of 1909. The practical effect is undoubtedly as contended, and this result may well arrest the attention of the Legislature upon whom rests the responsibility.

[9] But no limitation or prohibition of the Constitution has been violated. Article 8 "is mandatory not prohibitory." 68 Me. 583. It imposes the most solemn duties upon the Legislature and for obvious reasons. No subject was dearer to the hearts of the framers of our Constitution than that of education, recognizing as they did that it lies at the very foundation of good government. It was for that reason that they inserted this provision in the organic law of the state. They in terms expressed the broad and full powers which should be exercised in dealing with this subject and sought to impress upon the Legislature its high duty to avail itself of these powers. Not only could the Legislature enact laws providing for a general assessment under the public benefit clause, but in order that the towns, which were always jealous of their rights, might assist, the power was lodged with the Legislature to require the towns to make suitable provision at their own expense. It is an historical fact that in the early days the towns had frequently neglected to make such provision, and therefore the framers of the Constitution left no room to doubt that the Legislature should have the power to require them to do their duty, to the end that the children and youth of the state should be properly educated. But the provision is nothing more than mandatory. "It shall be the duty of the Legislature to require the towns to make suitable provision." Suppose after the Constitution was adopted the Legislature had failed to pass any such act, what would be the remedy? None certainly in the court. It might be deemed a failure of duty but the court could not correct it. "The Legislature is in duty bound to perform all duties imposed upon it by the Constitution, but, if it fails to do so and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy." 8 Cyc. Const. Law, p. 762. In re State Census, 6 S. D. 540, 62 N. W. 129: "The fifteenth section of the Schedule to the Constitution declares that 'the General Assembly shall pass all such laws as may be necessary to carry this Constitution into full effect.' There is no way of enforcing this injunction on the Legislature. Under our system of government there is no power to compel the legislative department of government to make laws. Constitutions may restrict legislative powers, and declare what laws shall not be valid; but from the very nature of legislative power its exercise in a particular case must depend upon the volition of the Legislature. Responsibility to a constituency, and a sense of public duty, are the only incentives which can prompt legislative action." St. Jos. Board v. Patten, 62 Mo. 444-448.

The Constitution of Alabama adopted in 1819 declared that the "General Assembly shall direct, by law, in what manner and in what courts, suits may be brought against

the state." Article 6, § 9. In accordance with that provision, statutes were enacted in 1820 and from time to time amended prescribing the courts and the mode of procedure. In 1865 the Constitution was amended to read, "Suits may be brought against the state in such courts as may by law be provided." Const. 1867, art. 1, § 16. It was held in *Ex parte Alabama*, 52 Ala. 231, 23 Am. Rep. 567, that the subsequent repeal of these statutes was constitutional and abated pending suits.

A case on all fours with that at bar is *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216. In the Massachusetts Declaration of Rights it was declared "that the people have a right to invest their Legislatures with power to authorize and require, and the Legislature shall, from time to time authorize and require the several towns, parishes, precincts and other bodies corporate and politic and religious societies to make suitable provision at their own expense for the institution of the public worship of God and for the support and maintenance of public protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily." Provisions for ministerial and parish taxes were subsequently made by the Legislature in accordance with this mandate of the Constitution. But in 1811 what was afterwards known as the Religious Freedom Act was passed, whereby any person was exempted from the payment of a ministerial tax by filing with the proper town officers a certificate of membership in another society. The constitutionality of this statute was attacked on the ground that its effect was to pro tanto repeal the statutes imposing ministerial taxes, and therefore that it controverted the provision in the Declaration of Rights above quoted. Chief Justice Parker in delivering the opinion of the court answered this contention as follows: "That part of the declaration which enjoins it upon the Legislature to exact the support of religious institutions and attendance upon public worship is merely directory. If no law had been passed pursuant to it, there could be no penalty upon the citizen, for not obeying the clear expression of the public will; nor is there any way of coercing a Legislature to carry into effect these important requisitions. So the mode, also, of executing the will of the people, in this particular, is left entirely to the Legislature; and although laws may be passed, which have a contrary tendency, and which, in their consequences, may injure, instead of promoting, the public worship, yet the Legislature is to judge, and even their erroneous construction of the design of the people, as expressed in the said declaration, must have legal effect, so far as they are not manifestly repugnant to the principles of the Constitution."

The phrasing of article 8 in the Constitution of Maine seems almost to have been

copied from this clause in the Constitution of the mother state, and the authority of this decision is the greater because rendered at a time (1817) not long after the Constitution of Massachusetts had been adopted. It may with propriety be deemed the construction placed upon it by contemporaries. This act of 1811 came again under discussion by the Massachusetts Court in *Holbrook v. Holbrook*, 1 Pick. 248, and in the course of the opinion Judge Wilde says: "No such exemption seems to have been contemplated by the framers of the Constitution, who manifestly intended that every one should be held to contribute according to his ability to the support of public worship, upon the institution and maintenance of which the happiness of the people and the good order and preservation of civil government so essentially depend. But, there being no restraining clause in the Constitution, the Legislature in the plenitude of their power have in the second section provided for this exemption; and, as it seems, on the condition only that the person claiming it shall become a member of some religious society, and shall produce a certificate of his membership to be filed with the town clerk. This religious society may be composed of Christians, or of Jews, Mohammedans, or Pagans. It is not required to support any teacher of piety, religion, and morality; and the person claiming exemption is not obliged to attend public worship as the condition of this privilege."

The phraseology of article 8 is in itself significant. In the first place only a "duty" is laid upon the Legislature. The Constitution does not even say that they shall require, but that they are "authorized," and it is "their duty to require" the several towns to provide for the support of common schools.

[10] And, in the second place, the extent of the requirement is left wholly to the discretion of the Legislature, because their duty is to require the several towns to make "suitable" provisions. Who is to determine what is suitable? Clearly the Legislature itself. "Suitable" is an elastic and varying term, dependent upon the necessities of changing times. What the Legislature might deem to be suitable, and therefore necessary under some conditions, they might deem unnecessary under others. The amount which the towns ought to raise would depend largely upon the amounts available to them from other sources, and as these other sources increase the local sources can properly diminish.

Most significant, too, in this connection, is the fact that the first act passed by the Legislature in furtherance of the constitutional injunction fixed the municipal as "a sum of money, including the income of any incorporated school fund, not less than forty cents for each inhabitant." Statute 1821. c. 117, § 1. Under that act, whatever was received

from the income of any incorporated school fund was in effect "deemed to be raised" under that statute, and reduced the amount required to be raised locally, and, if such income were sufficient in any town to equal the per capita tax of 40 cents, then the requirement for local taxation in that town ceased entirely. In this most important particular the acts of 1821 and of 1909 are identical.

In the light, therefore, of these decisions, and in view of the language of the Constitution and of the first legislative act passed in accordance therewith, we have no hesitation in saying that, although the act of 1909 may relieve a few towns (at present only fourteen out of a total of about five hundred) from any local taxation whatever for public schools, that is a matter which may be considered by the Legislature in the performance of their duty, but does not of itself, in the absence of any restrictive constitutional provision, render the act unconstitutional and void.

We have not overlooked a statement in the Opinion of the Justices, 68 Me. 583, that article 8, "is affirmative and not negative in its character. It (the Legislature) cannot constitutionally absolve the towns from making at their own expense suitable provision for this primary and indispensable foundation of all good government. The Legislature are by proper enactments to require the towns to make suitable provisions for the public schools, and the towns are, at their own expense, to comply with those enactments. Neither can escape from the performance of their several and respective obligations." The question then before the court was the power of the Legislature to supplement local taxation by general taxation for this public purpose, and the precise question of the force of the constitutional mandate was not involved. We do not feel that the conclusions reached in this decision after mature deliberation should be modified because of these expressions in the opinions of the justices which are in the nature of dicta in an adjudicated case.

[11, 12] 5. Another result of the application of the common school fund to the local tax is that all the towns are not now obliged to raise a uniform amount per capita, but it varies all the way along the line, from nothing up to 80 cents. In other words, the Legislative requirement operates differently in different towns and the inevitable result is to create, automatically as it were, a varying and un-uniform rate in the various cities and towns of the state.

But the Legislature has this power. Towns are mere agencies of the state. They are purely creatures of the Legislature and their powers and duties are within its control. *Hone v. Water Co.*, 104 Me. 225, 71 Atl. 709, 21 L. R. A. (N. S.) 1021. Hence it lies in the power of the Legislature not merely to pass laws applicable to all towns, but it may di-

rect its attention to the need of a particular town and compel such town to raise money by taxation, provided the purpose be a public one, and the tax be apportioned and assessed equally within that town, and the town receive the benefit thereof.

For instance the Legislature has control of the highways and bridges of the state, and it has the power to reach out and compel one or more towns to construct a certain piece of road or erect a certain bridge and require such town or towns to assess the property therein for the expense. *Waterville v. Co. Com.*, 59 Me. 80; *Opinions of the Justices*, 99 Me. 515, 60 Atl. 85. This is clearly implied in the decision of *Dyar v. Farmington Vill. Corp.*, 70 Me. 515, where the reason that a tax assessed for a public purpose could not be held constitutional was that it was imposed upon only a portion of the real estate of a town leaving the remainder exempt.

In *State v. Board of Co. Comms. of Shawnee Co.*, 28 Kan. 431, the question involved was the right of the Legislature to establish a state road, and cast the cost thereof upon the county through which the road lay, and that, too, without submitting the matter to the determination of the county commissioners or the people of the county. That learned jurist, Justice Brewer, then of the Supreme Court of Kansas, sustained the constitutionality of the act, and, after holding the purpose to be a public one, defined the legislative power in these words: "And finally we remark that counties are purely the creation of state authority. They are political organizations, whose powers and duties are within the control of the Legislature. That body defines the limits of their powers, and prescribes what they must and what they must not do. It may prescribe the amount of taxes which each shall levy, and to what public purpose each shall devote the moneys thus obtained. It may require one county to build a certain number of bridges at certain specified places, and of a particular size and quality. It may require another to open roads in given localities, and another to build a courthouse and to levy a tax to a prescribed amount for the purpose of paying therefor. In short, as a general proposition, all the powers and duties of a county are subject to legislative control; and, provided the purpose be a public one and a special benefit to the county, it may direct the appropriation of the county funds therefor in such manner and to such amount as it shall deem best."

Following the same reasoning the same court in *Kansas v. Freeman*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 87, declared constitutional a legislative act establishing a high school at Howard, Elk county, and requiring its maintenance by the people of the county. The court say: "If the obligations which the municipalities are required to assume and discharge are for institutions and necessities of purely public concern, and for which taxes may ordinarily be levied,

the power of the Legislature in respect to them is supreme, and its determination, if reached by constitutional methods, is not subject to review. The matter of establishing schools is certainly a public purpose, and the case at bar falls within the cited case, with which decision we are entirely satisfied." Other cases in point are *Gordon v. Cornes*, 47 N. Y. 608, where a single town was compelled to raise taxes for the erection of school buildings for a State Normal School; *Merrick v. Amherst*, 12 Allen (Mass.) 500, where the Supreme Court of Massachusetts held that the Legislature had power to pass a statute authorizing a town to raise money for an agricultural college to be established therein by the commonwealth; *Hanscom v. Lowell*, 165 Mass. 419, 43 N. E. 196, where an act establishing a textile school in the city of Lowell was held constitutional on the same ground. The last case affords an excellent illustration of the exercise of this power. In large manufacturing centers like Lowell, the Legislature may deem a textile school a necessity. It therefore directs Lowell to maintain such a school by local taxation. In another city it may deem a night school necessary. If so, it has the power to require that city to maintain one. See, also, as to the extent of the powers of the Legislature in directing the assessment of taxes for public purposes. *Cooley on Taxation* (2d Ed.) p. 119, *Cushing v. Inhs. of Newburyport*, 10 Metc. (Mass.) 511; *Freeland v. Hastings*, 10 Allen (Mass.) 570; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *School Dist. v. Prentiss*, 66 N. H. 145, 19 Atl. 1090; *Call v. Chadbourne*, 46 Me. 206.

It should be added that in all these states whose decisions have been cited the Legislature has no broader powers under their respective Constitutions than has our Legislature under the Constitution of Maine.

The power to impose a burden upon a particular town for a public purpose thus residing in the Legislature, the provisions of section 8 of article 9 of the Constitution as to equality of apportionment and assessment are fully complied with in the levy under consideration, because all the property in the particular town is assessed at a uniform rate for the support of the schools of that town, and the schools of that town receive all the benefits therefrom. So long as all the property in town A. is assessed at the same rate for the maintenance of schools in town A., and all the property in town B., for the maintenance of schools in town B., the provision of the Constitution as to equality of taxation is not violated even though the local rate prescribed by the Legislature in town A. differs from that prescribed in town B.

[13, 14] 6. Finally, does this act violate the fourteenth amendment of the federal Constitution, which declares: "Nor shall any state deny any person within its jurisdic-

tion the equal protection of the laws"? A single word is sufficient on this branch of the case. The object of this amendment is to prohibit discriminatory legislation, as the hawkers and peddlers license law, chapter 298 of the Public Laws of 1889, State v. Montgomery, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386. Same, chapter 277, Pub. Laws 1901, State v. Mitchell, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481. But if all persons subjected to the law in question are treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed, there is no violation of this amendment. Leavitt v. Railway Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; State v. Leavitt, 105 Me. 76, 72 Atl. 875, 26 L. R. A. (N. S.) 799. "The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways." Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892.

Our conclusion therefore is that chapter 177 of the Public Laws of 1909 violates neither the state nor the federal Constitution, and the entry must therefore be:

Bill dismissed, with costs.

KINSEY et al. v. LOCOMOBILE CO. OF AMERICA.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

NEGLIGENCE (§ 134*)—UNGUARDED ELEVATOR SHAFT—EVIDENCE.

Where there was evidence that plaintiff was a chauffeur in the employ of a customer of the garage, of which defendant was the owner, that he was lawfully on the premises, and without negligence on his part he fell down an elevator shaft which defendant had negligently left unguarded, a verdict for plaintiff was justified.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Sherman Kinsey, by his father and next friend, and John H. Kinsey, against the Locomobile Company of America. Judgment for plaintiffs, and defendant appeals. Affirmed.

On motion for judgment for defendant n. o. v. Carr, J., filed the following opinion:

"The defendant's motion for judgment non obstante veredicto presents two questions—the duty which the defendant owed the plaintiff, and the degree of care which the plaintiff, Sherman, exercised at the time of the accident.

"The plaintiffs contend that Sherman, who was injured, was on the premises of the defendant for the purpose of his employment

as chauffeur for Dr. Stewart, and that while working on the second floor of the building he was engaged in his lawful employment, and that it was a question of fact for the jury to determine whether he was there by virtue of an implied invitation from the defendant, and that, if so, it was the duty of the defendant to keep the premises in a reasonably safe condition so that he might not be exposed to injury. The defendant claims that Sherman was upon its premises as a licensee merely, and that therefore it owed him no duty except not to willfully injure him, or negligently permit him to encounter hidden peril. The determination of the respective rights and duties of the parties depends in the first place upon the fact of employment as chauffeur of Sherman by Dr. Stewart, and, in turn, his rights and those of his chauffeur to the use of the second floor of the building, and the degree of care thereby owing to Sherman from the defendant.

"The defendant is an owner and proprietor of a public garage for the storing and repairing for pay of automobiles, situated on the east side of Broad street between Race and Vine streets, and extending eastward to Watts street. The building consists of a basement and three stories. In the basement the automobiles were washed and polished. The first floor was used as a salesroom, and its rear opened upon Watts street. An elevator was operated for carrying automobiles to the several floors, on the third of which was a repair shop, and the second of which was used for storage purposes.

"The contract of storage between Dr. Stewart and the defendant does not appear in evidence. It was offered by neither side. Sufficient evidence, however, appears in the case to support the finding of the jury that Sherman was in fact employed as chauffeur by Dr. Stewart, who, in turn, had storage rights with the defendant. If such rights did not exist, the proof was readily at the defendant's command. No effort was made to disprove it by testimony. Sufficient proof also appears to support the jury's finding that Sherman was in the employ as chauffeur of Dr. Stewart, whose automobile was upon storage with the defendant on the second floor of its building. The defendant did not show rules and regulations between it and Dr. Stewart, the employer of the chauffeur, which forbade the use of the second floor by Sherman upon the evening in question. In fact, his presence there and his use of the place was known to and apparently acquiesced in by the employes of the defendant in charge upon the afternoon and evening of the accident. The evidence, therefore, supports the finding of the jury that Sherman, being upon the premises, was more than a mere licensee.

"The principle of law which controls this

case is that one who maintains a building for the purpose of trade or doing business with other persons, no matter what the business is, is bound to use reasonable care in keeping the premises safe. *Kay v. Railroad Co.*, 65 Pa. 269, 3 Am. Rep. 628; *McKee v. Bidwell*, 74 Pa. 218; *Connelly v. Faith Co.*, 190 Pa. 553, 42 Atl. 1024; *Reid v. Linck*, 206 Pa. 109, 55 Atl. 849.

"The averment of the statement is that the defendant kept and maintained the elevator shaft in a negligent condition, without safeguards, railings, or lights, so that Sherman, who was not in the employ of the defendant, but who was lawfully about the second floor of the building, fell through the shaft while using due care in leaving the building. Sufficient evidence appears on the record to show, as the jury have found, that the averments of negligence were well founded, and that the second floor of the building was not properly lighted, nor the elevator shaft properly guarded to the reasonably careful degree, which was owing from the defendant under the circumstances.

"The jury having found by their verdict that Sherman was upon the second floor of the building, not as a mere licensee, but upon the implied invitation arising from the relation of Dr. Stewart, the owner of the automobile, and the defendant, the question of Sherman's contributory negligence was necessarily submitted to the jury also, and from the testimony produced upon both sides, and upon the record, the finding of the jury upon this point is also warranted. Nor do we find that the verdict is grossly inadequate.

"The plaintiff's motion for a new trial is refused; and the defendant's motion for judgment non obstante veredicto is also refused."

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHISKER, JJ.

W. W. Smithers and H. A. Talbot, for appellant. William T. Connor and John R. K. Scott, for appellees.

PER CURIAM. This judgment is affirmed on the opinion of the court below refusing a new trial and judgment for the defendant non obstante veredicto.

In re CENTENNIAL AND MEMORIAL ASS'N OF VALLEY FORGE.

Appeal of STAGER.

(Supreme Court of Pennsylvania. Feb. 26, 1912.)

1. CHARITIES (§ 48*)—DISSOLUTION OF ASSOCIATION—DISTRIBUTION OF FUNDS.

The Centennial and Memorial Association of Valley Forge, incorporated under Act April 20, 1874 (P. L. 73), to purchase, improve, and preserve the lands and improvements thereon occupied by General George Washington at Valley Forge, and maintain them as a memorial park, was engaged in a public work, and its

funds, derived partly from general contributions and partly from payments by the state in condemnation proceedings under Valley Forge Park Act of April 7, 1905 (P. L. 117), were properly awarded on the formal dissolution of the association to commissioners of the Valley Forge Park, appointed under Act May 30, 1893 (P. L. 183), to perpetuate the site on which the Continental army under Gen. George Washington was encamped in winter quarters at Valley Forge.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 78, 81, 104, 106; Dec. Dig. § 48.*]

2. CHARITIES (§ 1*)—NATURE—DEFINITION.

In a legal sense, a charity is a gift applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1074-1088; vol. 8, p. 7600.]

3. CHARITIES (§ 39*)—CHARITABLE ASSOCIATIONS—SHARES OF STOCK.

That the Centennial and Memorial Association of Valley Forge had issued so-called shares of stock which lacked the essential features of shares of stock, since they gave the owners no rights to dividends and contemplated no rights to share in the property, did not affect the public character of the association's work and funds.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 100; Dec. Dig. § 39.*]

4. CHARITIES (§ 48*)—CHARITABLE ASSOCIATIONS—DISSOLUTION—RIGHTS OF DONORS.

On dissolution of a charitable association, its property does not revert to the donors, nor is it to be divided among the members of the association, but must be appropriated to the purposes most nearly akin to the intent of the donors under the court's direction.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 78, 81, 104, 106; Dec. Dig. § 48.*]

Appeal from Court of Common Pleas, Montgomery County.

In the matter of the audit of the account of the Centennial and Memorial Association of Valley Forge. From an order dismissing exceptions to the report of W. F. Dannehower, Esq., Auditor, Henry J. Stager, individually and as trustee, appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHISKER, JJ.

James H. Wolfe, for appellant. Samuel W. Pennypacker, Richmond L. Jones, and J. P. Hale Jenkins, for appellee.

MOSCHISKER, J. [1] The Centennial and Memorial Association of Valley Forge having been formally dissolved, the question is raised as to the proper distribution of its assets; and this depends upon whether or not the association was a public charity. The fund consists of moneys in the treasury of the corporation paid into court after its

dissolution. The association was a corporation of the first class created by a decree of the court of common pleas of Montgomery county July 5, 1878, under Act April 29, 1874 (P. L. 73); the charter purpose being "to purchase, improve and preserve the lands and improvements thereon occupied by General George Washington at Valley Forge, and maintain them as a memorial park for all time to come." Certificates of stock at the nominal value of \$1 per share were issued to the extent of about 7,600 shares, and 5,000 of these are held by the appellant as trustee for and the representative of the Patriotic Order Sons of America, a patriotic fraternal beneficial association. In 1886 there was a mortgage for \$3,000 upon the property, and the Patriotic Order through appeals to its members raised enough money to pay off this incumbrance. The mortgage was not purchased and kept alive, but paid off and satisfied of record. At that time, and in consideration of the money contributed for that purpose, the certificates were issued for the shares represented by the appellant. By the act of April 13, 1887 (P. L. 52), the state appropriated to the Centennial and Memorial Association \$5,000 "for the improvement, extension and preservation" of the lands and buildings occupied by Washington as his headquarters at Valley Forge, and this sum was expended in the purchase of additional grounds and improvements. By the act of May 30, 1893 (P. L. 183), the commonwealth appointed a commission (the appellee) "for the purpose of perpetuating and preserving the site on which the Continental army under General George Washington was encamped in winter quarters at Valley Forge," and directed the lands and entrenchments to be secured and laid out, preserved and maintained forever as a public place or park by the name of "Valley Forge." By act of April 7, 1905 (P. L. 117), the commonwealth was given authority to secure the "Headquarters" by the exercise of the right of eminent domain, which they did in that year, and the fund in question arose primarily from the award made to the Centennial and Memorial Association in this condemnation proceeding. Subsequently, upon its petition to the court of common pleas of Montgomery county, the association was formally dissolved by decree dated May 2, 1910. Thereafter the court appointed the Commissioners of Valley Forge trustees, and by a decree dated October 31, 1911, directed the fund to be paid over to such trustees to carry out the objects and purposes of the charitable use for which the property of the lately dissolved association had been held, in accordance with the trust declared in the charter of that corporation, as before stated. It is from this decree that the present appeal is taken. The appellant is the only subscriber to the fund who asks that the money be paid over to the stockholders for their individual purposes. He is a trustee,

and therefore properly feels that for his own protection, and that of those he represents, the questions raised ought to be determined by this court. The act of April 9, 1856 (P. L. 293), under which the Centennial and Memorial Association was dissolved, directs that "no property devoted to religious, literary or charitable uses, shall be diverted from the objects for which they were given or granted." The act of April 26, 1855 (P. L. 328), provides that "no disposition of property hereafter made for any * * * charitable use shall fail for want of a trustee," and the act of May 9, 1889 (P. L. 173), provides that no such public trust or "charitable use shall fail for want of a trustee, * * * but it shall be the duty of any court having equity jurisdiction in the proper county to supply a trustee." The decree of the court below was in pursuance of these statutes, and the question is, Was the Centennial and Memorial Association of Valley Forge a public charity whose charter created a trust which it was the duty of the court to maintain by the appointment of a new trustee to hold the trust fund after the dissolution of that corporation?

[2] As well stated in the opinion of the learned court below: "The attempt to formulate a definition that is so specific as to cover every public charity is sure to prove a failure. Charitable uses take such varied forms that a specific enumeration of the classes or objects is necessarily defective. The scope of a charitable use is well defined in *Perry on Trusts* cited in *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450: 'A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.' In *Episcopal Academy v. Philadelphia*, 150 Pa. 565, 25 Atl. 55, this court said: 'Whatever is gratuitously done or given, in relief of the public burdens or advancement of the public good, is a public charity. In every such case as the public is the beneficiary, the charity is a public charity.' * * * " In *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745, we said: "A charity in legal sense may be more fully defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public building or works, or otherwise lessening the burdens of government."

We feel that the Centennial and Memorial Association of Valley Forge was engaged in a public work, and that the moneys given to it were in relief of a burden that might properly have been assumed by the public. Its charter purpose comprehended a public

charity, and the formal public notice of the application for such charter declared the purpose of the association to be "to purchase, hold and improve the Washington Headquarters at Valley Forge and lands adjacent thereto and appropriate them to historical and humane purposes." There was no provision in the charter or by-laws of the association looking to pecuniary returns to its members, and no dividends were ever paid or contemplated. In fact, the appellant testified that it was never expected that any moneys would be divided among the stockholders, and that the object was to maintain the "Headquarters" as a memorial. The general public were invited to the grounds and the "Headquarters." Admission to the former was free, but a fee of 10 cents was charged for admission to the latter, and the money so received was applied to the expense of a caretaker.

[3] While the certificates issued were called "stock," they lacked its essential features, except that the holders were entitled to elect directors, and they appear really to have been intended as certificates that the holders had contributed for the purposes of the charity. They were engraved with some artistic skill, and contained a picture of the "Headquarters," avowedly so that they might be framed and hung up as a testimonial expressive of the patriotic impulses of the contributors. In *Neller v. Kelley*, 69 Pa. 403, Mr. Justice Sharswood thus defines "stock": "A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation, never realized except upon the dissolution and winding up of the corporation, with a right to receive in the meantime such profits as may be made and declared in the shape of dividends." The so-called stock in this case had none of these attributes. It was more like the stock in *Donohugh's Appeal*, 86 Pa. 306. There the control of a library vested in stockholders who were annual contributors and who elected a board of directors. The stock was issued for \$40 per share, and was worth \$25 in the market. The receipts of the library were applied to its maintenance. The public were permitted to use the books gratuitously within the library buildings, but a small payment was required for the privilege of taking them out; the stockholders alone being permitted to do so without charge. The court held that the essential feature was that the enterprise was "open to the indefinite public," and that this marked it as a public charity. In the present case the affairs of the Memorial Association were managed in the same way by the stockholders through a board of directors elected by them. The funds raised by contributions and admission fees were applied exclusively to the expenses of the association. In the *Donohugh Case* the library made a small charge to any of the general public who took

out books, and here the association made a like charge for admission to the headquarters. While each of these corporations issued to contributors certificates which they called stock, yet in both instances the object was to found a public charity. In the present case the purchase of a controlling number of shares by the order represented by the appellant could in no way affect the charitable character of the Memorial Association, and the weight of the evidence is that these purchases were made from patriotic reasons, without any expectation of return; the contributors knowing that they were simply aiding a worthy public cause. The maintenance of this historic property "for all time to come" as a public memorial of one of the most important events in the great struggle which gave birth to our nation can well be termed a public duty; and that it has since been so regarded by the Commonwealth is shown by the act of May 30, 1893, *supra*, and its supplements.

The facts should not be overlooked that the \$5,000 appropriated by the state were expended by the association in the purchase of grounds and improvements, that a large proportion of the funds to be distributed came indirectly from this source, and that one of the avowed purposes of this appropriation was the "preservation of the lands and buildings occupied by General George Washington as his Headquarters at Valley Forge." We have declared: "A public charity is but a trust and is bound to apply its funds in furtherance of the charity and not otherwise." *Fire Ins. Patrol v. Boyd*, *supra*.

[4] "On dissolution the property of a charitable association does not revert to the donors nor may it be divided among the members of the association, but it should be appropriated to the purposes most nearly akin to the intent of the donors under the direction of the court." 6 Cyc. 977. By the act of March 30, 1911 (P. L. 28), the commissioners of Valley Forge Park were expressly authorized and empowered to accept in trust "any fund heretofore or hereafter created for the benefit or improvement of Valley Forge Park or any part thereof, by deed, bequest, devise, grant, decree or otherwise." We entertain no doubt of the right of the court to appoint the commissioners of Valley Forge Park as trustees to hold the present fund, and we are equally convinced of the propriety of that action. But at the same time we feel that the appellant, in raising the questions which we have determined, merely performed his duty as trustee for others who unselfishly and patriotically contributed to maintain an historic property for all the people at a time when help for that purpose was sorely needed, and that he should not be fixed with the costs.

The assignments of error are overruled, and the decree of the court below is affirmed, the costs to be paid out of the fund.

In re JONES' ESTATE.

Appeal of NEAL.

(Supreme Court of Pennsylvania. Feb. 5, 1912.)

WILLS (§ 316*) — PROBATE — DEVISAVIT VEL NON—UNDUE INFLUENCE.

An issue devisavit vel non will be refused where testatrix was shown to be of sound mind and the will was written from her personal instructions, that the contestant, a daughter, had angered her mother by her marriage and by placing stock in a corporation which the family controlled in her husband's name, and the beneficiaries in no way influenced their mother against the contestant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 742-749; Dec. Dig. § 316.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Elizabeth D. Jones. Appeal of Bertha W. Neal from decree dismissing appeal from register of wills. Affirmed.

Anderson, J., filed the following opinion in the court below:

"A careful consideration of this appeal does not convince the judge sitting at preliminary hearing that there has been presented evidence sufficient to warrant the granting of an issue. The issue was prayed for on two grounds: First, lack of testamentary capacity; and, secondly, undue influence.

"As to the first ground, there is absolutely no evidence upon which an issue could be granted. The evidence disclosed the testatrix to have been a woman of clear mind; and the testimony of the physician who attended her, the lawyer who drafted the will, the nurse who was called in after the drafting of the will, and every one who came in contact with the testatrix, including the daughters whose shares were put in trust, fails to show the slightest impairment of mind if there was any impairment at all until long after the making of the will.

"As to the other ground, there is no testimony to show that any influence had been exerted upon the mind of the testatrix to procure the making of the will. The scrivener, a reputable member of the bar, testified that he was asked to call upon the testatrix by one of her daughters to see about drafting her will, the first suggestion of which was the announcement to the testatrix in the presence of some of her daughters by her attending physician that she had better have her affairs fixed up. The scrivener called at the house, and, after examining the testatrix as to her affairs, she told him how she wanted her will made, and he drew it as she had dictated it, she making but one change, in that she, at his solicitation, increased the legacy to the daughter who is now complaining from \$5 to \$100. She gave the residue of her estate, after a gift of \$10,000 to the single daughters, to be

equally divided among her children, excepting the daughter who now contests, the shares of two of them to be held in trust with the remainder to their children, and in default of children remainder to the other daughters, excepting the contestant.

"Under the circumstances of the family as described by the evidence the will was a natural one. The daughter who was cut off it was shown by the evidence had angered the mother, first, by a marriage to which she was, justly or unjustly, opposed, being prejudiced against her husband. And, as said in *Cauffman v. Long*, 82 Pa. 72, and reiterated in *Morgan's Estate*, 219 Pa. 355, 68 Atl. 953, one has a right to his prejudices. She was still further estranged from her daughter by the act of the latter, who had placed her stock in the Home Made Bread Company, a corporation owned by the mother and her daughters and conducted by them, in her husband's name. That the daughter realized that her mother was incensed by these acts is shown by her letter to her mother a letter most creditable to the daughter, in which she seeks reconciliation with her. The gift also of a special legacy by testatrix to her single daughter is the natural desire of a mother to add to the share of one, who had not, as her married daughters had, some one to protect and earn a living for her; and the gifts in trust were fully explained by the fact that one daughter had already jeopardized her interest in her father's estate which the mother was compelled to save, and that the other daughter's husband was distasteful to the mother and had estranged the family by letters written to them by his attorney.

"But, be that as it may, it was the will of the decedent, dictated by her, and as shown by the evidence, without a single suggestion on the part of those benefited by it. The mere fact that they were daughters of the testatrix, attended to the business and lived in the house with her, raises no presumption against them. *Herster v. Herster*, 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95. As was said by Mr. Justice Clark in that case: 'Undue influence of that kind which will affect the provisions of a testament must be such as subjugates the mind of the testator to the will of the person operating upon it; and, in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy free agency in the testator; and these inferences must be proved to have operated as a present constraint at the very time of making the will.'

"Judging the present case by that standard, there is absolutely no testimony to show any undue influence. It is a case which, if a jury should find against the will, the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judge would be constrained to set aside the verdict, and for that reason no issue can be granted.

"The appeal is dismissed."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCH-ZISKER, JJ.

V. Gilpin Robinson, John G. Kaufman, and George Henderson, for appellant. Hampton L. Carson, for appellee.

PER CURIAM. The order appealed from is affirmed on the opinion of Judge Anderson refusing an issue.

In re PULASKI AVE.

Appeal of EMIL WAHL MFG. CO.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

1. MUNICIPAL CORPORATIONS (§ 402*) — STREETS—VACATION—ACTIONS BY ABUTTING OWNERS.

Where the proper authorities in a city of the first class adopt and confirm a new plan of streets, omitting therefrom a previously existing street, such confirmation operates as an immediate vacation of the street omitted, and limitations begin to run at once against land-owners injured thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 969-981; Dec. Dig. § 402.*]

2. ASSIGNMENTS (§ 94*) — RIGHT TO DAMAGES.

The right of an assignee of damages resulting from the vacation of a street can rise no higher than that of his assignor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 162-165; Dec. Dig. § 94.*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition for the appointment of viewers in the matter of Pulaski Avenue. From an order quashing the petition, the Emil Wahl Manufacturing Company appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Theodore F. Jenkins and William W. Staake, for appellant. Abraham M. Beitler, and Edward Hopkinson, Jr., for appellee.

PER CURIAM. On June 22, 1905, this appellant filed its petition in the court of quarter sessions of Philadelphia county, asking for the appointment of viewers to assess damages which it alleged had resulted to it from the vacation of Pulaski avenue. That petition was quashed, and, on the petitioner's appeal to the superior court, the action of the court below was affirmed.

[1] The first reason given for affirming it was that, as Pulaski avenue, between Ruffner street and Roberts avenue, had been omitted from a new plan of streets adopted by the board of surveyors on June 3, 1895, that portion of the avenue had been absolutely vacated from the time of the adoption of

the new plan, and the statute of limitations barred any claim for damages made more than six years after the vacation. Pulaski Avenue, 33 Pa. Super. Ct. 108. On August 10, 1909, the appellant filed in the common pleas the petition now before us. It sets forth substantially the facts that appeared in its quashed petition in the quarter sessions, and was filed for the same purpose. It was quashed because the court of common pleas was of opinion that the controlling questions involved had been passed upon by the Superior Court adversely to the petitioner in its appeal from the order of the court of quarter sessions quashing its petition filed in 1905.

[2] Though the appellant may not have been the party legally entitled in 1905 to receive damages, if any were recoverable, for the vacation of Pulaski avenue, its right now can rise no higher than that of its assignors then, and, in the proceeding then instituted by it against the city of Philadelphia, it was definitely ruled by the Superior Court that a claim made by any one in 1905 for the first time for damages resulting from the vacation of Pulaski avenue was too late. From this ruling of the Superior Court, to which the appellant had appealed, it took no appeal, and the law as announced by that court became, as to the parties in that proceeding—who are the same in this—the law in the controversy between them, and the learned court below correctly so held. Bolton v. Hey, 168 Pa. 418, 31 Atl. 1097; Pulaski Avenue, 220 Pa. 276, 69 Atl. 749. Interest *republicæ* ut sit finis litium.

Appeal dismissed, with costs.

In re NIXON'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 12, 1912.)

1. TRUSTS (§ 162*)—TENURE OF TRUSTEES—RIGHT TO WITHDRAW.

An elderly trustee who has acted as such for more than 20 years, on filing an account and having it duly audited and the fund awarded to his cotrustees, who are competent persons, is entitled to withdraw from the trust, notwithstanding objections by the cestui que trust on the ground that he is the president of a corporation whose stock is largely owned by the trust estate and by the trustee, that he has a right to purchase the stock of the estate, and that there are pending for the consideration of the stockholders propositions either to liquidate the company, or to sell all of its stock, or to sell most of its property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 212, 213; Dec. Dig. § 162.*]

2. TRUSTS (§ 162*)—TENURE OF TRUSTEES—RIGHT TO WITHDRAW.

As a general rule, a trustee may relieve himself from the liabilities arising from a trust relation by submitting the administration of the trust to the jurisdiction of the court.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 212, 213; Dec. Dig. § 162.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Martin Nixon, deceased. From a decree dismissing a petition for discharge of trustee, William H. Nixon appeals. Reversed, petition reinstated, and record remitted.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Theodore F. Jenkins, for appellant. E. B. Martin, for appellees.

ELKIN, J. [1] By his will executed February 14, A. D. 1880, Martin Nixon, now deceased, appointed William H. Nixon, appellant here, one of his three executors. The testator died in 1888, and his estate was duly administered. The account of the executors filed in 1889 was confirmed absolutely, and the balance shown to be in their hands was awarded to them as trustees under the will. From that time to the present the trust estate has been controlled and managed either by the original trustees or by their successors duly appointed. Appellant has served continuously in the trust relation from the time the estate was awarded to the trustees until the present. In 1911 the trustees filed their account with notice to the parties in interest that upon its confirmation appellant would apply for his discharge as trustee. The account was audited and the balance awarded to the two cotrustees of appellant to hold under the trusts of the will. In accordance with his notice of withdrawal, appellant then filed his petition asking for a discharge. The cotrustees and all of the parties in interest except the two appellees, by consents in writing, filed of record, agreed to the discharge. Appellees object to the discharge on the ground that the business of the testator's paper company has reached a critical period in that there are three propositions pending concerning it—one to liquidate, another to sell most of the property, still another to sell all the stock—and that appellant is president of the company, executor and trustee of the estate, private owner of stock, and trustee of stock belonging to the estate, which he has the privilege of voting and buying, but which he does not yet own. For these reasons it is earnestly contended he should not be discharged. The learned court below took this view of the situation, and in refusing to discharge him entered the following decree: "The petition is dismissed, with leave to the petitioner to renew his application when the present negotiations have been concluded, or, if they fail, within a reasonable time." The reason given for refusing to discharge the trustee was that the proper time had not arrived for him to retire. We cannot accept this view of the situation. Almost every objection made to his discharge is a reason why he should be dis-

charged. If appellees were in court asking for his removal upon the grounds now insisted upon as reasons for preventing his discharge, they would in all probability prevail. His duties as a trustee and his interests as an individual may be at variance. Indeed this is the inference to be drawn from the facts averred in the supplemental answer, and, if so, it would seem to be to the common interest of all parties to have the trust relation terminated. The remaining trustees can then act solely and alone for the best interests of the trust estate without any complication in the performance of their duties by reason of being affiliated in its management with one having an adverse interest. But, aside from all such considerations, appellant is clearly within his legal rights in asking for a discharge, and no sufficient reason has been given to warrant a refusal of his request.

[2] The general rule is that a trustee may relieve himself from the liabilities arising from a trust relation by submitting the administration of the trust to the jurisdiction of the court. In our state the right of a trustee to be discharged is recognized by statutes which provide the method of procedure. Appellant has complied with the statutory requirements, and has done everything that the law requires to be done antecedently to the asking of a discharge. There may be, and no doubt there are, cases in which a court would be justified in refusing a discharge, as where there has not been an accounting, or where the trustee on account of benefits accruing to himself had undertaken to do certain things, or for other sufficient reasons, the time had not arrived for the termination of the trust relation. But we see nothing of this character in the present case.

There is nothing in this record to indicate that the remaining trustees are not fully competent to manage the trust estate, or that they are unwilling to do so. The trust estate will be as safe in their hands as it was in the hands of those who preceded them in its management. The argument that the cestuis que trustent will lose some advantage if the trustee be discharged is without merit. The discharge will in no way affect other proceedings said to be pending in which the attempt is being made to inquire into former adjudications relating to the trust estate. Whatever legal rights the parties have in those proceedings may be asserted without reference to what is done in the case at bar. Upon the record here presented, appellant is entitled to his discharge as trustee, and this is all we decide.

Decree reversed, petition reinstated, and record remitted for the purpose of having a decree entered in accordance with the views herein expressed, costs of this appeal to be paid by appellees.

STATE v. LOCKMAN.

(Supreme Court of New Jersey. June 5, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 314*) — OFFENSES AGAINST ELECTION LAWS — STATUTORY PROVISION — "PUBLIC OFFICER."

A judge of election is a public officer under "An act to regulate elections" (Revision of 1898; C. S. p. 2073), upon whom a duty is imposed, and the depositing by him of a ballot, in the ballot box, of a voter who has been challenged, before the board had by a majority vote decided to receive such ballot, makes him guilty of a misdemeanor under section 197 (C. S. p. 2137).

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 340, 341; Dec. Dig. § 314.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7772, 7773.]

2. CRIMINAL LAW (§ 1037*) — WRIT OF ERROR — PRESENTING OBJECTIONS IN TRIAL COURT — ARGUMENT OF COUNSEL.

A judgment will not be reversed for alleged error in the address of counsel to the jury, wherein he exceeds the limit of right and propriety, where there is not prompt objection thereto by interruption of counsel at the time the injurious comments are made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

3. CRIMINAL LAW (§ 1036*) — WRIT OF ERROR — PRESENTING QUESTIONS IN TRIAL COURT — STRIKING OUT EVIDENCE.

Where evidence in a criminal case, reviewed only under the 136th section of the Criminal Procedure Act (2 Comp. St. 1910, p. 1863) is stricken out without objection on the part of the defendant, a judgment against the defendant will not be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.*]

Error to Court of Quarter Sessions, Camden County.

William Lockman was convicted of violation of the Election Law, and brings error. Affirmed and remitted for imposition of sentence.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Harry C. Kramer, Albert S. Woodruff, and Floyd H. Bradley, all of Camden, and Robert H. McCarter, of Newark, for plaintiff in error. Henry S. Scovel, Prosecutor of the Pleas, and Charles A. Wolverton, Asst. Prosecutor, both of Camden, for the State.

VOORHEES, J. The indictment under which the defendant was convicted in this case contains nine counts. The first four charge that the defendant, a judge of the board of registry and election of the First election district of the Fifth ward of Camden, at the general election in November, 1910, knowing that a person was not qualified to vote, unlawfully and knowingly received and deposited his ballot in the ballot box as such judge, knowing that the election

board had not decided to receive the ballot. These first four counts differ merely in particularizing the disqualifying facts. The fifth, sixth, seventh, eighth, and ninth counts all charge the defendant with unlawfully and knowingly aiding, counseling, and assisting Lewis Baker unlawfully and fraudulently to vote. In each of the counts, the charge is that a certain person alleging himself to be one Lewis Baker presented himself to vote. The judge charged: "Gentlemen: There are really two charges in this case for you to try. The first is practically that this defendant received a vote of a man named Lewis Baker or Lewis Baker, Jr., being an illegal voter in the precinct and ward in which he was judge of election. The other charge is that he put a vote in the box, in the ballot box, when the board stood two to two. You should keep those two charges distinct in your minds, and you can convict on both or acquit on both, or convict on one and acquit on the other." On the first charge, the defendant was found "not guilty" by the jury, and, on the second charge, he was found "guilty." Under instructions of the court, this verdict was reframed as follows: "Not guilty as to first charge—Lewis Baker, Jr., being an illegal voter. Guilty as to second charge of receiving vote of Lewis Baker, Jr., when the vote of the board stood two to two." No objection has been made to the molding of the verdict, or to the form into which it has been recast.

We therefore concern ourselves entirely with the charge upon which the defendant was convicted. The point first argued is that it was error to permit the state to inquire into the acts of the person who called himself Lewis Baker, Jr., because the indictment charged that the alleged illegal voter presented himself to vote on the name of Lewis Baker, without the addition of the suffix "Sr." or "Jr." This subject has been treated in *State v. Lewis*, 83 Atl. 692, decided at this present term, and is governed thereby. The objection must therefore be overruled.

[1] The principal point made by the plaintiff in error may be thus epitomized: The indictment charges: That the defendant "did unlawfully, willfully, fraudulently, and knowingly receive and deposit in the ballot box * * * the ballot then and there offered to him * * * as judge, * * * well knowing that the board of registry * * * had not decided to receive said ballot," etc. That such acts are not specifically by statute declared to be a crime. That it is only by reference to sections 68 (C. S. p. 2099), 75 (C. S. p. 2101), and 80 (C. S. p. 2103) of the Election Law, in connection with the 197th section (C. S. p. 2137), reading as follows: "Every public officer upon whom any duty is imposed by this act who willfully or negligently violates his said duty or

who neglects or willfully omits to perform the same, shall be deemed guilty of a misdemeanor"—that a crime can be pleaded out.

The charge is the unlawful depositing of the ballot, knowing that the board had not decided to receive it. Section 80 (C. S. p. 2104) provides "that in no case shall the ballot be deposited by such judge until the board of election shall have decided to receive the same." A violation of this section is an offense. A custom of violating the statute will not excuse. Section 76 (C. S. p. 2101) prescribes the form of question to be put to the board as to the admission of the ballot. It is, "Shall this voter's ballot be received by this board?" It is so clear that no misunderstanding can arise. It is obvious that a tie vote is not a decision of the board to receive the ballot. The defendant whose duty it was as judge to put the question cannot plead ignorance of the facts or of the law.

A judge of election is a public officer, under "An act to regulate elections" (Revision of 1898; C. S. p. 2073), upon whom a duty is imposed, and the depositing by him of a ballot, in the ballot box, of a voter, who has been challenged, before the board had by a majority vote decided to receive such ballot, makes him guilty of a misdemeanor under section 197 (C. S. p. 2137).

[2] The prosecutor's address to the jury is said to have exceeded the limit of fair comment and argument upon the evidence. This is probably so, especially in its animadversions upon the failure of the defendant to produce Lewis Baker as a witness; there being nothing to show that he could have been produced by the defendant, or could not have been produced by the state. But not the slightest objection appears to have been offered to the summing up while it was in progress. It was not until, after the court had charged the jury, and they had retired to consider the case, that objection was made to it. The practice has been to interrupt counsel when he exceeds the limit of right and propriety in his address, so that any improper impression then created may be eliminated, and counsel may be prevented in continuing to transgress. Such was the method pursued in *Hall v. United States*, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003. See, also, *State v. Parker*, *infra*, decided at the present term of this court. The judgment should not be reversed for this cause.

[3] Annie Baker the stepmother of Lewis Baker, was sworn on behalf of the state, and was asked to describe him, which she did. She further stated that Baker was not, to her knowledge, in Camden, on election day. Upon cross-examination, she was asked the question, "You do not live with your husband, do you?" and answered, "No, sir." After that the prosecutor stated that the question was unfair and not cross-examina-

tion; that there had been no cross-examination as to Lewis Baker, Sr., whose wife the witness was, and moved to strike it out, which was done. The striking out of this evidence is assigned as cause for reversal. She had been called to testify about her stepson, not about her husband. Inasmuch as both the Bakers registered from the same place, it may have been relevant to show that the witness, not living with her husband at the same place where her stepson resided, had not opportunity to observe the whereabouts of the latter on election day. The question is: Did the striking out of the testimony result in manifest wrong and injury to the defendant? It was eliminated because it was an insult to the witness. No intimation was made by the defendant that it should remain for the reasons above suggested, or for any other reason, and no objection or opposition to the action of the court, in striking it out, was interposed. We think, in view of what occurred at the trial, the defendant has not suffered wrong or injury.

The judgment will be affirmed, but, being in form objectionable, for the reasons set forth by Mr. Justice Swayze, in *State v. Carrigan*, 82 Atl. 524, the record will be remitted to the court of quarter sessions, to the end that a proper sentence may be imposed by that court upon the defendant.

STATE v. PARKER.

(Supreme Court of New Jersey. June 3, 1912.)

(Syllabus by the Court.)

1. ELECTIONS (§ 321*)—MISCONDUCT OF JUDGES—EVIDENCE.

A judge of election, upon an indictment charging him with illegally depositing a ballot in the box, before the election board had voted to receive it, cannot question the status of one serving as a member of such board, without objection, and with apparent authority, and who voted against the reception of the ballot.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 348; Dec. Dig. § 321.*]

2. ELECTIONS (§ 329*)—MISCONDUCT OF JUDGES—EVIDENCE.

The court, upon an indictment against a judge of election, charging him with illegally depositing a ballot in the box before the election board had voted to receive it, refused to allow the defendant to show a custom of the board to permit a voter to swear in his vote where the board was evenly divided. *Held* proper.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 364-366; Dec. Dig. § 329.*]

3. CRIMINAL LAW (§ 1037*)—CONDUCT OF JURY.

Where counsel in addressing the jury transcend the proper and fair comment upon the evidence, the complaining party should promptly object; otherwise it will not furnish ground for the reversal of the judgment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error to Court of Quarter Sessions, Camden County.

William C. Parker was convicted of illegal voting, and brings error. Affirmed.

Argued November term, 1911, before GUMMER, C. J., and SWAYZE and VOORHEES, JJ.

Harry C. Kramer, Albert S. Woodruff, and Floyd H. Bradley, all of Camden, and Robert H. McCarter, of Newark, for plaintiff in error. Henry S. Scovel, Prosecutor of the Pleas, and Charles A. Wolverton, Asst. Prosecutor, both of Camden, for the State.

VOORHEES, J. The defendant, William C. Parker, was convicted under an indictment containing nine counts. The first four charge the same offense that, after William Jordan had been challenged, the defendant placed his ballot in the box before the board had by vote decided to receive it; and the last five counts, that the defendant unlawfully aided and assisted Jordan to cast his ballot, knowing that he (Jordan) was not qualified to vote. The jury returned a verdict of guilty. The offense took place at the election held in the Sixth district of the Fifth ward of the city of Camden. There was evidence to show that Jordan was registered from 323 Cherry street. In the afternoon of election day, a person representing himself to be Jordan offered his vote. One of the election officers asked him his residence, and he replied 232 Cherry street. He was then told that he was in the wrong precinct, and would have to go to another precinct. Some one in the crowd standing about then called out, "You mean 323 Cherry street," and Jordan, accordingly, changed the number of his residence which brought it in the precinct where he was attempting to vote. He was then questioned as to the length of residence at that place, and said, "From six to eight months." It was stated to him that there were six other voters registered from that house, and was asked if he could give the names of any of them, and he said, "No." The election officer then said he was not willing to accept his ballot until the board ordered it. This officer and his colleague voted not to accept the ballot, and the other two members of the board voted to accept it. The defendant, who was judge of the election, thereupon deposited the ballot, notwithstanding the vote was a tie and protest by the other two members of the board was made. There was evidence, also, that a committee of the Camden Bar Association had before that visited the election booth, and, upon learning that ballots had been deposited when the board stood two to two, told the board that it had no right to do so. The defendant replied, "that with a protest he wouldn't put no ballot in unless some one had vouched for him." He then said, "Well, you can give advice, but we know what we have got to do." And

afterwards stated: "To hell with the judge. I will take my medicine." The defense was that afterwards the other members of the board said, "All right."

[1] It is alleged that Albert Neutze, one of the members of the board, was not qualified to vote, because not a member of the board; but there was evidence that he had been on November 5, 1910, appointed as a member by the county board of elections until August 31, 1911. At all events, he was a de facto officer and was so serving and signed the returns. No objection to his acting all that day had been made, and it does not lie in the mouth of the defendant to deny his status. The court ruled that he was a de facto officer, and that ruling was correct.

It is said that the court failed to point out to the jury the demarcation between the two issues presented at the trial; that is, that the court gave no instructions in regard to one series of charges, viz., the aiding and abetting of the depositing of a fraudulent vote, but confined his charge altogether to the defendant's violation of the law as judge of election, in depositing the ballot before the election board had authorized it. There was no request made to him to do so. Error can be assigned only upon instructions actually given by the court to the jury or upon refusals to give instructions upon request, and this is so whether the case is reviewed by a strict bill of exceptions, or under the 136th section of the Criminal Procedure Act (2 Comp. St. 1910, p. 1863). *State v. Leo*, 80 N. J. Law, 21, 77 Atl. 523.

[2] It is next asserted that the court erred in refusing to allow the defendant to show a custom of the election board to permit a voter to swear in his vote where the board was evenly divided. A witness for the state was asked on cross-examination whether, during the two years he had served on the board, he had reported to anybody that practice that had grown up in this manner. This was not cross-examination. It was improper testimony, and a custom contrary to the law, is no justification for its violation.

It is said that this was permissible to go to the jury to negative any willful intent on the part of the defendant. But the defendant had, on that day, been warned by the Bar Association not to do this thing; and had been told that it was a violation of the law, and he replied substantially that, although he knew the law and its force, he yet would do it and take his medicine. He did not then pretend to rely upon custom, and if he had, having been instructed that the custom was violative of law, he cannot now be permitted to set up the illegal practice. There was no error.

The next point made is that the court permitted the state's witness to testify to what occurred after the offense charged had been committed to the effect that another person came in and voted as William Jordan, after

that name had already been voted upon, and that the entire board accepted this vote. The evidence was that no objection had been made to the reception of this vote, by any member of the board. It seems to be relevant evidence to charge the defendant; if not, it does not appear that there was manifest wrong or injury done to the defendant by its admission.

The next point is that the court admitted the registry book, notwithstanding the fact that there were extraneous memoranda written opposite the names of several of the voters. These memoranda the judge covered up by pasting slips over those portions of the books where they had been written in, and ruled them out. No allegation was made that the book had been otherwise tampered with. We perceive no error in the judicial action. The facts concerning the taking of the book from the county clerk appeared in evidence, and it became the province of the jury to determine whether the book had been tampered with in other particulars. There was no harmful error.

The motion made to direct a verdict for acquittal was based upon the fact that the two election officers said, "All right, put the vote in," and that the board contained but three members, instead of four. This, however, fails to take into consideration the other counts in the indictment, and also that the evidence was in dispute that all four members of the board assented, which with our view of the situation, as above stated, that there were four members in the board, are sufficient reasons why the court should not have directed a verdict.

[3] The next point made is as to the prosecutor's argument to the jury. There were no exceptions taken to this at the time, nor was there any objection made to it. The objections taken were made after the jury had retired and after it was impossible to have checked the prosecutor. Under these circumstances, it cannot be said that there was denial of any matter resting in the discretion of the court. The court was not moved to correct any statements. *State v. Lockman*, 83 Atl. 689.

The charge that the jury might take into consideration the evidence introduced by the defendant of his good character, in determining whether he knowingly and willfully did the act, was, "If that evidence convinces you that he would not knowingly and willfully do this act, you must give him the benefit of it." This is perhaps inaccurate, but in view of the accuracy of the instruction as to reasonable doubt, and as the case comes here under the 136th section of the Criminal Procedure Act only, we do not think it did the defendant manifest wrong and injury.

What took place in the polling booth, and the statements made by the members of the Bar Association, were properly admitted as

bearing upon the willfulness of the defendant's act.

The judgment should be affirmed. The form of the judgment is the same as that reviewed by this court in *State v. Carrigan*, 82 Atl. 524, and, under the authority of that case, the cause must be remanded to the trial court for the imposition of a proper sentence.

STATE v. LEWIS.

(Supreme Court of New Jersey. June 13, 1912.)

(Syllabus by the Court.)

1. NAMES (§ 4*)—AFFIXES.

The affixes Sr. and Jr. do not form part of a name, but are descriptive merely; hence in legal contemplation their presence or absence is immaterial.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. § 3; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4657-4660.]

2. WITNESSES (§ 323*)—CROSS-EXAMINATION.

It lies in the discretion of the trial court to permit a party to cross-examine his own witness, when it appears that such witness is unwilling and hostile, and the party offering such witness has been surprised thereby.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1096; Dec. Dig. § 323.*]

3. CRIMINAL LAW (§ 751*)—TRIAL—WITHDRAWAL OF JUROR.

In a criminal case, the court has power to withdraw a juror, but this action rests in the sound discretion of the court and is to be exercised only in very extraordinary and striking circumstances, in order to prevent the failure of justice.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 751.*]

Error to Court of Quarter Sessions, Camden County.

James Lewis was convicted of a violation of the election laws, and brings error. Affirmed.

Argued November term, 1911, before GUMMERE, C. J., and SWAYZE and VOORHEES, JJ.

Harry C. Kramer, Albert S. Woodruff, and Floyd H. Bradley, all of Camden, and Robert H. McCarter, of Newark, for plaintiff in error. Henry S. Scovel, Prosecutor of the Pleas, and Charles A. Wolverton, Asst. Prosecutor, both of Camden, for the State.

VOORHEES, J. The defendant was tried and convicted upon an indictment containing five counts, the first two charging him with knowingly counseling, procuring, and advising Lewis Baker, not being a qualified voter, to vote on the 8th day of November, at an election at the First election district of the Fourth ward of the city of Camden, and thereat falsely to personate Edward Ferat, who was a legal voter, and duly registered, and that thereupon Baker did unlawfully vote at said election as though he was, and as being, said Edward Ferat, and upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the name of said Ferat. The remaining three counts charge that the defendant, knowing that Lewis Baker was not a legal voter at said election district, did counsel and procure said Baker to vote at said election and in said district. With the writ of error, the entire record and proceedings had upon the trial have been returned, pursuant to the 136th section of the Criminal Procedure Act.

The testimony showed: That there was registered from the home of defendant, at 205 Spruce street, a man named Lewis Baker; that on the morning of election day a person alleging himself to be Lewis Baker presented himself to the election board of the First precinct of the Fifth ward and offered to vote on the name of Lewis Baker. He was challenged on the ground that he was not such person, and upon being questioned was told by the defendant in this case, who was a policeman in the city of Camden, that he need not answer any questions, after which defendant vouched for him as being a legal voter, and he voted. Immediately after he voted, he left the booth, followed by the defendant, who engaged with him in conversation, during which, as some of the testimony indicated, the defendant told him to go up to Golden's, meaning the First precinct of the Fourth ward, where Sergeant Golden, another policeman and Republican worker, was in charge. That immediately after such conversation the defendant and the alleged Lewis Baker went in the direction of said Fourth ward polling place. That, after going some distance, the defendant left Baker; the latter continuing on toward the voting place. At the corner of Fifth and Arch streets, one square from the voting place, the voter was met by Sergeant Golden, and taken to the polling place of the Fourth ward, and upon entering it he gave the name of Edward Ferat, who was registered in such election district. It then appeared: That certain young men, who had followed him from the last voting place, informed the board that such person had already voted in the First precinct of the Fifth ward. That upon giving such information one of the young men was attacked by Sergeant Golden and was thrown out of the election booth. The voter was then challenged, and the Democratic members of the board voted against receiving the ballot, the Republican members voting in favor of it, and the vote, notwithstanding such objection, was placed in the box. The defense was that the person who voted in the First precinct of the Fifth ward, and for whom the defendant vouched, was a genuine legal voter, and was the Lewis Baker who was registered from 205 Spruce street, and that defendant had had nothing to do with said person going from that precinct, where he first voted, to the last-mentioned precinct for the purpose of casting an illegal vote. There was also evidence show-

ing that in the Fifth ward of Camden, Lewis Baker, Sr., and Lewis Baker, Jr., resided, being father and son, and had voted in that ward for several years, both being registered from the same address for the November election, and that both actually voted on that day; the father in the afternoon and the son in the forenoon. They were of different appearance, and they were distinguished by the use of "junior" and "senior."

The charge in the indictment was that the defendant counseled Lewis Baker to vote, without describing him by the addition of either "Jr." or "Sr." The testimony offered by the state, and which was objected to at the trial, concerned the acts of Lewis Baker, Jr. It is now argued that, where father and son bear the same name, the use of that name alone without suffix will *prima facie* refer to the father, and that the man should have been described in the indictment as Lewis Baker, Jr. The English cases are to the contrary. 3 Russell, Crimes, 314, 315, citing *Rex v. Peace*, 3 B. & A. 579; *Hodgson's Case*, 1 Lewis, 236; *Rex v. Bailey*, 7 C. & P. 264; and others. See, also, Wharton's Criminal Law, § 249.

[1] The cases generally hold that Sr. and Jr. form no part of the name, but are mere matter of description, and that their addition to or omission from the name in a legal document is immaterial and of no effect. *Am. & Eng. Ency. of Law*, vol. 17, p. 1036, and vol. 21, p. 310, where the cases are collected.

In *Johnson v. Ellison*, 4 T. B. Mon. (Ky.) 526, 16 Am. Dec. 163, it is said: "Junior is no part of the name of a man. It is neither the name of baptism, nor the name of his family. It is an addition to distinguish between two or more persons bearing the same name. Supposing there are two persons named James Wyatt, usually distinguished by the addition of 'Sr.' or 'Jr.', the defendant has made the note to one of them, but to which the note on its face does not certainly and conclusively designate. To which of the two the note was in truth made and delivered is a question of fact. It rests in averment. * * * It is a question of identity as to the right owner of the note which cannot be raised upon demurrer." The indictment having named Baker, without designating whether junior or senior was intended, evidence was admissible as to the younger man identifying him as the person intended.

There was evidence that Baker was challenged on the ground of his name and of his residence, and that the defendant then vouched for him, stating that Baker was his brother-in-law. The reasons assigned for reversal upon this point are without merit.

A series of objections is made to the admission of evidence concerning alleged irrelevant and immaterial facts and circumstances. The first instance particularly

pointed out regards certain answers to questions put to the witness Hill, one of the election officers.

A young boy, after Baker had been vouched for by the defendant, came up to the witness Hill, and gave him some information, and as a result of that information witness stated that he gave the boy certain instructions. Then came the question, "What were those instructions?" This was objected to, because it was in the absence of the defendant. He was allowed to answer that he "told the boys to watch Lewis Baker, where he went, and that the boys followed him." It is clear that the statement to the boys has not caused the defendant manifest wrong and injury which is necessary to cause a reversal of the judgment.

The next objection is that the details immediately preceding the deposit of the ballot did not indicate a counseling by the defendant or the knowledge by him of Baker's disqualifications, and that while the admission of testimony that, at the time that Baker cast his vote, he was challenged, that the defendant vouched for him as a legal voter, and what was said at the time by a member of the election board, and whether the vote was received without protest, and whether the election board took a vote to receive or reject the ballot on the ground on which it was challenged, as well as the incidents occurring before and after Baker cast his vote in the Fourth ward, are admitted to be correlated incidents, but without probative force, upon the real issue, viz., counseling Baker to vote.

As above stated, it appeared that Baker had voted in the Fifth ward, notwithstanding a challenge, and then went to the Fourth ward, and again voted there. There was evidence from which the inference might be drawn that the defendant advised him to do so. It was therefore proper to prove what took place at each poll, touching Baker's vote. All these facts had a bearing upon the knowledge of the defendant that Baker was not a legal voter, and were so related to the main issue as to be admissible within the discretion of the court.

[2] The only witness for the state who could connect Baker with the defendant was a young man named Kenny. His evidence was quite uncertain, and it was evident that he was a hostile witness and that the prosecutor had been surprised by his testimony. The prosecutor was thereupon allowed to cross-examine him regarding statements which the witness had made shortly before the trial. This was a matter resting in the discretion of the trial court. Notwithstanding the remarks of the prosecutor, charging that some one had "gotten next" to the witness, we fail to find that legal error was committed.

The prosecutor, however, continued this method of examination, and finally asked

the witness if one Gordon had not told the witness "to tell his father that he (Gordon) had a job for him, working for the city, and you are subpoenaed. Why can't you make this a little easy?" The court then stopped the prosecutor, and the counsel for the defendant said: "I pray an exception to that and move the withdrawal of a juror by virtue of what has taken place, certainly a most improper thing for an officer of the law to undertake to make evidence of a private talk between himself and this witness in justification of an argument he is making to your honor. I think it is improper. The Court: No, I rule that out, Mr. Scovel. Mr. McCarter: I move the withdrawal of a juror, sir. The Court: I will not let you withdraw a juror, Mr. McCarter. (Whereupon the defendant, by his counsel, prays a bill of exceptions, which is allowed and sealed accordingly.) C. V. D. Joline, Judge. [Seal.]"

[3] The withdrawal of a juror seems to be within the discretion of the court, and the authorities hold that, in a civil case, it may be done by the consent of the parties, or even by the court in its discretion; that in a criminal case, also, the court has power to withdraw a juror, but this action rests in the sound discretion of the court, in order to prevent the failure of justice. *U. S. v. Coolidge*, 2 Gall. 364, Fed. Cas. No. 14,858. Storey, Circuit Justice, there said: "It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow." The cases on this subject are collected under the notes appended to *Usborne v. Stephenson*, 36 Or. 328, 58 Pac. 1103, 48 L. R. A. 432, 78 Am. St. Rep. 778.

Now, being in the discretion of the court, a strict bill of exceptions will not lie to the refusal, nor can it be availed of under the 136th section of our Criminal Procedure Act, unless its refusal resulted in manifest wrong and injury to the defendant, and it is evident that such was not its result.

After the jury had retired, following the charge of the court, an objection was made by the defendant in the following form to the summing up to the jury on the part of the State: "I want to note that I consider the remarks of the prosecutor in regard to a system, and that this was part of a system, and all he said in that regard, as improper. If there is any error to be had from that or advantage to be had from it, I want the advantage of it." This subject is controlled by the cases of *State v. Lockman*, 83 Atl. 689, and *State v. Parker*, 83 Atl. 690, decided by this court at the present term, and the assignment has no merit.

The judgment must be affirmed, except as to form. It is like that in *State v. Carri-gan*, 82 Atl. 524. Following the procedure in

that case, this cause will be sent back to the trial court, to the end that a proper sentence may be there imposed upon the defendant.

CULLUM v. COLWELL

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. WILLS (§ 332*)—PROBATE—HEARING—INSTRUCTIONS—BURDEN OF PROOF.

In a jury trial on the issue whether a will had been induced by undue influence, where there was no evidence upon which the contestant could claim that the case came within the exception to the rule that the burden of proving undue influence was on the party alleging it, an instruction stating the exception to the rule where the will was in favor of the attorney who drew it or of any person occupying a clearly analogous position of trust, without explaining the meaning of "analogous position of trust," was applicable to the facts of the case.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 785; Dec. Dig. § 332.*]

2. TRIAL (§ 186*)—INSTRUCTIONS—COMMENT ON EVIDENCE.

The court, in submitting a case to the jury, may call its attention to the evidence or lack of evidence bearing upon any point in issue in the case, and may comment upon the weight of the evidence, so long as it does not direct or advise the jury how to decide the matter.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 409, 410; Dec. Dig. § 186.*]

3. TRIAL (§ 187*)—INSTRUCTIONS—COMMENT ON EVIDENCE—DISCRETION.

In a jury trial on the issue whether a will had been induced by undue influence, an instruction called the attention of the jury to testimony that deceased could not write, and stated the testimony of the attesting witnesses as to the execution and signature of the will by deceased, that it was manifest that in such situation the attesting witnesses could not be mistaken, that deceased subscribed her name to the writing or the attesting witnesses were guilty of perjury, and that the attesting witnesses had no interest in the result of the action except one who was connected with the case as an attorney. *Held*, that this comment on the evidence was without any direction as to how to find the facts, and hence was not an abuse of discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 414-419; Dec. Dig. § 187.*]

4. WILLS (§ 54*)—TESTAMENTARY CAPACITY—ADMISSIBILITY OF EVIDENCE.

On the issue whether a will had been induced by undue influence, evidence by the husband of deceased, who alleged such undue influence, that deceased called him and gave him a bank book, saying that she was not going to live, and that the bank book belonged to him, was admissible in determining whether or not testatrix had legal capacity to dispose of the same property by her will some three weeks before that date.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 131-134, 136; Dec. Dig. § 54.*]

5. TRIAL (§ 349*)—SPECIAL INTERROGATORIES—POWER OF SUPERIOR COURT.

The superior court has the right to submit written interrogatories to the jury to be answered by them for the purpose of ascertaining upon what ground the jury rested their ver-

dict; the matter being within the reasonable discretion of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

6. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESS.

The circumstance that a witness who was equally within the control of both parties was not called in a hearing on the probate of a will raised no presumption against the party offering the will and having the burden of proof that, if called, the witness' testimony would have been unfavorable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

Appeal from Superior Court, New Haven County; Marcus H. Holcomb, Judge.

Proceedings by James Colwell, named as executor, for the probate of the will of Mary Cullum, deceased, opposed by Edward Cullum. From a decree of the probate court sustaining the will, contestant appealed to the superior court, where a verdict was rendered in favor of the will and the contestant appeals. No error.

John F. McGrath and Lawrence E. Lewis, both of Waterbury, for appellant. Terrence F. Carmody and John H. Cassidy, both of Waterbury, for appellee.

RORABACK, J. This case was tried to a jury in the superior court, where a verdict was rendered sustaining the will. The appellant contended that the instrument was not properly executed as a will, that at the time of its execution Mrs. Cullum did not have testamentary capacity, and that she was induced to make the will by undue influence.

The reasons of appeal now before us allege errors in the charge of the court and in failing to charge as requested.

At the time of her decease the testatrix Mary Cullum, was 65 years of age. She had no children. Her husband, an elderly man, 65 years of age, had not engaged in manual labor for some time prior to the death of his wife. Mary Cullum when she died had a brother residing in Ireland, a sister, Margaret Cullum, and her family, and children of a deceased brother, all of whom survived her and resided in Waterbury. Mary Cullum's estate amounted to about \$14,000. The first clause of the will in controversy gave the children of her deceased brother a note and mortgage amounting to \$2,000. The second devised to her husband, Edward, the life use of Mary's one-half interest in the homestead, valued at \$1,400. The third and fourth bequeathed \$500 to a Roman Catholic church in Waterbury, and the residue and remainder of her estate was devised and bequeathed to her sister Margaret Colwell. The will in dispute was executed August 4, 1911. Mary Cullum died on the 25th of August of the same year. Upon the trial in the superior court the executor rested his case after he had offered evidence to prove, and claimed to have proved, that the will

was duly executed when the testatrix was of sound mind. The appellant then offered evidence to show that this alleged will was not signed by the testatrix, and that at the time when it was claimed that it was signed the testatrix was not of sound mind, and that she was unduly influenced by Margaret Colwell and by the executor, James Colwell, to make the will. The executor in rebuttal offered evidence to meet the testimony of the appellant as to the execution of the will, the alleged mental incapacity of the testatrix, and the undue influence claimed to have been exerted upon the deceased.

[1] Upon the question of undue influence, the court said to the jury, in part: "And, as this will is attacked in this third reason of appeal upon the ground of having been obtained by undue influence, the issue presented and which you must determine is: Was this testatrix induced by undue influence to make her said will or any provision thereof? The opponent of the will—that is, the appellant—maintains the affirmative of this issue, and his burden therefore is to prove by a preponderance of the evidence that said Mary Cullum was induced to make and execute this will controlled by the undue influence exerted upon her by Margaret and James Colwell and others, as alleged. If he has failed to sustain this burden, your determination of this issue must be in favor of the proponent of the will. There is only one exception of this rule placing the burden of proof upon the opponent to the will upon the issue of undue influence. Where a will is in favor of a lawyer who draws it or advises as to its provisions, or where the will of a minor is made in favor of a guardian who has the legal custody of the person and estate of such minor, or where the will is in favor of a person occupying a clearly analogous position of trust, in such cases the burden of disproving undue influence is upon the proponent of the will. It is not alleged, and does not appear, that there was any such trust relation between the devisees or legatees in this will to Mary Cullum, and I therefore charge you that this case does not come within the exception to the rule, and that the burden of proving the alleged undue influence is upon the said Edward Cullum. If he has failed to prove by a preponderance of the evidence that such undue influence was in fact exercised, your conclusion upon this issue must be in favor of the proponent of the will." The appellant criticises this portion of the charge because it failed to explain to the jury what was meant by "analogous position of trust," or whether the circumstances of the case were such as to bring the parties within the meaning of that phrase. This objection is not well founded. It does not appear that in the trial of the case in the court below the appellant contended, or could have fairly claimed, that there was evidence tending to show that the case came within the exception to the rule that the

burden of proving undue influence was upon the party alleging it. Under such circumstances, a more detailed instruction as to the meaning of an "analogous position of trust" was unnecessary. The language used by the court was applicable to the facts appearing in the case.

[2, 3] The court in connection with the controverted question as to whether or not the purported will had been duly executed, after calling the attention of the jury to the testimony of several witnesses who had testified that Mary Cullum, the deceased, could not write, also stated that "the testimony as to the execution of the will is that of the attesting witnesses, viz., John H. Cassidy and Edward O'Brien, lawyers, and John H. Kelley, a merchant, all of Waterbury. You have heard the testimony of these witnesses that a book was procured for Mary Cullum to use as a desk; that she was propped up with pillows; that with her own hand she signed her first or given name, and, the ink failing, the pen was reinked and given to her, and she then finished subscribing her name to said writing, and that no one guided her hand; that she said it was her will and asked them to sign as witnesses; and that they did so in her presence. It is manifest that this is not a situation where these witnesses could be mistaken. Mary Cullum subscribed her name to said writing or these witnesses have been guilty of perjury. So far as appears, O'Brien and Kelley have no interest in the result of this action, and Cassidy none except his connection with the case as an attorney. You have seen these witnesses upon the stand and will determine whether they are truthful or otherwise." It has been established by repeated decisions in this state that a court in submitting a case to the jury may call the attention of the jury to the evidence, or lack of evidence, bearing upon any point in issue in the case, and may comment upon the weight of the evidence, so long as it does not direct or advise the jury how to decide the matter. *State v. Duffy*, 57 Conn. 525, 529, 18 Atl. 791; *State v. Rome*, 64 Conn. 329, 337, 30 Atl. 57; *State v. Fetterer*, 65 Conn. 237, 239, 32 Atl. 394; *State v. Cabaudo*, 83 Conn. 163, 76 Atl. 42. The extent to which a trial judge shall refer or comment on the evidence in his charge to the jury is a matter confided to his sound discretion. *Joyce v. Joyce*, 80 Conn. 88, 90, 67 Atl. 374.

In the present case the court submitted the question of fact to the jury without any direction as to how to find the facts, and there is nothing in the record to indicate such an abuse of its discretion by the court in commenting upon the testimony as to warrant a new trial for this reason.

[4] The appellant offered and claimed to have proved that about three weeks after the will is said to have been executed that Father Skelly, pastor of the Sacred Heart Church, called to see Mary Cullum, and told

her that she did not have 24 hours to live, and that she should arrange her temporal affairs, and shortly after he left she called her husband and gave him a bank book representing a deposit of over \$10,000, saying she was going to die, and that "this bank book belongs to you and everything else in the house," and thereupon the appellant took said book and looked at it, and deposited it in a drawer of a stand in the same room. In referring to this claim, the trial court in substance said to the jury: "You will remember the statement of the appellant that the morning before his wife died, or the day before she died, she said to him, in effect, to take this bank book, referring to Exhibit 6, the one which is in evidence with the deposit of \$10,316.64. 'It is yours.' If it is claimed from this that at that time she had the legal capacity to make a valid gift of upward of \$10,000 deposit in the savings bank, evidenced by the bank book, you will take into consideration in determining whether or not she had legal capacity to dispose of the same property by her will some three weeks before that date. The jury have nothing to do with the question whether Mary Cullum did what was necessary in law to be done to make a valid gift of this deposit in the bank. If there is a controversy as to that, it must be determined in a proper action. In determining the question as to the mental capacity of a testator at the time of executing a will, the law admits proof of his words and acts prior and subsequent to that point of time. The acts and words at and nearest to the time of execution may have the greater weight as evidence, diminishing in weight as time lengthens in each direction, the jury to determine when they cease to have any." *Canada's Appeal*, 47 Conn. 450, 463. There is no error in the application made by the court of the testimony concerning the declarations and conduct of the testatrix.

[5] The superior court unquestionably had the right to submit written interrogatories to the jury to be answered by them upon returning their verdict. Where there are several distinct grounds upon which a verdict might be based, it is not improper for the judge to ascertain which ground the jury adopted, since there may be little or no evidence upon any one ground and sufficient evidence upon another. This is a matter within the reasonable discretion of the trial court. *Freedman v. New York, N. H. & H. R. Co.*, 81 Conn. 601, 614, 71 Atl. 901, 15 Ann. Cas. 464.

[6] One reason of appeal relates to omission on the part of the court to charge the jury that, under certain circumstances, the failure on the part of a party to call witnesses known to have been in a position to know material facts gives rise to the presumption that, if called, the testimony of

such witnesses would be derogatory to the interests of such party. This complaint arose from the fact that Father Skelly called upon Mrs. Cullum a few hours before her death, and told her that she had but a few hours to live, and that she should arrange her temporal affairs. The court pursued the proper course in this respect. No claim of this character was made by the appellant in the court below, and the situation before the jury was not such that the appellant could justly complain because such instructions were not given. The circumstance that Father Skelly, who was equally within the control of both parties, was not called, raised no presumption against the appellees that if called the witness would have been unfavorable. *Scovill v. Baldwin*, 27 Conn. 316, 317. The charge is not subject to the criticism that the court erred in unnecessarily emphasizing minor claims of fact of the appellant, and the exclusion of others more important which he made upon the trial.

The appellant submitted a request for ten separate instructions to the jury, all of which so far as they were pursued before this court were substantially complied with.

There is no error. In this opinion the other Judges concur.

85 Conn. 452

UNION & NEW HAVEN TRUST CO. v.
TAINTOR et al.

(Supreme Court of Errors of Connecticut.
June 13, 1912.)

1. CORPORATIONS (§ 152*) — DIVIDENDS —
"CASH DIVIDEND."

A dividend on the capital stock of a corporation payable in stock of another corporation which the first corporation had purchased out of earnings and held as an asset and distributed so that it passed from its control and ownership, has all the characteristics of a "cash dividend," defining that term to include all distributions of surplus assets, whether in the form of cash or property taken from the body of the assets to become the property of the shareholder.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 994-996.]

2. LIFE ESTATES (§ 15*)—PRINCIPAL OR IN-
COME—CORPORATION DIVIDENDS—CASH DIV-
IDEND.

A cash dividend is regarded as income passing to the life tenant as against the remainderman.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

3. CORPORATIONS (§ 157*) — DIVIDENDS —
"STOCK DIVIDEND."

A "stock dividend" is an issue by a corporation of new shares of its own stock to its shareholders.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 584-586; Dec. Dig. § 157.*

For other definitions, see *Words and Phrases*, vol. 7, p. 6664.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. LIFE ESTATES (§ 15*)—PRINCIPAL OR INCOME—CORPORATION DIVIDENDS—STOCK DIVIDEND.

A stock dividend is treated as capital, and passes to the remainderman as against the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

5. LIFE ESTATES (§ 15*)—CASH DIVIDENDS—RIGHT TO AS BETWEEN LIFE TENANT AND REMAINDERMAN—ACTION BY TRUSTEE FOR CONSTRUCTION—BURDEN OF PROOF.

In an action by a trustee of shares of the capital stock of a railroad company to determine the respective rights of a life tenant and remainderman to a dividend on the shares, the remainderman has the burden of showing that the rule, entitling the life tenant to a cash dividend, took from the capital its rightful due.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

6. CORPORATIONS (§ 67*)—CAPITAL—DISTRIBUTIONS TO STOCKHOLDERS.

Capital may not be impaired by distribution to shareholders, although a corporation's surplus may be so distributed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 181-183, 449; Dec. Dig. § 67.*]

7. LIFE ESTATES (§ 15*)—PRINCIPAL OR INCOME—DIVIDENDS—CASH DIVIDEND.

Where a railroad purchased all the stock of another railroad out of surplus, taking a perpetual lease of the road and guaranteeing 4% dividend on the stock bought and declared a dividend payable in the shares of such other railroad, there was no such liability against the purchasing corporation as would deprive a life tenant under a testamentary trust of the dividend as a cash dividend.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

8. LIFE ESTATES (§ 15*)—CAPITAL OR INCOME—PERMANENT IMPROVEMENTS.

The fact that a railroad corporation invests its earnings in permanent tracks and improvements of another road, and declares a dividend payable in the stock of such other road, does not give the earnings so invested the character of capital, so as to entitle a remainderman to the dividend as against the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

9. LIFE ESTATES (§ 15*)—CAPITAL OR INCOME—DIVIDENDS.

Under Gen. St. 1902, § 377, which declares that all stock dividends on shares of a corporation held in trust belong to the trust fund, not be deemed a part of the income unless in case of a stock dividend the corporation shall expressly declare it to be made from its earnings subsequent to the trust, a corporation's dividend, payable in stock of another corporation purchased with its earnings, is not required to be distributed as capital to a remainderman as against a life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.*]

Case Reserved from Superior Court, New Haven County.

Suit by the Union & New Haven Trust

Company, trustee under the will of Mary C. Wakeman, deceased, against Charles M. Taintor and others, to determine the respective beneficiaries under the will. Reserved by superior court in New Haven county for advice of the Supreme Court. Judgment advised in favor of the defendant life tenant.

Suit to determine the rights of the respective beneficiaries under the will of Mary C. Wakeman of Southport, deceased, brought to and reserved by the superior court in New Haven county upon issues presented by the pleadings, being the facts stated in the complaint and admitted by the several answers of the defendants for the advice of this court. Judgment advised in favor of the life tenant.

Mary C. Wakeman of Southport died April 17, 1900, leaving a will duly admitted to probate, and by it gave an aliquot part of her residuary estate to her son Jesup Wakeman, and by the fifth article of the second codicil to her will she provided as follows: "Fifth. The share in my estate which in my will I have given absolutely to my son Jesup, or, if he dies before me, to his daughter Elizabeth if she survives me, I now give to my son Jesup for life, remainder to his said daughter Elizabeth for her life, remainder per stirpes in fee to such of my other grandchildren and issue of deceased grandchildren as are living at my death." Said Jesup Wakeman died before the testatrix, and his said daughter Elizabeth survived her, and married the defendant Frederick Dwight. No child has been born to her. Said testatrix left surviving her the following grandchildren, to wit: said Elizabeth Wakeman Dwight, Charles M. Taintor, a son of Eliza H. W. Taintor, now deceased, who was a daughter of said testatrix, the defendants M. Louise Shaw, Edythe W. Dolby, and Ross W. Wakeman, children of William W. Wakeman, Jr., a deceased son of said testatrix. The plaintiff is the duly appointed trustee of the property of which said Elizabeth is the beneficiary for life under said codicil, and holds as such trustee 308 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company of Pennsylvania.

The Lackawanna Railroad Company of New Jersey was incorporated for the purpose of constructing a railroad from the Delaware river to Hopatcong, in New Jersey. The Delaware, Lackawanna & Western Railroad purchased at par all of the stock of said Lackawanna Railroad except such stock as was necessary for qualifying directors and paid for the same out of its earnings. Subsequently the board of managers of the Delaware, Lackawanna & Western Railroad duly passed the following resolution: "Resolved, that an extra dividend of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

35 per cent. on the capital stock of the company be and is hereby declared payable by the distribution of the stock of the Lackawanna Railroad Company of New Jersey, as recommended by the Executive Committee, payable on December 20, 1911. That the stock books be closed from December 1st, to 12th, inclusive." Said Lackawanna Railroad Company of New Jersey has leased its railroad and property to said the Delaware, Lackawanna & Western Railroad Company, in perpetuity, and said lessee company has guaranteed and agreed to pay by way of rental 4 per cent. per annum upon the capital stock of said the Lackawanna Railroad Company of New Jersey. The plaintiff as trustee aforesaid received as its part or share of said extra dividend a certificate for 53 shares of the capital stock of the said Lackawanna Railroad and \$90 in cash, the proceeds of sale of a fractional right. The defendant Elizabeth Wakeman Dwight as life tenant claims such certificate and cash as part of the income, and the other defendants claim that the trustee should retain them as part of the principal of said trust fund, paying the income to Mrs. Dwight for life, and upon the termination of said trust conveying the same to the defendants as part of the principal of said trust fund.

Bristol, Stoddard, Beach & Fisher, for plaintiff. Leonard M. Daggett, of New Haven, for defendants Elizabeth W. and Frederick Dwight. Joseph P. Howe, of New York City, for defendants Charles M. Taintor, M. Louise Shaw, Edythe W. Dolby, and Ross W. Wakeman.

WHEELER, J. (after stating the facts as above). [1] Upon the admitted facts, the Delaware, Lackawanna & Western Railroad Company purchased with its earnings certain stock of the Lackawanna Railroad which it held among its assets. It declared a 35 per cent. dividend on its capital stock by distributing the stock of the Lackawanna Railroad so held by it to its stockholders. The stock thus distributed ceased to be a part of the surplus assets of the Delaware, Lackawanna & Western Railroad, and passed from its control and ownership. Such a dividend has all of the characteristics of a cash dividend. The fact that the distribution was made of the stock held as an asset rather than in cash procured from its sale does not affect its character. "Cash dividends include all distributions of surplus assets whether in the form of cash or property taken from the body of the assets to become the property of the shareholder." *Bishop v. Bishop*, 81 Conn. 509, 528, 71 Atl. 553; *Green v. Bissell*, 79 Conn. 547, 552, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287.

[2-4] The rule that, save in exceptional cases cash dividends are regarded as in-

come and pass to the life tenant while stock dividends—that is, an issue by a corporation of new shares of its own stock to its shareholders—are treated as capital and pass to the remainderman, is the settled doctrine of this jurisdiction. Usually the payment of a stock dividend is made by the transfer of surplus assets to capital while the cash dividend is made by either the transfer to the stockholder of surplus, or their conversion into cash and distribution pro rata among the stockholders. *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *Stamford Trust Co. v. Yale & Towne Mfg. Co.*, 83 Conn. 43, 49, 75 Atl. 90; *Boardman v. Mansfield*, 79 Conn. 634, 640, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178. Under our rule the dividend of the Lackawanna stock was a cash dividend, and passed to the life tenant, Mrs. Dwight.

[5] The burden was upon the remainderman to show that in this instance the operation of the rule took from the capital its rightful due, and this burden they have signally failed to meet. The remaindermen attempt to except this case from the application of our rule. They assert in their brief that the Lackawanna Railroad changed the main line of the Delaware, Lackawanna & Western by a short cut, thus diverting traffic from the old line of the Delaware, Lackawanna & Western and presumably decreasing its value, and to this extent the new road takes the place of the old; that the Delaware, Lackawanna & Western took its surplus earnings which were represented by its stock and capitalized them into a roadbed, rails, and rolling stock in place of its old roadbed represented by its stock, and thereby presumably increased the value of the Delaware, Lackawanna & Western stock; and that the stock of both roads represents merely the actual value of the old road before it built the Lackawanna with its earnings. We have no occasion to consider rights arising out of a situation of this character, since all of this argument rests upon a set of facts wholly outside the record. So far as that speaks, each corporation existed independently of the other, and the Delaware, Lackawanna & Western purchased the Lackawanna stock as an investment, and held it among its surplus assets. Nor does the record disclose the physical relation of the new road to the old.

[6] The suggestion that the surplus earnings of the old road were represented by its capital stock is not in accord with our law. Capital may not be impaired by distribution to shareholders; surplus may be. *Smith v. Dana*, 77 Conn. 543, 552, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; *Stamford Trust Co. v. Yale & Towne Mfg. Co.*, 83 Conn. 43, 49, 75 Atl. 90.

[7] The remaindermen argue that the real

transaction underlying the acquisition of this stock, the lease of the railroad, and the dividend vote was the incurring of a perpetual obligation of the Delaware, Lackawanna & Western to pay 4 per cent. to the Lackawanna for the use of the short cut, and that this guarantee imposed upon the stock of the Delaware, Lackawanna & Western a liability to the extent of the rental guaranteed. So they contend this case is on a parity with *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583. The essential difference between that case and this is that in *Bishop v. Bishop* the dividend was by the distribution of bonds secured by assets of the Adams Express Company, set apart for their payment, but that the company directly assumed as a liability the payment of these bonds. In this case the stock was purchased and upon its distribution as a dividend no liability to the Delaware, Lackawanna & Western of any description arose. There the shareholder received by the distribution an obligation of the company. Here the shareholder received a part of the assets. In order to find a similarity between that case and this, there arose the necessity for assuming that the 4 per cent. guaranty was a liability incurred as a result of the distribution of the stock, and that assumption compelled the creation of facts outside the record.

[8] The further contention that the character of the assets by their investment in permanent works, improvements, or extensions became such that as between owners of successive stock interests they ought to be regarded as capital, and, in fact, cannot be disassociated from the rest of the working capital relies upon a condition not supported by the finding. Moreover, if the facts supported the argument, it would appear to have been disposed of adversely to the remaindermen by *Smith v. Dana*, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51, where the facts upon which the remaindermen relied to show that the distribution was of capital were very much more persuasive and potent than any the remaindermen mistakenly claim to exist in this case.

[9] The claim that General Statutes, § 377, controls the case and makes imperative the distribution of this stock as capital, is entirely without merit.

The superior court is advised to render its judgment that the 53 shares of stock of the Lackawanna Railroad Company of New Jersey and the \$90 cash, referred to in the complaint and now in the hands of the plaintiff trustee, is income of the trust fund and belongs to, and should be paid over and transferred to, the defendant Elizabeth Wakeman Dwight, as part of the income of said trust fund to which she is entitled under the said will and codicils referred to in the complaint. In this opinion the other Judges concurred.

STATE v. SOUCIE.

(Supreme Judicial Court of Maine. June, 1912.)

INTOXICATING LIQUORS (§ 248*)—SEARCH AND SEIZURE PROCEEDINGS.

A complaint in a proceeding under Rev. St. c. 29, § 49, to search for and seize intoxicating liquors, describing the place as "a certain shop and dwelling and its appurtenances," occupied by defendant as a "store and dwelling," is insufficient for failing to charge that the dwelling house, or any part of it, is used as an inn or shop, or for purposes of traffic, within the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 368-375; Dec. Dig. § 248.*]

Exceptions from Supreme Judicial Court, Aroostook County.

Search and seizure proceeding by the State against Florent Soucie. On exceptions by defendant. Exceptions sustained.

Complaint and warrant under Revised Statutes, c. 29, § 49, authorizing the process for search and seizure of intoxicating liquors. The complaint, omitting formal parts, is as follows:

"Elmer G. Bryson, of Houlton, in said county, competent to be a witness in civil suits, on the 11th day of July, 1911, in behalf of said state, on oath complains that he believes that on the 11th day of July, in said year, at Grand Isle, in said county of Aroostook, intoxicating liquors were, and still are, unlawfully kept and deposited by Florent Soucie, of Grand Isle, in said county of Aroostook, in a certain shop and dwelling and its appurtenances, situate on the easterly side of Highway street in said Grand Isle, occupied by Florent Soucie as a store and dwelling, said Florent Soucie not being then and there authorized by law to sell said liquors within said state, and that said liquors then and there were, and now are, intended by said Florent Soucie for sale in this state in violation of law, against the peace of the state, and contrary to the form of the statute in such case made and provided.

"I therefore pray that due process be issued to search the premises hereinbefore mentioned, where said liquors are believed to be deposited, and, if there found, that said liquors be seized and safely kept until final action and decision thereon, and that said respondent be forthwith apprehended and held to answer to said complaint, and to do and receive such sentence as may be awarded against him."

On this complaint a warrant was issued by the trial justice to whom the complaint was addressed, and which, omitting formal parts, is as follows:

"In the name of the state of Maine, you are hereby commanded to enter the premises described and specially designated in the above complaint, which is expressly referred

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to as a part of this warrant, and therein to search for said liquors, and, if there found, to seize and safely keep the same, with the vessels in which they are contained, until final action and decision thereon; and if you there find said liquors, or have reason to believe that said respondent has concealed them about his person, or if you are prevented from seizing them by their being poured out or otherwise destroyed, you are hereby commanded to arrest said respondent, if he may be found in your precinct, and bring him forthwith before me, the subscriber, or some other trial justice in and for said county, to answer to said complaint, and to do and receive such sentence as may be awarded against him. And you are in like manner required to summon the complainant, and also to appear and give evidence touching the matter contained in said complaint when and where you shall have said respondent, and to make immediate return of this warrant."

Search was made, and 95 bottles, "each containing one pint lager beer," were seized. The defendant was arrested and brought before the trial justice, where he waived hearing, pleaded not guilty, and was sentenced to pay a fine of \$100 and costs, and to be imprisoned 60 days in jail. The defendant then appealed to the Supreme Judicial Court, and when the matter came on for hearing in said court he demurred to the complaint and warrant. The demurrer was overruled, and the defendant excepted.

Argued before WHITEHOUSE, C. J., and SPEAR, BIRD, HALEY, and HANSON, JJ.

Perley C. Brown, Co. Atty., of Presque Isle, for the State. A. S. Crawford, Jr., of Ft. Kent, and L. V. Thibodeau, of Van Buren, for defendant.

BIRD, J. The question for determination in this case arises upon demurrer of defendant to a complaint and warrant under R. S. c. 29, § 49, authorizing the process for "search and seizure" of intoxicating liquors. The demurrer was overruled below, and the case is here upon exceptions of defendant.

In support of the demurrer, defendant urged that neither the complaint nor the warrant contains any express allegation, nor any allegation from which by necessary inference or intendment it appears, that the said dwelling house therein described, or any part of it, is used as an inn or shop, or for purposes of traffic; nor did the magistrate before whom the complaint was made allege in said warrant that he was satisfied by evidence presented to him that intoxicating liquor was kept in said dwelling house or its appurtenances intended for illegal sale, thus invoking the provisions of R. S. c. 29, § 52.

We think the exceptions must be sustained. The complaint describes the place of alleged unlawful deposit to be "a certain shop and dwelling and its appurtenances, situate

on the easterly side of Highway street in said Grand Isle, occupied by said Florent Soucie as a store and dwelling."

There is no allegation that the dwelling, or part of it, is used "for the purposes of traffic," and we cannot regard the words "shop and dwelling" and "occupied as a store and dwelling" as, or equivalent to, an allegation that the dwelling house "or some part of it is used as an inn or shop." There may be two distinct buildings. It is urged by the state that the use of the words "its appurtenances" shows that the shop and dwelling are identical. But "its" would naturally refer to dwelling, and might refer to shop, and the state claims it refers to both. If this be so, it cannot be said that the complaint possesses precise and sufficient certainty, or that the allegation is made with reasonable precision and directness. *State v. Paul*, 69 Me. 215, 218; *State v. Whalen*, 85 Me. 469, 472, 27 Atl. 348; *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 206. See, also, *State v. Spencer*, 38 Me. 30, 32; *McGlinchey v. Barrows*, 41 Me. 74, 77.

Exceptions sustained.
Demurrer sustained.

PENNINGTON v. GARTLEY.

(Supreme Judicial Court of Maine. June, 1912.)

1. USE AND OCCUPATION (§ 4*)—RIGHT TO SUE.

One is not entitled to sue for use and occupation of land to which he has no legal title.

[Ed. Note.—For other cases, see *Use and Occupation*, Cent. Dig. § 16; Dec. Dig. § 4.*]

2. USE AND OCCUPATION (§ 9*)—BURDEN OF PROOF.

The burden was on plaintiff to show an express contract by defendant to pay her a fixed sum for the use and occupation of land to which she had no legal title.

[Ed. Note.—For other cases, see *Use and Occupation*, Cent. Dig. § 25; Dec. Dig. § 9.*]

3. USE AND OCCUPATION (§ 9*)—EXISTENCE—EVIDENCE—SUFFICIENCY.

In an action for use and occupation of land, evidence held insufficient to show promise by defendant to pay plaintiff rents and profits from land to which she had no legal title.

[Ed. Note.—For other cases, see *Use and Occupation*, Cent. Dig. § 25; Dec. Dig. § 9.*]

4. NOVATION (§ 1*)—ELEMENTS.

The doctrine of novation cannot apply to an action for use and occupation of land to which plaintiff had no legal title, where neither defendant nor the lessee of the land was indebted to plaintiff, she being a stranger to the transaction, since novation implies a substitution of a debtor of a creditor and of a new contract.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4848-4851; vol. 8, p. 7733.]

Report from Supreme Judicial Court, Aroostook County, at Law.

Action by Margaret H. Pennington against Ephrim Gartley. On report. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and HANSON, JJ.

Shaw & Shaw, of Houlton, for plaintiff. Doherty & Tompkins of Houlton, for defendant.

CORNISH, J. [1] This is an action of assumpsit, brought on a promissory note for \$36, dated July 15, 1910, due in three months, with interest at 8 per cent., and also on the following account annexed: "To use and occupation of 10 acres of land on my farm in Houlton, for season of 1910, same you used with Ulmont H. Hovey, and which you agreed to pay to me, rent being \$15 per acre, \$150."

No defense is made to the note, and the sole controversy is over the claim for rent. The case is before this court on report.

Two insuperable obstacles prevent recovery for use and occupation.

In the first place, it is the use and occupation of 10 acres on the plaintiff's farm that is sued for; but the evidence shows that the plaintiff was not the owner of the premises in question, either in the season of 1910 or at any other time.

The history of the title as shown by the uncontradicted evidence is somewhat unique and is as follows:

George L. Pennington, the father-in-law of the plaintiff, was the owner of the farm in question up to about 1898 or 1899, when he conveyed it to his son, George A. Pennington, the husband of this plaintiff. The deed was duly delivered to the son and retained by him until his death in 1907, but was never recorded, for reasons well known to the parties, but not appearing in evidence.

Then, according to the plaintiff's statement, "after my husband's death, and his property went through probate, and everything was settled, we decided the farm would be good property for my son, and it was deeded right straight to my son." That deed was given in May, 1910, after the lease in this case was given, and was put on record some time in 1911. This son, whose name is George D. Pennington, is a minor, and the plaintiff is his legal guardian, having been appointed in February, 1908.

George L. Pennington died on June 26, 1911, and the administrators of his estate are James L. and Sarah A. Pennington.

It is clear from the foregoing that the plaintiff has never had any legal title to the premises, except, perhaps, an undivided interest by descent from her husband at his decease. The destruction of the deed, once delivered, could not, of course, destroy the title which had been conveyed; but in any event the legal title during the season of

1910, when the controversy here took place, was either in George L., or the heirs of George A., or George D. It was not in the plaintiff. She was the guardian of George D., but this suit is not brought by her as guardian. *Hutchins v. Dresser*, 28 Me. 76; *Dorr v. Davis*, 76 Me. 301.

Apparently it was treated by the father-in-law, George L., as being still in himself, because on March 9, 1910, he executed and delivered a written lease of the entire farm of about 250 acres to Ulmont H. Hovey, the son-in-law of the defendant, for one year for a rental of \$1,400.

The plaintiff appears nowhere in the transaction, except in some interviews, as will hereafter be seen.

It is difficult to see, therefore, how the plaintiff can recover for the use and occupation of real estate to which she had no title. *Porter v. Hooper*, 11 Me. 170; *Carroll v. Hayward*, 124 Mass. 120.

[2, 3] But the plaintiff contends in the second place that, while the legal title may have been in some other party, she was really to have the rents and profits from the farm, and she relies upon an alleged express promise made by the defendant to pay her \$150 for the use and occupation of these 10 acres out of the whole tract. This contention is strongly resisted by the defendant, who says that he had made no such contract with the defendant; that his son-in-law, Hovey, took a lease of the entire farm, and he, the defendant occupied these 10 acres by arrangement with the lessee. A careful study of the evidence shows that the plaintiff has not sustained the burden of proof on this question of fact. Not only does the testimony preponderate toward the defense, but the circumstances point in the same direction.

1. The written lease covers the entire 250 acres, and makes the lessee, Hovey, liable for the entire rental of \$1,400. There is no exception of 10 acres to be occupied by Gartley, with rental to be paid by him. Hovey is left liable for the whole.

2. By the terms of the lease, the title to all crops raised on the leased premises was reserved to the lessor, George L., as security for payment of the rent. No exception was made.

3. Under date of September 5, 1910, the attorney for the plaintiff, who was evidently familiar with the entire transaction from the beginning, wrote the lessee, Hovey, as attorney for the lessor, George L. Pennington, in order to have an understanding in regard to all the crops raised on the premises, and said: "We will not allow you, your father, and Mr. Gartley to dig the potatoes and haul them off the place, unless we know that enough of them are saved to pay the rent." This letter is entirely inconsistent with the plaintiff's present position. The lessor was then claiming of the lessee security on all the potatoes raised, and both the plaintiff on the

one hand and Gartley on the other, as an independent lessee, are ignored.

4. Again on November 18, 1910, the same attorney wrote to the defendant, Gartley, saying in part:

"I have been expecting to see you every day with the money which is due Mr. Hovey on the potatoes you raised on his place, and I am surprised that you have not attended to it. I am writing to give you fair warning, so that there will be no misunderstanding about it. Mr. Hovey had no right to rent you the land, and the crop which you raised on the land belonged to Mr. Pennington, and you cannot give a title to the same until you pay the land rent. I advise you to get the money somewhere and fix it up at once, because the parties are urging me to take some action in the case.

"Hoping that you will give this prompt attention and bring in the \$150 at once, I am," etc.

This is an exact statement of the transaction as the defendant claims it, and conclusively proves that Gartley was operating under Hovey. The plaintiff at that time apparently had no interest in the matter; the only parties concerned being the lessor, George L. Pennington, the lessee, Hovey, and the sublessee, Gartley.

Subsequently the lessee, Hovey, went into bankruptcy, and the defendant claims that this changed situation gave rise to the claim in this case.

The conclusion is well-nigh irresistible that the defendant sublet 10 acres from Hovey for \$150, that he paid a portion of that sum to Hovey in the fall of 1910, \$40 to the lessor's attorney by order of Hovey, and the balance to Hovey's mother, also by his order, and that nothing was ever due from the defendant to the plaintiff in this action on any contract with reference to this farm, either express or implied.

[4] The plaintiff seeks to invoke the doctrine of novation, based upon an alleged promise by the defendant to her to pay her the amount due from defendant to Hovey, and an agreement on Hovey's part that this should be done.

The evidence on this point falls far short of sustaining this contention; but, aside from that, we have found as a fact that neither the defendant, Gartley, nor the lessee, Hovey, was the debtor of this plaintiff for use and occupation of this farm, or any part thereof, and therefore the doctrine of novation does not apply. She was a stranger to the transaction, while novation "implies the substitution of a debtor of a creditor and of a new contract." *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. 551.

The liability on the promissory note being admitted, the entry must be:

Judgment for plaintiff for \$40.32, with interest from June 15, 1912, and costs.

MEREDITH v. KNOX.

(Court of Chancery of Delaware. June 25, 1912.)

1. CONTRACTS (§ 128*)—VALIDITY—CRIMINAL CHARGE—COMPROMISE.

A bond to compromise a prosecution for using a female under 18 for sexual intercourse, which is a felony, is invalid.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 633-653; Dec. Dig. § 128.*]

2. CONTRACTS (§ 128*)—PUBLIC POLICY—VALIDITY.

A bond given to the father of a woman for the payment of money, in consideration that bastardy charges should not be prosecuted against the obligor's son for the maintenance of a child, of which the obligee's daughter was pregnant, merely providing for the relinquishment of a claim for the maintenance of the child, if any, born within four months, and not for the abandonment of a charge of using the female under 18 for sexual intercourse, was not against public policy, but was based on a sufficient consideration, and was enforceable, in the absence of fraud or conspiracy.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 633-653; Dec. Dig. § 128.*]

3. JUDGMENT (§ 416*)—EQUITABLE RELIEF—INSUFFICIENCY OF CAUSE OF ACTION.

Where bastardy proceedings had been instituted by the father of a woman against complainant's son, and complainant, after having been afforded means of investigation, executed a bond to defendant to compromise the charge, on which judgment was subsequently entered, and it appeared that the woman had no knowledge of such proceedings, the fact that it subsequently appeared that complainant's son was innocent of the charge, and that the woman denied his paternity of the child, was no ground for setting aside the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 784, 786-788; Dec. Dig. § 416.*]

Suit by William J. Meredith against Samuel F. Knox to vacate a judgment in favor of defendant Knox. Dismissed.

John B. Hutton, of Dover, for complainant. Thomas C. Frame, Jr., of Dover, for defendant.

THE CHANCELLOR. The bill is filed by the defendant in a judgment to have it declared null and void. By the bill it is alleged that the plaintiff in the judgment, Samuel F. Knox, and his daughter, Hattie, conspired to falsely charge Graham Meredith, the son of the defendant in the judgment, with having used her for the purpose of sexual intercourse and with being the father of the child with which she was pregnant, she being then under 18 years of age, and in pursuance of the conspiracy had issued a warrant for the arrest of Graham Meredith upon the charge of having so used her. In order to prevent a prosecution of the charge the complainant, William J. Meredith, gave to the defendant, Samuel F. Knox, his judgment bond for \$360, upon which judgment was entered in the Superior Court for Kent county. It was claimed that the bond was void because the obligor was induced to give it by reason of the false

charge and because it was accepted by the obligee as an inducement to stop further prosecution of the criminal charge. Suit was brought in Maryland on the judgment, and it was alleged that the complainant here had no defense of which he could avail himself in that suit.

The defendant denied the conspiracy and averred that the legal proceeding was taken against Graham Meredith, not on the statutory offense, but to hold him for having seduced Hattie Knox. In support of this the defendant produced a written agreement between the obligor and obligee, made contemporaneously with the giving of the bond, wherein the obligee promised on behalf of himself and his daughter not to prosecute any action against Graham Meredith for or on account of any charges which had or might be brought "for the maintenance and support of any child or children which may be born to the said Hattie Knox within four months from the date hereof." It was further agreed that Samuel F. Knox was acting for himself and his daughter and William J. Meredith was acting for himself and his son.

It was shown that when the bond was given and the agreement signed, Hattie was pregnant and a child was born within four months of the date of the bond and agreement, but she denied that Graham Meredith was the father of the child, and this was also denied by Graham Meredith. The daughter also disclaimed any knowledge of the making of the charge, or the giving of the bond, or the written agreement, until long afterward, or giving her father at any time authority to act for her in the matter.

The affidavit of Samuel F. Knox, on which the warrant against Graham Meredith was issued, after stating the pregnancy of his daughter, declared:

"I charge Graham Meredith, single man, with having seduced my daughter, and that she is under the age of consent."

When the bond was given and the agreement made there was a legal proceeding pending against the son of the obligor on the complaint of the obligee. The contention of the complainant was that the charge was not a bastardy proceeding to fix the paternity of the child and force him to provide for the care of the mother and child, but was a more serious one, viz.: the statutory offense of using a female child under eighteen years of age for sexual intercourse. To prove this the affidavit of Samuel F. Knox, on which the warrant was issued, was used and it bears that construction, though not necessarily.

[1] It is unlawful, says the complainant's counsel, to compromise such a criminal charge for money paid and to be paid, and hence the bond is invalid. That principle of law is well established, and if the facts were as claimed by the complainant would probably justify a decree avoiding the transaction, un-

less the compromise of such a charge is permissible on grounds of public policy. But whatever the phraseology of the complaint may have been, the character of the warrant based thereon is not shown, for neither the warrant, or a copy thereof, was produced.

[2] Assuming that the warrant followed the complaint, still the transaction between the parties is to be gathered from the written agreement between the obligor and obligee made contemporaneously with the giving of the bond and as part of the same transaction. From the agreement, then, it is clear that the bond was given to the father of a woman then pregnant for the payment of money in consideration that charges would not be prosecuted against the son of the obligor for the maintenance of the child with which the daughter was so pregnant. The consideration for the giving of the bond was not the abandonment of the charge of the statutory offense, but a relinquishment of a claim for the maintenance of the child if any be born within four months.

There is no legal objection to such compromises, but, on the contrary, they are encouraged by the courts, for the sake of those guilty of the illicit intercourse, for the sake of the child and to hide the scandal from the public. Such cases have always and rightly been considered private matters in which the public has no interest, except to see to it that the unfortunate woman and her child are protected and the expense of the care of her and her child shall not fall on the taxpayers, but on the seducer.

A promise to pay money in compromise of bastardy proceedings already taken cannot be avoided on the ground that such a compromise is contrary to public policy, or public morals, but is a valid promise and the consideration sufficient to support it. *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Holcomb v. Stimpson*, 8 Vt. 141; *Pfau v. McClintock*, 130 Pa. 369, 18 Atl. 734; *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668; *Hays v. McFarlan*, 32 Ga. 699, 79 Am. Dec. 317.

It is claimed, however, that it is proved by the testimony of both the seducer and seduced that the man charged was not the seducer. Without commenting on this testimony, and the probability of its truthfulness, it seems established that it is immaterial whether Graham Meredith was or was not the father of Hattie Knox's child. She was pregnant; her pregnancy had been charged to him in a legal proceeding; and a contract was made to pay money in consideration that the putative father should not be further prosecuted for the maintenance of the child. As a general principle the abandonment of judicial proceedings is a good consideration for a promise, though the demand be unfounded. As was said in *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668:

"Where, however, there is an actual subject of dispute and a suit has already been instituted, if parties meet fairly, upon equal terms, with equal knowledge, or means of knowledge, of all the facts and without fraud or duress make a settlement, which is followed by a discontinuance of the suit, the compromise or discontinuance will be a sufficient consideration for a promise to pay money, without regard to the ultimate right of the case. Such a settlement estops both parties from any further litigation of the matter in dispute."

This principle has been distinctly applied to compromises of bastardy proceedings. In *Holcomb v. Stimpson*, 8 Vt. 141, the court enforced payment of a note given before the birth of a bastard child in compromise of a suit in bastardy, though proof was offered to show that the accused person could not have caused the pregnancy, in absence of fraud or imposition in bringing about the compromise. So also in *Billingsley v. Cleland*, 41 W. Va. 234, 23 S. E. 812, and several cases there cited.

In *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668, of such a defense, it was said:

"The compromise and settlement of a suit would be an idle and mischievous ceremony, if after a discontinuance had been secured, the very matter in dispute remained open and could be pleaded as a good defense to the notes given in settlement."

[3] The innocence of a putative father was not considered a defense to a recovery of a note given in compromise of a charge against him in bastardy proceedings in the case of *Hargroves v. Freeman*, 12 Ga. 342, or in the case of *Merritt v. Flemming*, 42 Ala. 234.

It is unnecessary, therefore, to decide whether the testimony of Hattie Knox of statements made to her father and sister respecting her pregnancy and the paternity of the child is admissible, for the paternity of the child will not be determined in this case, and in view of the conclusions here reached is immaterial.

There was no evidence to sustain the allegation of a conspiracy between the obligee and his daughter respecting the charge against Graham Meredith. Indeed, the daughter appeared as a witness for the complainant and testified that she did not know of the giving of the bond, or making of the agreement, until long after the occurrence, and, therefore, she could not have conspired with him to obtain them. Nor was there evidence of any substantial misrepresentation of fact made by the obligee to the obligor in the procurement of the obligation. There was a charge against the son of the obligor made by the obligee and a legal proceeding against him based on the then existing pregnancy of the obligee's young daughter. That

case was compromised, and that compromise was a good consideration. Whether the obligee was acting for the daughter with or without her knowledge was immaterial, for he had a right to make the charge and also to compromise it. So also it was unimportant, if true, that the obligee stated to the obligor that the daughter would appear against the obligor's son. It was not a representation of a fact but a declaration respecting probable future conduct of a third person.

It is immaterial that the bond in this case was given, not to the injured woman, but to her father. A note given for such a consideration by the despoiler to the mother of the despoiled was held valid in *Merritt v. Flemming*, 42 Ala. 234, though the offspring of the illicit intercourse did not come to full life after the compromise had been effected. But it is urged by the complainant that the bond in this case was made not by the accused but by his father, and, therefore, that a different rule should be applied. It is urged that where the obligation is made by the reputed father it must be assumed that he acted with full knowledge as to the facts upon which his liability is based, but that where the obligor is other than the putative father he acts without such knowledge. Whether, or not, this be a sound distinction applicable in some cases, it surely is not pertinent here. The obligor, the complainant in this case, undertook in the agreement to act for his son and it is his own lookout if he was not informed of the facts. Besides, he did not agree to the compromise when it was first suggested, and did not do so until after he had conferred with his son. It is not an unreasonable inference then to say that he acted with knowledge, or means of knowledge of the facts of the case, and so that the obligor and obligee negotiated on equal terms. If one undertakes to effect a compromise of a matter affecting another person for and on behalf of such person, he is surely charged with knowing the facts known to the person he represents. There was no evidence that unfair advantage was taken of the obligor, or any undue pressure brought upon him, for he was amply protected from both by the presence at the negotiations and in the compromise of his legal adviser, who in fact drafted the bond and agreement.

There is, then, in this case no equitable ground for annulling the bond in question. A bond given to the father of a woman pregnant with child in compromise of a legal proceeding against the obligor's son based on seduction by the son of the pregnant woman, is valid and the consideration, therefore, sufficient and not against public policy. The bill must, therefore, be dismissed with costs against the complainant.

A decree will be entered accordingly.

HENESSEY v. WABASH MILLS CO.

(Supreme Court of Pennsylvania. Feb. 12, 1912.)

MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Evidence in an action by a night watchman against his employer for injuries resulting from falling down an unguarded hatchway at night *held* to present a case for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

Action of trespass by James Hennessey against the Wabash Mills Company for personal injuries. From an order refusing to take off nonsuit, plaintiff appeals. Reversed, and venire facias de novo awarded.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

G. Von Phul Jones, for appellant. F. B. Bracken, for appellee.

ELKIN, J. This is an action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant company. The negligence charged is that defendant maintained dangerous hatchways, used for the purpose of raising and lowering merchandise, and had permitted one of these hatchways on an upper floor to be left unguarded, unprotected, and uncovered, as a result of which failure to properly guard appellant in discharge of his duties as a night watchman and without notice of the dangerous situation fell through the open hatchway to the floor below, and sustained the injuries about which complaint is here made; in other words, appellant contends that he was not provided a reasonably safe place to work. At the conclusion of the testimony produced by the plaintiff tending to show negligence, defendant moved for a nonsuit, which was granted by the learned trial judge on the ground that the evidence was not sufficient to charge the defendant with negligence within the meaning of the law. From the judgment so entered this appeal was taken.

Appellee relies on *Pawling v. Hoskins*, 132 Pa. 617, 19 Atl. 301, 19 Am. St. Rep. 617, *Clough v. Hoffman*, 132 Pa. 626, 19 Atl. 299, 19 Am. St. Rep. 620, *Kupp v. Rummel*, 199 Pa. 90, 48 Atl. 679, and other cases and principles of like character to sustain the judgment of nonsuit. Appellant contends that it was the duty of the appellee company to use ordinary care to protect its servants from dangers which should have been reasonably anticipated from open and unguarded hatchways, and that under the facts of the present

case it was for the jury to say whether there had been a failure to perform this duty. To sustain this contention, *Johnson v. Bruner*, 61 Pa. 58, 100 Am. Dec. 613; *Bennett v. Plate Glass Co.*, 158 Pa. 120, 27 Atl. 874; *Smith v. Oil City Tube Co.*, 183 Pa. 485, 38 Atl. 1014; *Gilbert v. Elk Tanning Co.*, 221 Pa. 176, 70 Atl. 719, and *Ferry v. Rapid Transit Co.*, 232 Pa. 403, 81 Atl. 426, are cited. The principle underlying each class of cases is sound, but its application depends upon the facts. If appellant had been familiar with the premises and had known of the location of the hatchway, his right to recover to say the least would be very doubtful, but his own testimony is positive that he had no knowledge of a hatchway in the floor at the place where the accident occurred, and that he had not seen it during the short time he was employed as night watchman. The accident occurred in the nighttime of the second day of his employment and a view of the hatchway was to some extent obstructed by bundles of cotton and other materials piled near it. The place was in darkness; the only light furnished being that of a lantern carried on the arm of appellant. Under such circumstances, nothing could have been more dangerous than an open unguarded hatchway in the floor over which the watchman in the performance of his duties had to walk several times each night in total darkness except as his footsteps might be guided by the light of his lantern. It is argued for appellee that the testimony of the witness, Brooke Carl, shows appellant to have been familiar with the location of the hatchway in question: it having been pointed out to him the day before when he was taken through the building for the purpose of being familiarized with his duties. Appellant positively denies that he saw the hatchway at that time, or that it was pointed out to him by Carl, and the testimony of Carl leaves the question in doubt. But, even if there was a variance in the testimony of these two witnesses as to the fact in dispute, it would still be a question for the jury. We cannot agree that this is a case where the employer is relieved from liability because a workman employed in other duties during the day left the hatchway open. If the testimony of appellant is believed, and his credibility is for the jury, he did not know that there was a hatchway on that floor, and had no notice of this hidden danger to put him on inquiry. We are all of opinion that this case was for the jury.

Judgment reversed, and a venire facias de novo awarded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index—

SHIVE v. PHILADELPHIA & R. RY. CO.
(Supreme Court of Pennsylvania. March 18, 1912.)

CARRIERS (§ 331*)—INJURIES TO PASSENGERS—ACTIONS—NONSUIT.

In an action against a railroad for injuries to a passenger, where the evidence shows that just before the accident plaintiff stood in the open doorway of a car with his back to the interior, and one hand on the door jamb and the other holding an umbrella, that the car was crowded beyond its seating capacity, but that the car next to it contained no passengers, that shortly after the train started it passed a switch or another track, and the car was jolted, not to an unusual degree, but sufficiently to cause passengers within the car to press against plaintiff, causing him to fall to the ground, a nonsuit is properly granted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1371, 1374-1382; Dec. Dig. § 331.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass for personal injuries by Nathan W. Shive against the Philadelphia & Reading Railway Company. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Peter M. MacLaren and Walter H. Fenimore, for appellant. Wm. Clark Mason, for appellee.

STEWART, J. The injury plaintiff sustained is traceable directly to the dangerous position he occupied on the car on which he was a passenger. He was not within the car, but was standing in the open doorway with his back to the interior of the car with one hand resting on the door jamb, while in the other he was holding an umbrella. While in this position the train started. It had proceeded but a short distance, when passing a switch or crossing another track than its own—it does not clearly appear which—the car on which plaintiff was a passenger was jolted, not however to any unusual degree, but nevertheless to a degree sufficient to cause passengers within the car and standing next to the plaintiff to press against him. By this pressure he was forced from his position out upon the platform, and in his effort to take hold of the railing of the car he fell to the ground. The negligence complained of was that the defendant company by its servants in charge operated the train in such a reckless and careless manner that at or when the point where the tracks crossed Race street the plaintiff without fault or contributory negligence on his part was violently jolted and thrown from his position on the car upon the track. It is quite sufficient to say with respect to the negligence here alleged that there was no evidence in the case to support the charge. It cannot be pretended that the ac-

cident occurred through any defect in any of the means of transportation, or that these or any of them were being employed in a negligent way. So far as appears from the evidence, there was not a circumstance in the case indicating that anything had occurred in connection with the operation and management of the train or in its movement that was not necessarily incident under the most skillful direction with the most approved equipment. Had the negligence charged been failure on part of the company to provide the plaintiff with a safe place in which to ride, in consequence of which the injury resulted, the case would not have been so entirely naked of facts tending to support the charge, for, accepting the testimony offered as correct, the car on which plaintiff rode was crowded beyond its seating capacity, and its aisles so filled with passengers standing that plaintiff could advance no further than the door. Unquestionably injury happened to him because of the position he occupied; but was he in that position because the company had allowed him no other accommodation? He does not so testify. He says that there was a passenger coach in the rear of the one on which he was riding which contained no passengers. He made no attempt to enter that car either before or after he made the discovery that the first car was crowded. He nowhere gives any reason for not seeking a safer place than the one he occupied; nor does he mention a single obstacle or circumstance that stood in the way of his finding a seat in the car to the rear. So far as appears, a step or two across the connected platform of the two cars would have placed him where this accident at least could not have happened. The testimony not disclosing any necessity for his occupying the position he did, and remaining in it, the lack of such evidence was not to be supplied by conjecture on the part of the jury. For the injury that resulted he was without cause of action.

The assignments of error are overruled, and the judgment is affirmed.

IN RE MERCER'S ESTATE.

Appeal of FARMERS' & MECHANICS' TRUST CO.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

DESCENT AND DISTRIBUTION (§ 53*)—WILLS (§ 801*)—RIGHTS OF WIDOW—PREFERENCE—ELECTION—EFFECT.

Act April 1, 1909 (P. L. 87), giving to widows a preference of \$5,000 in distribution of intestate estates, applies to the estate of a testate whose widow has elected to take against the will, and is constitutional.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 141-143; Dec. Dig. § 53;* Wills, Cent. Dig. §§ 2077-2080; Dec. Dig. § 801.*]

Appeal from Orphans' Court, Chester County.

In the matter of the estate of J. Edge Mercer, deceased. From a decree dismissing exceptions to widow's preference, the Farmers' & Mechanics' Trust Company, committee of Theodore Mercer, appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thomas W. Pierce, for appellant. Walter S. Talbot and Jos. H. Baldwin, for appellee.

MESTREZAT, J. The question raised on this record involves the interpretation of the act of April 1, 1909 (P. L. 87), and is determined by the decision in the Estate of Joseph Guenthoer, Deceased, 83 Atl. 617.

For the reasons stated in the opinion filed herewith in that estate, the decree of the court below is affirmed.

KAUFMANN et al. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 18, 1912.)

1. DEDICATION (§ 18*)—ACTS CONSTITUTING—CONVEYANCE.

Where a city by ordinance widens a street from 66 to 72 feet wide by taking a 3-foot strip on each side, but providing that existing buildings shall not be affected until altered or rebuilt, and an owner of a lot 137 feet deep thereafter conveys it by deed describing it as 134 feet deep on a 72-foot street, a subsequent grantee can claim no damages for the widening, when he rebuilds according to the new building line; the first deed making the 3-foot strip a part of the street as effectually as a formal dedication could have done.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

2. DEDICATION (§ 18*)—DEED—EFFECT OF ENCROACHMENTS.

That the coping and steps of a building extended onto a strip of land included in the widening of a street is unimportant as affecting the rights of the parties; such encroachment not being beyond the limits of the usual permissive use of city streets.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Morris A. Kaufmann and others, executors, against the city of Philadelphia. From an order refusing to take off nonsuit, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

William A. Carr, W. Horace Hepburn, and Sidney L. Krauss, for appellants. Henry J. Gibbons, Edwin O. Lewis, Asst. City Sol., and Michael J. Ryan, City Sol., for appellee.

FELL, C. J. Arch street, in the city of Philadelphia, was originally laid out and opened of the width of 66 feet. In 1886 the

city by ordinance directed the widening of the street to 72 feet; 3 feet to be added to either side. The ordinance was not to apply at once to properties on which buildings were erected, but all new or altered buildings were to be placed back on the new line established. At that time the St. George's Hall Association was the owner of a lot with a building thereon, at the southwest corner of Arch and Thirteenth streets, 60 feet in front on Arch street, which was 66 feet wide, and extending south on the line of Thirteenth street 137 feet. In 1895 the association conveyed this lot to Henry C. Lea by deed, in which it was described as being on the south side of Arch street as widened to the width of 72 feet and containing in front or breadth on Arch street 60 feet and extending of that width southward along the west side of Thirteenth street 137 feet, bounded northward by said Arch street, and eastward by the said Thirteenth street. In 1902 Mr. Lea conveyed the property by deed containing the same description to the plaintiffs, who, desiring to rebuild, receded three feet in accordance with the ordinance of 1886. This proceeding was to recover the value of the strip of ground three feet in width included in the street by its widening. At the trial a nonsuit was entered.

[1] The contention of the appellants is that under the well-established rule of law that a conveyance of land bounded on a highway gives the grantee a title to the middle of the highway, if the grantor himself had title to it, and did not expressly or by clear implication reserve it, they acquired title to the strip of land 3 feet wide on the Arch street front, and can recover of the city the loss occasioned by being required to recede 3 feet when they rebuilt. This contention could be sustained if they had bought a lot 137 feet in depth, bounded by a street 66 feet in width. But in the deed to them and the deed to their grantor, the lot is described as "situate on the south side of Arch street, as widened to the width of 72 feet," and the 3 feet taken from the south side of the street is deducted from the depth of the lot. The right the plaintiffs acquired to the land in question was to its use as part of the highway, in common with the general public, with the reversionary right to the land as a part of the bed of the street in the event that the street should be vacated. This was all their grantor possessed, and all that he conveyed to them. The St. George's Hall Association in 1895 established a new line as the northern boundary of its lot that conformed with the ordinance of 1886 and conveyed according to it. As between the association and its grantee the 3 feet at the northern end of its lot was made a part of the street, as effectually as a formal dedication to the use of the public could have made it. *Bornot v. Bonschur*, 202 Pa. 463,

52 Atl. 44; Forsythe v. Philadelphia, 211 Pa. 147, 60 Atl. 578. The plaintiffs therefore lost nothing and had no right to recover.

[2] The fact that the coping and steps of the building extended onto the strip of land included in the widening of the street is unimportant as affecting the rights of the parties, since the encroachment was not beyond the limits of the usual permissive use of city streets.

The judgment is affirmed.

DUFFY et al. v. YORK HAVEN WATER & POWER CO.

(Supreme Court of Pennsylvania. Feb. 26, 1912.)

APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION—NEW TRIAL AFTER REVERSAL.

Where a judgment non obstante veredicto is reversed and a procedendo awarded, so that the court may consider and dispose of the pending motion for a new trial, the grant of a new trial without assigning any reason therefor is not an abuse of discretion which will be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Appeal from Court of Common Pleas, Dauphin County.

Action by James Duffy and others against the York Haven Water & Power Company. From an order granting a new trial, plaintiffs appeal. Affirmed.

Argued before MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John R. Geyer, Bernard J. Myers, John E. Fox, and John E. Malone, for appellants. Reynolds D. Brown and Charles L. Bailey, Jr., for appellee.

PER CURIAM. When this case was here before (Duffy v. York Haven Water & Power Co., 233 Pa. 107, 81 Atl. 908), in concluding the opinion we said: "It appears from the record that the motion for a new trial made by the defendant has not been disposed of. We will therefore not direct judgment to be entered on the verdict, but reverse the court in granting the judgment notwithstanding the verdict, and award a procedendo, so that the court may consider and dispose of the pending motion for a new trial." This was in accord with the prior practice established in *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559, and *Bond v. Railroad Co.*, 218 Pa. 34, 66 Atl. 983. The record having been remitted, the learned court heard the parties on the motion for a new trial and made the following order: "We have carefully considered all the testimony in this case and are constrained to conclude that it does not warrant the verdict which has been rendered. We accordingly sustain the pending motion and grant a new trial."

The plaintiffs have appealed from this order, and contend that the action of the court in granting a new trial was an abuse of discretion. We cannot sustain this contention. The authority exercised by the trial court was clearly within what was said in our opinion. We held that the facts appearing on the trial were sufficient to send the case to a jury, and we reversed the court below for entering judgment for the defendant notwithstanding the verdict for the plaintiffs. In granting the new trial the court did not attempt to review our conclusion, but, following what we expressly said, considered and disposed of the pending motion for a new trial. The reason for granting the new trial does not appear, nor is it necessary that it should appear. It may be that the learned court thought the verdict was excessive as to which we expressed no opinion.

The order is affirmed.

In re KNIGHT'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

WILLS (§ 672*)—CONSTRUCTION—CREATION OF TRUST.

A gift by will to the executors in trust for the daughter of testatrix, with a direction that the income therefrom shall be paid to the daughter during her natural life, freed from the obligations and control of any husband she may have, with power in the daughter to dispose of the property by will, but without limitation over, creates an active trust for the benefit of the daughter for life.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579-1581; Dec. Dig. § 672.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Sarah J. Knight. From a decree dismissing exceptions to an adjudication, Harriet W. Knight appeals. Affirmed.

From the record it appeared that Harriet W. Knight claimed an absolute interest in a share of her mother's estate under a clause in the mother's will which was as follows: "One other equal third part or share of my estate shall be held by my said executors and the survivor of them, in trust for my daughter Harriet W. Knight, and the income arising therefrom shall be paid to her my said daughter from time to time annually during the term of her natural life freed from the obligations and control of any husband she may have. But my said daughter shall have power to dispose of her said share of my estate both principal and interest by any instrument in writing in the nature of a last will and testament." The appellant was not married or in contemplation of marriage at the date of the will. The auditing judge disallowed the claim. Exceptions to the adjudication were dismissed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

J. H. Brinton and Wm. Meharg Lilly, for appellant. Alex. Simpson, Jr., and Jere J. Crowley, for appellee.

PER CURIAM. Nothing could be clearer than the intention of the testatrix that the shares of her son and daughter should be held in trust for them. Her direction is that a share of her estate be held by her executors, and the survivors of them, in trust for each of her children, the income arising therefrom to be paid to them annually during the term of their natural lives. As this intention of the testatrix to create a trust and guard her bounty for her children with the protection of a trustee is so clear, the validity of the trust is not affected because there is no limitation over. *Spring's Estate*, 216 Pa. 529, 66 Atl. 110.

Appeal dismissed and decree affirmed, with costs.

MILLS v. BRANDES.

(Supreme Court of Pennsylvania. March 4, 1912.)

LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECT IN PREMISES—ACTIONS—QUESTION FOR JURY.

In an action by a servant of a subtenant against the tenant of the entire building for injuries from a fall down an unguarded elevator shaft, plaintiff is not entitled to have her case submitted to the jury, in the absence of evidence that defendant, or any of his employes, left the shaft open, where the only inference from the evidence is that some person whose identity is absolutely unknown, but who was probably an employe of plaintiff's employer, used the elevator and left the shaft open.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of trespass for personal injuries by Sallie E. Mills against Moses Brandes, trading as Brandes & Bro. Reversed and rendered.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Alex. Simpson, Jr., for appellant. William T. Connor and John R. K. Scott, for appellee.

POTTER, J. The injuries, for which plaintiff here sought to recover, resulted from a fall through an unguarded opening in the first floor of the building in which she was employed. The opening was intended for the passage of a small freight elevator, or hoist, worked by hand, which was located in the hallway near the front door, and extended across a passage leading from the door to a stairway, by which

access was had to the upper floors of the building. The hall was short, being only about 5½ feet in length. Under ordinary circumstances, the elevator stood at the first floor, and the floor of the elevator then formed the floor of the passageway, so that persons entering the hall from the street passed directly over the floor of the elevator. The arrangement was such that, when the elevator was raised, the opening in the floor of the hallway was expected to be covered by trapdoors, working automatically. The defendant in this case was the lessee of the entire building, with the right to sublet. He retained for his own occupancy only the first floor and basement, and sublet the upper floors of the building to the firm of Wise & Goodman, by whom the plaintiff was employed. Two front doors opened into the building from the street; one leading directly into defendant's store-room, and the other opening into the hallway above described, which gave access to the stairway leading to the upper floors occupied by Wise & Goodman. The elevator seems to have been at the disposal of both firms which occupied the building, but was chiefly used by Wise & Goodman, who occupied the upper floors. The only use that defendant had for it was in taking goods to and from the basement.

It appears from the evidence that on the morning of the accident plaintiff came to the premises early. Some of the employes of Wise & Goodman had arrived and gone into the building, but defendant's place of business was not yet open, and no one connected with it had as yet arrived. It was not shown that defendant or any one in his employ had anything to do with the elevator on that day. When the plaintiff arrived, she opened the street door, and stepped into the hallway, which was dark, and another step precipitated her into the basement through the hatchway, which was open and unguarded. The elevator had been raised, but whether far enough to operate the trapdoors did not appear; at least, they did not come down, so as to guard the opening. Obviously the fault was that of the person who had made use of the elevator, and in so doing had left the hatchway unguarded without giving any notice of the danger to persons entering the hallway from the street. Just after the accident, it was noted that the elevator was stationary near the second floor. The natural inference would be that one of the occupants of that floor had brought the elevator to that point. Who that person was the evidence did not show. But there was nothing to indicate that the defendant was in any way responsible for the movement of the elevator at that time, or for the consequent exposure of the opening in the floor.

We have, then, the fact of an elevator, used at times by tenants in the building, oc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cupying different floors, and an injury occurring through the negligence of one of the tenants to one who was lawfully in the building. Under such circumstances, the evidence must fix the negligence upon the tenant sued, or there can be no recovery. The trial judge evidently took this view, for he charged the jury that, unless they were satisfied that some one in the employ of the defendant caused the hatchway to be open, there could be no recovery by the plaintiff in this case. It was upon that ground alone that the case was submitted to the jury. Counsel for appellant here urge that there is nothing in the evidence from which the jury could have found that the defendant or any one in his employ was responsible for the raising of the elevator, and the consequent unguarded condition of the hatchway at the time of the accident. Our examination of all of the testimony compels us to accept this conclusion. We can find nothing to indicate that the defendant was in any way responsible for the position in which the elevator was found at the time of the accident, or for the existence of the open hatchway. Crude as was the arrangement for elevator service in the building, yet it is evident that the plan was not in itself the direct cause of the accident. The proximate cause was the careless use made of the elevator, and the dangerous position in which it was left; that is, the taking of it away from its position at the first floor, in a normal condition of safety, and the consequent leaving of the hatchway open and unguarded, without giving any notice to persons having occasion to use the hallway. For this use, or rather misuse, of the elevator, there is nothing in the evidence to show that the defendant was in any way chargeable. Negligence is a fact to be proven as such. This is not a case of employer and employé; but, even if it were, there could be no recovery without showing whose negligence had brought about the accident, which resulted from uncovering the opening in the floor, and leaving it exposed, without warning to the users of the hallway. Plaintiff wholly failed to make out her case in this essential respect.

It is urged upon behalf of plaintiff that the defendant, as lessee of the entire building, was bound to take notice of the dangerous condition of the hallway, owing to the location of the elevator and its operation there, and that he was guilty of negligence in permitting such conditions to continue. Whatever may be said as to this, the fault in that respect was not the direct and proximate cause of the accident. That resulted directly, as we have pointed out, from the reckless and negligent manner in which the elevator was used by the person who last moved it away from the first floor. Under the evidence, it was not the fault of the defendant.

The first assignment of error is sustained. The judgment is reversed, and is here entered for the defendant.

GREEN & GREEN CO. v. THRESHER et al.
(Supreme Court of Pennsylvania. Feb. 19, 1912.)

MUNICIPAL CORPORATIONS (§ 671*)—INJUNCTION—GROUNDS.

Where an occupant of a commercial building sets up on the street in front of the building a showcase and signs, which attract crowds, obstructing the entrance used by another occupant of the building, and cut off the view of the occupant's show windows, the latter may compel the removal of the showcase and signs as a nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Green & Green Company against Carl H. Thresher and others. Decree for plaintiff, and defendants appeal. Affirmed.

Audenried, J., filed an opinion in the court of common pleas containing the following findings of fact and law:

"Findings of Fact.

"(1) The plaintiff, Green & Green Company, is a corporation organized under the laws of the state of Massachusetts for the manufacture and sale of muslin underwear, etc. It has complied with the requirements of the acts of assembly of Pennsylvania, and is authorized to transact business within this commonwealth.

"(2) The defendants, Carl Thresher, Burton E. Thresher, and Avery A. Thresher, are copartners trading under the firm name of Thresher Bros. They are engaged in the sale of various articles made of silk for women's wear. Thresher Bros. are now, and on November 11, 1911, were, lessees of a three-story building known as No. 1322 Chestnut street, in the city of Philadelphia. This building is situated on the south side of Chestnut street; its north or front wall standing on the new line of that street. The defendants' business is carried on upon the third and fourth floors of the building leased by them, and they use also a part of its basement.

"(3) On November 11, 1911, the defendants sublet to the plaintiff a part of the basement of No. 1322 Chestnut street for a term of two years and one month, from December 1, 1911 (with the right to renew the lease for a further term), at the annual rental of \$12,000, payable by monthly installments. The plaintiff was to use that part of the building covered by this lease as a place for the sale of ladies' and children's underwear, white waists, corsets, and similar goods. It was agreed between the parties hereto on March 24, 1911, that the lease above men-

tioned should be modified by the insertion therein of a covenant that no white waists, except white waists made of silk, should be offered for sale by the defendants during the continuance of the plaintiff's term or any renewal thereof.

"(4) Pursuant to the terms and conditions of its lease the plaintiff entered into possession of the first and second floors and part of the basement of No. 1322 Chestnut street, and has continued in possession thereof up to the present time. It has fully complied with all the terms and conditions of its lease. Until within a few weeks ago it carried on upon the demised premises the business of selling underwear and white goods for women and children.

"(5) The property known as 1322 Chestnut street is bounded on the east by another store building known as No. 1320 Chestnut street, which in front of the latter building has not been widened to its full width as recently established by the city of Philadelphia, and the front wall of No. 1320 Chestnut street stands on the old line of that street, which is five feet farther north than the line of the front wall of No. 1322 Chestnut street. The west wall of No. 1320 Chestnut street consequently projects five feet beyond the front of No. 1322 Chestnut street. This wall is solid and without openings. It stands on the line which formerly bounded the two properties just referred to. Against this wall the defendants have set up a showcase above 5 feet wide, 8 feet high, and 12 inches deep. This showcase stands within the lines of Chestnut street projecting westward from the west wall of No. 1320 Chestnut street and northward from the front wall of No. 1322 Chestnut street. It is made of glass set in iron or wooden frames, and is used for the display of samples of silk skirts, waists, and other wares offered for sale by the defendants. On the top of this showcase the defendants have set up and fastened to the wall above mentioned a large business sign about 5 feet wide and 6 or 8 feet high, and upon this sign they have erected and secured against the wall an upright sign extending from the top of the sign last mentioned to the top of No. 1320 Chestnut street. The signs which surmount the showcase, as well as the showcase itself, encroach upon the space included within the lines of Chestnut street. They are located directly north of the doorway situated on the east side of No. 1322 Chestnut street, by which entrance is had to the elevator used for conveying visitors to the second, third, and fourth floors of that building. The front of the first-floor storeroom that the plaintiff occupied at No. 1322 Chestnut street consists of two windows fitted up as showcases, one on either side of the center door by means of which entrance is obtained to the store. Neither the signs nor the showcase set up by the defendant as above de-

scribed had been erected on November 11, 1910, and the plaintiff has never consented expressly or impliedly to their erection.

"(6) The showcase maintained by the defendants as above mentioned attracts the attention of passers-by and frequently causes so many persons to gather in front of it as to interfere seriously with the approach to the elevator by means whereof the plaintiffs' employes and customers have access to the second floor of No. 1322 Chestnut street, and to prevent other persons using the street from seeing the goods exposed to view in the show windows of the plaintiffs' store on the first floor of that building. The value to the plaintiff of the advertisement afforded by the display of its goods in the front windows of its place of business is very great, and any interference with this means of bringing its wares to the attention of the public involves a serious injury to the plaintiff and entails a loss which falls on it alone.

"Applying the law to the facts thus ascertained our conclusions are as follows:

"Findings of Law.

"(1) The plaintiffs' lease from the defendants covered 'first and second floors and part of the basement of No. 1322 Chestnut street.' It did not and necessarily could not include any portion of the street in front of that building, except so far as the right to use the street was an incident or appurtenance thereof.

"(2) As was said by the Superior Court in *Commonwealth v. Kembel*, 30 Pa. Super. Ct. 199: 'Highways belong to the commonwealth in trust for the great body of the people, and that any one who claims a peculiar privilege to invade them must establish beyond the peradventure his title under some act of legislative power to do so as is well settled. * * * One who appropriates the space above the footway creates a purpresture by making several to himself that which ought to be common to many.' Showcases or signboards located in the public street, as are those that the defendants have set up against the west wall of No. 1320 Chestnut street, constitute a public nuisance, unless the city, which has control of its streets, has by general ordinance permitted their maintenance. *Frey & Forker v. Norristown Borough*, 16 Pa. Dist. Rep. 136; *Wilkes-Barre v. Burghander*, 7 Kulp, 63; *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451. No city ordinance authorizing such constructions in the highways was offered in evidence at the trial. The court has no right to assume that such an ordinance exists. *Commonwealth v. Kembel*, 30 Pa. Super. Ct. 199. It follows, therefore, that neither of the parties hereto has the right to erect or maintain showcases or signs in the position in which the defendants have placed this of which the plaintiff complains.

"(3) The invasion of the common right by

the taking for private use of that which belongs to the public as by a continuing encroachment on or over the highway may be punished by indictment or may be restrained by injunction. *Reimer's Appeal*, 100 Pa. 182; *Penna. R. R. Co.'s Appeal*, 115 Pa. 514, 5 Atl. 872; *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. 120, 31 Atl. 476.

"(4) While the plaintiff has no standing to question the act of which it complains on the part of the defendants upon the ground that they are evicting it from a portion of the space to the possession of which it is entitled under its lease from them, the special injury that it sustains through the maintenance of the nuisance that the defendants have set up gives it the right to invoke relief at the hands of a court of equity. *Philadelphia & Trenton R. R. Co. v. Phila. & Bristol Pass. Ry. Co.*, 6 Pa. Dist. Rep. 487; *Faust v. Pass. Ry. Co.*, 3 Phila. 164; *Reighard v. Flinn*, 189 Pa. 355, 42 Atl. 23, 43 L. R. A. 502.

"(6) The plaintiff is entitled to a decree that the defendants be enjoined from maintaining in Chestnut street, in front of the building occupied by the parties hereto, the signs and showcase above referred to, and requiring the defendants to pay the costs of these proceedings."

Argued before **BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.**

Francis G. Gallagher, for appellants. **J. Quincy Hunsicker and J. Quincy Hunsicker, Jr.**, for appellees.

PER CURIAM. The first five facts found by the court below are not open to dispute, and, in view of the sixth, which was fully justified by the evidence, the relief asked for could not have been withheld.

Decree affirmed, at appellants' costs.

MARTIN et al. v. PROVIDENT LIFE & TRUST CO. et al.

(Supreme Court of Pennsylvania. March 18, 1912.)

1. CONVERSION (§ 15*)—PROVISION OF WILL—BLENDING REALTY AND PERSONALTY.

A mere failure of the testator to distinguish between realty and personalty in directing his estate to be divided into shares and so distributed, does not constitute a blending of the realty and personalty sufficient to authorize an inference of intention to convert.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

2. CONVERSION (§ 15*)—PROVISION OF WILL—BLENDING REALTY AND PERSONALTY.

Where testator left his entire estate to trustees to pay over one-third of the net income to his wife for life, and the remaining two-thirds in equal shares to his five children, and provided that on the death of his wife, the trustees should hold her share on the same trusts declared concerning the remaining two-

thirds, and when the children should die, the property should be distributed as their wills might direct or to the persons to whom it would go if they died intestate, no intention to convert the real and personal property into a common fund was shown, and on the death of one of the children the persons entitled to his share of real estate could maintain partition.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill for partition by **Frank P. Martin** and others against the **Provident Life & Trust Company**, Trustee under the will of **Michael McCahey**, deceased, and others. From a decree dismissing the bill, plaintiffs appeal. Reversed and bill reinstated with a *procedendo*.

The bill recited: That **Michael McCahey** had died May 2, 1894, leaving a last will wherein he had devised and bequeathed his entire estate, real, personal, and mixed, to the **Provident Life & Trust Company of Philadelphia**, upon the following trust: "To invest and keep invested the same in good and sufficient securities, to collect and receive the rents, issues, income, dividend and profits thereof, to manage and control the real estate thereof and keep the same in proper repair, and after paying out of the said income the costs, charges, taxes and expenses of managing the said estate then to pay over one-third of the net income thereof unto my wife **Maria McCahey** for her life and the remaining two-thirds of said net income in equal shares unto my children **Rosey McCahey** (wife of **James McCahey**), **Mary McCahey**, **Annie McCausland** (wife of **Thomas McCausland**), **Thomas McCahey** and **Maggie Shallow** (wife of **James Shallow**) for their respective lives, the shares of my said daughters to be for their sole and separate use, benefit and behoof, and when and as my said children shall respectively die, I order and direct my said trustees to pay over and divide the share or shares of my estate on which said decedent or decedents shall have been receiving the income as aforesaid unto and among such person or persons as said decedent or decedents shall by his, her or their last will or wills direct, limit and appoint, and in default of such direction, limitation or appointment then to pay over unto and divide said share or shares of my said estate among such person or persons as would have been entitled thereto under the intestate laws of Pennsylvania if said decedent or decedents had died intestate seised and possessed thereof absolutely and in fee. And upon the death of my said wife, I order and direct that my said trustees shall hold and dispose of the one-third part of the principal or capital of my said estate on which my said wife had been receiving the income and apply the income and principal thereof

upon the uses and trusts herein declared concerning the remaining two-thirds of my said estate directed to be held as hereinabove set forth for the use and benefit of my children as aforesaid." That by a subsequent clause in the will the testator directed as follows: "I authorize and empower my trustees and executors herein named, at any time in their discretion, to sell at public or private sale, for such price or prices and upon such terms as they may deem proper, all or any part of my real estate not hereinabove specially designated, and to make, execute and deliver to the purchaser or purchasers therefor good and sufficient deeds of conveyance therefor, freed and discharged of all trusts and without liability," etc. By a later clause he directs that "during the continuance of the trusts herein created, I authorize and empower my said trustees to have all repairs to my said real estate made under the supervision of my son-in-law James McCahey, without liability," etc.

María McCahey, widow of testator died January 1, 1897, all of the children named in the will surviving. Subsequently, in 1906, Thomas McCahey, one of the children named in the will, died, having by his last will directed his interest in the estate of his father be equally divided between his wife and his four surviving children. One of the children, Margaret E. Willis, wife of Louis E. Willis, subsequently assigned and conveyed all her interest in the estate of Michael McCahey to Marion A. Martin, who, with her husband joining filed the present bill to enforce partition of the real estate.

The court dismissed the bill in the following opinion: "At the argument it was agreed by counsel for the parties that the exceptions filed by plaintiff to the answer and amended answer of the defendant might be treated as a demurrer to answer, and that the matter should be disposed of as on bill, answer, and demurrer, and we have therefore so considered it. We are of the opinion that the testator by his will did not intend to vest in any of the beneficiaries named therein the title to any portion of his real estate; but that the title thereto was vested in the trustee and mingled with personal estate for the purpose of raising a fund to be administered, paid out and distributed among the beneficiaries by the trustee in the manner indicated by the will; and that there was an equitable conversion of the real estate for the purposes of the trust. The plaintiffs have a complete and adequate remedy at law which may be invoked at any time for the purpose of effecting a distribution of the estate by the trustee, in accordance with the terms of the will. The demurrer of the plaintiffs is therefore overruled and the bill is dismissed at the cost of the plaintiffs." From this decree the plaintiffs have appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Clarence E. Kuemmerle and William D. Neilson, for appellants. F. B. Bracken, Joseph B. Townsend, and Charles C. Townsend, for appellees.

STEWART, J. [1] The governing consideration here, as in all such cases, is the intention of the testator. If the intention was that the real estate was to be converted and the several beneficiaries were to take the proceeds as money, the bill was properly dismissed, otherwise it should have been sustained. Where the will contains a positive and unmistakable direction to sell in any event, no question can arise. Where it contains no express direction to sell, and a sale is necessary to carry out the provisions of the will, the inference arises that this is what the testator contemplated. Again, where the testator in disposing of his property blends his real and personal property and creates a single fund out of which the beneficiaries are to be paid, a like inference arises. In the present case it is not pretended that any necessity exists for a sale of the real estate in order to carry out the provisions of the will. Each and every provision can be satisfactorily administered without conversion. The dismissal of appellants' bill was put exclusively upon the ground that by the terms of the will the real and personal estates were blended for the purpose of raising a fund to be distributed among the beneficiaries. To this construction of the will we cannot agree. When it is manifest that each and every provision of the will can be carried out without a sale of the real estate, and the effort is to derive an intention to convert from the fact of a blending of the real and personal estate, such inference cannot be supported except as it rests on something more than a mere failure on part of the testator to distinguish between the two kinds of property in directing that his estate be divided into shares and so distributed; for, as said in *Seeds v. Burk*, 181 Pa. 281, 37 Atl. 511, the general expression "divide and pay" per se includes real and personal estate, since land as well as personalty may be the subject of division in kind.

[2] True, appellees point to other features of the will as showing a blending of the two estates, but these, as well as that to which we have just adverted, are of little significance when compared with another feature which seems to have been overlooked in the discussion, and which to our mind is wholly inconsistent with the theory advanced by the appellees. That there was to be ultimately a sale of the real estate by the trustees is the contention of the appellees; but when? The will directs that, "when and as my said children shall respectively die, I order and direct my said trustees to pay over and divide the share or shares of my estate on which said decedent or decedents shall have been receiving the income as aforesaid, unto and among

such person or persons as said decedent or decedents shall by his, her or their last will or wills direct, limit and appoint, and in default," etc. It will hardly be contended that this provision was a blending of the two estates, that the testator here intended that upon the death of any one of his children an undivided one-fifth interest in his real estate was to be sold in order to pay over to the residuary beneficiaries the share on which such child had been receiving the income, and that like proceeding was to follow upon the death of each survivor. Or, take the case of the widow, who died within three years after the death of the testator. The provision as to her is: "And upon the death of my said wife, I order and direct that my said trustees shall hold and dispose of the one-third part of the principal or capital of my said estate on which my said wife had been receiving the income, and apply the income and principal thereof upon the uses and trusts herein declared concerning the remaining two-thirds of my said estate directed to be held as hereinabove set forth for the use and benefit of my children as aforesaid." It will hardly be contended that this reveals a blending of the two estates, and an intention that upon the death of the widow one undivided third interest of the real estate was to be sold in order that the trustees might apply the income upon the uses and trusts declared. Both the provisions we have quoted show unmistakably that testator clearly distinguished between the two estates; that it was no part of his intention to convert both into a common fund out of which distributees were to be paid; but, on the contrary, the intention clearly was that the residuary beneficiaries were to receive their respective shares of the personal estate in cash and succeed to the real estate as he himself expressed it elsewhere in the will, as though the first takers "had died intestate, seized and possessed thereof absolutely and in fee." A discussion of the cases cited by counsel with a view to distinguish them would be unprofitable. There can be no question as to the correct rule to apply when questions like this arise. Controversy only arises where, in the absence of express direction to sell, the effort is to derive an intention to convert from the provisions of the will, general or special. Since it seldom happens that two wills are exactly alike in their terms, exact precedents are correspondingly rare. We have none here; and, while many may be found bearing close resemblance to this it will be found on examination that we are not running counter to any of these in reversing this decree.

The assignments of error are sustained, the decree is reversed, and it is ordered that plaintiffs' bill be reinstated with a procedendo.

MEINHARDT v. MEINHARDT.

(Court of Appeals of Maryland. Feb. 2, 1912.)

1. INSURANCE (§ 770*)—FRATERNAL INSURANCE—BENEFICIARIES—"WIDOW."

Under Code Pub. Gen. Laws 1904, art. 23, § 210, which provides that fraternal insurance benefits are payable only to the "widow," etc., one with whom a member lived illicitly for 10 years on separation from his wife, who survived him, is not entitled to the benefits, though designated as wife in the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7457-7459.]

2. INSURANCE (§ 770*) — FRATERNAL INSURANCE—BENEFICIARIES—ESTOPPEL.

Under Code Pub. Gen. Laws 1904, art. 23, § 210, which provides that fraternal insurance benefits are payable only to the "widow," etc., a fraternal insurance society is not estopped to deny the right of one who lived illicitly with an insured member to the proceeds of the certificate, because it received dues from the member, where it did not know until after his death that she was not his lawful wife.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.*]

3. INSURANCE (§ 770*) — FRATERNAL INSURANCE—BENEFICIARIES—ELIGIBILITY.

Where the classes of persons to whom fraternal insurance proceeds may be paid are prescribed by statute or charter, neither the society nor a member, nor both, can divert benefits to any other class.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.*]

4. INSURANCE (§ 116*)—MUTUAL OR CO-OPERATIVE INSURANCE — BENEFICIARIES — ELIGIBILITY.

Life insurance in a company operating on the mutual or co-operative plan may be made payable to one with whom insured lived illicitly on separation from his wife, though the beneficiary be designated as "wife," as well as by name, and though the lawful wife survives insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.*]

5. INSURANCE (§ 793*) — FRATERNAL INSURANCE—ILLEGALLY DESIGNATED BENEFICIARY —DISPOSITION OF PROCEEDS.

Under Code Pub. Gen. Laws 1904, art. 23, § 210, which provides that fraternal insurance benefits shall be paid only to the widow, etc., where proceeds of a certificate are claimed by the member's lawful widow from whom he was separated and by a woman with whom he had lived illicitly, and who was designated as his "wife" in the certificate, and the proceeds are deposited in court by the society under interpleader, to be paid to either woman, as the court may determine, the proceeds should be awarded to the lawful widow, in the absence of some by-law or rule of the society to the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1967-1972, 1980; Dec. Dig. § 793.*]

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Interpleader by the American Mutual Benefit Society of Baltimore against Bertha Meinhardt and Annie V. Meinhardt. Decree for Annie V. Meinhardt, and Bertha Meinhardt appeals. Remanded without decision.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Geo. Washington Williams, for appellant.
Daniel F. Reisenweber and William Colton, for appellee.

BOYD, C. J. This is an appeal from a decree of the circuit court of Baltimore city, which determined that the appellee was entitled to a fund which had been paid into court by the American Mutual Benefit Society of Baltimore under a bill of interpleader. The evidence shows that the appellee was married to Frederick Meinhardt in 1888, but they separated a few years afterwards, and did not live together again, although they were never divorced; that the appellant and Frederick Meinhardt lived together as man and wife for over 10 years prior to his death, which occurred in December, 1909. While the latter were so living together, to wit, on May 28, 1907, a certificate of membership was issued by the American Benefit Society of Baltimore city to Frederick Meinhardt, by which he was entitled to receive from the benefit fund a sum not exceeding \$250, and the certificate states that "the benefits herein provided will be paid to Bertha Meinhardt, wife, after the proper proofs of death." That society became incorporated in 1909, and, after the death of Mr. Meinhardt, it filed a bill of interpleader against the appellant and the appellee, both of whom are claiming the fund, which finally resulted in the above-mentioned decree being passed. The appellee contends that the certificate was subject to the provision in what is section 210 of article 23 of the Code of 1904, which is as follows: "Payments of death benefits may be made only to the widow, children, grandchildren, mother, father, brother, sister, grandparent, aunt, uncle, niece, nephew, first cousin, next of kin who would be distributees of the member's personal estate if he died intestate, to an affianced husband or affianced wife of the member, or to persons dependent upon the member for food, lodging, clothing or education, and to none other." The record is by no means satisfactory, as it is difficult, if not impossible, to determine from it the precise character of business done by the American Mutual Benefit Society. Section 210 of article 23 of the Code of 1904 also says: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such association shall have a lodge system, with ritualistic form of work and a representative form of government, and shall make provision only for the payment of benefits in case of sickness, disability or death of its members, subject to their compliance with its constitution and laws." There is nothing in the record to

show whether the society had a lodge system, with ritualistic form of work, and the evidence was very meager as to its form of government. No reference whatever is made in the charter to the provisions of the Code applicable to fraternal beneficiary societies, and there are those in it which rather indicate that it was intended to organize a corporation exclusively on what is known as the mutual or co-operative plan. It is true that Mr. Pardee testified that he was "actuary for the society, and general manager of the fraternal branch," but whether or not the society was authorized by law to conduct such business is left in uncertainty by the record. It may be that it actually was, and hence we will not decide that question on this record, which we deem too uncertain to justify us in passing on it, as our determination might injuriously affect the society and members of it who are not before us.

[1-3] We have concluded that we must remand this cause without affirming or reversing the decree, and we will state the conclusions reached by us on such points as we feel justified in determining on this record, as directed by section 38 of article 5 of the Code. If it be shown that the society is subject to the provisions of the Code in reference to fraternal and beneficiary societies (sections 210, etc., of article 23), then in our judgment the appellant is not entitled to this fund. She was confessedly not the wife of Frederick Meinhardt, and was not related to or dependent upon him, as provided by section 210, and the language of that section that "payments of death benefits may be made only to the widow, children, * * * and to none other," cannot be disregarded. The appellant cited 29 Cyc. 105, where it is said that, "even where by statute, by the common law, or by the charter or laws of the society restrictions are placed on the right to designate beneficiaries, it is generally held that no one but the society can question the eligibility of the person designated, and that its right to object may be lost by estoppel or waiver." It cannot be said in this case that the society could be estopped or that it waived this provision by receiving the dues from this member, for it is thoroughly established by the evidence that it did not know until after the death of the member that the appellant was not his lawful wife. There are cases which hold that by requiring claimants to interplead and pay the money into court the association waives the ineligibility of the beneficiary designated by the member (*Aurora Lodge v. Watson*, 64 N. H. 517, 15 Atl. 125; *Supreme Council v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 785; *Taylor v. Hair* [O. C.] 112 Fed. 913). but this society is not questioning the right of the appellant to the money, and, although the bill for interpleader is not in the record, we assume that such statements were made in it as are ordinarily required to enable the

court to pass a decree of interpleader. But the question here is whether such a statute as we have, which positively prohibits the payment of death benefits to any one other than to one or more of the classes named, can be set aside by the action of the society. It is said in 29 Cyc. 108, that: "Where the classes of persons to whom benefits may be paid are prescribed by statute or by the society's charter of incorporation, neither the society, nor a member, nor the two combined, can divert the fund from the classes prescribed." We deem that to be a correct rule, and we are not willing to admit that the mere act of the society in filing a bill of interpleader can have the effect of doing what it and the beneficiaries together could not do. It may have been proper for the society to ask that the parties be required to interplead, as each of the two parties was claiming the fund, one being described in the certificate as the wife of the member, and the other contending she was his lawful wife, but whether the facts set out in the bill and the answer did justify the court in passing such a decree is not before us, and we do not even have the means of knowing what those facts or allegations were, as neither the bill, the answer, nor the decree are in the record.

An examination of the cases cited in the note to 29 Cyc. 105, above quoted, will show that there was no statute such as ours involved in any of those decisions. There are undoubtedly cases which hold that, in the absence of a statute prohibiting payment to beneficiaries other than those named in the statute, an association may under some circumstances be estopped from denying its liability, or it may waive a by-law or rule of its own creation, although there are other decisions to the contrary, but when the statute under which it is created and by which it is governed expressly declares that payments can only be made to certain designated classes and "to none other." it cannot be set aside by acts of the society on the ground of estoppel or waiver, and the society, its members and those claiming under such members, are subject to the terms of the statute. In *Britton v. Royal Arcanum*, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. Rep. 376 (affirmed in 47 N. J. Eq. 325, 21 Atl. 754), Vice Chancellor Van Fleet, in denying the right to recover to a beneficiary named in the certificate, but not one authorized by the statute, said: "Its promise would not only be ultra vires, but in direct contravention of the purposes of the statute from which it derived both its corporate existence and powers." See, also, *Am. Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Am. Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. 634; *Briggs v. Earl*, 139 Mass. 473, 1 N. E. 847; *Nat. Mut. Aid Ass'n v. Gonser*, 43 Ohio St. 1, 1 N. E. 11; *Groth v. Central*

Verein G. U. G. Germania, 95 Wis. 140, 70 N. W. 80; *Ky. Mut. Life Ins. Co. v. Miller's Administrator*, 13 Bush (Ky.) 489; *Wagner v. Benefit Society*, 70 Mo. App. 161, and cases there cited. In *Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, which is much relied on by the appellant, the statute applicable expressly authorized the society to pay to others than relatives and dependents, and the court held that the society could waive a by-law limiting the beneficiaries to those classes, and in such cases as *Schoales v. Order of Sparta*, 206 Pa. 11, 55 Atl. 766, and *Tepper v. Supreme Council of Royal Arcanum*, 61 N. J. Eq. 688, 47 Atl. 460, 88 Am. St. Rep. 449, it is strongly implied, if not expressly decided, that only those who are within the meaning of the statutes can be admitted as beneficiaries. So in *Woodmen of the World v. Rutledge*, 133 Cal. 640, 65 Pac. 1105, and *Prudential Ins. Co. v. Morris* (N. J. Ch.) 70 Atl. 924, there were no statutes involved, and in the latter case there was apparently an ordinary life insurance policy before the court. Indeed, we have found no case decided by a court of last resort where it has been held that the express provisions of a statute, such as ours, can be set aside by estoppel or waiver, although in many of them the statutes were interpreted liberally in determining who could be beneficiaries under the statutes.

[4] Our conclusion, therefore, is that, if this society is a fraternal beneficiary society as defined by our statute and this certificate was issued under that plan, the appellant is not entitled to the fund in controversy. If, however, it is shown that it is not such a society, but is simply an insurance company on the mutual or co-operative plan, then, as section 210 of article 23 is not applicable, she is entitled to recover the fund, as we know of no legal reason why such insurance could not have been taken out for her benefit. But the record is not sufficient to enable us to now determine which it was.

This brings us to the consideration of peculiar and unusual conditions. If it be satisfactorily shown, after the case is remanded, that the society is subject to the provisions of section 210, etc., of article 23, then the appellant not only has no standing in court to claim the fund, but she is in no position to contest the disposition of it. No provision is made in the society's laws which appear in the record for the disposition of the fund, if the beneficiary named in the certificate be ineligible. It may be that the executive board has adopted some by-law, rule, or regulation under law 24, which says, "The executive board may adopt any by-laws, rules and regulations not in conflict with the laws of this society," but, if it has adopted one which applies to such conditions as we have before us, we are not so informed by the record. Surely most associations of this kind have rules covering such cases. In *Dale v.*

Brumbly, 96 Md. 674, 54 Atl. 655, the constitution of the Supreme Conclave, Improved Order of Heptasophs, was before the court, and it provided that, if any designation of beneficiaries should fail for illegality or otherwise, the amount of the benefit certificates should be paid to those to whom distribution would be made of the personal estate of the member in case of intestacy, and, that certificate having been assigned to a creditor, we held that the association had no power under its constitution or the Act of 1894, c. 295, to pay the fund to a creditor. The decree directing the fund to be paid to the wife and children of the assured was accordingly affirmed. It is said in 29 Cyc. 156, that: "In case the designation of a beneficiary proves for any reason to be invalid or ineffectual, the fund does not as a rule revert to the society; but it goes to such person or persons as are eligible to take the benefits in the manner prescribed by statute or by the laws of the society or the certificate of insurance," and in giving illustrations of when that rule applies it mentions amongst others "where the person designated as beneficiary was at the time of his designation ineligible as such." If the by-laws or some rule of the society had named the order in which those who can be beneficiaries shall be paid, if the designation in the certificate of a beneficiary proves to be invalid or ineffectual, there could be no difficulty in determining who is entitled to this fund, but, if there is no such by-law or rule, then the only way it can be disposed of in this proceeding is to award the fund to the appellee. The society by its bill of interpleader in effect said that one of these two claimants is entitled to the fund, and asked permission to pay it into court with the understanding that whichever was determined by the court to be entitled to it should have it. If the society is subject to section 210, the appellant is not entitled to any of it, but the appellee is entitled to at least part of it, and, if any of the other parties named in section 210 have any interest in it, they can assert their claim against the appellee. So far as we are informed, no other persons have claimed any part of it.

[5] We would also add that in our judgment the mere fact that the word "wife" was used after the appellant's name in the certificate cannot have any effect in favor of the appellee in considering her claim. That term was undoubtedly used as a description of Bertha Meinhardt, and the evidence shows that she and not the appellee was the one intended, but inasmuch as she is ineligible as a beneficiary, if the society is subject to section 210 of article 23, she cannot recover the fund, but as the society paid the money into court to be paid to the appellant or the appellee, as the court might determine, and as the appellee is entitled to

at least some part of the fund, the only solution of the peculiar conditions which occurs to us is that in the absence of some by-law or rule of the society the fund should be awarded to her.

We regret that we cannot finally dispose of the case, but for the reasons we have already stated that cannot be properly done on this record. The amount involved is small, but the questions are important. We will remand the cause without affirming or reversing the decree, under section 38 of article 5 of the Code, in order that further testimony may be taken relevant to the questions (1) whether the society is subject to section 210, etc., of article 23; (2) if it is so found, whether there is any by-law, rule, or resolution of the society in force, determining the order in which the beneficiaries named in section 210 shall take, on failure of a member to designate one who is eligible; and (3) such further testimony as to the lower court may seem necessary or proper, in order to follow the conclusions reached by us as shown by this opinion. Of course, after such additional evidence is supplied by testimony or agreement, the lower court will pass such decree as the facts and this opinion require.

Cause remanded for further proceedings in accordance with this opinion, without affirming or reversing the decree, the costs to abide the final result.

Ex parte SARGOOD.

(Supreme Court of Vermont. Bennington.
June 10, 1912.)

1. CRIMINAL LAW (§ 1210*) — SENTENCE — CUMULATIVE SENTENCES.

At common law, one convicted of several crimes might be sentenced to cumulative terms of imprisonment, one sentence being limited to begin after another, and the last sentence might be made at a term after the term at which the first sentence was imposed, so that P. S. 2362, providing for cumulative sentences, is merely declarative of the common law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3301, 3315; Dec. Dig. § 1210.*]

2. CRIMINAL LAW (§ 1210*) — SENTENCE — CUMULATIVE SENTENCES—STATUTE.

A statute is not to be given a construction at variance with established rules of procedure unless the intention of the Legislature is plain, so that P. S. 2362, providing that a person convicted of two or more offenses, punishable by imprisonment, and sentenced at the same time for more than one of such offenses, may be sentenced to as many terms of imprisonment as there are offenses of which he is convicted, one term being limited to commence upon the expiration of the other, does not limit the power of the courts to impose cumulative sentences to the same term of court at which the first sentence was imposed; the common law allowing the imposition of such sentences at subsequent terms.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3298-3301; Dec. Dig. § 1210.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. CONSTITUTIONAL LAW (§ 270*)—DUE PROCESS OF LAW—SENTENCE OF ACCUSED.

Where an accused was convicted of two offenses and given cumulative sentences, and before the expiration of those sentences was convicted of another offense and given a sentence which was limited to begin upon the expiration of the second, he was not denied due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 758; Dec. Dig. § 270.*]

Petition by Eugene E. Sargood for habeas corpus. Writ refused, and petitioner remanded.

See, also, 77 Vt. 80, 58 Atl. 971; 80 Vt. 415, 68 Atl. 49, 130 Am. St. Rep. 995, 13 Ann. Cas. 387; 80 Vt. 412, 68 Atl. 51, 130 Am. St. Rep. 992.

Argued before ROWELL, C. J., and WATSON, HASELTON, and POWERS, JJ.

Batchelder & Bates and C. A. Maurer, for relator. John G. Sargent, Atty. Gen., for the State.

WATSON, J. On September 15, 1904, the relator was duly committed to the state prison to serve a sentence—designated herein as the "first sentence"—for the term not exceeding 4½ years, for the crime of felony of which he had been convicted in Bennington county court. At the December term, 1904, of that court, he was convicted of the crime of perjury, and also of the crime of attempting to poison one Sanford Hicks and one Carrie Hicks. On December 31, 1904, the relator was sentenced on both of said convictions. In the perjury case, the sentence—designated herein as the "second sentence"—was to imprisonment in the state prison for the maximum term not exceeding six years, to "begin at the expiration of the term" he was then serving under the first sentence. In the attempted poisoning case, the sentence—designated herein as the "third sentence"—was to imprisonment in the state prison for the maximum term not exceeding eight years, to "begin at the expiration of the term of imprisonment" under the second sentence. He was duly committed to the state prison, under the last two sentences, on January 3, 1905. At the October term, 1905, of this court the judgment in the perjury case was reversed on error. The relator's present detention in the state prison is under the third sentence.

It is contended that the second and the third sentences were unlawful and without due process of law, for the asserted reason that cumulative sentences, to take effect, one at the expiration of another, can be imposed only by the provisions of section 2362 of the Public Statutes, and at the same time or term of court; that the third sentence imposed, the imprisonment to begin at the expiration of the second sentence, is void for uncertainty, and by his imprisonment thereunder he is deprived of equal and

impartial justice, in violation of the Constitution of the state and that of the United States.

[1] Section 2362 of the Statutes reads: "A person convicted of two or more offenses punishable by imprisonment in the state prison or house of correction, and sentenced at the same time for more than one of such offenses, may be sentenced to as many terms of imprisonment as there are offenses of which he is convicted, one term being limited to commence upon the expiration of the other, in the order designated by the court." This statute was enacted in 1880. Prior thereto, the matter was governed wholly by the common law.

It has been held in some of the sister states that, in the absence of statutory provisions giving such power, the courts have no authority to impose cumulative sentences on conviction under separate indictments for several offenses; the imprisonment under one to commence at the termination of that of another. The contrary rule, however, is more generally laid down by the courts of this country, and is, we think, the true doctrine. *Kite v. Commonwealth*, 11 Metc. (Mass.) 581, is a leading case of this sort. There, cumulative sentences to imprisonment at hard labor for felonies, of which the plaintiff in error had been convicted on several indictments were imposed at the same term of court. In one case, where the sentence of imprisonment was to take effect from and after the expiration of three former sentences specified, the error assigned was that the judgment was erroneous and void, because there were not three former legal and valid sentences, and therefore no fixed time for the punishment on this sentence to begin. Delivering the opinion affirming the judgment, Chief Justice Shaw said: "The court are all of opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment, or a pardon, it then expires; and then, by its terms, the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment was reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and, though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect." In *Blitz*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725, the plaintiff in error was convicted on all three counts of the indictment. The judgment was arrested as to the second count. The plaintiff in error was sentenced upon the first count to imprisonment in the penitentiary for a term specified; and upon the third count, to imprisonment for a like period, to begin upon the expiration of the sentence upon the first count. It was contended by him that, as the motion in arrest of judgment should have been sustained as to the first count also, as the term of imprisonment under the judgment on the third count was to commence from the expiration of the judgment on the first count, and as no judgment should have been pronounced on the first count, the cause must be remanded with directions for a new trial. It was held that judgment should have been arrested as to the first count, as well as to the second; yet, concurring in the views expressed in *Kite v. Commonwealth*, it was held that the sentence in respect to the third count should stand, and the term of imprisonment under it be held to commence from the date fixed by the judgment below for imprisonment to begin under the sentence on the first count. It is said in *Mims v. State*, 26 Minn. 498, 5 N. W. 374, that the power of the court to make the term of imprisonment under one sentence to commence at the expiration of the term under another sentence exists from necessity; for, otherwise, a person might be convicted at the same term of court for several distinct offenses, and the court have power to punish for one only. In *State v. Mahaney*, 73 N. J. Law, 58, 62 Atl. 265, it is said that this "doctrine is one resting in common sense as well as in authority. It is apparent that unless consecutive sentences can be imposed, the court must either suspend sentence for one offense until the expiration of the time of imprisonment named in the other sentence, at which time the personnel of the court and of the prosecutor's office may have changed, and the facts essential to the imposition of a sentence become difficult of ascertainment, or else the court must impose concurrent sentences, the effect of which is to entirely nullify the effect of one of them. For these reasons the great weight of authority in this country is that, without any statutory provision for consecutive sentences, the power to impose them resides in the court." Some of the other cases to the same effect are the following: *United States v. Carpenter*, 151 Fed. 214, 81 C. C. A. 194, 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509; *Brown v. Commonwealth*, 4 Rawle (Pa.) 259, 26 Am. Dec. 139; *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132; *Breton*, Petitioner, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 325; *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 315, 43 S. E. 780, 61 L. R. A. 739; *Fitzpatrick v. People*, 98 Ill. 269; *Harris v. Lang*, 27 App. D. C. 84, 7 L. R. A. (N.

S.) 124, 7 Ann. Cas. 141; *Williams v. State*, 18 Ohio St. 47; *Petition of McCormick*, 24 Wis. 492, 1 Am. Rep. 197; *Ex parte Jackson*, 96 Mo. 116, 8 S. W. 800.

The court has the same power at common law to impose cumulative sentences when the respondent, already in execution on a former sentence to imprisonment, is brought into court, and convicted of another, or several other distinct offenses. The court may lawfully impose sentence of imprisonment against him to take effect at the expiration of the term of imprisonment he is then serving and, if there be a third conviction for which a sentence to imprisonment is imposed, the term of such imprisonment may be made to commence at the termination of the preceding sentence, as was done in the cases against this relator. In *Rigor v. State*, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719, it was contended by the plaintiff in error that he, while in execution in the state penitentiary for felony could not be brought into court upon a writ of habeas corpus to answer to an indictment charging him with an assault with intent to murder. He was convicted of the latter offense, and a cumulative sentence to imprisonment was imposed, to begin at the expiration of the term of the former sentence. The court said the questions presented concerned the sentence imposed. It was held that the criminal court had power to bring the plaintiff in error before it, as it did, and to place him on trial under the indictment there pending against him, and on conviction to sentence him for that violation of the law by imposing a cumulative penalty. The court said that, unless this was so, courts would be so hopelessly impotent, in such circumstances as to be unable to do anything until the expiration of a sentence (in that case) for eight or ten years, by which time the main witnesses might be dead, and the ends of justice might be defeated; that, if the contentions made in this behalf were sound, the arm of the criminal law would be paralyzed; not a step could be taken towards prosecuting a person so long as he remained a convict sheltered within the walls of the penitentiary—which is not the law. "Jurisdiction to inflict cumulative punishment," said the court, "is dependent, not on the accident that the offender has been convicted twice or oftener, before the same tribunal, but upon the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate, and therefore cumulative, penalties. Authority to sentence at all is incident to, and a consequence of, the power to try an accused, and the right to try is founded on the fact that the crime was committed within the jurisdiction of the court, and upon the further fact that the prisoner, after being indicted, is present in person before the court during the trial." To the same effect are *Russel v. Commonwealth*, 7 Serg. & R. (Pa.) 489; *United States v. Far-*

rell, Fed. Cas. No. 15,074, 5 Cranch C. C. 311; *Ex parte Brunding*, 47 Mo. 255. A citation of further authorities is unnecessary. It is very clear and we hold, that the statute (P. S. 2362), upon which the relator relies, gives the courts no additional power, and that it is but declaratory of the common law of the state which declaration, the Legislature very likely, in the language of Blackstone (1 Bl. Com. 86), "thought proper, in perpetuum rei testimonium, and for avoiding all doubts and difficulties."

[2] It is urged however, that this statute impliedly limits the power of the courts to impose cumulative sentences to the same term of the court. If this were the purpose of the lawmakers, language could easily have been used so indicating. "The rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language." *Dewey v. St. Albans Trust Co.*, 57 Vt. 332; *State v. Hildreth*, 82 Vt. 382, 74 Atl. 71, 24 L. R. A. (N. S.) 551, 137 Am. St. Rep. 1022, 18 Ann. Cas. 661. The limitation contended for is not expressly created by the statute, nor is it by necessary implication; and the presumption obtains that the Legislature, in the enactment of statutes, does not intend to overturn long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication. In *re Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; *Miller v. Detroit*, 156 Mich. 630, 121 N. W. 490, 132 Am. St. Rep. 537. And in *State v. Central Vermont Ry. Co.*, 81 Vt. 459, 71 Atl. 193, 21 L. R. A. (N. S.) 949, we said: "A statute is not to be given a construction at variance with established rules of procedure unless the intention of the Legislature is apparent." We therefore hold that the limitation urged is not implied in the statute; that the second and the third sentences were legally imposed, the imprisonment under the second, to begin at the expiration of the term of the first sentence, and the imprisonment under the third sentence to begin at the expiration of the term of the second; that the second sentence, though the judgment in that case was subsequently reversed, was only voidable, not void, and until such reversal it is to be deemed of full force and effect and sufficient to fix the term at which the third sentence should take effect; that, since the second sentence expired by the reversal of the judgment during the continuance of the first sentence, the term of the imprisonment under the third sentence began in law at the expiration of the term of the first sentence. It follows that the term of the third sentence has not terminated.

[3] The relator's contention that by the

imposition of the second and the third sentences, and by his imprisonment under the third, his constitutional rights have been violated, is without force.

It is adjudged that the relator is not unlawfully imprisoned and he is remanded to the state prison, whence he was taken, and his complaint is dismissed.

JOHNSON et al. v. BARDEN et ux.

(Supreme Court of Vermont. Rutland. May 14, 1912.)

1. DEEDS (§ 129*)—CONSTRUCTION—LIFE ESTATE.

Where a deed from a daughter to her parents stated in the habendum that they were to have and to hold the premises their lifetime, the words "heirs and assigns" in the printed form having been stricken out of the habendum and also of the covenant, and where a clause wholly in writing followed, stating that at the death of both of the grantees the deed should become null and void, otherwise to remain in full force, the estate conveyed was a life estate only, although the granting clause stated that the grantor conveyed the premises unto the grantees, "heirs and assigns"; the failure to strike out the quoted words being apparently an inadvertence.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. § 129.*]

2. DEEDS (§ 93*)—CONSTRUCTION—COMMON LAW.

The common-law rule in the construction of deeds was that effect will be given to the intention of the parties as drawn from the instrument if such effect can be given without violating some rule of law.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

3. DEEDS (§ 97*)—CONSTRUCTION—COMMON LAW.

It was a rule at common law that, if the habendum or any later clause in a deed was repugnant to the granting clause, the granting clause would control.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.*]

4. DEEDS (§ 129*)—CONSTRUCTION—COMMON LAW.

While this common-law rule operated to make the use of the word "heirs" in the granting clause after the designation of the grantees pass a fee simple title when the quoted word was accompanied by a pronoun, yet, when not so accompanied, the deed was not by reason of the use of the word "heirs" in the granting clause construed to make a grant of inheritance contrary to that indicated by the other clauses, even though the grantees were husband and wife.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. § 129.*]

5. DEEDS (§ 129*)—CONSTRUCTION—LIFE ESTATE.

The use of the word "forever" in the habendum of a deed to the grantees, "their lifetime, to them and their own use, benefit and behoof forever," did not prevent the grant being of an estate for life.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. § 129.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2892, 2893.]

6. DEEDS (§ 97*)—CONSTRUCTION.

The common-law rule that the granting clause of a deed controls in case of a conflict between it and the other clauses is merely a rule of construction in Vermont, and is not a rule of positive law, and it must yield to the rule that the intention of the parties as drawn from the whole deed governs.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447, Dec. Dig. § 97.*]

7. DEEDS (§ 90*)—CONSTRUCTION—RULES.

While the meaning of deeds is not left to conjecture, and where the meaning is uncertain, resort must be had to well-settled rules of construction, but such rules are subordinate, and not rules of positive law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. § 90.*]

Appeal in Chancery, Rutland County; Fred M. Butler, Chancellor.

Action by Robert Johnson and others against Adams J. Barden and wife. From a decree for the orators, defendants appeal. Affirmed and remanded.

Argued before MUNSON, WATSON, HASELTON, and POWERS, JJ.

M. C. Webber, for appellants. T. W. Moloney and S. E. Everts, for appellees.

HASELTON, J. This is a suit in chancery brought here on an appeal by the defendants Adams J. Barden and his wife, Annette Barden, from a decree in favor of the orators.

[1] May 1, 1900, Mabel V. Bush conveyed to the defendants, whose only child she was, a farm situated in the town of Wells. The farm consists of some 50 or 60 acres, and has on it a house and other buildings. Five or six acres of the farm are used for tillage, and the remainder is either pasture or woodland. The consideration expressed in the deed is \$1, and by the granting clause the grantor does "give, grant, bargain, sell, convey, and confirm unto the said Adams J. Barden and wife Annette Barden heirs and assigns" the farm in question. The habendum reads: "To have and to hold the above granted premises with all the privileges and appurtenances thereof to the said Adams J. Barden and wife Annette Barden their lifetime, to them and their own use, benefit and behoof forever." A printed form was used by the draftsman and the printed words "heirs and assigns" were struck out from the habendum, and the words "their lifetime" were written in. In the covenant the words "heirs and assigns" are also struck out of the printed form. Then follows a clause which is wholly written in, and which reads: "The conditions of the above conveyance are such that at the death of both of the aforesaid Adams J. Barden and his wife Annette Barden then this deed becomes and is null and void, otherwise, to be and remain in full force and virtue."

This is an inartificial but unmistakable way of saying that the estate conveyed is a life estate only. At the time of this convey-

ance in 1900, the grantor, Mabel V. Bush, was a widow with three children. Later she married, and thereafter she and her husband deeded the farm to the orators, "subject to the life lease of Adams J. and Annette Barden in said real estate." The orators, Robert Johnson and another, brought this bill, claiming as reversioners, and that the defendants Adams Barden and his wife have only a life estate, and have committed and are threatening to commit waste. The defendants claim that by virtue of the deed given them by their daughter Mabel in 1900 they are the owners in fee simple of the land. Nothing can be more clear than that the intention of the grantor, as gathered from the whole deed from Mabel V. Bush to her father and mother, was to convey to them a life estate merely.

[2, 3] The intention of a written instrument gathered from all that is within its four corners ordinarily controls, but in the construction of deeds the common-law rule, which the defendants invoke here, was that effect will be given to the intention of the parties as drawn from the instrument, if such effect can be given without violating some rule of law; and it was a rule of the common law that, if the habendum or any later clause in a deed was repugnant to the granting clause, the granting clause would override the repugnant clause or clauses. This rule might well be thought to have been a rule of construction merely, and one to be invoked only to aid in determining the intention of the parties. But it was exalted into a rule of positive law. As illustrations of this rule, if a grant was to one and his heirs, and the habendum was to the heirs of his body, the habendum was given force because it did but explain what heirs were intended in the granting clause; but if a grant was to one and his heirs and the habendum or a later clause was to the grantee for his life, or the life of another, the habendum or later clause was considered void as being repugnant to the meaning conveyed by the words "his heirs" as previously used. The reason commonly given for this hard and fast rule was that one could not be allowed by subsequent limitations to defeat his own grant. But this was no reason; for there was no grant until the instrument was completed and executed, and all parts of the instrument spoke together. Another and more plausible reason was that the rule conduced to certainty and security; but this reason is no better than the other, as has been demonstrated in the construction of wills, where the expressed intention of the testator is always controlling, and where technical rules are resorted to only for the aid they may give in arriving at such intention, and where the security of testators in the disposition of their property and the stability of testaments rests upon the pre-eminent rule that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the expressed intention shall govern. We first consider this case upon the assumption that the rules of the common law, which could find application to the deed in question, remain in full force in this state.

[4] By the common law it is not the word "heirs" alone which makes an estate of inheritance, but the word "heirs" accompanied with a pronoun which shows its application, for, said Littleton, these words "his heirs" only make an estate of inheritance. Commenting upon this passage of Littleton, Coke says "that every word is worthy of observation," and that if a man grant land unto two and heirs, omitting the pronoun, the grantees have but an estate for life on account of the uncertainty; and he goes on to remark that while it is said that if land be granted to one man and heirs, omitting the pronoun, a fee simple passes, it is, nevertheless, safe to follow Littleton. So Coke gives no sanction to the saying that in the case of a deed to one the word "heirs," unaccompanied by a pronoun to indicate whose heirs, is sufficient to convey a fee simple. Coke did not care to give currency to the doctrine that a deed to one and "heirs" without the use of a pronoun would convey a fee simple by saying who said so, but he doubtless referred to what Sergeant Saunders, Edward, not Edmund, had recently said as counsel in the case of Colthirst v. Benjushin, 1 Plowden, 21, 28. For the Sergeant had there claimed that to be the doctrine, and it came to be unquestioned. In Shepard's Touchstone it is said that, if a grant be made to one and "heirs" without a pronoun, a fee simple passes, but that if a grant be to two and "heirs," without the appropriate pronoun, an estate for life only will pass for want of certainty as to whose heirs are intended. *Page 101. The same law is laid down in Conyn's Digest, and by Cruise in his Digest of the Law of Real Property. Com. Dig. Estates, A. 2; 4 Cruise Dig. Greenl. Ed. tit. 32, c. 22, § 3, b. 2, p. 657.

Here the grantor struck out the words "heirs and assigns" wherever they occurred in the printed form used, except in the granting clause; and there, while she omitted to strike them out, apparently from oversight, they do not, according to the rule of the common law which we have reviewed, make the grant one of inheritance, for the grant is to two, and no pronoun is inserted before the word "heirs." True, the two grantees here are husband and wife, considered as one person at common law, and a deed to them jointly created a peculiar estate, neither a tenancy in common nor a joint tenancy, but an estate by entirety such that each was deemed to be seised of the whole and to own the whole. Co. Litt. 187; *Corinth v. Emery*, 63 Vt. 505, 22 Atl. 618, 25 Am. St. Rep. 780; *Laird v. Perry*, 74 Vt. 454, 52 Atl. 1040, 59 L. R. A. 340. But in case of a deed to husband and wife the heirs may be "their"

heirs or "his" heirs or "her" heirs. *Davis v. Davis*, 30 Vt. 440; Litt. Tenures, §§ 285, 26, 27, 28. This being so, if these refinements are pursued, it might well be claimed that at common law a deed to husband and wife and "heirs," without more, would convey a life estate only for want of certainty as to whose heirs were intended. We have not observed how precisely such a case was treated, if it was treated, and we have made no extensive investigation of the matter, for we do not find it necessary to rest the decision of this case upon the curious refinements of feudal law, in disregard of the actual and expressed intention of the parties.

[5] Mention is made in argument of the fact that, although the grantor struck out the words "heirs and assigns" and inserted the words "their lifetime" after the names of the grantees in the habendum, she left standing after the words "to them" the words "and their own use, benefit and behoof forever." But the word "forever" was well enough allowed to stand, for it may well be used in the grant of an estate for life. Practically the whole law which we have discussed is condensed into a few lines by Littleton, where he says in his concise manner: "If a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs; for these words (his heirs) made the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever, or by these words, To have and to hold to him and his assigns forever; in these two cases he hath but an estate for term of life, for that there lack these words, 'his heirs,' which words only make an estate of inheritance in all feoffments and grants." Litt. Tenures, § 1. It is worth observing that Littleton makes it the proper office of the habendum to define the quantity of the estate granted, and this long was its proper office, while the chief office of the premises was to describe the land; and so it came about that the clause describing the land and the land described are both spoken of as "premises." Nathaniel Chipman considered that many of the rules and maxims resulting from the system of feudal tenures were "full of absurdity," and were not operative here; that the English lawyers and judges had been "habituated to pursue the rights of real property through a thousand intricate ambages and circuitous labyrinths"; and that, so far as transfers of real estate are concerned, the rules of the common law, applicable here, are few and simple. His language is general in character and is found in part in his dissertation on the statute adopting the common law, and in part in his dissertation on our statute of conveyances in its earlier form. N. Chipman, Rep. and Diss. 122-129, 145, 146.

Pursuant to these views, the intention of

the parties has prevailed in this state in the construction of deeds unless such intention was contrary to some positive law, and no rule of construction, unless statutory in character, has been recognized as positive law. Rules of construction have been found useful in arriving at the intention expressed in a deed, but we have no case in which a mere rule of construction has been allowed to override the intention as drawn from the deed itself. In *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554, two clauses in a deed were repugnant, and the court said: "The first clause was probably introduced as mere words of form, without apprehending their import, and is clearly repugnant to the manifest intent of the grantor. We have no difficulty therefore in giving effect to the deed according to that intent." In this case the broad doctrine was stated and applied that, "if the intent of the parties is clearly ascertained upon the face of the deed, courts will give it effect; and those parts which are inconsistent and repugnant to that intent will be rejected." This case was decided in 1834, during what the late Chief Judge Taft called "the palmy days of the court," when Williams, Phelps, Royce, Collamer, and Mattocks were the judges, and the eulogium quoted, which is acquiesced in by every one versed in the judicial history of this state, was based upon what Judge Taft denominated "the sound, prompt, wholesome, and effective justice that was always administered wherever they sat." *Mills v. Catlin*, 22 Vt. 98, is an illustration and application of the doctrine that in construing the grant in a deed, and the quantity of interest thereby conveyed, every part of the deed may and should be resorted to for the purpose of ascertaining the intention. The language of the court in reference to the deed there under consideration is "this deed should be construed according to the intention of the parties as manifested by the entire instrument"; and, again, the court say that the rule "requires the construction to be on the entire deed." It seems to have been recognized from the first that the division of a deed into such parts as the premises, the habendum, and the tenendum was pretty much a matter of capitalization and punctuation, and our court was never greatly impressed with the idea that it is of vital importance in what part of a deed the intention is expressed so long as it finds somewhere clear and adequate expression. In *Gorham v. Daniels*, 23 Vt. 600, it was held that the statute of uses (27 Henry VIII, c. 10) has never been adopted in this state, although English statutes of Henry's time, and later until 1760, are a part of the law of this state so far as they are applicable to our situation and circumstances, and are not inconsistent with the Constitution or with some act of the Legislature. The case was twice argued and the conclusion stated

above was reached, although the court recognized the fact that the statute of uses was then considered in force in most of the states, and although Mr. Justice Thompson of the Supreme Court of the United States, while presiding in the circuit court of this state, had held that the statute had always been in force in this state. The opinion in *Gorham v. Daniels* reviews the early history of the state, indorses the views of Judge Chipman already adverted to, and lays stress upon the doctrine that, while the forms and words of deeds derive their meaning and operation to some extent from the common law as modified by English Statutes, our system of conveyancing was intended to be simple and capable of being understood by the people of our state "without this necessity of resorting to the study of the subject in other quarters."

In *Blake and Wife v. Stone*, 27 Vt. 475, questions arose upon the construction of the deed of Benjamin Burt, and in this court in considering whether or not his grantee, Leonard Burt, took a life estate simply, Chief Justice Redfield said: "There can be no doubt we think that such was the intention of the original grantor, Benjamin Burt. And as we have a statutory system of conveyances or transmission of the title of real estate, wherein we have more or less explicitly departed from many of the common-law provisions upon the subject, it deserves serious consideration in my judgment whether we should make any distinction between a covenant to convey a will or devise, and a deed, in regard to the indispensable necessity of the use of the word heirs to create a fee simple or fee tail, or whether that word is always to be regarded as one of limitation and never of purchase, in a deed, without reference to the clearly expressed intention of the parties. The question as it affects deeds will probably ultimately settle down upon the same basis it has at common law in regard to covenants and devises as one of intention merely." In *Smith v. Hastings*, 29 Vt. 240, it was considered by a unanimous court, the opinion being delivered by Chief Justice Redfield, that the decision in *Blake v. Stone* left the rule in *Shelly's Case* without force as a positive rule of law and recognized it as merely a rule of construction, for such aid as it might furnish in arriving at the intention of the parties as gathered from the whole deed; and in *Smith v. Hastings* the rule in *Shelly's Case* was overborne in the decision, and it was declared that, "as our system of conveyancing is statutory, there is no necessity and no reason in adopting any rule of construction which will tend to carry us one side of the true purpose and intention of the instrument." By the overwhelming weight of common-law authority, the rule in *Shelly's Case* was a positive rule of law not intended to effectuate the intention of the parties to a deed, but rather to

defeat such intention in furtherance of the feudal policy. In this country it was generally received and adopted. For a concise statement of it and of the jealousy with which it was guarded as an imperative rule of law, there is nothing better than the pages devoted to it by Chancellor Kent, who, writing after the rule was abolished by the Legislature of New York, said that what he had written on the subject was to be considered, so far as his native state was concerned, as "an humble monument to the memory of departed learning." 4 Kent's Com. 214-233. In refusing to recognize the rule in *Shelly's Case* as positive law in this state, our court took a step which emphatically demonstrated that mere technicalities have here a very limited application in the construction of deeds.

In *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363, a deed was construed in accordance with the manifest intent shown by the granting clause taken as a whole, and in accordance with the intent shown by the entire deed taken together, and this the court specifically said. Rules of construction are stated, but it is there said, and the saying is applicable here: "It is quite apparent that the deed was very unskillfully drawn, and that the words, or terms, used by the scrivener which import a conveyance of an estate in fee simple were introduced into the deed as mere words of form, without the slightest apprehension of their legal meaning or effect; and they are clearly repugnant to the general intent and purpose apparent on the face of the deed." The court did not in fact determine the case by any technical rule, for they say that their conclusion is reached whether they regard the premises of the deed alone or whether they "take every part of the deed into consideration in seeking to ascertain its object and general intent"; and they state the rule that, "when the manifest intent of the deed appears, the words which are repugnant to it are to be rejected." This case is relied on by the plaintiffs and by the defendants. But since the manifest intention of the deed taken as a whole coincided with the manifest intention of the granting clause, and was given effect, the decision itself has little or no bearing either way upon the question now under consideration.

In *Collins v. Lavelle*, 44 Vt. 231, there was under consideration a deed which in the granting part was a warranty deed in the usual form. But the grant of a fee simple was defeated by a proviso written above the signature to the deed which made the intention of the parties clear, and the court considered that it had nothing to do but to educe "the just result as between the parties." In *Gilkey v. Shepard*, 51 Vt. 546, it was said by this court that the "feudal system ingrafted upon the common law of England a construction of deeds and conveyances of real estate that overruled the in-

tention of the parties, and in many cases worked great injustice." Reference is made to the fact that the rule in *Shelly's Case* has never been followed in this state, and it is declared that the rule in this state is that "deeds, like other instruments, should be so construed as to give effect to and carry out the intention of the parties." This rule was not only declared, but was acted upon, in the decision of the case, which involved the construction of a deed given in 1833 by Judge Asa Aikens. This excellent lawyer, drawing his deed within a few months of the time when the decision in *State v. Trask*, already referred to, was rendered, seemed to have had a well-grounded confidence that his expressed intention would not be defeated by a process which Bentham likened to forgery, but which we will call simply the misapplication of rules of construction. In *Robinson v. Railroad Co.*, 59 Vt. 426, 10 Atl. 522, there was an inconsistency in the granting clause of a deed, and a clause following the description which limited what had gone before, and the later clause was given effect because to do so seemed to be in accordance with the manifest intent of the parties. Reference was made to the fact that in the conveyance a printed blank was used, and that the limiting clause was written in where it was because of a convenient blank space in the printed form, a fact of striking significance here.

The principles which in this state govern the construction of deeds have been fully and thoroughly considered in the recent case of *De Goosh v. Baldwin & Russ*, 85 Vt. —, 82 Atl. 182. The minor rules of construction are there given their due weight, but the doctrine is reasserted and put beyond question that the intention of the parties to a deed as gathered from the whole instrument must govern, and that this rule is as applicable to deeds as to other written instruments. This rule, and no other, affords security and certainty in business transactions, whether or not they relate to real estate in whole or in part. *McLean v. Windham Light & Lumber Co.*, 85 Vt. —, 81 Atl. 613.

[6] In this state the rule invoked by the defendant is a rule of construction merely and not a rule of positive law, and, like the rule in *Shelly's Case*, it must yield to the master rule that the intention of the parties as drawn from the whole deed must govern. We have no case in which the clearly expressed intention of the parties to a deed has been defeated by treating a rule of construction as a positive rule of law. The positive laws, which in this state may defeat the clearly expressed intention of the parties to a deed, are illustrated by the statute as to preventing the entailing of estates. Minor rules of construction are of great value, since there are many cases where the intention of the parties to a deed can only

be conjectured, and since in such cases certainty requires that resort be had to technical rules of construction, like the rule that the words of a grant are to be construed more strictly against the grantor. *Huntley v. Houghton*, 85 Vt. —, 81 Atl. 452.

[7] The meaning of deeds is not left to conjecture, for, where the meaning is uncertain, resort must be had to well-settled but subordinate rules of construction, to be treated as such, and not as rules of positive law. See the cases already cited, and see, also, *Smith v. Pollard*, 19 Vt. 272; *Adams v. Dunklee*, 19 Vt. 382; *Congregational Society v. Stark*, 34 Vt. 243; *Chapman v. Longworth*, 71 Vt. 228, 44 Atl. 352; *Deavitt v. Washington County*, 75 Vt. 156, 53 Atl. 563. The doctrine in this state was from the first applied so deliberately and with such conscious departure from technicalities that it is unprofitable to consider just how fully it is recognized in other states in consequence either of judicial decisions or of legislation. But the doctrine held in this state now widely prevails, as may be seen from the notes to the following selected cases: *Post v. Weil*, 115 N. Y. 361, 22 N. E. 145, 5 L. R. A. 422, 12 Am. St. Rep. 809, and *Triplett v. Williams*, 149 N. C. 396, 63 S. E. 79, 24 L. R. A. (N. S.) 514. The same may be seen from an examination of *Devlin on Deeds* (1911) §§ 836, 836A, 837, 840.

The defendants had only a life estate in the premises in question, and at the time the injunction in this case was served had been and were cutting timber from the premises for sale. It was not their purpose to cut any more timber at that time, but they claimed the right to cut and sell all the timber, and threatened to do so. The timber that was being cut, and that had been cut, was small pine from eight to twelve inches in diameter at the stump. The court found that the timber was cut for sale to obtain money to pay taxes, and for general family purpose, and not for estovers.

The court adjudged and decreed that the cutting of timber to the extent of 2,952 feet worth, as the court found, \$29.52, constituted waste, and enjoined the defendants from the further cutting of timber for sale and from committing further waste, and decreed that they pay to the orators the sum of \$29.52, with costs. On the assumption that the defendants are life tenants, they claim that what they did, did not amount to waste, and that the orators were not entitled to an injunction or to damages. Some subordinate facts are referred to in support of these claims, but no one of them is controlling as matter of law, and there is no reason to suppose that they were not given due weight by the court of chancery.

For the reasons already stated, the decree is affirmed, and the cause is remanded. All concur.

DUGGAN v. HEAPHY.

(Supreme Court of Vermont. Washington. May 13, 1912.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS FOR INJURIES—EVIDENCE—SUFFICIENCY.

In an employé's action for injuries caused by her hand being drawn into the mangle which she was operating, evidence on the question whether the employer was negligent in not having a guard rail on the machine held to present a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURIES—DEFECTIVE MACHINERY.

An employer is bound to furnish an employé with machinery and appliances reasonably safe with reference to the character of the employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

3. MASTER AND SERVANT (§ 217*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

The risk of an injury from an employer's negligence in failing to equip a mangle with a guard rail was not assumed by an employé who knew nothing of any such an appliance as a guard rail, since knowledge or imputed knowledge of the dangerous character of a machine does not charge the employé with the assumption of an extraordinary risk, unless she knows or must be taken to know that such risk is not an ordinary one.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 204*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé does not assume a risk resulting from his employer's neglect of a duty imposed by statute in the exercise of the police power, irrespective of his knowledge.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

5. MASTER AND SERVANT (§ 236*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

Although an employé did not assume the risk of an injury from the employer's negligence in failing to have the mangle, which she was operating, equipped with a guard rail, she was nevertheless bound to exercise the care and prudence of a careful and prudent person in the situation with reference to existing and obvious dangers, however caused.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.*]

6. NEGLIGENCE (§ 122*) — CONTRIBUTORY NEGLIGENCE—BURDEN.

In an action for negligence, the burden is on plaintiff to show freedom from contributory negligence; but there need not be evidence distinctly directed to that negative proposition.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

7. MASTER AND SERVANT (§ 270*)—ACTIONS FOR INJURIES—EVIDENCE—ADMISSIBILITY.

Where an employer denied that he knew that a guard rail belonged on the mangle which caused the injury sued for, the testimony of a witness that she took the guard rail off the machine, and that after defendant became the

owner of the laundry she told his superintendent about the guard rail, was competent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

8. APPEAL AND ERROR (§ 232*)—REVIEW—RESERVATION OF GROUNDS FOR REVIEW.

Where an objection below, that a witness was not qualified as an expert, is abandoned on appeal, and an objection not made below is urged, that the matter about which he was examined was not a proper subject of expert testimony, neither objection will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1430, 1431, Dec. Dig. § 232.*]

9. APPEAL AND ERROR (§ 273*)—REVIEW—EXCEPTIONS—SUFFICIENCY.

A general exception to the refusal of the court to charge each and every request by defendant and to the charge given in respect to each and every request is insufficient to present the requested instructions for review, where some were given and some were properly denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.*]

10. TRIAL (§ 260*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an employe's action for injuries caused by a defective machine, where the court charged that plaintiff could not recover on account of known and obvious dangers, that she was bound to take notice of the machine as it was, to see what a prudent person would see, and to know what was obvious, the refusal of an instruction that the employer was not required to give her special instructions, unless there was some concealed danger about the machine, was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

11. APPEAL AND ERROR (§ 1078*)—BRIEFS—SPECIFICATION OF ERRORS.

Exceptions shown by the transcript or bill of exceptions, but not relied upon by the appellant in his brief, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Powers, J., dissenting.

Exceptions from Washington County Court; Fred M. Butler, Judge.

Action by Abbie Duggan against Thomas J. Heaphy. Judgment for plaintiff, and defendant brings exceptions. Judgment affirmed.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

W. N. Theriault, Lord & Carleton, and F. L. Laird, for plaintiff. Senter & Senter and H. C. Shurtleff, for defendant.

HASELTON, J. The plaintiff worked for the defendant in the laundry of his hotel, and received an injury by having her hand drawn into a power mangle while she was operating it. The action is case for negligence. The cause was tried by jury. Verdict and judgment were for the plaintiff. The defendant excepted.

[1] The mangle in question, as the testi-

mony tended to show it, is as follows: There is an iron steam chest 6 feet high and 10 inches long resting on framework. The upper surface of this chest is concave, and a large cylinder, 20 inches in diameter and of the same length as the chest, and wrapped with felt and covered with canvas, is so fixed above the chest that it fits into the upper concave surface of the chest. The chest surrounds the lower half of the cylinder, and the two are in close contact, except that when the machine is in operation the chest recedes from the cylinder about one-fourth of an inch on the receiving side. At the upper edge of the chest, and on the side at which the operator of the machine stands, and of the same length as the chest, is a brass cylinder 4 inches in diameter, called an "apron." The top of the apron is about 3 feet and 4 inches from the floor, and the top of the revolving cylinder is about 2 inches higher. The machine is run by water power, and when it is in use the steam chest is full of steam and is very hot. The apron is stationary and is from half an inch to three-fourths of an inch from the cylinder, and as the latter revolves, in the operation of the machine, the stuff to be ironed is fed over the apron. It is the duty of the operator to spread the stuff to be ironed over the apron and push it over and downward until it is caught by the machinery described, when it is drawn on and ironed. The exact line of contact between the cylinder and the steam chest cannot be seen by the operator on account of the position of the apron, but the point of contact at either end of the machine can be seen from the corresponding end. The cylinder revolves slowly, making from three to five revolutions a minute. The way in which the revolutions are regulated was explained without objection by an expert who had examined this machine and was familiar with mangles of the make of that in question. He said: "There are four-inch pulleys running approximately about 100 revolutions. On the end of those pulleys are what is called a pinion-gear, about 4 inches in diameter, that runs into another gear about 20 inches, and a return on the same. There is another four-inch pinion-gear running into a gear on the roll, bringing the thing down to about 20 to one from the original start of the power; in other words, reducing it approximately from the 100 revolutions down to approximately about 5 revolutions of the roll a minute." He explained, also, without objection, that the steam chest was pressed up against the roll by springs underneath regulated by a screw.

The machine in question was one of the Poland Company's manufacture, and the evidence tended to show that machines of this make are ordinarily equipped with guard rails, and that this machine had been equipped with a guard rail which fitted into small

sockets, and that when the guard rail was in place it was about half an inch above the apron over which the material to be ironed was to be placed, and that its purpose was to keep the hands of an operator from being drawn in where they would be injured, and that without a guard rail the machine was not a safe appliance for mangling. The machine was bought by the defendant of a former owner of the hotel, and the guard rail, which had been removed under the former ownership, had not been in place after the purchase up to the time of the injury to the plaintiff.

The plaintiff was a woman about 43 years of age, who had been in this country about 15 years. During the greater part of that time she had done chamber work. The matter of her experience with a mangle was very fully gone into in evidence. What appeared in that regard was that, before she entered the employ of the defendant, she had worked more or less at laundering with a small mangle turned by hand. For a few months before the accident she had worked for the defendant in his laundry. Her work there was upon the washing machine and, as she testified, as an all-around helper. Mrs. Heaphy, who superintended the laundry, and who hired the plaintiff, testified that it was no part of the plaintiff's work to operate the mangle. The plaintiff testified that she had on a few occasions run articles through the mangle when Mrs. Cashen, the head laundress and mangle operator, was at her side. But the tendency of all the testimony was to show that the plaintiff could have done very little of this work, for Mrs. Heaphy, who had charge of the laundry testified that she was there a good deal, and that she never saw the plaintiff working on the mangle. And Mr. Heaphy, who, as the testimony tended to show, was frequently in the laundry, testified that he never saw the plaintiff at work on the mangle.

The accident happened while the defendant and his wife were away on a visit, and while Mrs. Cashen, the head laundress, was on a short vacation; and the claim of the defendant was, and his evidence tended to show, that the plaintiff at the time of the accident was at work upon the mangle in disregard of instructions that it should not be operated in the interval referred to; liability of an accident being, as the defendant testified, one reason for the instructions. On the contrary, the plaintiff testified that she was asked by Mrs. Heaphy to do the mangling of the pieces, except the tablecloths, during the visit and vacation referred to. Here was a sharp contradiction in the evidence, and in considering, as we are about to do, whether or not the court erred in not directing a verdict for the defendant, we are bound to view the evidence in the light most favorable to the plaintiff.

At the close of the evidence, the defendant

moved, on various grounds, that a verdict be directed in his favor. One of the grounds, stated in various ways, was that the evidence did not tend to show negligence on the part of the defendant.

[2] The defendant was bound to furnish the plaintiff with reasonably safe machinery and appliances, reference being had to the character of the employment, and we think there was evidence fairly tending to show that the defendant was negligent in respect to providing for use this kind of a mangle without the guard rail provided for and ordinarily used upon it; and so the question of negligence on the part of the defendant was for the jury. *Geno v. Falls River Paper Co.*, 68 Vt. 568, 35 Atl. 475; *Morrisette v. Canadian Pacific Railway Co.*, 74 Vt. 232, 52 Atl. 520; *McDuffey's Adm'x v. Boston & Maine R. Co.*, 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019; *Vaillancourt v. Grand Trunk Ry. Co.*, 82 Vt. 416, 74 Atl. 99; *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128.

A second ground of the motion, stated in different ways, was that the plaintiff assumed all the risks which she encountered.

[3] If the absence of the guard rail constituted a defect or imperfection in the machinery due to the master's negligence, and it was for the jury to say whether or not it did, the plaintiff cannot be said, as matter of law, to have assumed the risk of working with such defective machinery, for, according to the tendency of the evidence, she knew nothing of such an appliance as a guard rail. The law did not impose upon her the duty of becoming an inventor, and of determining that such a machine should have a guard rail, and did not hold her to have assumed the risk consequent upon the lack of an appliance which she knew nothing about. The claimed duty of invention on the part of an employer was effectually disposed of in *Farrington v. Rutland Railroad*, 72 Vt. 24, 47 Atl. 171, and it needs no discussion to show that such duty does not exist on the part of an employé.

There can be no assumption of risks due to a master's negligence in providing defective machinery, unless the servant knows, or must be taken to know, both of the defect and of the danger attending it. The doctrine is thus stated in *Skinner v. C. V. R. Co.*, 73 Vt. 336, 340, 50 Atl. 1099, 1100, where it is said: "If a servant, knowing that the master has neglected his duty and that he is thereby subject to dangers not incident to the employment, continues in the service, the increased danger becomes an incident of the service which he assumes, and, for an injury resulting therefrom, the master is not liable." This passage is, without change but with due credit, incorporated into the text of the third edition of *Cooley on Torts*, and is given as a correct statement of the law on the point under consideration. *Cooley, Torts*, 1045.

That a servant does not assume the risk of encountering dangers caused by the master's negligence unless he knows, or must be taken to know, that such dangers result from defective conditions, is the clearly expressed doctrine of the still earlier case of *Severance v. New England Talc Co.*, 72 Vt. 181, 47 Atl. 833. There an employé was injured because the wall of an excavation had not been left in a reasonably safe condition. The court said: "There was no special assumption of this risk, for it does not appear that the plaintiff knew that the wall had been left in an unreasonably dangerous condition."

In *Johnson v. Boston & Maine Railroad*, 78 Vt. 344, 347, 62 Atl. 1021, 1022 (4 L. R. A. [N. S.] 856), this court said: "So it is that a servant, when, in the course of his employment, a special and obvious risk is presented to him—one not ordinarily incident to the business—may, as a rule, decline to accept it; but, if he choose to encounter it, he assumes it." But a special risk is not "presented to him" when it appears in the guise of an ordinary risk, and he does not "choose to encounter" such a risk unless he knows its nature.

In *Williams v. Norton Bros.*, 81 Vt. 1, 8, 69 Atl. 146, 148, it is said of the plaintiff: "Whether he had an opportunity to see defects or was chargeable with knowledge of them were questions of facts for the jury to determine upon all the evidence." And *Severance v. New England Talc Co.*, 72 Vt. 181, 47 Atl. 833, is referred to.

In *Vaillancourt v. Grand Trunk R. Co.*, 82 Vt. 416, 74 Atl. 99, a case much in point, it was held that such knowledge of dangerous conditions as was admitted was, on the question of the assumption of risk, immaterial, "in the absence of actual or imputed knowledge of the defect which caused the accident and a comprehension of the danger attending it."

The doctrine that in order to the voluntary assumption of an extraordinary risk one must know not only of the dangers he is encountering, but also that he is encountering risks due to defects or imperfections, runs through the case of *Marshall v. Dalton Paper Mills*, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128. For the claim is there combated that the plaintiff therein knew, or ought to have known, that the defendant had neglected its duty.

That knowledge, actual or imputed, of a defect or imperfection, and not merely of a dangerous condition, is essential to the assumption by an employé of the risk thereby caused, is the doctrine of *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195.

Of course, it is often the case that knowledge of a danger, which exists in consequence of a defect, carries with it knowledge that the danger is due to such defect, and so it has not been found necessary in every case to state the whole law of the subject, but

the rule herein stated is not questioned in this state. A servant is not required, for the protection of his rights, to qualify himself to pass upon the sufficiency of the machinery furnished him for use, nor upon the methods by which his master conducts his business, but may assume that the master has fulfilled his obligations. *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 320, 75 Atl. 653, 26 L. R. A. (N. S.) 1195; *Vaillancourt v. Grand Trunk Ry. Co.*, 82 Vt. 416, 435, 74 Atl. 99; *Drown v. N. E. Telephone, etc., Co.*, 80 Vt. 1, 15, 66 Atl. 801.

The true doctrine of the assumption of risk is well and briefly stated by the United States Supreme Court in *Washington, etc., R. Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1049, 34 L. Ed. 235, where the statement of the doctrine as applied to that case is this: "If the employé knew of the defects in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk."

A statement so full and exact as to challenge criticism is found in *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. We quote: "The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of an employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or if it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover."

The rule that knowledge of the defect as well as of the danger is essential to the assumption of risk has been followed in the federal courts generally, and is nowhere made more clear than by Judge Lurton in *National Steel Co. v. Hore*, 155 Fed. 62, 83 C. C. A. 578, where he says: "To defeat an action by the defense of assumption of risk, the employer must show not only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the in-

creased danger to which he voluntarily exposed himself." He emphasizes the distinction between knowledge of defects and knowledge of risks therefrom arising, and makes both essential to defeat recovery on the ground of assumption of risk when an injury has resulted from the furnishing of defective appliances by the master.

In *Chicago, etc., Ry. Co. v. Prescott*, 8 C. C. A. 109, 59 Fed. 237, 23 L. R. A. 654, the court said: "The doctrine of voluntary assumption of a risk, as distinguished from contributory negligence, is generally applied in cases arising between employer and employé, where an employé, without any valid excuse for so doing, voluntarily undertakes to work with a tool or any appliance which is known to be defective."

In *Kattalla Co. v. Rones*, 186 Fed. 30, 108 C. C. A. 132, a case decided in the Circuit Court of Appeals, an instruction was approved which made it essential to the assumption by a servant of an extraordinary risk consequent upon the character of the place in which he is required to work that "it is apparent and obvious to him that the employer has not furnished a reasonably safe place."

The Supreme Court of Pennsylvania has stated the doctrine in its application to machinery with great precision. It has said: "He (the servant) certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has the right to suppose that his employer has provided such guards and means of protection from injury in the use of the machinery, tools, and appliances as are usual and reasonably necessary for his safety." *Rummel v. Dilworth, etc., Co.*, 131 Pa. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827.

The rule thus stated is applied in *Cargill v. Philadelphia Towel Supply & Laundry Co.*, 185 Pa. 269, 39 Atl. 962, the facts of which are not fully stated in the opinion, but are clearly set out by reference in *Bartholomew v. Kemmerer*, 211 Pa. 277, 60 Atl. 908. Both cases, it may be well enough to mention, were cases in which it was held that the plaintiff was entitled to go to the jury because of the absence of a guard rail on a mangle in the operation of which she was injured.

"Assumption of risk, in its true sense," says the Supreme Court of Iowa, "has reference to risks arising out of the negligence of a master when such negligence is known to the employé and the danger therefrom appreciated by him." *Duffey v. Consolidated Block Coal Co.*, 147 Iowa, 225, 124 N. W. 609, 30 L. R. A. (N. S.) 1067.

When the Iowa court speaks of the assumption of risk in its true sense, it is by way of distinction between that and what is quite commonly called the assumption of the

natural and ordinary risks of an employment; for to say that the servant assumes the latter is but another way of stating the rather obvious truth that the servant cannot recover on the ground of the negligence of the master unless the master has been negligent. Already the court last referred to had declared that the servant "never takes the risk of the master's negligence under any circumstances, save when he knows of such negligence, or as a reasonably intelligent person ought to have known of it." *Martin v. Light Co.*, 131 Iowa, 724, 106 N. W. 359.

In *Tyrrell v. Cain & Co. (Iowa)* 128 N. W. 536, which was a mangle case, the Supreme Court of Iowa, in distinguishing the case before it from another, applied the doctrine stated in the following discriminating paragraph: "In that case the employé knew that proper safety appliances were absent and continued in the employment without objection notwithstanding such absence. In the case before us, plaintiff, while appreciating the danger of getting her fingers caught in the revolving rollers, knew nothing about any appliances being practicable or usual which would have lessened the danger; in other words the plaintiff, while assuming the risk generally incident to employment about such a machine, did not answer the risk involved in the absence of safety appliances, for she had no knowledge that such safety appliances as would lessen the danger had been omitted." The defendant in the case cited had neglected a statutory duty; but because of the general principle above stated, the court found it unnecessary to decide whether or not the plaintiff could assume the risk arising from such neglect.

In Ohio the nature of the assumption of a risk has been clearly expressed, for, in distinguishing the doctrine in that regard from that of contributory negligence, the Supreme Court of that state has said: "Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may use the utmost care to avert the dangers which they threaten." *Hesse v. Columbus, etc., R. Co.*, 58 Ohio St. 169, 50 N. E. 355.

In speaking of the assumption of extraordinary risk, the Supreme Court of Connecticut says: "It arises from the fact that the servant, knowing of the abnormal risk, has willingly encountered it." *Worden v. Gore-Meehan Co.*, 83 Conn. 647, 78 Atl. 424. And elsewhere the same court states the rule by saying: "A servant assumes the risk when he knows the defective condition of an instrument, appreciates the danger from its use, and voluntarily encounters the risk." *Elie v. Cowles & Co.*, 82 Conn. 226, 73 Atl. 258.

The doctrine of the assumption of risk is grounded on the idea of intelligent choice and is well expressed by the Supreme Court

of Massachusetts thus: "The servant assumes the danger of the employment to which he voluntarily and intelligently consents, and while, ordinarily, he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions." *Leary v. Railroad*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733. In a recent Massachusetts case the doctrine of assumption of risk is again stated with great clearness. After a statement of the principle that an employer is bound to furnish his employé with reasonably safe tools and appliances, the court say: "If, however, when furnished with an improper tool or unsafe appliance, the workman fully comprehends its defects and imperfections, and realizes the nature and extent of the danger which will arise from their use, and voluntarily, without compulsion or exigency, intelligently and intentionally proceeds to use them, he must abide the consequence." *O'Toole v. Pruyn*, 201 Mass. 126, 87 N. E. 608. This case is especially instructive because, for one reason, the court was not misled by the familiar character of the appliance in question, which was a wheelbarrow.

In *Klofski v. Railroad Supply Co.*, 235 Ill. 146, 85 N. E. 274, the court expresses the doctrine thus: "The master's negligence is not an ordinary and usual risk of the employment. Hence the servant does not assume dangers arising therefrom by his contract of hiring, but the servant, knowing of such negligence, may assume the risk." This case follows *Browne v. Siegel*, etc., Co., 191 Ill. 226, 60 N. E. 815, where the court, after stating the duty of the master in respect of machinery and appliances, adds: "But even if the master fails in such duty, and there are, to the knowledge of the servant, defects in such machinery, means, appliances, which render their use hazardous, he is held to have assumed the hazard." A further citation is essential to a full statement of the doctrine as understood in Illinois: "A servant who knows that there are dangerous defects on premises where he works, and does not make complaint and ask for repairs or improvements necessary for his safety, assumes the risk involved." *Cichowicz v. International Packing Co.*, 206 Ill. 346, 68 N. E. 1083.

In Arkansas the matter is put in this way: "It is only where the servant is aware of the defect and voluntarily exposes himself to the danger that he can be said to have assumed the risk." *St. Louis*, etc., Ry. Co. v. *Vann*, 98 Ark. 145, 135 S. W. 816.

In Texas it is held that, to charge an employé with the assumption of the risk of using a defective implement, it must appear "that the employé knew of the defects, or

that in the exercise of ordinary care in the discharge of his duties he must necessarily have acquired the knowledge." *Texas Co. v. Garrett* (Tex. Civ. App.) 134 S. W. 812.

The rule as to the assumption of an extraordinary risk consequent upon defective machinery is fully stated in *Blom v. Yellowstone Park Association*, 86 Minn. 237, 90 N. W. 397, where, among other things, it is said by Chief Justice Start: "To justify the court in a given case in holding as a matter of law that the servant assumes the risk incident to the use of defective and dangerous machinery, it must clearly appear from the undisputed evidence that he knew of the defects therein." In that case the plaintiff was injured in the operation of an unguarded mangle. The court made short work of the question of negligence on the part of the defendant, declaring that all modern mangles are provided with a guard, that it was perfectly practicable for the defendant to have a guard on this machine, and that with such a guard the machine was reasonably safe and without it dangerous. But in that case the plaintiff had had considerable experience in feeding a mangle properly equipped with a guard, it appeared that she knew of the guard and its purpose, and the court held that from the evidence no other reasonable inference could be drawn than that "she knew and appreciated the defects in the mangle" and the risks incident to the operation of the machine in its defective condition.

In South Carolina it is held that assumption of risk is in the nature of a waiver on the part of the servant. *Bodie v. Charleston*, etc., R. Co., 61 S. C. 468, 478, 39 S. E. 715; *Hall v. Northwestern*, etc., R. Co., 81 S. C. 522, 62 S. E. 848.

The New York Court of Appeals calls the assumption of an extraordinary risk "an independent act of waiver" on the part of the servant "evidenced by his continuing in the employment with a full knowledge of all the facts." *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121.

In *Blanchard v. Vermont Shade Roller Co.*, 84 Vt. 446, 79 Atl. 913, where a servant was promised protection from certain risks, this court said: "The protection promised was to take the place of the ordinary safeguards, the presence of which might have hindered the defendant's work, but the absence of which made the place unsafe; and the plaintiff was entitled to one thing or the other, unless both were waived."

Many courts speak of the assumption of risk as in the nature of a waiver; but, if anything in the law is certain, it is that a waiver is the intentional relinquishment of a known right. *Webster v. State Mutual Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319; *Christenson v. Carleton*, 69 Vt. 91, 37 Atl. 226; *Donahue v. Windsor County Ins. Co.*, 56 Vt. 374, 382.

A waiver presupposes a knowledge of the

right waived, and there can be no waiver by a servant of the right to better protection unless he knows of the facts which give him such right. So all the courts which treat the assumption of risk as a waiver must be taken as holding that there can be no assumption of the risk consequent upon the use of defective machinery unless the servant knows not only that it is dangerous, but also that it is defective.

In *Smith v. Baker*, 1 App. Cas. (1891), Lord Morris pertinently said: "How can the plaintiff be held to voluntarily incur a danger from unfit machinery the unfitness of which he was admittedly not aware of?" This was the unanswerable reasoning which governed the decision of a case that had been vigorously contested at every stage. The later case of *Williams v. Birmingham, etc., Co.*, 2 Q. B. (1890) 338, an action at common law, shows that the doctrine of the assumption of risk as herein maintained is established in England.

The governing maxim is, "*Volenti non fit injuria*," not, "*Scienti non fit injuria*." *Drown v. N. E. Telephone, etc., Co.*, 80 Vt. 1, 13, 66 Atl. 801; *Thomas v. Quatermaine*, 18 Q. B. D. 685. And this is so because the former expression is inclusive of the latter and makes it tautological to state the maxim in the form used by Bracton, who says, "*Volenti et scienti non fit injuria*," and who labors to avoid misunderstanding by talking of one who has been freely willing, "*gratis voluerit*." 5 Bracton, 262 (Twiss' Ed.) f. 413b.

That knowledge, or imputed knowledge, of the dangerous character of a machine, does not charge the servant with the assumption of an extraordinary risk, unless he knows or must be taken to know that the risk is not an ordinary one, must be true, for otherwise there would be no meaning in what is generally said as to the bearing of complaints to the master about defects in machinery and of promises by the master to repair. *Washington, etc., Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Harris v. Bottom*, 84 Vt. 28, 77 Atl. 945.

The duty of the servant to give notice or make complaint of defects that he does not know of has never been consciously recognized by any court. When it is said, as it is in many of the cases cited, that a servant assumes known risks and dangers, it is to be understood that the knowledge referred to relates to the source and nature of the risks and dangers, as well as to their character and extent, and such general expressions are to be construed in the light of the specific statements to which reference has been made. Any other view results in a hopeless confusion between the doctrine of assumption of risks and that of contributory negligence, or in the mistaken idea that they are the same, or near enough the same, for

practical purposes, or in speaking of contributory negligence, as assumption of risk in a secondary sense.

As has been sometimes commented on, it is by no means always clear whether a particular discussion relates to contributory negligence or to the assumption of risk, or, indeed, to negligence on the part of the master. But nonliability of a master because he has not been negligent, his nonliability because his servant has voluntarily assumed a risk in encountering which he has been injured, and nonliability of the master because of the contributory negligence of the servant, are separate and distinct, and there are abundant reasons why only harm can come from their confusion. Note to *Scheurer v. Banner Rubber Co.*, 28 L. R. A. (N. S.) 1215.

[4] What is here said is not to be understood as in any way derogating from the doctrine that an employe, whatever his knowledge, cannot assume a risk consequent upon his employer's neglect of statutory duty imposed in the exercise of the police power. *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887. The above case, twice here (74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887; 72 Vt. 263, 47 Atl. 827, 82 Am. St. Rep. 939), shows the necessity of clearly distinguishing between assumption of risk and contributory negligence; for it is therein held that, while there can be no assumption of the risk caused by the employer's neglect of such a statutory duty, nevertheless, in such case contributory negligence may defeat recovery.

Since the evidence here tended to show that the plaintiff was encountering no risks except such as she supposed to be ordinarily and necessarily attendant upon the operation of the mangle, it cannot be said that she knowingly and intelligently chose to assume the risks consequent upon a defect in the machinery unknown to her.

No reference has thus far been made to the case of *Wiggins v. E. Z. Waist Co.*, 83 Vt. 365, 76 Atl. 36; for, except that it grew out of an injury incurred in the operation of a mangle of some sort, it has little in common with this case. There the mangle, such as it is, had upon it a guard rail which was inadequate, and so the operator was not left to conjecture as to whether there was such a device, and it was held that the whole situation was one of which the plaintiff had full understanding. The case will again be referred to.

[5] Though the plaintiff did not, as matter of law, assume the risk of the defect pointed out, still she was bound to exercise the care and prudence of a careful and prudent person in the situation in which she was and with reference to the existing and obvious dangers however they may have been caused; for "the care and prudence of a prudent person in any circumstances depends upon the

nature of those circumstances." Harris v. Bottom, 84 Vt. 28, 34, 77 Atl. 947; Hartigan v. Deerfield Lumber Co., 85 Vt. 133, 81 Atl. 239.

In *O'Toole v. Pruyn*, 201 Mass. 126, 87 N. E. 608, it is well said of the duty of care on the part of the employé: "This duty rests on him equally, whether the employer has done his duty or has failed in its performance. The standard of duty for the employé is the same, whether he is provided with tools and appliances which are in good or in bad condition. He must at all times be in the exercise of due care." This quotation is from the wheelbarrow case, in which, for the reason already stated, it was held that it could not be said, as matter of law, that the plaintiff had assumed the risk in encountering which he was injured, and in which it was further held that the question of contributory negligence was for the jury.

[6] It is held in this state that in a negligence case the burden of showing freedom from contributory negligence is on the plaintiff. But, in order to sustain this burden, it is not necessary that there should be evidence distinctly directed to that negative proposition. *Barber v. Essex*, 27 Vt. 62, 69; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Fassett v. Roxbury*, 55 Vt. 552; *Manley v. Delaware & Hudson Canal Co.*, 69 Vt. 101, 37 Atl. 279; *Winifred Bros. v. Rutland R. Co.*, 71 Vt. 48, 42 Atl. 980; *Sherwin v. Rutland R. Co.*, 74 Vt. 1, 51 Atl. 1089; *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 302, 52 Atl. 531, 93 Am. St. Rep. 887; *Morris v. Trudo*, 83 Vt. 44, 74 Atl. 387, 25 L. R. A. (N. S.) 33.

In the examination of the plaintiff, counsel for both parties required her to illustrate, by holding a towel before her, the way she was doing the work at the time of the accident, and while this fact makes it somewhat exceptionally difficult to judge of the tendency of her testimony, it must be said that her testimony fairly tended to show that she was free from contributory negligence.

The defendant argues the case largely upon the claim that this machine was like an ordinary clothes wringer, only larger; but the description of the machine is inconsistent with this claim. Some mangle cases in which recovery has been denied turn upon the fact that the cloth is, before the very eyes of the operator, drawn between two rolls revolving inwardly like the rolls of a clothes wringer, so that it is made apparent at a glance that, if the hand follows the cloth, it can touch nothing stable like the steam chest here, but must inevitably be grasped and carried forward by the rollers if it is allowed to follow the cloth too far. Of this class was the *Wiggins Case*, 83 Vt. 365, 76 Atl. 36.

Of course, as is claimed, the plaintiff knew that the mangle was hot, and that the tendency of the machine would be slowly to

draw in things once gripped by it if they were not too large. But the evidence on her part tended to show that she had not actual or imputed knowledge of the full situation; that she, in fact, knew nothing of the amount of power driving this slowly revolving cylinder, geared as it was; and that she had no full appreciation of the difficulty or impossibility of stopping or pulling back her hand if it should once go too far.

The plaintiff testified that at the time she was hurt she was looking right at her work, right at the towel, and observing how it was going, and not looking at the cylinder. One ground of the claim that the plaintiff was guilty of contributory negligence is that this testimony showed that she was not in the exercise of due care, "because she says she wasn't looking at the mangle, but was looking down on the towel itself." Had she said she was looking at the cylinder and not at the towel which she was guiding, there would have been a stronger ground for the claim that her testimony as to where she was looking showed contributory negligence. If she was looking down at her work, the dangerous parts of the machine must have been within the range of her vision. The precise phraseology of a witness in such a matter is not often of much significance.

The defendant, in fact, claimed on trial that the plaintiff was not looking at her work, as she claimed, or at the machine, but that she was looking away at or for or after one Maggie Doyle. How this was it was, of course, for the jury to decide.

We have examined numerous cases growing out of injuries to operators of mangles. In some recovery has been had; in others it has been denied. It is very clear that such machines vary much in their construction, that each case must stand or fall upon the evidence peculiar to it, and that it would be unfortunate, not to say absurd, for the courts to undertake to develop a body of mangle law.

The plaintiff's counsel in an opening statement made a reference to what he claimed would be shown in regard to the guard rail; and there was evidence introduced in support of the claim made in the opening statement. The mangle in question was exhibited to the court and jury during the trial. At the time of its exhibition, the guard rail was also shown. There was no objection to the use made on trial of the machine itself; but the defendant had an exception to the admission of some of the evidence relating to the guard rail and its function, to the opening statement in regard to it, and to the ruling permitting the jury to see it. It is claimed that there was error in all this.

But the grounds of this claim have been fully considered in the discussion of the question of the assumption of risk.

[7] Whether or not the defendant, or his superintendent prior to the accident, knew

that a guard rail belonged on this machine and was there on his premises, was a question in dispute. Mr. Heaphy testified that he did not have any such knowledge, and Mrs. Heaphy, the superintendent of the laundry, testified that she did not. The sockets for it were on the machine, and Mrs. McCormick, the head laundress under a former ownership of the hotel, and for a time under the ownership of Mr. Heaphy, testified, under objection and exception, that she, during such former ownership, had taken the guard rail off and put it away, and that she had told Mrs. Heaphy about it and where it was. The reply of Mrs. Heaphy to this notice, as given by the witness, ran on into a statement of Mrs. Heaphy's views as to the effect of Mrs. McCormick's action upon her right of recovery if she had got hurt. But with respect to this part of the conversation the defendant makes no point upon his brief, and so we dismiss it from consideration. The substance of the conversation tended to show the knowledge which the defendant's evidence denied, and was admissible.

Mrs. Heaphy took the stand and denied any recollection of any conversation with Mrs. McCormick about the guard rail. She was cross-examined about that, and testified that she never knew anything about a guard rail until it was put on. Subject to objection and exception, the plaintiff's counsel was allowed to elicit testimony tending to show that the guard rail had been on the machine since the accident; had been put on right after the accident. This evidence, as the transcript shows, was not received for the purpose of showing negligence on the part of the defendant in not having the guard rail on the machine before, and it would have been inadmissible for that purpose. *Place v. Grand Trunk Ry. Co.*, 82 Vt. 42, 71 Atl. 836. All that was claimed for it was that it tended to contradict both Mr. and Mrs. Heaphy, both of whom had said that they did not know of the guard rail. The way the matter stood appears from what transpired in argument. Mr. Lord, of counsel for the plaintiff, referred to this testimony, and, upon objection being made, said: "It goes to the testimony of both Mr. and Mrs. Heaphy, to their knowledge of the existence of the guard rail. They said they did not know it was there. How did they have it to put on and not know what it was for?" The court permitted this line of argument, but stated at the time that the evidence had no bearing whatever upon the question of whether or not the defendant was negligent in not having the guard rail on the machine before the accident. Counsel for the defendant expressed no objection to the right of the opposing counsel to make this argument from the evidence, but said: "In view of what may be claimed for it, we save the question."

The full transcript of the case is referred

to and made controlling, and has been examined upon all points, and it is clear that the apprehension of the defendant's counsel that an improper argument might be based upon the evidence, or an improper use otherwise made of it, was dispelled.

[8] The plaintiff called as a witness W. J. Donovan, who qualified as a machinist and engineer of very long experience. His experience, as testified to by him, included the setting up and repairing of laundry machines and laundry plants, including the plant of the Boston City Hospital, of which he had had charge as master mechanic for many years, and repairs of laundry plants about the hotels and public baths of Boston. His testimony was to the effect that as a machinist and engineer he had become familiar with various kinds of mangles, of which four or five kinds had been looked after by him in the Boston City Hospital. His testimony tended to show special familiarity with the mangles manufactured by the Poland Company, which was the kind of mangle in question; that he had done work for the company, and had made substantial parts of its mangle. His experience as a machinist and engineer, in matters not connected with laundries, we omit to refer to, but it was such that the court found him qualified as an expert in respect to machinery in general; and, under objection and exception, he was permitted to testify that the guard rail, which had been shown him, was ordinarily a part of a mangle of the kind in question, that its purpose was to prevent injuries to the hands of an operator; that, with the guard rail on and properly adjusted, it would prevent an operator's hands from being drawn into the machine; and that the mangle in question, which also had been shown him, was, without the guard rail, not a safe appliance for use in mangling.

The defendant urges the inadmissibility of Mr. Donovan's testimony as to the purpose and effect of the guard rail and the inadmissibility of his opinion that the machine in question, without the guard rail, was not a safe appliance for mangling, on two grounds: The first is that all the testimony as to the guard rail was inadmissible. That we have already considered and passed upon. The only other ground urged in the brief is that the opinion of the expert that the machine was a dangerous one to use without the guard rail was not within the scope of proper expert testimony. But that was not the ground of objection below. The objection there made was that the witness had not shown any expert knowledge on the subject of running a mangle, and that point is not relied on here. So neither point comes in for consideration. *Foster's Ex'r v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *State v. Noakes*, 70 Vt. 247, 257, 40 Atl. 249; *Graves v. Waitsfield*, 81 Vt. 84, 69 Atl. 137; *State v. Manley*, 82 Vt. 556, 74 Atl. 231; *State v. Roby*, 83 Vt. 121.

74 Atl. 638; Jewell v. Hoosic Tunnel, etc., R. Co., 85 Vt. 64, 81 Atl. 238; Coolidge v. Taylor, 85 Vt. 39, 80 Atl. 1038.

[9] The defendant presented 25 requests to charge and excepted "to the refusal of the court to charge according to each and every request requested by the defendant," and "to the charge of the court as given in respect to each and every request requested by the defendant."

Some of the requests could not have been properly complied with. Some were complied with. They relate to every question that could readily be thought of in connection with the case. The general exceptions just referred to are like an exception to an entire charge, not wholly unsound, and avail nothing.

[10] The defendant specifically excepted to the failure of the court to comply with its request No. 22, and to the charge as given in respect thereto. The request was this: "The defendant is not required to give special instructions unless there is some concealed danger about the machine." If this request had been in terms complied with, it would have been necessary for the court to have explained what it meant by "special instructions." The court, however, charged in various places that the plaintiff was bound to know what was obvious, that she could not recover on account of known and obvious dangers, that she was bound to take notice of the machine just as it was, that she was bound to see just what a prudent person could see, and we think that the request was in substance complied with. In argument the defendant says simply that the request was sound law, and that it was error for the court to refuse to comply with it; but no claim is based upon that part of the exception which was directed to the charge of the court upon the subject-matter of the exception.

The defendant took in all 19 exceptions to the charge. In argument his counsel say: "Exceptions to the charge of the court numbered 6, 7, 8, 9, 10, 11, 12, 13, 14, and 18 should be sustained for reasons already stated." The reference is to the reasons advanced in support of the motion for a verdict. These reasons have already been considered.

[11] The bill of exceptions states particularly some of the exceptions and refers generally to the transcript to show the exceptions taken. The transcript shows numerous exceptions to the evidence taken by the defendant; but, in accordance with the well-settled rule, we have considered only those relied upon by the defendant in his brief. Judgment affirmed.

POWERS, J. (dissenting). When the decision in this case was handed down, I announced a dissent on the question of assumption of risk. Since then, I have had an opportunity to give further study to the case

with a transcript of the evidence before me, and I now desire to make my dissent somewhat broader than it was then stated.

In the first place, the case decided by the majority is not the case made by the record. The decision of the majority goes upon the ground: (1) That it was negligence on the part of the defendant to furnish the plaintiff a machine to work with which was without a guard which had been an integral and important part of the machine; and (2) that the plaintiff did not assume the risk of operating the machine in the condition in which it was, because she was ignorant of the fact that there was such an appliance which belonged on the machine.

On both these points the burden of proof was, under our decisions, on the plaintiff.

I shall not criticise the conclusions of the majority so far as the first point is concerned; but I assert that its conclusions on the second point are wholly outside the record and unwarranted.

I am not going to say that the declaration is not legally sufficient to cover a case made on the theory that the plaintiff was relieved from what would otherwise be an assumption of the risk by the fact that she was ignorant that a guard belonged on the machine; I do say, however, that it is apparent from the declaration that it was not drawn with any such theory in mind, and it is utterly insufficient to suggest it to the defendant. Nor was the case tried on that theory. Nor was any evidence introduced tending to show that the plaintiff was ignorant of the fact that there was a guard which belonged on the mangle. To be sure, the matter came up at the trial; but it did not result in any evidence on that subject one way or the other getting into the record. In direct examination the plaintiff was asked this question: "At that time, up to the time you were there, did you know that there was—don't answer this until I tell you to—at the time of the injury, and all the time you were there working in the laundry, did you know that there was a guard rail for this mangle?" This question was never answered. Objection was made, the court sustained the objection, and counsel for the plaintiff withdrew the question. No further attempt to get in evidence on this subject was made. Some evidence was introduced to show the plaintiff's knowledge of the machine and her ignorance of the dangers, but nothing having a legal tendency to establish her ignorance of the guard rail was elicited. The burden of proof was, as I have said, on the plaintiff, and, in the absence of evidence on this subject, she failed to make a case to which the theory of the majority could be applied. She was required to produce evidence having a reasonable tendency to support this issue, and, having failed to do so, the case stands for decision precisely as it would if the machine had never had a guard rail.

The caution given the witness in the question—not to answer until told—shows that counsel had a pretty definite idea that the evidence was not proper, and his prompt withdrawal of the question when it was objected to strongly indicates that such idea amounted to full conviction. But, turning to the charge, I find abundant confirmation of my statement that the case was tried below without evidence or claim that the plaintiff was ignorant of the guard rail; for the court, time and again, told the jury that the plaintiff must take the machine as it was, and if she appreciated its dangers she assumed the risk. The court called attention to the fact that a guard had been taken off this machine, but said not a word on the subject of the plaintiff's knowledge or ignorance of this fact. At the close of the charge, counsel for the plaintiff excepted to what the court had said as to its being obvious to the plaintiff that there was no guard rail on the machine, saying: "We claim she did not have knowledge enough of the machine to ever know there was such a thing." And again, her counsel excepted to what the court said about the servant's knowledge of the master's neglect as to the guard rail, saying: "We claim that is improper, as there is no evidence that she knew anything about a guard rail." And yet again, counsel excepted to what the court said to the effect that she was bound to know what was obvious as to the guard rail, saying: "We claim that her knowledge of the machine was not sufficient; that she was not employed originally as a mangle." But no claim of this kind had been previously made, and there was no evidence to support it, so the court very properly refrained from modifying the charge in respect of these matters. This is of especial significance, as the record shows that the court gave a supplemental charge covering various matters to which counsel called its attention, and that the jury came in three times for instructions, and that on each occasion the court recharged them covering substantially the whole case, yet made no allusion to the plaintiff's ignorance of the guard, nor did counsel make further mention of the matter. So I say that the case presented was that of the ordinary unguarded mangle, in the hands of a mature, intelligent, and experienced operator, to whom the conditions and dangers, not only ought to have been, but actually were fully understood and appreciated. The plaintiff made a feeble—I might say pitiful—attempts to deny knowledge; but the cross-examination left nothing worthy of submission to the jury on this subject. To say that one who testifies in general terms that she did not know the dangers of a machine, and then admits that she knew each one of them when categorically asked about them, could go to the jury on the question, would be to announce a proposition

altogether too pregnant with danger. Taking the case as it was decided, I wish to make clear at the outset just where I put my company with the majority. They say that, before a servant can be held to assume the risk, he must know of the defect as well as the danger. And when they use the word "defect," they mean a condition existing through the negligence of the master. So in the view of the majority, it comes to this: A servant must know that the physical condition which is presented to him is one which would not exist if the master had discharged his duty toward him; that his master has neglected a duty owed him; that the risk involved is one which the law puts upon the master; and that if he continues in the work the law will shift the risk on to himself.

The rule I stand for is this: If a servant knows the physical conditions that are presented to him, and appreciates just how those conditions affect his safety in the prosecution of his work, and voluntarily continues in the service, he assumes the risk whatever they are and however occasional. Various cases from other jurisdictions are referred to by the majority as sustaining their view. As briefly as possible I wish to examine these cases.

Chicago, etc., Ry. Co. v. Prescott, 8 C. C. A. 109, 59 Fed. 237, 23 L. R. A. 654. It is true that in the course of his opinion the District Judge says what the majority accuse him of saying; but immediately following the statement quoted, and only separated therefrom by a period, he continues: "It is no doubt true, as a general proposition, that a person is not entitled to claim compensation for an injury which he has sustained by voluntarily encountering a known danger, which there was no occasion to encounter and that might as well have been avoided." It is apparent that there was no intention of announcing any such proposition as is embodied in the majority opinion. All that is said on this subject, however, is of no consequence; for the case was that of a person injured while attempting to cross a railroad track, and not a master and servant case at all. And, as the District Judge well says, when he was talking about the doctrine of assumption of risk, he was talking about something that did not concern the case; or, to use his own language: "With reference to the further contention of counsel—that the plaintiff voluntarily assumed the risk of crossing the tracks, and should be precluded from recovering on that ground—it seems sufficient to say that the rule invoked has no application to the present case."

National Steel Co. v. Hore, 155 Fed. 62, 83 C. C. A. 578. It is true that Judge Lorton uses the word "negligence" as shown in the quotation in the majority opinion. But the case decides nothing of the kind. It was made to turn wholly on the plaintiff's knowl-

edge of the danger. The allegation which was wanting in the petition, as the court indicates, is that the plaintiff was "ignorant of the danger." The learned judge says: "To assume as a matter of law that a common laborer, such as Hore was, should have known that there was danger from the facts known to him, is going too far. To determine the effect of the conditions known to him in producing hazard," etc. And again: "Now knowledge of the conditions which surround the doing of a thing by a workman does not always imply knowledge of the dangers which confront him."

Katalla Co. v. Rones, 186 Fed. 30, 108 O. C. A. 132. This was an action for injuries occasioned by the fall of the hammer of a pile driver. There was no "chock block" on the machine to prevent such an accident. The case turned on the servant's implied knowledge of the physical situation. The court said: "A prudent person might have gone up and down as he did and his attention not have been attracted to the absence of the block, or the particular condition of the structure, at the point where it should have been."

Washington, etc., R. Co. v. McDade, 135 U. S. 568, 10 Sup. Ct. 1048, 34 L. Ed. 235. That the paragraph quoted from this case, as interpreted by the majority, does not correctly represent the law of the case becomes perfectly apparent when the whole case is examined. The injury involved was received in an attempt to put a belt onto a moving pulley. Three specific instructions were under review, of which one was as follows: "And (3) assuming that putting on the belt was attended with danger, the question to be determined by the jury was not whether the plaintiff knew of such danger, but whether a man of ordinary care and observation, in his situation, would have known it, as he must be presumed to possess that degree of intelligence; and that if with such observation and care he would have known the danger, then in putting on the belt he assumed all the risks incident thereto." Knowledge of the danger is thus made the test—not knowledge of how that danger came into existence. No intimation is given that specific knowledge of the master's negligence, separate and apart from the dangers arising therefrom, is of any importance whatsoever. Yet this instruction, with others, was approved by the court in the following language: "We do not think there was any error in any of these instructions of which the defendant has any right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court." True it is that, in the course of the argument, the court speaks of the servant's knowledge of the defect in the machinery; but it is apparent that it means no more thereby than the physical conditions which caused the injury. No suggestion is made that the servant must know

that this condition arose from the master's negligence. This is the language of the court: "Upon every question in the case (the safety or unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident) the evidence was controverted"—and so made a case for the jury. Could the issues involved be more plainly stated? Is it not perfectly plain that the assumption of the risk was made to depend upon the servant's knowledge of the danger, alone?

Choctaw, etc., R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. The majority place much reliance on this case. It is said that it contains a statement of the law "so full and exact as to challenge criticism." McDade, a brakeman, was killed by coming in contact with a waterspout while passing it on a freight car. The negligence of the master consisted in maintaining the spout so near the track and in such a position as to endanger a man riding on the top of a freight car. An instruction was under review, the exact language of which is not shown, but which, in the language of the court, "did not permit of recovery if he (McDade) either knew of the danger of collision with the waterspout, or, by the observation of ordinary care upon his part, ought to have known of it." This last clause was said to be too favorable to the defendant, but otherwise the instruction was approved. That the court used the word "defect" to mean only the physical condition which caused the accident, without regard to how it was caused, could not be plainer. Suppose McDade had known the spout was there, and understood and appreciated just how its presence affected his safety when riding by it, and he had chosen to ride by it as he did, can there be any doubt that he would have assumed the risk?

That the law of the federal Supreme Court is not with the majority seems to be put beyond controversy by *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, from which the rule laid down in *Fraser v. Blanchard*, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797, with only slight verbal changes, is borrowed. I quote Mr. Justice Moody: "One who understands and appreciates the permanent conditions of machinery, premises, and the like, and the danger which arises therefrom, or the reasonable use of his senses, having in view his age, intelligence, and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk." *Rummel v. Dilworth, Porter & Co.*, 131 Pa. 509, 19 Atl. 345, 346, 17 Am. St. Rep. 827. The majority's quotation from this case is incomplete and stops in the middle of a sentence.

That the true meaning of the court may appear, I quote the whole passage: "He certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has a right to suppose that his employer has provided such guards and means of protection from injury in the use of machinery, tools, and appliances as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant upon their absence, unless such absence is apparent, or his attention has been called to it. If the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risk of dangers of the existence of which he has no knowledge." Further on in the opinion it is said: "In view of the youth and want of experience in the business on the part of Rummel, it was necessarily a question for the jury whether his employer had sufficiently warned and instructed him about the dangers of the employment, and how to avoid them, or had done all that was reasonably necessary to protect him from injury." I respectfully submit that this case is not an authority for the majority.

Bartholomew v. Kemmerer, 211 Pa. 277, 60 Atl. 908. It is a fact that the court quotes with approval in this case the passage from the opinion in the *Rummel Case* which appears in the majority opinion. And it gives a more complete statement of the case of *Cargill v. Phil., etc., Co.*, 185 Pa. 269, 39 Atl. 962. Both these cases were mangle cases in which a guard which belonged on the machine had been removed by the master. Yet—and this is full of significance—the court does not in either case make allusion to the plaintiff's ignorance of this fact, nor does it in any way treat it as of the slightest consequence. The question of assumption of risk was not raised in the *Cargill Case*. The defendant seems to have been satisfied to rely upon its claim that no negligence had been established. Neither the court below, nor does the Chief Justice in his opinion, make the slightest allusion to the law of assumption of risk. That I read this case correctly is evident from what is said of it in the *Bartholomew Case*: "This court affirmed the judgment entered on the verdict, thereby holding that the case is for the jury where the evidence is conflicting as to whether the plaintiff was properly instructed before being placed at work at the mangle, whether the absence of a guard rendered the machine more dangerous, and whether the plaintiff herself was guilty of contributory negligence." Not a word about the assumption of risk.

Nor was the question of assumption of risk in the *Bartholomew Case*. The opinion recites that counsel for the defendant in their printed argument say that the question for determination "is solely one of fact, and reduces itself down to whether there was a guard upon the mangle through which the plaintiff was injured." No defense was made on the ground of assumption of risk; it was simply claimed that the guard was in place. This position of the defendant seems easier to understand when we take notice that all the witnesses except the plaintiff testified that the guard was in place. The trial court ruled the case against the plaintiff on the ground of assumption of risk, and this was held error; but not because the plaintiff did not assume the risk, but because that was not the issue. This appears in the closing paragraph of the opinion. After stating just what the questions were which were determined in the *Cargill Case* as above quoted, namely, whether the plaintiff was properly instructed, whether the absence of the guard rendered the machine more dangerous, and whether the plaintiff was negligent, the court added: "These were the questions raised in the case at bar, and the learned judge was in error in directing a verdict in favor of the defendant on the ground that the plaintiff assumed the risk of her employment." There is nothing decided in these cases which throws any doubt on the rule stated in *Bowen v. Penn. R. Co.*, 219 Pa. 405, 68 Atl. 963: "In this state the law is settled that an employé, in accepting the employment, assumes all risks ordinarily incidental thereto, and all other risks open and obvious, the dangerous character of which he has had opportunity to observe." Or on the rule stated in *Nuss v. Rafsnnyder*, 178 Pa. 397, 35 Atl. 958, and approved in *Masterson v. Eldridge*, 208 Pa. 242, 57 Atl. 515, as follows: "When an employé, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if subsequently injured by such exposure. By contracting for the performance of hazardous duties, he assumes such risks as are incidental to their discharge from causes open and obvious, the dangerous character of which causes he has had an opportunity to ascertain." Or on the rule as stated in *Wilkinson v. Johns Mfg. Co.*, 198 Pa. 634, 48 Atl. 810: "With full knowledge of the nature of his employment and of the appliances used therein, he must be held to have assumed the risk involved in it."

Duffey v. Consolidated Block Coal Co., 147 Iowa, 225, 124 N. W. 609, 30 L. R. A. (N. S.) 1067. This case involved the law of assumption of risk only as a matter of pleading. It was held that it was an affirmative defense, and must be pleaded. And that, since it was not pleaded, it was not involved in the case.

Martin v. Light Co., 131 Iowa, 724, 106

N. W. 359, was the same kind of a case. It involved a question of pleading. The remark of the court quoted by the majority was made in discussing the question of pleading. The editorial staff of the West Publishing Company, as shown by the headnote in the reporter, understand the court to mean, "a servant does not assume risks that arise from negligence of the master, unless they be shown to him or by the use of proper diligence are discernible by him." But the case is of little consequence here because the substantive law was not under discussion. As the court says: "The defendant's answer does not, in our judgment, raise the issue of assumption of risk."

Tyrrell v. Cain & Co. (Iowa) 128 N. W. 536. This case is an authority for the theory adopted by the majority, and the opinion is by Judge McClain, in whose ability and learning I have great confidence. The mangle was being operated in violation of a statute. There is a ringing dissenting opinion by Chief Justice Deemer, who says that the decision is due to a reluctance of the court to decide the real question submitted, which is whether a servant can assume a risk arising from a breach of a statutory duty. On this question, he says the court is hopelessly divided, though he is ready to say (as this court said in *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887) that such a risk could not be assumed. He then goes on to say: "It is not a question whether he knows the law or is familiar with the legal definition of negligence, but rather does he know that in its then condition it is dangerous; and does he know or should he have apprehended the risk to which he is exposed in working with the machine in its then condition?"

Hesse v. Columbus, etc., R. Co., 58 Ohio St. 167, 50 N. E. 355. This case involved only a question of pleading, and is not an authority for the majority, since the question was not involved in the case on account of the lack of a proper averment.

Worden v. Gore-Meenan Co., 83 Conn. 642, 78 Atl. 422. There is nothing in this case, rightly understood, which affords any support to the theory of the majority. The question under discussion, so far as it related to the case in hand, was purely a question of pleading. In holding that the defendant and not the plaintiff was to establish the assumption of the risk, the court used the language quoted by the majority. But it is not all quoted. The court had just said: "But extraordinary risks, such as are not ordinarily incidents of the employment, are not assumed by the servant. He may by his conduct assume them." Then, having said that the assumption of risk is not imputed to the relationship of the parties or contract of employment, the court goes on to say: "It arises from the fact that the servant, knowing of the abnormal risk, has will-

ingly encountered it. In the absence of facts showing that he has assumed such a risk, he is not presumed to have done so, and he is not required to allege or prove that he had not assumed them or had no knowledge of them in order to make out a prima facie case." It is plain enough that the court makes knowledge of the risk, and not of the fact that it is extraordinary—that is, that it exists through the negligence of the master—the true test.

Elle v. Cowles & Co., 82 Conn. 236, 73 Atl. 258. The plaintiff was nonsuited at the close of his evidence. The case was one in which the defective machine and the dangers thereof were fully known and appreciated by the plaintiff, and he relied upon a promise to repair to relieve him of the assumption of the risk. The statements in the opinion are to be interpreted in view of the character of the case then in hand. The opinion in the case was filed June 10, 1909, and on July 20, 1909, *Girard v. Grosvenordale Co.*, 82 Conn. 271, 73 Atl. 747, was announced in an opinion written by the same judge who wrote the *Worden* case. The action was for injuries received as a result of running certain pulleys too fast, by reason whereof one of the pulleys burst, and, being thus put out of balance, it tore down the shaft, which finally brought down a countershaft, which hit the plaintiff and injured him. The plaintiff entered the room after the pulley broke and before the shafting fell, and saw and appreciated the situation and its dangers. He remained 10 or 12 minutes, warning others of the danger, before the countershaft fell. The court instructed the jury that there was no negligence on the part of the defendant prior to the bursting of the pulley. This left nothing for the plaintiff's action to stand on, except the conduct of the master after the pulley went to pieces; that is to say, his negligence in failing to stop the machinery. It appeared that the defendant had, in fact, taken steps to shut it down; but it did not appear that the plaintiff knew this. The case was reversed on account of inconsistent instructions, which allowed a recovery though plaintiff assumed the risk. Among other things, the court said: "So far as these assignments have been pursued in argument, they revolve around the question, already considered, whether the plaintiff could assume a risk of injury resulting from the defendant's negligence. That he could do this is unquestionable; whether he did or not was, upon the evidence and claims of the parties, a question of fact for the jury, and could not properly be taken from them by the court, as it was requested to do by the defendant." Whether this holding can be sustained on any ground, I do not stop to consider; certainly it could not on the theory of the majority. Remembering that in Connecticut the burden of establishing as-

sumption of risk is on the defendant, it cannot be said that this involves establishing the plaintiff's knowledge of the defendant's negligence, for it is expressly stated that it did not appear that plaintiff knew what steps the defendant had taken to stop the machinery. So if the law of Connecticut was that the defendant must show, in order to establish assumption of risk, not only that the plaintiff knew the conditions and appreciated the dangers, but also that he knew that these conditions and dangers existed through the defendant's negligence, the charge would have been harmless, for the defendant had failed in the proof, and, as plaintiff claimed, the doctrine of assumption of risk was out of the case. The case is conclusive that, by the law of Connecticut, knowledge and appreciation of conditions and dangers are sufficient to charge a servant with the assumption of the risk. But if any further evidence regarding the rule in Connecticut were needed, reference might be had to *Tenney v. Baird Machine Co.* (Conn.) 82 Atl. 639, which has just come to hand, wherein it is said: "It thus appears that he knew and appreciated the risks which he encountered in this, which was his ordinary employment, and he must be held to have assumed them."

Leary v. B. & A. R. Co., 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733. Although it is true that the court used the language quoted by the majority, the result of the case shows that the true meaning of the court is not that which is claimed for it. It was the case of one who fell or was thrown while attempting to get off a moving engine. The trial court held that he could not recover, and this was affirmed, on the ground that "no fault or negligence was shown on the part of the defendant." It was said that the danger was known to the plaintiff, and nothing is said regarding his knowledge of any negligence on the part of the defendant which produced that danger.

O'Toole v. Pruyn, 201 Mass. 126, 87 N. E. 608. There is little consolation to one adhering to the theory of the majority in a study of this case. The true meaning of the court's language is too plain to be mistaken. *O'Toole* did not know of the defect; that is to say, he did not know the physical condition of the wheelbarrow. He did not know that one leg was shorter than the other. That the court did not mean more than this is apparent from this expression in the opinion: "A plaintiff may be precluded from recovery if he appreciates the character and extent of the danger, although he fails to understand the precise manifestation of it, which causes his injury; but he cannot be so precluded, unless he understands the nature and degree of the risk, to which he is subjected."

There is little need of being in doubt as to the law of Massachusetts on this subject.

It is thus stated in *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. Rep. 176: "The risk of the safety of machinery is not assumed by an employé, unless he knows the danger, or unless it is so obvious that he will be presumed to know it. He takes the risk of known or obvious dangers, and not of others." It is thus stated in *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 589: "A person cannot be said to take a risk unless he knows, not only the condition of things, but also that danger exists in such condition. If, however, the danger is obvious, knowledge of the condition of things need only be shown." This rule, by the way, was quoted and approved in *Berning v. Medart*, 56 Mo. App. 443. It is thus stated in *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469, by Judge Holmes: "The danger to fingers from two cylinders in contact with each other, and seen to be revolving inwardly, is obvious to any person of ordinary powers, and plainly was understood by the plaintiff." And further: "If there had been no guard across the shelf of the mangle, the plaintiff would have acted at her peril." It is thus stated in *Glass v. Hazen Confectionery Co.*, 211 Mass. 99, 97 N. E. 627: "A guard may have been reasonably necessary to insure a safe machine. See *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294. But the judge carefully instructed the jury in this connection that if the risk or danger was obvious—as the absence of a guard would be—there was no liability on the part of the defendant for using this machine, and it was not bound to provide a different or safer one."

Klofski v. Railroad Supply Co., 235 Ill. 146, 85 N. E. 274. It is apparent from a reading of this case that the rule contended for by the majority is not the rule of the Illinois court; for it is said in this very case: "If the servant has, or by the exercise of reasonable care would have, knowledge of the existence of a particular danger, and continues in the employment without complaint, he will be deemed to have assumed the danger; and, in respect to such dangers, it is wholly immaterial whether they arise from the negligence of the master or from other causes."

Browne v. Siegel, Cooper & Co., 191 Ill. 226, 60 N. E. 815. It is said by the majority that the *Klofski* Case follows this case, and a quotation from the opinion is given to the effect that the servant must know of the defects before he can be held to have assumed the risk. The trouble is too little is quoted to show the true meaning of the words of the court. The court goes on to say: "The servant assumes, not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing or having means of knowing its dangers, he is deemed

to have assumed the risks, and to have waived all claims against the master for damages in case of personal injury."

Cichowicz v. International Packing Co., 206 Ill. 346, 68 N. E. 1083. This case is cited by the majority as essential to a full statement of the doctrine as understood in Illinois. Here again the majority quote too little. Restoring the sentence quoted by the majority to its place in the opinion and taking it with what should go with it, it appears thus: "And if a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot maintain an action against his master for the injury merely on the ground that there was a safer mode in which the business might have been conducted. A servant who knows that there are dangerous defects," etc. I think it is plain from these very cases that the rule in Illinois is the rule I am advocating.

Blom v. Yellowstone Park Ass'n, 86 Minn. 237, 90 N. W. 397. I admit that Chief Judge Start uses the word *defects* in defining the law of assumption of risk in this case. That he means anything more than the *condition* of things, I deny. It was a mangle case as stated, and it was held that the plaintiff had assumed the risk—a result that could not have been reached if knowledge of defendant's negligence had been essential. The rule of that court is plain enough from *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551, 5 Am. St. Rep. 832, where it is said: "Again, it is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know and appreciate the *risks* resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed. The mere fact that a servant knows the defect does not necessarily charge him with contributory negligence or the assumption of risks growing out of these defects. The question is: Did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrumentalities exposed him?" It is thus seen that the court sometimes says *defects*, and sometimes *condition*; but it is perfectly apparent that the same thing is meant whichever word is used. Chief Judge Start comes to my aid, in seeking the true meaning of the Minnesota court, in *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 N. W. 826, 85 Am. St. Rep. 440, wherein he says: "Now, to charge him with assumption of any risks incident to the condition of the saw which injured him, it is not sufficient that he knew its condition unless he also knew, or in the exercise of ordinary prudence ought to have known and appreciated, the risks to which

the condition of the saw exposed him in doing the acts he was doing when injured."

St. Louis, etc., Ry. Co. v. Vann, 98 Ark. 145, 135 S. W. 816. One need not go a great ways to find that the Arkansas doctrine is not what the majority claim. The passage quoted from the case named means no more than if it read "it is only where the servant is aware of the *condition* and voluntarily exposes himself to the danger that he can be said to have assumed the risk." This becomes perfectly apparent when reference is made to the case cited just before the statement quoted by the majority. *C. & G. R. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430. For it is therein said of the servant's relation to a risk caused by the negligence of the master: "On the other hand, if he realizes the danger, and still elects to go ahead and expose himself to it, then, though he acts with the greatest care, he may, if injured, be held to have assumed the risk." And again: "As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that, when he did so, he knew and appreciated the danger to which he exposed himself by doing the work." This puts the burden of proof onto the defendant, but otherwise the rule is the same as our own. To the same effect is *C. & P. Ry. Co. v. Grubbs*, 97 Ark. 486, 134 S. W. 636.

Texas Co. v. Garrett (Tex. Civ. App.) 134 S. W. 812. The true meaning of this case is mistaken by the majority. Here again the word "defects" is used simply to denote the physical conditions. The case shows it. But if further evidence were needed, reference might be had to *Farmers' Cotton Oil Co. v. Barnes* (Tex. Civ. App.) 134 S. W. 369, wherein it is said: "We are aware that the law is well settled that, notwithstanding the servant owes no duty of inspection, yet he cannot shut his eyes to dangers that are obvious to ordinary men, and assumes the risks of a danger of which he had actual knowledge and of such hazards as he would have learned by the exercise of that ordinary circumspection which a prudent man would have used in the particular employment." Again, in *Lone Star, etc., Co. v. Caddell* (Tex. Civ. App.) 134 S. W. 841, it is said: "The servant, in order to be charged with an assumption of the risk upon the ground that he knows of the existence of the defect, must not only know of the *situation*, but also of the danger that is likely to result from it"—citing *Railway Co. v. Jones*, supra; and 1 Labatt, Mast. & Serv. § 296, wherein it is said: "A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed."

Reference is made by the majority to the doctrine of waiver. Of course, there would be no occasion to refer to this if it was not considered to be applicable to the case, and the result of the treatment of this feature of the case by the majority is to commit the court to the applicability of that doctrine to these cases. In this connection, the majority calls attention to the use of the word "waived" in *Blanchard v. Vt. Shade Roller Co.*, 84 Vt. 446, 79 Atl. 911. I am ready to admit that the law of waiver is as stated by the majority. But I am not ready to admit that this court ever intentionally announced the doctrine that it had any place in a negligence case in determining the question of assumption of risk. No such idea was in the mind of the writer of the opinion in the *Blanchard Case*, or any other member of the court, when it was announced. The term was not used in its legal sense, at all, but only to express the idea that the plaintiff might have so conducted himself as not to be entitled to either protection referred to.

In South Carolina, it seems to be held, as stated by the majority, that assumption of risk is in the nature of a waiver. And this term seems to be used in its legal sense. But such is not the law of New York. This appears from the very case cited by the majority. *Drake v. Auburn City Ry. Co.*, 173 N. Y. 466, 66 N. E. 121. I quote the paragraph from which the statement in the majority opinion is selected: "The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employé, but on an independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts." Thus it appears that the waiver here spoken of is not the technical waiver—the voluntary relinquishment of a known right—but one of evidence, that is proved by continuing in the employment with knowledge of the facts. If any doubt of this could exist, it would be dispelled by what immediately follows what I have quoted. The court proceeds: "In *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, the Supreme Judicial Court of Massachusetts uses this language: 'The doctrine of the assumption of the risks of his employment by an employé has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, "*Volenti non fit injuria*"—one who, knowing and appreciating a danger, and voluntarily assuming the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that

respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger.'" It must be kept in mind all along that, whenever the majority uses the word "defect," it is the equivalent of "a dangerous condition which exists through the negligence of the master." So, to get a full understanding of the majority rule, one should substitute this phrase for the word "defect" therein. That I am correct in this proposition sufficiently appears from the following taken from the majority opinion: "There can be no assumption of risks due to a master's negligence in providing defective machinery, unless the servant knows, or must be taken to know, both of the defect and of the danger attending it. The doctrine is thus stated in *Skinner v. C. V. R. R. Co.*, 73 Vt. 336, 340 [50 Atl. 1099, 1100], where it is said: '*If a servant, knowing that the master has neglected his duty and that he is thereby subject to dangers not incident to the employment, continues in the service,*' etc. What "doctrine" is here referred to? Why, the doctrine just stated, of course, that the servant must know of the defect as well as the danger. And by "defect" is meant just what I have pointed out. So there is no escape from this: The doctrine of the majority contains the elements quoted from the *Skinner Case* which I have italicized.

An ingenious selection and arrangement of expressions taken from various opinions makes it appear that the doctrine of the majority has been previously announced by this court. I boldly and confidently assert that this claim is incorrect. Restoring these expressions to the opinions from which they were taken, and reading them in connection with the context, shows that this court never gave conscious utterance to any such doctrine. The cases follow:

Skinner v. C. V. R. R. Co., 73 Vt. 336, 50 Atl. 1099. Judge Start is correctly quoted. But just before the passage quoted by the majority we find him saying: "He (the servant) also, in like manner, assumes risks and dangers attending his service that are known to and comprehended by him, in so far as they would have been known and comprehended by one of his age, experience, and capacity." What was actually decided in that case is well stated in the headnote thereto: "A servant assumes all ordinary risks incident to his employment, and if there are risks, made incident to his employment by his master's negligence, which the servant knows and comprehends, or ought to know and comprehend, he assumes these also, unless he is lulled into a sense of security by an express or implied representation of the master." This, I insist, is an accurate statement of the law of that

case. This headnote was written by the same hand that penned the majority opinion, and I submit that the reporter analyzed the case more accurately than the judge.

It is said that the language taken by the majority from this case is quoted and approved in the third volume of Cooley on Torts. The importance of this should not be magnified. The voice is not the voice of Judge Cooley, but of his editor. Judge Cooley himself never gave utterance to any such proposition. His rule was this: "The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them." Cooley, Torts, 551.

Severance v. New England Talc Co., 72 Vt. 181, 47 Atl. 833. The majority quote the last sentence of the opinion. But I cannot believe that this case means what the majority claim for it. What the court there refers to is knowledge of the *conditions*—not knowledge of how those conditions came to be. And here again I vouch the headnote prepared by the writer of the majority opinion, and insist that it is an accurate statement of the law of the case: "There is no special assumption by a servant of a risk due to the master's negligence, unless the servant knows or ought to know of the unnecessary risk so caused." Knowledge of the risk, and not knowledge of its origin or cause, is thus made to determine.

Johnson v. B. & M. Railroad, 78 Vt. 344, 62 Atl. 1021. The statement selected by the majority is entirely outside of the decision, and, if it meant just what the majority claim, would be a dictum, only. But I have first-hand information that the opinion was never intended to proclaim any such theory as is ascribed to it. This appears from the following paragraph, in which, in speaking of the negligence relied upon, and the claim that it afforded a basis of recovery, the opinion says: "And so it does, unless, as we have seen, the *condition* and its *dangers* were known to and voluntarily incurred." It is plain enough from the clause, "as we have seen," that the expression quoted by the majority and the expression which I quote were intended to mean the same thing. It is equally apparent that at that time, this court, and every member of it except Judge Munson, who did not sit, understood that, if Johnson knew the conditions and their dangers, he assumed the risk, without regard to whether he knew or was ignorant of how these conditions came to be. This is just what counsel claimed, and just what the reporter covered by his headnote.

Williams v. Norton Bros., 81 Vt. 1, 69 Atl. 146. It is true that Judge Tyler makes use of the word "defects," but it is perfectly apparent that he means no more than if he had said: "Whether he had an opportunity

to see the *condition* of the cable, or was chargeable with knowledge of its *condition*, were questions for the jury." Again I call upon the reporter; and I insist that he correctly interprets the court when he understands it to say, "whether plaintiff was chargeable with knowledge of the *danger*" was a question properly submitted to the jury.

Vaillancourt v. Grand Trunk Ry. Co., 82 Vt. 416, 74 Atl. 99. This case is not an authority for the majority opinion when properly understood. In order to show this, I quote the whole paragraph from which the majority take a part (the stars take the place of cases cited): "It is further said that the plaintiff assumed the risk. The risk was not an ordinary one incident to the plaintiff's employment, for the tendency of the evidence is that it existed as a result of the negligence of the master itself. And as an extraordinary risk he did not assume it as a matter of law, since the evidence tends to show that no knowledge of the presence of the clinker was had by him prior to the accident, and whether it was so plainly observable that he will be taken to have known of it and to have comprehended the danger was clearly for the jury to determine. * * * Nor in this respect does the fact that the plaintiff testified to knowledge that clinkers, big and little, are commonly found around railroad yards and along the tracks and right of way, make any difference, in the absence of actual or implied knowledge of the particular defect which caused the accident and a comprehension of the danger attending it." Is it not plain that the word "defect" is here used to mean merely the presence of the clinker as a part of the physical conditions from which danger arose, without regard to how the clinker got there or why it remained there? If the plaintiff knew the clinker was there and comprehended and appreciated just how its presence affected his safety in the discharge of his duties, he would, in the absence of anything to relieve him therefrom—like being absorbed in his attempt to mount the train or something of that kind—assume the risk, though he was ignorant of how it came there, and did not know that it had been there long enough to charge the company with negligence.

Marshal v. Dalton Paper Mills, 82 Vt. 489, 74 Atl. 108, 24 L. R. A. (N. S.) 128. I find no support of the majority opinion in this case. I quote all the court says on the subject of assumption of risk, omitting the statement of the claims of counsel: "There was no evidence, however, that grease had ever before accumulated on the running board to such an amount, nor that the plaintiff had reason to believe it would, nor that he knew it was there on the night of the accident before he was injured. On the other

hand, his testimony that he did not know of any trouble with the running board that night was uncontradicted. When before that time there had been a break in the paper during the time the plaintiff was on duty, or when he had previously been called upon to pass over the running board to or from the wet end of the machine, does not appear. He was working nights only. On that particular night the light in the mill was not good. On the occasion in question in going to the wet end of the machine he ran on the floor between the machine and the side of the room. In returning, guiding the paper over and under the driers and felt rolls, necessarily his whole attention was constantly given thereto. He could not look down to see where or on what he was stepping, without great danger of being caught by and drawn into the machine. The jury found in effect that but for the defendant's negligence the unsafe condition would not have existed. The risk was therefore not an ordinary one incident to the plaintiff's employment, but an extraordinary and unusual one which he was not in law obliged to anticipate. He had a right to assume that the master had used due diligence to provide him a suitable place in which to work, and he did not assume the risk of the master's negligence in the performance of that duty. Upon the facts and circumstances shown we cannot say as a matter of law that the plaintiff knew of the unsafe condition, nor that it was so plainly observable that he will be taken to have known of it. The question of the assumption of the risk was therefore for the jury."

It is to be observed that the negligence in this case was not simply in the presence of grease on the running board, but in allowing it to remain there an unreasonable length of time as was indicated by the quantity which had accumulated. Now supposing the plaintiff had known the grease was there, but ignorant that it had been there so long as to make the master negligent, and had known just how its presence affected the safety of the place—just how it increased the hazards of his work—is there any doubt that he would have assumed the risk? The majority says that knowledge of a defect or imperfection, and not merely a dangerous condition, is essential to the assumption of the risk is the doctrine of *Miner v. Franklin County Telephone Co.*, 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195. I cannot see it. It is true that the court in stating the tendency of the evidence several times uses the word "defect"; but, when the rule of law is stated, it is put in these words: "The plaintiff understood that some of his work would be on poles carrying insulated power wires, and he assumed the risks ordinarily incident to such an employment; but this did not include risks which were due to the defendant's want of proper care, unless they

were risks which he knew and comprehended, or risks so obvious that the law would charge him with knowledge or comprehension." The "defect" in this case was the lack of insulation at a point on these wires between which Miner attempted to pass. He did not see that the insulation was off, though he looked. Suppose he had seen that the insulation was off, he knew all about the dangers which this condition would present. Can it be that he would not have assumed the risk? Suppose these wires were utterly bare, and this for the reason that the master had removed the insulation, and Miner, knowing all about the terrible dangers involved, had attempted to pass between them, could he be heard to say: "I knew the wires were bare. I knew that it meant serious injury if I touched one of them, but I did not know the company had removed the insulation"? I think not. Knowing the conditions and appreciating the perils would have charged him with the consequences of his attempt to pass between the wires. Turning, now, from what I insist this court never intentionally said, to what we have said on this important subject, I find that the rule I stand for is by no means unfamiliar.

It was said by Judge Miles, in *McDuffee's Adm'x v. B. & M. Railroad*, 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019, with the approval of every member of this court as now constituted except Judge Munson, who tried the case below, in speaking of a railroad waterspout maintained too near the track: "If it was one of the ordinary risks incident to his employment, it was assumed when he entered the service of the defendant; and if it was an extraordinary one and which he had had an opportunity to ascertain and in fact ascertained and comprehended its dangerous character, and continued in the defendant's service after ascertaining that fact, he also assumed that risk. But we think that the risk was not an ordinary one which he assumed upon entering the defendant's service. It can well be said of this danger, as it was said of a similar structure in the case of *Choctaw, O. & G. R. R. v. McDade*, 191 U. S. 63, 24 Sup. Ct. 25, 48 L. Ed. 96; 'Its maintenance under the circumstances was negligence upon the part of the railroad company.' Existing as it did through the wrong of the defendant, it was an extraordinary risk, and the intestate did not assume it unless he knew and comprehended the danger, or in the circumstances of the case will be taken to have known and comprehended it."

In *Harris v. Bottum*, 81 Vt. 346, 70 Atl. 560, it was said by Judge Tyler, with the approval of Chief Judge Rowell, and Judges Munson and Watson, in speaking of a mangle which was without a guard: "The law is settled that the employé assumes the open and obvious danger incident to the operation of unguarded machinery." This case ap-

proves the rule that while a servant assumes no risk caused by his employer's breach of duty, unless he has knowledge of the dangers thereby caused, and voluntarily continues in the employment, but, if with this knowledge he does continue therein, the increased danger becomes an incident of the service which he assumes, and for any injury resulting therefrom the master is not liable.

It was said by Chief Judge Rowell, in *Fraser v. Blanchard*, 83 Vt. 136, 73 Atl. 995, 75 Atl. 797, with the approval of every member of this court, in speaking of the assumption of risk: "But if the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge of all, and both conditions and the dangers are obvious to the common understanding, and the servant is of full age, intelligent, and of adequate experience, and these elements appear without contradiction, the question becomes one for the court."

I respectfully insist that the case in hand fulfills every requirement of his rule.

In *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887, Judge Stafford, with the approval of Chief Judge Rowell and Judges Munson and Watson, said: "Moreover, one who enters upon a regular employment is presumed to know and appreciate the risks ordinarily incident thereto, and he assumes them. And when, in the course of his employment, a special and obvious risk is presented to him, one not ordinarily incident to the business, he may, as a rule, refuse to accept it, and, if he choose to encounter it, he assumes that also."

In *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097, Chief Judge Rowell, with the approval of Judge Munson, said: "The servant assumes the usual and ordinary risks incident to the business in which he engages; but he does not assume the unusual and extraordinary risks thereof, unless they are, or ought to have been, known and comprehended by him, in which case he assumes those also, whatever they are. When a servant shows that his injury was caused by a danger not usually and ordinarily incident to the business, and which ought not to have existed, and would not have existed had the master performed his duty to him, and of which he neither knew nor was negligent in not knowing, the master is liable."

In *Houston v. Brush & Curtis*, 66 Vt. 331, 29 Atl. 380, Judge Thompson quotes this rule of *Dumas v. Stone* and says it is correct.

In *Dunbar v. C. V. Ry. Co.*, 79 Vt. 474, 65 Atl. 528, Chief Judge Rowell, with the approval of Judges Munson, Watson, and Haselton, said: "But the risk was not an ordinary risk, existing without the fault of the defendant, and therefore assumed by the plaintiff; but an extraordinary risk, as it existed by the fault of the defendant, and therefore was not assumed by the plaintiff, unless he

knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it."

In *Carbine's Adm'r v. B. & R. R. Co.*, 61 Vt. 348, 17 Atl. 491, it was said by Judge Taft: "But a servant assumes no risk caused by his employer's breach of duty, unless he has knowledge of the danger thereby caused and voluntarily continues in the employment. If with this knowledge he does continue, the increased danger becomes an incident of the service which he assumes, and for an injury resulting therefrom the master is not liable. By the acceptance of the service and continuance therein, the servant assumes the hazard incident to obvious and known dangers."

In *Hatch v. Reynold's Estate*, 80 Vt. 294, 67 Atl. 816, Chief Judge Rowell, with the approval of Judges Munson and Watson, said: "Suppose the risk to have been extraordinary, which is most favorable to the plaintiff, the burden was on him to show that he did not assume it; and to do that, it was necessary for him to show that he did not know and comprehend it, and that it was not so plainly observable that the law will charge him with knowing and comprehending it."

In *Bolton v. Oviatt*, 80 Vt. 362, 67 Atl. 881, Chief Judge Rowell, with the approval of Judges Munson and Watson, said: "When the defendant set the plaintiff to holding the cap with his hand, he subjected him to an extraordinary risk, and one that the plaintiff did not assume, unless he knew and comprehended it and how to avoid it, or it was so plainly observable that he will be taken to have known and comprehended it, and how to avoid it; and the burden was on the plaintiff to show nonassumption, we will say for present purposes. But whether he was to be taken to have assumed that risk was an open question, depending upon whether he understood the danger from which his injury resulted."

In *McKane v. Marr & Gordon*, 79 Vt. 13, 63 Atl. 944, Judge Watson, with the approval of the Chief Judge and another member of this court, quoted and approved the rule governing the law of assumption of risk as stated in *McKane v. Marr & Gordon*, 77 Vt. 7, 58 Atl. 721, *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526, and *Dumas v. Stone*, supra, in each of which knowledge and appreciation of the danger is made the sole determining factor.

In *Shattuck's Adm'r v. C. V. Ry. Co.*, 79 Vt. 469, 65 Atl. 529, Chief Judge Rowell, with the approval of every member of the court as now constituted, said: "The case as presented is one of an extraordinary risk, because existing by the fault of the defendant, and therefore not assumed by the deceased unless he had knowledge of it, actual or imputed."

It was said by Judge Hall in *Place v. Grand Trunk Ry. Co.*, 80 Vt. 196, 67 Atl. 545, with the approval of the Chief Judge and Judges Munson and Watson, that an employé "does not assume an extraordinary risk, existing by the fault of his employer, unless he knows and comprehends it, or it was so plainly observable that he will be taken to have known and comprehended it."

It was said by Chief Judge Rowell, in *Drown v. N. E. Tel. & Tel. Co.*, 81 Vt. 358, 70 Atl. 599, with the approval of Judges Munson and Watson, in speaking of the assumption of risk: "The case stands on this question as it stood before, when we held that the risk was not ordinary, and therefore assumed by the plaintiff, but extraordinary, and therefore not assumed by him, unless he knew and comprehended it, or it was so plainly observable that he would be taken to have known and comprehended it."

It is sometimes said that it is better that the law be certain than that it be logical. If this be so, it seems to me that, after this proposition for which I contend has thus repeatedly been asserted by this court, it is about time that it should be considered as settled law.

As we have seen, the doctrine announced by the majority is supported only by one or two isolated cases and a few unguarded dicta. Its importance is very far reaching. The result is apparent. At one stroke of the judicial pen the doctrine of assumption of risk as a practical factor in the law of negligence is eliminated forever; for there will never be found a plaintiff so dull as to admit that he knew that the master's conduct amounted to what the law would hold to be negligence. To require him to know this would be to put upon him the burden of deciding offhand questions which often take this court a year to decide; for the only question involved in many of these cases is the very question whether the master has been negligent. It may be that the doctrine of assumption of risk ought to be eliminated from the law, but I submit that it should be done by legislative and not judicial action.

I should reverse the judgment and render judgment for the defendant to recover his costs.

LYNCH'S ADM'R v. MURRAY.

(Supreme Court of Vermont. Rutland. May 14, 1912.)

1. FRAUDULENT CONVEYANCES (§ 64*)—SUBJECT—"ACTUAL FRAUD."

Decedent, the owner of a farm, being threatened with a suit on a claim for labor which he insisted had been paid, to make himself execution-proof conveyed the land, which was worth \$1,800, to defendant without consideration except that defendant assumed a \$600 mortgage; it being agreed between decedent and defendant at the time that on the

settlement of the claim for labor the property should be reconveyed to decedent. *Held*, that the conveyance was fraudulent as against decedent's creditors, though decedent believed in good faith that he did not owe the claim against him; "actual fraud" meaning fraud according to the common conscience and not according to the idea of the parties to the conveyance.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 159-164, 165; Dec. Dig. § 64.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 157, 158.]

2. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS—FINDINGS OF MASTER.

Where the facts found by the master in an administrator's suit to set aside his intestate's fraudulent conveyance permit no conclusion except that the conveyance was made with fraudulent intent, it will be presumed on defendant's appeal that the court drew that conclusion, supplying thereby a direct finding thereof.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

3. FRAUDULENT CONVEYANCES (§ 84*)—CONSIDERATION.

That the grantee of a farm worth \$1,800 assumed a mortgage thereon worth \$600 did not prevent the conveyance from being fraudulent as to creditors, where it appeared that the conveyance was only made to make grantor execution-proof until a claim against him could be settled, when grantee agreed to reconvey; the assumption of a mortgage being attributed to an intention to give the transaction a fair aspect rather than to make it a conveyance in good faith between the parties.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 214-218; Dec. Dig. § 84.*]

4. FRAUDULENT CONVEYANCES (§ 163*)—ACTUAL FRAUD—INTENT.

An actual fraudulent intention by both grantor and grantee made the conveyance void as against subsequent creditors of the grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 510, 517; Dec. Dig. § 163.*]

5. APPEAL AND ERROR (§ 1017*)—FINDINGS OF MASTER—CONCLUSIVENESS.

A finding of the master, in an administrator's suit to set aside his intestate's fraudulent conveyance, that there was a deficiency of assets when the suit was brought, is conclusive, unless made through a misconception of law and fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. § 1017.*]

6. EXECUTORS AND ADMINISTRATORS (§ 451*)—ASSETS.

In an administrator's suit to set aside his intestate's fraudulent conveyance, it was not necessary for the master to audit the various bills upon which he reported in considering the question of deficiency; he having reported bills for administration and burial expenses to an amount of about twice the assets in the administrator's hands, and it being presumed that he considered the bills reported sufficiently to determine that they were proper and enforceable to an amount which would leave a deficiency in the assets.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 906, 1877-1882; Dec. Dig. § 451.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. EXECUTORS AND ADMINISTRATORS (§ 456*)
—ASSETS—RIGHTS OF ACTION—EXPENSES OF NECESSARY ACTIONS.

The expenses of litigation, including attorney's fees, by an administrator necessary to set aside a fraudulent conveyance under P. S. 2863, authorizing an administrator, if there be a deficiency of assets, to sue to set aside a fraudulent conveyance by a decedent for the benefit of creditors, may be satisfied out of the property fraudulently conveyed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941-1967; Dec. Dig. § 456.*]

8. EXECUTORS AND ADMINISTRATORS (§ 432*)
—ASSETS—ACTIONS TO RECOVER—SETTING ASIDE FRAUDULENT CONVEYANCES — DEFENSES.

The fact that if decedent's executor had accounted for personalty coming into his possession, or if his bondsmen had been sued for failure to do so, there would have been no deficiency of assets, is not a defense to an action by decedent's administrator de bonis non to set aside a fraudulent conveyance by decedent to replenish a deficiency of assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1674-1676; Dec. Dig. § 432.*]

9. EXECUTORS AND ADMINISTRATORS (§ 57*)
—ASSETS—DEFICIENCY.

The amount of debts against decedent's estate is not the only item to be considered in determining whether there was a deficiency of assets so as to authorize the administrator to sue to set aside fraudulent conveyance; the statute providing for the allowance of administration and burial expenses before determining the amount available to pay debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. § 57.*]

10. EXECUTORS AND ADMINISTRATORS (§ 57*)
—ASSETS—DEFICIENCY.

If there be a deficiency of assets at any time during his administration, an administrator may sue, under P. S. 2863, authorizing an administrator to sue to set aside a fraudulent conveyance where there is a deficiency of assets.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. § 57.*]

11. EXECUTORS AND ADMINISTRATORS (§ 57*)
—CONSTRUCTION—LIBERAL CONSTRUCTION.

P. S. 2863, authorizing an administrator in case of a deficiency of assets to maintain a suit to set aside a fraudulent conveyance by decedent, should be liberally construed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. § 57.*]

12. FRAUDULENT CONVEYANCES (§ 312*)
—RELIEF TO DEFENDANT.

Upon setting aside a conveyance as fraudulent against creditors, defendant is not entitled to an allowance because of his disbursements for taxes, insurance, and payments as interest on a mortgage assumed by him; those expenditures being necessary to give a color of good faith to the fraudulent transaction.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 963-965, 967; Dec. Dig. § 312.*]

13. EXECUTORS AND ADMINISTRATORS (§ 450*)
—ASSETS — DEFICIENCY — ACTIONS—ADMISSION OF EVIDENCE.

In an administrator's action to set aside a fraudulent conveyance by decedent brought

on the ground that there was a deficiency of assets, the files in a prior action, brought by decedent and continued by his executor and administrator to set aside the conveyance, were admissible in evidence as showing the nature and extent of that litigation and the amount of attorney's fees and administrator's charges in connection therewith, covering a period of six years during such prior litigation and showing the occasion of such fees and delays.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1858-1876; Dec. Dig. § 450.*]

14. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS.

In absence of a showing to the contrary, it may be fairly presumed that the master used evidence only for the purpose for which it was properly admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

15. EVIDENCE (§ 578*)—EVIDENCE ON FORMER TRIAL—DEATH OF WITNESS.

In an administrator's action against the grantee in a fraudulent conveyance by decedent to have it set aside in order to supply an alleged deficiency of assets, evidence of the testimony of decedent in a former suit, brought by him against the grantee to set aside the same conveyance, was admissible; defendant having claimed in both cases that the conveyance was in good faith, and there having been adequate cross-examination on that question in the former case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2411; Dec. Dig. § 578.*]

16. APPEAL AND ERROR (§ 1078*)—PRESENTATION BELOW—ADMISSION OF EVIDENCE.

Only the grounds of objection and exception to the admission of evidence both made below and relied on in appellant's brief may be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

17. EVIDENCE (§ 578*)—EVIDENCE ON FORMER TRIAL—DEATH OF WITNESS.

It is sufficient, to admit in evidence testimony taken at a former trial, where the witness is dead at the subsequent trial, that the issues were substantially the same so that the cross-examination was adequate in the former trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2411; Dec. Dig. § 578.*]

18. EVIDENCE (§ 200*)—ADMISSIONS OF DEFENDANT.

Evidence of defendant's admissions, whether in a former trial or out of court, is admissible against him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 684-686; Dec. Dig. § 200.*]

19. APPEAL AND ERROR (§ 926*)—PRESUMPTION.

It is presumed on appeal that evidence was offered and received on the ground on which it was admissible, in the absence of a showing that it was admitted on other ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2869, 3729, 3730, 3735-3747; Dec. Dig. § 926.*]

Appeal in Chancery, Rutland County; Zed S. Stanton, Chancellor.

Bill by Thomas Lynch's administrator against William Murray to set aside a con-

veyance by Lynch as in fraud of creditors. From a decree for plaintiff, defendant appeals. Affirmed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Charles L. Howe, for orator. M. C. Webster, for defendant.

HASELTON, J. This is a bill in chancery brought by the administrator de bonis non of the estate of Thomas Lynch. The bill is founded on P. S. 2863, which authorizes an executor or administrator, where there is a deficiency of assets, to maintain a suit to set aside a fraudulent conveyance made by the deceased person whom he represents. The conveyance in question was made by Thomas Lynch to William Murray, the defendant, June 20, 1898. The case was heard on bill, answer, master's report, and defendant's exceptions thereto, and on the defendant's motion for a decree in his favor, and it was decreed that the conveyance in question is void as to the creditors of Lynch and of his estate to the extent of the deficiency of the assets of the estate to pay such creditors. There were further provisions in the decree the propriety of which, except as herein noticed, is not questioned, provided the decree, so far as above recited, was rightly made. The decree is in substantial conformity with that directed by this court in its mandate in the well-considered case of *McLane v. Johnson*, 43 Vt. 48. *Murray*, the defendant, appeals.

It is claimed by Murray that it does not appear by the report that the conveyance to him was made with an actual fraudulent intent on the part of Lynch. It appears from the report that Lynch had owned and occupied the farm for about 10 years before the conveyance in question; that during most of that time, a period of about 10 years, he had kept in his family one McCabe, who had left shortly before the conveyance, and who claimed that there was due to him from Lynch a large sum on account of labor done by the former for the latter; that McCabe threatened to bring suit on such claim; that Lynch hearing of the threatened, or contemplated, action of McCabe consulted his close friend Murray as to what should be done under the circumstances; that the two called upon a third person to draw the deed in question; and that, after it had been properly executed, Lynch delivered it to Murray, and Murray took it and had it recorded. The farm was then worth \$1,800. It was unincumbered except by a mortgage of \$600. There was no consideration for the deed of Lynch's equity of redemption, but Murray assumed the comparatively small mortgage. Lynch believed that he had more than paid McCabe and that the latter's claim was unfounded and unjust, but feared that the lat-

ter might obtain a large judgment on his claim, and he gave the deed for the purpose of so transferring the apparent title to the property that it could not be reached in execution by McCabe. Lynch told Murray that McCabe had been more than paid, and it was agreed between Lynch and Murray at the time of the giving of the deed that on settlement of the McCabe claim the property should be deeded back to Lynch.

[1] The master does not in terms find that the conveyance was fraudulent, but the facts found as above stated are equivalent to a finding that the conveyance was actually fraudulent; for, as has well been said, actual fraud means "fraud according to the common conscience." And it is that conscience, and not Lynch's or Murray's, which determines the character of this conveyance. *Bigelow*, *Fraudulent Conveyances* (Knowlton's Ed.) 1, 444. Even though Lynch did not believe that he owed McCabe, it was the latter's right, if he thought otherwise, to bring suit and have his rights determined, not by the judgment of Lynch, but by the judgment of the court, and it was the duty of Lynch, so far as his property not exempt would enable him, to satisfy any such judgment, and so the conveyance was made with the fraudulent intent of defeating the right of McCabe and of avoiding the duty of Lynch, and was an actual fraud upon one who, as was contemplated, might become a judgment creditor in consequence of claims existing at the time of the conveyance. *Foster v. Foster*, 56 Vt. 540; *Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976; *Kimball v. Thompson*, 4 Cush. 441, 447, 50 Am. Dec. 799; *Rogers v. Evans*, 3 Ind. 574, 56 Am. Dec. 537.

With great good sense, the Statute of Elizabeth counted as fraudulent conveyances which tended "to the let or hindrance of the due course and execution of law and justice." 13 Eliz. c. 5, cl. 1.

To say that fears of an unjust judgment against Lynch affected the character of the transaction would be much like saying that a mob is justified in hanging or burning one charged with crime because of apprehensions that a court of law will unjustly acquit him.

[2] It is further claimed by Murray that there is no finding in the report that he had any fraudulent intent in taking the deed, and that he must be considered as an innocent grantee. But the facts above stated permit but one conclusion; that is, that he was in collusion with Lynch; that he took the deed in furtherance of the fraudulent intent of Lynch and for the purpose of effectuating it. It is therefore to be presumed that the trial court drew that conclusion. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557; *Johnson v. Paine*, 84 Vt. 84, 78 Atl. 732; *Perkins v. Perley*, 82 Vt. 524, 74 Atl. 231.

We have then a case of a conveyance given by the grantor and taken by the grantee with the actual fraudulent intent on the part

of both of defeating such existing claim, if any, as McCabe might succeed in establishing through regular proceedings in a court of justice.

[3] The defendant claims that this was not a voluntary conveyance, on the ground that Murray assumed to pay the mortgage on the farm. As we have seen, the farm at the time of the conveyance was worth \$1,800, the mortgage was \$600, and nothing was paid for the valuable equity of redemption. This could be levied upon by creditors, and its alienation without consideration was within the statute. The circumstance of the assumption of the mortgage, and other circumstances connected therewith, do not tend to relieve the transaction of its fraudulent character in view of the fact that it was agreed between the parties that, when the McCabe claim was put out of the way, the property should be deeded back to Lynch. In view of that agreement, the assumption of the mortgage seems to have been intended rather to give a fair aspect to the fraud than to make the transaction bona fide. *Bigelow, Fraudulent Conveyances* (Knowlton's Ed.) 39, 122; *Spencer v. Caverhill* (Iowa) 133 N. W. 450, 453; *First National Bank v. Bertschy*, 52 Wis. 438, 9 N. W. 534; *Lyon v. Haddock*, 59 Iowa, 682, 13 N. W. 737; *Randall v. Vroom*, 30 N. J. Eq. 353; *Stutson v. Brown*, 7 Cow. 732; *Welcome v. Batchelder*, 23 Me. 85.

As the parties to the fraud had contemplated, McCabe brought suit against Lynch and caused the property which the deed attempted to convey to be attached as the property of Lynch. Negotiations for a settlement of the claim were had, and during the negotiations it was represented to McCabe, and by Murray, who took part therein, that an execution against Lynch would be worthless for the reason that the deed in question was valid. During the first term of court after the bringing of McCabe's suit, it was agreed between McCabe and Murray, the defendant, that McCabe should have \$75 and costs of the suit in settlement thereof, and that if the agreement was not carried out during that term of court McCabe should have judgment for that amount. The agreement was not kept. McCabe took his judgment and levied execution on personal property mentioned in the deed. This personal property we have not before referred to; but the deed attempted to convey personal property to the value of \$500, in addition to the real estate. McCabe having levied on this personal property, Lynch requested Murray to pay the execution, and Murray, by agreement with Lynch, attended the execution sale and bid off the personal property in one lump for \$102, which was just enough to pay the amount of the execution with costs. This sum Murray paid to the sheriff. The claim of McCabe having been thus disposed of, Lynch asked Murray to reconvey to him the property in question, and offered to pay the latter what might be due

him in settlement. But Murray declined to settle or reconvey. Thereupon Lynch brought a bill in chancery to have the deed in question set aside. Murray filed an answer, and the case was referred to a special master, who made and filed a report. In the meantime Lynch had died and his executor had entered to prosecute. Before the matter was disposed of in the court of chancery, the executor died. Thereafter the administrator, who prosecutes this suit, was appointed and entered to prosecute the former suit. He filed an amended bill, which was demurred to on the ground that it sought "to bring upon the record new matter repugnant to and inconsistent with that set forth in the original bill and substantially constituting a new bill." The court of chancery sustained the demurrer and dismissed the bill. An appeal was taken to this court, where the decree of the court of chancery was affirmed and the cause remanded with leave to the administrator to make further application if he desired. No application was made, and on motion of the defendant an order was filed dismissing the bill.

Thereafter this bill was brought. It is founded on P. S. 2863, which, as has been said, gives an administrator, where there is a deficiency of assets in his hands, the right to bring suit, for the benefit of creditors, to set aside a fraudulent conveyance made by the decedent. The defendant claims that the bill does not allege the requisite fraudulent intent on the part of Lynch. The bill alleges substantially the facts already stated herein as found by the master, and while the bill asserts that the wickedness was all on the part of Murray, and that Lynch acted in good faith, this is a conclusion which the facts alleged will not permit, for the facts alleged and the facts found by the master permit only one conclusion, and that is that the conveyance was made with a fraudulent intent on the part of both grantor and grantee in respect to such right as McCabe might establish and in respect to any debt and duty owing to McCabe which he might establish by the judgment of the courts. *Blenkinsopp v. Blenkinsopp*, 1 De Gex. M. & G. 495; *Foster v. Foster*, 56 Vt. 540.

The defendant claims that the bill is insufficient in other respects, all of which we have examined, and with reference to these claims it is enough to say that this case does not stand on demurrer.

[4] The actual fraudulent intent on the part of both Lynch and Murray rendered the conveyance void as against subsequent creditors. *McLane v. Johnson*, 43 Vt. 48; *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429; *Corey v. Morrill*, 71 Vt. 51, 42 Atl. 976.

The commissioners on the estate of Thomas Lynch appraised the personal property at \$455.75. On this personal property there were, however, two mortgages to secure J. E.

Manley for signing an injunction bond in the suit brought by Lynch v. Murray, for costs and for attorney fees in that suit, and for money Manley might pay out for Lynch. Manley brought the suit last referred to, and conducted the litigation in the lifetime of Lynch. Manley is dead. His administratrix is beyond the jurisdiction of the court, and, so far as appeared, the orator could not show what his charges against Lynch were. Manley was Lynch's executor and after his death the administrator de bonis non attempted to get an accounting with Manley's administratrix but was unable to do so and he has received nothing from that source. It appeared that there were no known assets that could be recovered except the sum of \$32, due from one Newton, which he is willing to pay. As already stated, Manley's administratrix is beyond the jurisdiction of the court. The administrator could get no trace of any personal property belonging to Lynch's estate except that which went to Newton out of which the obligation to pay \$32 arose. The administrator has received from all sources \$442 and has paid out \$73.24, leaving a balance in his hands of \$368.76.

On the other hand, the costs taxed against him in the suit begun by Lynch against Murray amount to \$79.58. He claims for services as administrator the apparently moderate sum of \$30 a year, but at this rate his total claim is \$180. Charles L. Howe, Esq., and the estate of Col. Baker have, against the Lynch estate, bills of the amount of \$272.88, for services rendered the administrator in carrying on to determination the suit begun by Lynch in his lifetime. Mr. Howe has a further bill of \$75 rendered the administrator in contesting a claim of \$574 made by one Delia Mitchell, the housekeeper of Lynch, against the estate. This claim was disallowed by the commissioners but is pending on appeal. The commissioners allowed claims against the estate, unappealed from, to the amount of \$264.24. The burial expenses were an additional sum of \$60.25.

[5] The master reports that, if it is for him to find how the fact is, he finds that at the time this suit was brought there was a deficiency of assets. The question was a mixed one of law and fact, and his finding in that regard governs unless he arrived at it through some misconception of the law.

[6] Our statutes provide that, when the assets of an estate are insufficient the necessary expenses of administration shall first be paid, and next the necessary funeral expenses. It was not necessary for the master to audit the various bills upon which he has reported. To do that pertains more properly to the probate court. He has reported bills for administration expenses and burial expenses to the amount of about twice the assets in the hands of the administrator, and

it is to be presumed that he so far considered these bills as to determine that they were proper and enforceable to an amount which would not leave in the hands of the administrator funds with which to pay the claims allowed by the commissioners against the estate of Lynch, to say nothing of the claim disallowed and pending on appeal. So there was a deficiency of assets to meet the claims of the creditors of Lynch.

[7] The case is so argued that it seems proper to refer to the question of whether the expenses of maintaining this suit, including attorney's fees, can be satisfied out of the property fraudulently conveyed. Such expenses and fees cannot be considered in determining whether there was a deficiency of assets at the time when the suit was brought, and it is clear from the report that the master did not consider them upon that question. But since the statute makes it the right and the duty of an administrator to bring a suit of this sort where there is a deficiency of assets, it by necessary inference contemplates that a fraudulent conveyance shall be set aside so far as to provide for the expense of the litigation necessary to set it aside. If an administrator, finding a deficiency of assets, must conduct, at his own expense, the litigation necessary to set aside a fraudulent conveyance, then the law is farcical. But, of course, it contemplates nothing of the sort, for the right to satisfy the expenses of the necessary litigation out of the property fraudulently conveyed is an incident to the right to institute and carry on the litigation.

[8] The defendant urges that if Manley, Lynch's executor, had accounted for the personal property which came into his possession, there would have been no deficiency of assets; but the law does not consider any nice question of priority as between wrongdoers, and, the master having found that there is a deficiency of assets in the hands of the administrator, Murray cannot retain the advantage of his fraud in reliance upon the misdoings of Manley. It is urged that Manley gave a bond as executor to the amount of \$1,000, and that there is no finding that it cannot be recovered on. And the master, in fact, reports that it did not appear whether or not the bondsman is or is not good for the amount of the bond. But this is immaterial, for the liability of the bondsman is not in any proper sense an asset of the estate, and the law will not compel resort to an innocent bondsman for the purpose of securing a fraudulent grantee in his holding of the ill-gotten assets of an estate.

[9] The defendant says that the commissioners' allowance of \$264.24 as the amount of debts against Lynch's estate is the only sum for consideration on the question of deficiency of assets. But such claim ignores our statute providing for administration ex-

penses and burial expenses before the determination of the amount available in payment of the debts allowed by commissioners.

[10] The defendant claims that he was entitled to a judgment in his favor on the ground that there was not a deficiency of assets at the time of the death of Lynch. But the statute, fairly construed, gives the administrator a right in behalf of creditors to have fraudulent conveyances set aside if at any time during his administration there is a deficiency of assets.

[11] A statute like that under consideration is to be liberally construed, and ever has been so construed, and the principles of the common law are adequate to a salutary interpretation and application of such a statute. *Twyne's Case*, 3 Coke, 80b; *Lord Mansfield in Cadogan v. Kennett*, 2 Cowp. 434.

[12] The defendant argues that the decree makes no provision for protecting him on account of his disbursements for taxes on the property, for insurance, and for money paid as interest on the \$600 mortgage; but he is entitled to no protection on account of these payments. It was necessary for him to make those disbursements to give color of good faith to a transfer which was in fact fraudulent, and equity will not aid him in securing reimbursement for his expenses incurred for the purpose of defeating justice and concealing a fraud.

The defendant excepted to the report of the master on various grounds. We proceed to consider those which are relied on in his brief. He claimed, and claims, that there was no evidence to warrant a finding that the deed was without consideration, asserting that the assumption of the mortgage by him was a sufficient consideration. The finding tells all about the assumption of the mortgage, and amounts to a finding that the deed was without consideration unless the assumption of the mortgage was a consideration. The finding lays before the court the fact upon which the defendant relies, and that is enough. The legal effect of that fact we have already considered.

[13] The master received in evidence the files in the case brought by Lynch and carried on by his executor and by the plaintiff as administrator de bonis non. These files were offered as a part of the petition, they being referred to therein, as evidence of the nature, character, and extent of that litigation, and as showing that the question of a fraudulent conveyance was *res judicata*. It is claimed that they were not admissible unless the former case is here *res judicata*, and that it is not because that was a case between the grantor and the grantee, while in this the administrator represents the creditors. But the files, in the former case, were admissible as showing the nature and extent of the original litigation, for it was important on the question of attorney's fees and the administra-

tor's charges, covering a period of six years. to know the occasion of such fees and charges and delays. The master nowhere indicates that he treated the former case as *res judicata*, and the defendant in another part of his brief seems to recognize the situation in this respect, for in speaking of the former case he says, "The judgment of the court in that case is not *res judicata* in this, even if the court so found."

[14] The fair inference is that the master used the evidence only for the purposes for which it was admissible. *State v. Intoxicating Liquor*, 82 Vt. 287, 296, 73 Atl. 586; *Limerick Bank v. Adams*, 70 Vt. 132, 141, 40 Atl. 166; *State v. Spaulding*, 61 Vt. 506, 17 Atl. 844.

[15, 16] The orator called as a witness F. S. Platt, Esq., who as master had heard the former case, and introduced in evidence, by his testimony, the substance of what Lynch had testified to before him. The grounds of objection and exception both made below and relied on in the defendant's brief, and none others, are considered. *Dugan v. Heaphy*, 85 Vt. —, 83 Atl. 726. These grounds are that the former case involved an entirely different cause of action, and that the defendant was deprived of the right of cross-examination, and that so, though Lynch is dead, his testimony as a witness in the former case cannot be used here. With reference to these questions the defendant cites and relies upon sections 1386 and 1387 of Wigmore's Treatise.

[17] The rule as to the substantial identity of parties and issues is well stated and fortified in the sections referred to, and the real point of the rule is there thus expressed: "It is sufficient if the issue was the same, or substantially so, with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law." The author proceeds: "The general rule in this shape is nowhere disputed. But there is naturally much variance shown in the strictness of its application in specific cases. It is enough to suggest that the situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality. On the whole, the judicial rulings show a liberal inclination to receive testimony already adequately tested."

We think that the above quotation is a satisfactory statement of the law, and it is, as Wigmore shows, well sustained by authority. In section 1388 of his work, Prof. Wigmore goes on to say that it is sometimes claimed that the rule, in cases where the doctrine of *res judicata* is invoked, is the true rule in respect to the use of testimony taken in a former case; but he shows by reason and abundant authority that the niceties of the rule of *res judicata* do not

determine the admissibility of the evidence formerly given, but that its admissibility depends upon whether the party against whom it is used had in the former case adequate opportunity and motive for sifting the testimony by cross-examination.

Judged by this test, the evidence given by Lynch in the former case was admissible here, for in both cases the claim of the defendant, Murray, was that the conveyance was in good faith, and his motives and opportunities in the former case were adequate to a cross-examination such as he might have desired.

True, this case asserts a new equity, growing out of the deficiency of assets, an equity so distinct from that asserted in the original bill that it could not be introduced by way of amendment. Lynch's Adm'r v. Murray, 81 Vt. 97, 69 Atl. 133.

But this new equity leaves untouched the fraud charged upon Murray which in both answers he repels in substantially the same language. To determine the admissibility of Lynch's former testimony, it was necessary to refer to the files in the former case, and this necessity furnishes an additional reason why it was proper for the master to receive and examine those files.

[18] The orator introduced evidence as to what the defendant had testified to in the former case. This testimony was received

under objection, and the report is excepted to for error in that regard, on the ground that the parties and issues here and there are different. But this exception requires no discussion.

[19] Murray being a party here, his admissions made elsewhere, whether in or out of court, were evidence in chief against him, and it is to be presumed that the evidence was offered and received on the ground that it constituted an admission.

The report is excepted to for claimed error on the part of the master in receiving the testimony of the administrator as to his charges and as to bills presented him for legal services. The claims in this regard are that these items could not be considered on the question of deficiency of assets, that such deficiency must be determined as of the date of the death of Lynch, since the suit is for the benefit of Lynch's creditors. But we have already shown how these matters were necessary and proper for consideration in order to the determination of the sufficiency of assets left available for the creditors of Lynch.

Propositions made in the defendant's brief and not here particularly noticed are met by the foregoing rulings. Some minor facts have not been mentioned because of their immateriality.

Decree affirmed, and cause remanded.

CATLOW v. WHIPPLE.

(Supreme Court of Rhode Island. July 6, 1912.)

GARNISHMENT (§ 56*)—BANK DEPOSIT—OWNERSHIP OF FUND.

Where a savings bank deposit is in the name of husband or wife, "or the survivor of them," and it was shown that one-half of the deposit belonged to each, only such proportion thereof was subject to garnishment in an action against the husband.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 110-111; Dec. Dig. § 56.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by J. H. Catlow against W. O. Whipple. From an order charging the Providence Institution for Savings, as garnishee, to the extent of one-half of the deposit, plaintiff brings exceptions. Affirmed.

Hugh J. Carroll, of Pawtucket, for plaintiff. Fitzgerald & Higgins, of Providence, for defendant.

PER CURIAM. The case being before the presiding justice of the superior court upon motion to charge the garnishee, the Providence Institution for Savings, and it appearing that there was on deposit in said institution at the time of service of the writ the sum of \$1,585.71, standing in the names of "Walter O. Whipple, or Kate Whipple, or the survivor of them," the question arose whether the garnishee was chargeable for the whole, or only for one-half, of the sum so on deposit. Upon the evidence of the defendant Whipple and his wife, Kate Whipple, the presiding justice found that one-half of the sum belonged to Kate Whipple and one-half to the defendant, and charged the garnishee for one-half the sum on deposit, to wit, \$792.85. To this decision the plaintiff excepted.

We find no error. The evidence supports the decision that one half of the money belonged to Kate Whipple, and the other half to the defendant, Walter O. Whipple.

The plaintiff's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment charging the garnishee as decided by the presiding justice.

CAREY v. DAVIDSON.

(Supreme Court of Rhode Island. July 6, 1912.)

APPEAL AND ERROR (§ 1005*)—VERDICT—CONCLUSIVENESS.

A verdict, supported by evidence and approved by the trial court, will not be disturbed on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Action by William T. Carey against John Davidson. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and case remitted, with direction to enter judgment.

Edward M. Sullivan, of Providence, for plaintiff. Henry D. Glendinning and Joseph McDonald, both of Providence, for defendant.

PER CURIAM. There was ample evidence before the jury to sustain the counts of the declaration based upon alleged trover and conversion, and to support the verdict of the jury for the plaintiff. The defendant's motion for a new trial was denied by the justice, who tried the case and heard the evidence. We find no error in the act of the trial judge in denying the motion for a new trial.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter its judgment for the plaintiff upon the verdict.

SANITARY OYSTER CARRIER & COMMISSION CO. v. WM M. MERWIN & SONS CO.

(Supreme Court of Rhode Island. July 6, 1912.)

APPEAL AND ERROR (§ 70*)—FINAL DECISION—DEMURRER TO COMPLAINT—SEPARATE COUNT—RIGHT OF REVIEW.

Gen. Laws 1909, c. 298, § 24, provides that exceptions to decisions or rulings prior to trial shall be open to revision after verdict or final decision on the merits, but so far only as it appears to the Supreme Court that the verdict or final decision has been erroneously affected thereby. *Held* that, where a demurrer was overruled as to the first three counts of plaintiff's declaration and sustained as to the fourth, such ruling as to the fourth count could not be reviewed on exceptions prior to trial and final decision on the merits, though such fourth count alleged a distinct and separate cause of action from those charged in the other counts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-385; Dec. Dig. § 70.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by the Sanitary Oyster Carrier & Commission Company against the Wm. M. Merwin & Sons Company. From an order sustaining a demurrer to the fourth count of the plaintiff's declaration, it brings exceptions. Dismissed.

Murdock & Tillinghast, of Providence (John A. Tillinghast, of Providence, of counsel), for plaintiff. Tillinghast & Collins, of Providence (James C. Collins, of Providence, of counsel), for defendant.

PARKHURST, J. The plaintiff filed a declaration in assumpsit for breach of a contract in writing, in four counts, to which the defendant demurred. The demurrer was overruled, in the superior court, as to the first three counts, and was sustained as to the fourth count. Thereupon the plaintiff excepted to the decision of the court in sustaining the demurrer to the fourth count, and has brought its bill of exceptions to this court, although there has been no "verdict or final decision on the merits."

Plaintiff claims that it should be heard in this court on its exceptions, because it is apparent on the face of the declaration that the fourth count sets forth a distinct and separate cause of action from those set forth in the other counts, and that it might have brought a separate suit thereon, and that therefore the decision sustaining the demurrer to the fourth count is in effect a "final decision," which will prevent it from offering testimony at the trial on the claim for future profits set up in the fourth count, and that it ought to be allowed to have the question of the sufficiency of the fourth count settled before it goes to trial on the whole declaration, so that all its lawful claims may be tried at once; otherwise, if it tries only its claims on the first three counts, it may still be entitled to another trial on the fourth count, in case it shall be finally determined in this court that its fourth count sets up a good cause of action.

But the matter involved here is a question of the jurisdiction of this court under Gen. Laws R. I. 1909, c. 298, § 24 (which is a re-enactment of C. P. A. § 497), and which reads as follows: "Sec. 24. Exceptions to decisions or rulings prior to trial shall be open to revision after verdict or final decision on the merits, but so far only as it appears to the Supreme Court that the verdict or final decision was erroneously affected thereby." The decision of the superior court on the demurrer to the fourth count was a "decision prior to trial," and we are of the opinion that it cannot, under the statute quoted, be brought up on exception to this court until "after verdict or final decision on the merits," inasmuch as our jurisdiction is controlled by the plain terms of the statute.

The argument, that the fourth count is in effect a separate and distinct suit, would apply equally well in all cases where there are several counts, some of which are held to be good and others bad on demurrer, because in legal theory each count in every declaration is in effect a separate and distinct suit upon a different cause of action; otherwise, there would be no force in the practice of filing more than one count in a declaration. In the case of *McDonald v. Providence Telephone Co.*, 27 R. I. 595, 65 Atl. 266, it appears from the papers in the

case that a similar decision was made sustaining a demurrer to the second count of the declaration, and the plaintiff brought his bill of exceptions to the decision, and it was held that the bill of exceptions was prematurely preferred, because there had been no verdict or final decision on the merits, as required by C. P. A. § 497.

Under the law, as it now stands, we are of the opinion that this court has no jurisdiction to hear the exceptions at this stage of the case; and the plaintiff's bill of exceptions is dismissed without prejudice, and the case is remitted to the superior court for further proceedings.

McISAAC v. WOONSOCKET ELECTRIC MACHINE & POWER CO.

(Supreme Court of Rhode Island. July 2, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the wrongful death of a lineman, evidence held insufficient to charge the master with negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RULES.

Where a lineman in the employ of an electric company knew its rule requiring all persons working on wires to quit work from 10 minutes before until 10 minutes after 4, allowing the company time to test its wires, and did not understand that the assurance that a wire he was working on would remain dead suspended that rule, he was guilty of contributory negligence for failure to observe the rule.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Mary McIsaac against the Woonsocket Electric Machine & Power Company. There was a judgment for plaintiff, and defendant excepts. Reversed and remanded.

Bliss & Walsh, of Providence, for plaintiff. John J. Heffernan and James H. Rickard, Jr., both of Woonsocket, for defendant.

PER CURIAM. This is an action on the case for negligence, and comes to this court upon the defendant's exceptions, after verdict for the plaintiff, including an exception to the denial of the defendant's motion for a new trial by the trial court.

[1] The plaintiff's intestate was a lineman in the employ of the defendant company. He was a man of experience in his particular vocation. On the afternoon of the accident he was directed, with another employé named George L. Drury, to proceed to the corner of Rathbun and East School streets for the purpose of changing a mast

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

arm and lamp from an old to a new pole. Upon the pole at this point the defendant maintained two arc lamp wires, which were, for convenience, designated as No. 1 and No. 2. The work required was upon line No. 2. At about 4 o'clock in the afternoon, while the plaintiff's intestate and Drury were engaged in the work, they being at the time on different poles, the plaintiff's intestate received an electric shock from which he died.

The defendant company tested its wires at 4 o'clock in the afternoon. It was the well-established rule of the company that all linemen should quit the wires at 10 minutes before 4, and remain away from them until 10 minutes after 4. This rule was well understood by both the plaintiff's intestate and Drury. Another rule of the defendant company required that, when workmen were engaged upon any particular line, such line should be tagged at the switchboard, and that during the time the tag remained in place the electric current was not to be turned onto that wire.

The plaintiff claims that her intestate, before going to the locality in question, received assurance that during the work upon wire No. 2 that wire would remain "dead." The testimony shows that wire No. 2 was tagged at the switchboard, on the afternoon of the accident, and remained so tagged until after plaintiff's intestate had met his death. Wires Nos. 1 and 2 were in very close proximity. Wire No. 1 was tested at 4 o'clock, as usual, and found to be defective, and thereupon it was also tagged. The testing of the wire No. 1 and the finding of an obstruction were apparently coincident with the electrocution of the plaintiff's intestate, and inasmuch as this same wire was, later in the day, put into use without further attention, it reasonably follows that the obstruction existing at 4 o'clock must have been due to some contact or connection on the part of McIsaac.

There is no testimony that there was any current upon wire No. 2 during the afternoon of the accident, but there is positive testimony that no current was turned upon that wire. McIsaac, in the performance of his work, was seated on the cross-arm with some wire in contact with his leg and hip. There is some conflict of testimony as to whether McIsaac, at the time of the accident, was working upon No. 1 or No. 2 wire; but in our view of the case we may assume, in accordance with the plaintiff's contention, that he was working on No. 2 as he had been directed.

Under these conditions we think that the plaintiff has failed to show any negligence on the part of the defendant. There was no negligence in testing the No. 1 wire at 4 o'clock. The test showed that there was some trouble with the circuit, and this discovery was made at about the time, proba-

bly the exact time, when McIsaac received his shock. The situation of McIsaac in close proximity to wire No. 1, and his carelessness in permitting some wire to remain in contact with his leg and hip, furnishes the basis for the only reasonable conclusion—that he must have come in contact or connected with wire No. 1 during its temporary "life" at the time of the test. This conclusion is materially aided by the undisputed testimony that no current was turned on No. 2 that afternoon.

The plaintiff's declaration is in two counts. The case went to the jury on the first count only, which alleges, in substance, that while the plaintiff's intestate was working upon an arc lamp wire of the defendant, having been informed that said wire was not transmitting power, the defendant "caused the electric current to be turned into said wire," whereby the plaintiff's intestate was killed. We do not think that the plaintiff's testimony has sustained this allegation.

[2] There is also some conflict of testimony as to whether the plaintiff's intestate, before going to do the work, received an assurance that line No. 2 would remain "dead." Assuming that he did receive such assurance, it is not apparent, from the testimony, that it was designed or intended to supersede or temporarily suspend the well-established and well-understood rule that the lines would be tested at 4 o'clock in the afternoon, and that for a period of 10 minutes, both before and after said hour, all line work should be abandoned. On the contrary, it appears that both McIsaac and Drury regarded the rule as still in force, for the latter in his testimony says that they failed to observe this rule on this particular day because they did not keep track of the time, and that that was the first and only time during his connection with the defendant company when the rule was not obeyed. The failure of the plaintiff's intestate to observe this rule, through a failure to notice the time, would amount to contributory negligence on his part.

The defendant's eighteenth exception is sustained.

In this view of the case, it will be unnecessary to consider the other exceptions, and they are accordingly overruled.

The case is remitted to the superior court, with direction to grant a new trial.

CENTREVILLE NAT. BANK OF WARWICK v. INMAN.

(Supreme Court of Rhode Island. July 6, 1912.)

1. JUDGMENT (§ 163*)—DEFAULT—MOTION TO VACATE—MERITS.

Where, in an action on a note, defendant, sued as joint maker, was defaulted, and on application to take off the default claimed a defense, in that he never signed the note on its

face, but became guarantor only, nearly two years after the note was given, it was error for the court to pass on the question whether such defense would prevail on a trial in the determination of the motion to open the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

2. JUDGMENT (§ 162*)—DEFAULT — APPLICATION TO OPEN—MERITS—COUNTY AFFIDAVITS.

On an application to open a default judgment, the court will not hear counter affidavits on the merits, or examine into the truth of the allegations of defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 319-322; Dec. Dig. § 162.*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by the Centreville National Bank of Warwick against Charles M. Inman. From an order refusing to take off a default, defendant brings exceptions. Sustained and remitted, with directions.

Archibald C. Matteson, of Providence, for plaintiff. John P. Beagan and Joseph J. McCaffrey, both of Providence, for defendant.

PARKHURST, J. The defendant was defaulted in the superior court under the following circumstances: The suit was brought August 1, 1911, and made returnable August 15, 1911. The defendant employed an attorney, who seasonably entered his appearance for defendant on August 9, 1911; and said attorney was, upon his request, duly excused from further attendance on the superior court from August 9 to September 15, 1911, and went away on a vacation and did not plead to the action within the time fixed by statute. While he was away, notice of motion by plaintiff's attorney to take judgment by default was left at his office, but not received by him, and default was taken September 2, 1911, before a justice other than the one who excused the attorney. Upon the return of the defendant's attorney in September, he immediately moved to take off the default, and a hearing was had before the presiding justice of the superior court, who heard evidence upon the question whether the defendant had a defense to the action, as a condition precedent to taking off the default and allowing the defendant to plead to the action and proceed to trial.

From the transcript of the proceedings at this hearing, it does not appear that the question of the absence of the defendant's attorney on vacation and of his being excused by a justice of the court, or that this was a valid excuse for not pleading to the action, was questioned, or that any question was considered, other than to find out whether the defendant had a defense to the action; it being conceded by the justice at the hearing that he would take off the de-

fault and allow the defendant to plead and go to the jury, if he could see any reasonable defense. But after hearing evidence from the defendant, and also from the cashier of the plaintiff bank, the justice decided that there was no reasonable defense, and refused to take off the default. To this decision the defendant took exception, and the case is now before this court upon this exception.

It appears that the note, upon which suit was brought, was originally for \$1,200, dated July 2, 1904, to the order of the plaintiff, payable six months after date. It bears upon its face the signatures of Daniel E. Sullivan and D. Lebane, and also the name Charles M. Inman; but Mr. Inman says he never saw the note until June 30, 1906, when he admits that he signed his name on the back of the note, under the words "June 30, 1906, I hereby guarantee the payment of this note." He denies that he ever saw the note before this latter date; but he is not certain whether he did, or not, place his name on the face of the note at this time. The cashier testified that he saw Mr. Inman sign the note in both places; but he does not give the date at which he claims it was signed on its face, nor does he offer any explanation why the defendant, if he was a joint and several maker, should have signed a guaranty on the back of the note, or why, if he was a guarantor, he should have signed on the face of the note, as a joint and several maker. We think the note itself indicates that the signature of Charles M. Inman was placed thereon in different ink and probably at a different time from the other signatures; and it appears that the claim of Mr. Inman is that he had nothing to do with the note when it was given, and knew nothing of it till nearly two years after its date, when he admits that he guaranteed it. The declaration simply declares against Mr. Inman as a maker of the note, and so as primarily liable, but contains no count against him as a guarantor.

[1, 2] Under the circumstances, we think that the defendant should have been permitted to go before a jury and make his defense on the question whether or not he was a maker of the note; he being sued only as maker, and not as a guarantor. In the matter of motions to take off defaults, where the question whether the defendant has a defense on the merits is involved, it has been frequently held that the court hearing the motion will not seek to determine whether the defense claimed will prevail on a trial. *Excise Com'rs v. Hollister*, 2 Hilt. (N. Y.) 588; *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 905. Nor will the court, on the motion, hear counter affidavits on the merits, or examine into the truth of the allegations of defense. 6 Encyc. Pl. & Pr. 188, and cases cited; *Francis v. Cox*, 33 Cal. 325; *Gracier v. Weir*, 45 Cal. 53; *Buck v. Ha-*

vens, 40 Ind. 221, 224; Hanford v. McNair, 2 Wend. (N. Y.) 286. The error of the court in the case at bar was in passing upon the truth and sufficiency of the defendant's claim that he was not a maker of the note, which could only properly be passed upon by a jury on the trial of the case, or by the court in case a jury trial was waived.

The defendant's exception is sustained, and the case is remitted to the superior court, with direction to enter its order taking off the default upon such terms as to costs as it shall determine, and to permit the defendant to plead within such time as it shall fix, and for further proceedings.

HECK v. CASEY.

(Supreme Court of Rhode Island. July 6, 1912.)

MECHANICS' LIENS (§ 260*)—ENFORCEMENT—TIME.

Gen. Laws 1909, c. 257, § 5, provides that no person who shall do work for, or furnish materials to be used in, the construction, erection, or repair of any building without a written contract, shall have any advantage of any lien therefor created by the chapter, unless he sues to enforce the same within six months from the commencement of the work or of delivery of materials. *Held*, that where a subcontractor put in plumbing and gas piping under an oral contract with the general contractor, and had made a single and entire contract for plumbing and gas-fitting, without any specifications of items, and the work and delivery of materials under the general contract began in July, 1910, while the proceedings to establish a lien were not begun until March 8, 1911, they were too late, though, after doing the work which was inclosed in the walls and floors, nothing further was done on the contract between the first week in August and October.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 456-468; Dec. Dig. § 260.*]

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Proceeding by Charles F. Heck against John W. Casey to establish a mechanic's lien for labor and material. Judgment for petitioner, and defendant appeals. Reversed and remanded, with directions.

Gardner, Pirce & Thornley, of Providence (Charles R. Haslam, of Providence, of counsel), for appellant. William A. Morgan, of Providence, for respondent.

PARKHURST, J. This is a proceeding by a subcontractor to establish a mechanic's lien for labor and materials, under the provisions of Gen. Laws R. I. 1909, c. 257. It appears from the petition, as well as from the papers on file and from the evidence set forth in the transcript, that the petitioner in July, 1910, entered into a parol contract with Michael J. Donahue, the general contractor, who was engaged in building a house for John W. Casey, on Manton avenue. Provi-

dence, to put in the plumbing and gas piping in said house on Manton avenue for the sum of \$425. This contract was a single and entire contract for plumbing and gas piping, without any specification of items. The petitioner filed his plan in the office of the inspector of plumbing July 25, 1910, and immediately thereafter began work under the contract, delivering certain materials for gas piping, waste pipes, soil pipes, drops and outlets for gas, etc., and doing all the work which had to be done before the house was plastered, which was to be covered up by the plaster. This delivery and work was done within 9 or 10 days after July 25, 1910. After that no further work was done under the contract, as the petitioner claims, until October, 1910.

The petitioner, not having received payment from the contractor for work done and materials furnished under said contract, and after giving notice to the said Casey, on March 8, 1911, filed an account or demand, with a notice as to the building and land upon which he claimed a lien, in the office of the recorder of deeds of the city of Providence, the same being "for the purpose of commencing legal process for the enforcement of a lien," etc., as recited in the notice, under the provisions of section 7 of chapter 257, above referred to, and thereafter on March 10, 1911, filed this petition. The respondent Casey thereafter, on May 8, 1911, filed his motion to dismiss the petition, on the ground, among others set forth, that the court "has not acquired jurisdiction of the subject-matter, because the complainant has not complied with the statutory requirement," etc. The superior court denied the motion, and the same was renewed at the hearing of testimony, and was again denied. The justice of the superior court, after hearing the evidence, decreed the establishment of a lien for \$305 and referred the case to a master. From this decree the respondent has appealed to this court, and the first reason of appeal is based upon the same ground as that in the motion to dismiss above referred to.

We are of the opinion that the justice of the superior court erred in denying the motion to dismiss the petition on the ground above set forth. It is not disputed that the contract was an entire contract for the work and materials in plumbing and gas piping. It is so stated in all the papers and notices attached to the petition and filed in the office of the recorder of deeds. It is so proved in the evidence, and there is no dispute that the commencement of the work and of the delivery of materials, under this entire contract, was in July, 1910. The commencement of legal proceedings for the establishment of the lien as provided in chapter 257, § 7, was on the 8th day of March, 1911, more than seven months after the commencement of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the work and of the delivery of materials. This is not in accord with the provisions of Gen. Laws R. I. 1909, c. 257, § 5, which reads as follows: "Sec. 5. No person who shall do work for or furnish materials to be used in the construction, erection, or reparation of any building, canal, turnpike, railroad, or other improvement, without written contract, shall have any advantage of any lien therefor created by this chapter, unless he shall commence legal process for enforcing the same, in manner hereinafter provided, within six months from the time of the commencing the doing of such work or of the commencing the delivery of materials, if payment for the same shall not then be made. * * * " The case is governed by the decision of this court in *McParlin v. Thompson*, 32 R. I. 291, 79 Atl. 681.

The appeal is sustained, the decree of the superior court is reversed, and the cause is remanded to the superior court, with direction to enter its decree dismissing the petition, with costs.

GENERAL SIX PRINCIPLE BAPTIST CONFERENCE OF RHODE IS- LAND v. BENNETT.

(Supreme Court of Rhode Island: July 2, 1912.)

RELIGIOUS SOCIETIES (§ 24*)—STATUTE—EFFECT.

Under an act of the January session, 1910 (Acts 1910, p. 299), affecting Six Principle Baptist Churches, but limiting the effect to those which have been affiliated with the General Conference created in 1895, the court has no jurisdiction over a church which became extinct before 1895.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 154-157; Dec. Dig. § 24.*]

Exceptions from Superior Court, Kent County; Darius Baker, Judge.

Petition by the General Six Principle Baptist Conference of Rhode Island against Daniel L. Bennett. There was a judgment denying the petition, and petitioner excepts. Exceptions overruled.

The following is the rescript of the superior court, by Baker, J.:

"This is a petition by two members of said conference, represented to be duly authorized thereto by the executive committee of said conference, asking the court, under an act of the General Assembly passed at its January session, 1910 (Acts 1910, p. 299), to declare the Six Principle Baptist Church of Old Warwick to be extinct, and that the property and the title and possession thereof, which belonged to said church or was held in trust for it, particularly the fund now in the custody and control of Rev. Daniel L. Bennett aforesaid, has by virtue of said act vested in said conference.

"The act by its terms relates only to such Six Principle Baptist churches or Six Principle Baptist societies as have been or shall be at any time affiliated with the General Six Principle Baptist Conference of Rhode Island, a religious corporation created by the General Assembly of this state in 1895. The evidence, in the judgment of the court, shows that the Six Principle Baptist Church of Old Warwick became extinct before 1895, and that, therefore, it has never been in affiliation with the said General Six Principle Baptist Conference of Rhode Island, the religious corporation aforesaid. The court does not see, therefore, how said act applied to the present case, or how the court can make any decree in the premises. It apparently has no jurisdiction in the present case under the act in question.

"It is suggested that, long before and up to 1895, a voluntary religious society existed of the same name as the religious corporation aforesaid, and that the Six Principle Baptist Church of Old Warwick, before it became extinct, was in affiliation with said society, and that the court can in some way treat the words in the act of 1910 above referred to, 'a religious corporation created by the General Assembly of this state in 1895,' as surplusage. While the court can see no good reason for limiting the application of the act of 1895 to bodies in affiliation with the corporation, to the exclusion of the former society of the same character and name, it nevertheless feels bound to recognize this express limitation.

"The court, therefore, denies the relief asked for, for want of jurisdiction under the said act of 1910 to afford such relief."

Archibald C. Matteson, of Providence, for petitioner. Willis B. Richardson, of Providence, for respondent.

PER CURIAM. This is a petition by two members of said conference, represented to be duly authorized by its executive committee, asking the court, under an act of the General Assembly passed at its January session, 1910 (Acts 1910, p. 299), to declare the Six Principle Baptist Church of Old Warwick to be extinct, and that the property, and the title and possession thereof, which belonged to said church, or was held in trust for it, particularly the fund now in the custody and control of Rev. Daniel L. Bennett aforesaid, has by virtue of said act vested in said conference. The matter comes before this court upon the exceptions of the petitioner to the order of the superior court dismissing its petition.

For the reasons stated in the rescript of the superior court, the exceptions of the petitioner are overruled, the decree of the superior court is affirmed, and case remitted to superior court.

STANDARD OIL CO. OF NEW YORK v. CADY, Building Inspector.
(Supreme Court of Rhode Island. July 6, 1912.)

Action by the Standard Oil Company of New York against Frederic W. Cady, Inspector of Buildings. Motion to dismiss complainant's appeal denied.

Barney & Lee, of Providence, for petitioner. Waterman & Greenlaw, of Providence, for respondent.

PER CURIAM. Respondent's motion to dismiss the complainant's appeal is denied.

SMITH v. KARIAN.

(Supreme Court of Rhode Island. July 6, 1912.)

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Dora M. Smith against Magritch M. Karian. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Peter C. Cannon, of Providence, for plaintiff. Thomas A. Jenckes, of Providence, for defendant.

PER CURIAM. Defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment upon the verdict as reduced by the remittitur.

MENO v. STATE

(Court of Appeals of Maryland. Feb. 2, 1912.)

1. HOMICIDE (§ 203*)—DYING DECLARATIONS—PRELIMINARY PROOF.

Where decedent had been informed by her physician that she was going to die, and, before making a statement to a detective, answered by an affirmative shake of the head that she realized she was going to die, and did die six days thereafter, her statement to the detective was admissible as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

2. CRIMINAL LAW (§ 507*)—EVIDENCE—ACCOMPLICES.

A woman on whom an abortion has been performed is not an accomplice, so that her evidence requires corroboration to establish sufficient proof of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096, 1098; Dec. Dig. § 507.*]

3. HOMICIDE (§ 218*)—DYING DECLARATIONS—CAPACITY—QUESTIONS FOR JURY.

Where the evidence as to decedent's mental condition when she made a dying declaration was conflicting, whether she possessed sufficient understanding to entitle the declaration to probative force was for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 458, 459; Dec. Dig. § 218.*]

4. HOMICIDE (§ 166*)—ABORTION—EVIDENCE—IMPROPER RELATION WITH OTHERS.

In a prosecution for homicide by abortion alleged to have been performed by defendant on decedent, evidence that she had had improper sexual relations with another or other men was inadmissible to negative the inference of motive

on defendant's part for the perpetration of the abortion.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.*]

5. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for killing deceased by means of an abortion, evidence that accused told witness that he had performed similar operations on other girls was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

6. CRIMINAL LAW (§ 706*)—TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY.

In a prosecution of accused, a foreigner, for practicing abortion on deceased, a girl 19 or 20 years old, there was no direct evidence of the perpetration of the crime, the state relying mainly on decedent's dying declaration taken by affirmative and negative nods to questions put to her by a detective. During the examination of a nurse she was asked whether she had been directed by the state in a habeas corpus proceeding not to testify to anything unless asked, to which she replied that she had, and, when asked to state what the subjects were, she started to answer that she asked deceased, "Who did this?" when the state's attorney interrupted, and stated, "She told her it was old dirty black-haired Jim that did it, if you want to know what it was she told her," the court did not check attorney, nor instruct the jury to disregard the remark. *Held*, that such statement applying to defendant was improper, and constituted prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

7. CRIMINAL LAW (§ 696*)—TRIAL—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

A witness having been asked as to the subjects she had been instructed by the state not to testify to, unless asked, the prosecuting attorney improperly answered for the witness, "She told her it was old dirty black-haired Jim that did it, if you want to know what it was she told her," when the witness was asked to answer the question and to state the subjects only, and not the conversation or details, when the witness answered, "The subjects were what Nellie told me—not to say what Nellie told me about dirty black-haired Jim." *Held*, that such answer was prompted by the remark of the state's attorney, and that the court erred in refusing to sustain a motion to strike it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

Appeal from Circuit Court, Dorchester County; Robley D. Jones and E. Stanley Toadvin, Judges.

James Meno was convicted of causing the death of deceased by abortion, and he appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Frederick H. Fletcher, for appellant. V. Calvin Trice, State's Atty., and Edgar Allan Poe, Atty. Gen., for the State.

STOCKBRIDGE, J. The appellant in this case was indicted, tried, and convicted for having caused the death of Nellie Robinson by an abortion practiced upon her. The exceptions are 20 in number, though the points involved were considerably less, as exceptions

were reserved to rulings of the court upon offers of evidence where the same legal proposition was involved in repeated tenders. The most important is the question of the admissibility of the dying declaration of the deceased which formed the basis of the tenth and twentieth exceptions.

What is necessary to render a dying declaration admissible has been so recently passed upon by this court in the cases of *Worthington v. State*, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506, and *Hawkins v. State*, 98 Md. 355, 57 Atl. 27, as to make its repetition unnecessary.

[1] The declaration in this case was made in Camden, N. J., to a detective of that city, at a time when Nellie Robinson was in the hospital, and but a few days before her death. She had been told by the doctor in attendance that she was going to die, and was at the time either unable to speak, or unwilling to do so, but communicated with those grouped about her bed by affirmative or negative inclinations of her head. After having been informed by the doctor of her condition, and impending death, she was asked by Carroll, the detective, "Do you realize that you are going to die?" And she shook her head, "Yes." This conversation apparently took place on the 19th of December, 1910, and she died on Sunday following, December 25th. The requisites for the admissibility of the dying declaration were complied with. The question of the amount of credence to be placed in it was a question for the jury.

[2] It has been suggested in the brief of the appellant that it is not admissible, however, because, if an abortion had been practiced, the girl was an accomplice to its perpetration, and it was therefore the statement of an accomplice, upon which, unless corroborated, no conviction could be properly had. This argument is not supported by authorities. A woman on whom an abortion has been performed is regarded as a victim rather than an accomplice, and, even if she be deemed an accomplice, she is competent as a witness for the prosecution of the accused, and her evidence does not require corroboration when it establishes satisfactory proof of guilt, though in all such cases the credibility of it is to be passed upon by the jury under proper caution from the court, as to the amount of credence to be placed in it. *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319; *State v. Smith*, 99 Iowa, 26, 68 N. W. 428, 61 Am. St. Rep. 219; *State v. Owens*, 22 Minn. 238; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *Peoples v. Commonwealth*, 87 Ky. 487, 9 S. W. 509, 810; *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586; *Watson v. State*, 9 Tex. App. 237; *People v. Vedder*, 98 N. Y. 630.

[3] A further objection was made to the admissibility of the dying declaration upon the ground that Nellie Robinson did not possess sufficient understanding at the time when the declaration was made to entitle it

to any probative force. The evidence upon this point given by the physicians is conflicting. Dr. Shields, who was in attendance upon the girl, states her condition and what she did, the manner in which she replied to questions, but does not express any opinion whatever as to her mental condition at the time. Dr. Mace and Dr. Steele were both examined as experts, they not having attended the deceased woman, and they differ quite radically as to her probable mental condition at the time. It was therefore proper that the jury should pass upon this, as upon the other matters of fact which were involved in the trial of the case, and no error therefore can be imputed to the court for its rulings upon the tenth and twentieth exceptions.

[4] The first, fourth, fifth, ninth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth bills of exception were all reserved to rulings of the court upon attempts to introduce into evidence testimony which would tend to show that the deceased girl had had improper relations with another man or other men, and thus negative an inference of motive upon the part of this traverser for the perpetration of the abortion. The court uniformly refused to admit all testimony of this character as being immaterial to the issue before the jury. The question to be determined in the case was not the unchastity of the girl with any other man or men, but whether this traverser had committed an abortion upon her. And this he might perfectly well have done, no matter who was the father of her child, and even if she had led a notoriously improper life. The introduction of the evidence could only have tended to raise an immaterial and collateral issue, and so divert the attention of the jury from the real question involved. Much reliance for the admissibility of this evidence was placed upon the decision in the case of *Dunn v. People*, 29 N. Y. 526, 86 Am. Dec. 319, in which case evidence of such a character was admitted; but it was admitted in that case because of contradictory statements made by the prosecuting witness as to the paternity of her child, and the purpose of it was not to establish the paternity, or motive for the offense, or the lack of such motive, but for the purpose of discrediting the evidence of the prosecuting witness, and in the separate opinion filed by Ingraham, J., in that case he said: "Evidence to prove who was the father of the child can scarcely be said to be material to prove that the prisoner had been guilty of the crime charged, viz., aiding or advising the producing of an abortion." The testimony sought to be elicited was not the general character of the deceased girl for lewdness, but her conduct with a particular man, and it was therefore analogous to the rule laid down in *Shartzer v. State*, 63 Md. 149, 52 Am. Rep. 501, and *Richardson v. State*, 103 Md. 112, 63 Atl. 317, holding such evidence inadmissible.

This evidence being properly excluded, it follows that no proper objection could be made to the remarks of the court which formed the basis of the third exception.

Nor do we find any reversible error in the rulings of the trial court to which the second, eleventh, twelfth, thirteenth, and fourteenth bills of exceptions were taken.

[6] The state attempted to prove by the witness Ludi that the accused had told him that he had performed operations on or treated other girls as showing a familiarity on the part of the traverser with what could be done to rid a woman of a child. This evidence was admitted over the objection of counsel, and this ruling of the court was made the subject of the eighth exception. This evidence was inadmissible, and should have been excluded. There is a class of cases in which evidence may be given of other similar acts done by an accused, but this class of cases is restricted to where the several acts are connected together and form part of one entire scheme or transaction, so that one of the acts forms a basis for a reasonable and proper inference as to the purpose and intent with which the particular act was performed for which the accused was then on trial. *Lamb v. State*, 66 Md. 285, 7 Atl. 399. The answer of the witness Ludi to these questions, however, was so vague and inconclusive that the traverser can hardly have been injured thereby, and unless there is some additional reason would not, standing alone, justify this court in reversing the conviction.

[8] In the course of the cross-examination of the witness Annie Wharton, produced by the state, she was asked whether there was anything that she had been directed by the state at the habeas corpus proceedings, which had preceded the trial of the case, not to testify to unless asked about them, to which she replied, "Yes, sir." Then the following took place: "Q. What were those subjects? A. I got in conversation with Nellie, and I asked her who did this— Mr. Andrews (State's Attorney): She told her it was old, dirty, black-haired Jim that did it, if you want to know what it was she told her." Whereupon the counsel for the accused took an exception (sixth bill of exceptions) to the conduct of the state's attorney. The witness Mrs. Wharton was a confinement nurse, who was called in at Camden to care for the deceased at the time of the miscarriage at her aunt's house. She was not the nurse at the hospital where Nellie Robinson was subsequently taken, and statements made to this witness were made before the deceased had been advised by the physician of her approaching death, and formed no part of the dying declaration. The statement made by the state's attorney could not have been admitted in evidence if it had been testified to by the witness, for it was clearly hearsay. For the state's attorney to inject it into the case in the manner he did was highly im-

proper, and he should have been checked immediately by the court, and the jury instructed to totally disregard his remark, neither of which things appear to have been done. The question for this court is whether the improper remark of the state's attorney was of such a character that it must be regarded as calculated to have unduly prejudiced the jury in its finding, and thus to prevent a fair and impartial verdict. If so, the verdict must be set aside and the conviction reversed. The courts of this country have been frequently called upon to pass upon similar occurrences, and the cases will be found very fully collected, classified, and digested in an exceptionally able note to the case of *People v. Fielding*, 48 L. R. A. 641 et seq. It is there said as a conclusion from all the cases that: "Since a conviction will only be reversed for improper language of the prosecuting attorney in a criminal case where it was such as to prejudice the defendant, even though due objection was made, a ruling had, and an exception taken, and the language was not withdrawn, it follows that the question whether or not a reversal will be had for that cause will depend upon the degree of impropriety of the language, and that the test will be the question whether or not it was so improper as to prejudice the jury against the accused and deprive him of a fair trial."

In this case we have a foreigner accused of practicing an abortion upon a young girl 19 or 20 years of age. No direct testimony is offered of the perpetration of the crime, the case of the state resting mainly upon a dying declaration of the girl, who uttered no word, but gave her statement by affirmative or negative nods to questions put to her by a detective through her father in a hospital away from her home, and the proceeding is interrupted by the state's attorney who injects a statement alleged to have been made by the girl, and which would not have been admissible evidence had the state attempted to introduce it. The remark of the state's officer was not checked by the court, nor were the jury cautioned or instructed by the court to pay no heed to it. In such a condition it seems impossible that the jury should not have been unduly prejudiced against the accused. The court is not unmindful of the fact that, where the improper conduct or remark of the prosecuting officer has been called forth by like conduct on the part of the counsel for the prisoner, courts are not disposed to set aside a verdict because of such conduct. This rule has been laid down and recognized in quite a long line of cases which will be found collected in the note before referred to; but the record in this case does not disclose any such improper conduct on the part of the counsel for the prisoner in this case, and therefore this ground of justification or palliation cannot be invoked. For this reason the conviction below must be reversed, and the verdict set aside.

[7] There remains but one additional exception to be considered, namely, the seventh. Immediately following the incident which gave rise to the sixth exception, the witness Annie Wharton was asked by the counsel for the accused, "What were the subjects that you were asked not to testify about? I mean subjects only, not any conversations or details?" And thereupon the witness answered, "The subjects were what Nellie told me—not to say what Nellie told me about dirty, black-haired Jim." The counsel for the defense thereupon moved to strike out that portion of the answer which referred to dirty, black-haired Jim, which motion the court overruled. In view of the incident which had just preceded this, it is impossible to avoid the conclusion that the expression of the witness had been prompted by the remark of the state's attorney, which, as has already been said, was improper, sufficiently so to vitiate the conviction. It follows that the motion to strike out should have been granted, and that the overruling of that motion by the court was error.

For the reasons hereinbefore set forth, the conviction below must be set aside, the verdict stricken out, and the case remanded for a new trial.

Judgment reversed, and case remanded for new trial.

SCHWARZ BROS. CO. et al. v. BOARD OF HEALTH OF JERSEY CITY.

(Supreme Court of New Jersey. July 8, 1912.)

(Syllabus by the Court.)

HEALTH (§§ 20, 21*)—CONSTITUTIONAL LAW (§ 237*)—ORDINANCES—BOARDS OF HEALTH—REMOVAL OF DEAD ANIMALS.

An ordinance passed by the board of health of Jersey City provides in effect that (section 1) "it shall be the duty of every owner of any animal which shall die from accident or disease, or be killed for any purpose other than consumption for food, within the limits of Jersey City, to give notice of such death to the office of the board of health" within a certain specified time after death; (section 2) it shall be unlawful for any person or persons, except the health officer or the board or the contractor for the removal of dead animals, to transport any such animal, from the place where it died, to any place within or without the limits of Jersey City, without having first obtained permission in writing from the board or health officer, and that no permit shall be granted unless there be a written application signed by the owner; (section 3) if, in the judgment of the health officer or the board, such dead animal is a nuisance or offensive and likely to be dangerous to public health, or if the owner shall fail to apply for a permit or to remove the animal within the time mentioned in the permit, or within such time as in the judgment of such health officer or board may be necessary to prevent it from becoming a nuisance or offensive and likely to be dangerous to public health, then it shall be lawful for such officer or board to cause its removal by the contractor, etc. *Held* (1) that the ordinance is not unreasonable; *held* (2) that it is

not discriminatory, and that it does not deny to citizens the equal protection of the laws in violation of the state or federal Constitution; *held* (3) that it is within the power of the board of health; *held* (4) that, in absence of proof of fraud, the motives of the board of health in passing it will not be inquired into.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. §§ 24, 25; Dec. Dig. §§ 20, 21; Constitutional Law, Dec. Dig. § 237.*]

Certiorari at the prosecution of the Schwarz Bros. Company and Eugene J. Schwarz against the Board of Health of Jersey City. Writ dismissed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Davis & Hastings, George L. Record, and Merritt Lane, all of Jersey City, for prosecutors. James J. Murphy and Thomas G. Haight, both of Jersey City, for defendant.

TRENCHARD, J. This writ brings up for review an ordinance passed by the board of health of Jersey City on November 21, 1911, entitled "An ordinance to regulate the removal and transportation in and through Jersey City of animals dying from accident or disease or killed for any purpose other than consumption for food." The ordinance provides in effect that (section 1) "it shall be the duty of every owner of any animal which shall die from accident or disease, or be killed for any purpose other than consumption for food, within the limits of Jersey City, to give notice of such death at the office of the board of health," within a certain specified time after death; (section 2) it shall be unlawful for any person or persons, except the health officer or the board or the contractor for the removal of dead animals, to transport any such animal from the place where it died to any place within or without the limits of Jersey City, without having first obtained permission in writing from the board or health officer, and that no permit shall be granted unless there be a written application signed by the owner; (section 3) if, in the judgment of the health officer or the board, such dead animal is a nuisance or offensive and likely to be dangerous to public health, or if the owner shall fail to apply for a permit or to remove the animal within the time mentioned in the permit, or within such time as in the judgment of such health officer or board may be necessary to prevent it from becoming a nuisance or offensive and likely to be dangerous to public health, then it shall be lawful for such officer or board to cause its removal by the contractor, etc. We now proceed to consider in convenient order the only reasons assigned and argued why the ordinance should be set aside. We are of opinion that there is no merit in the objection that the ordinance is unreasonable.

Where an ordinance is within the power of the board which passed it, the presumption is that it is reasonable, and the judicial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

power to declare it void can be exercised only when, from the inherent character of the ordinance or from evidence showing its operation, it is demonstrated to be unreasonable, and the burden is on the person asserting the unreasonableness, where it is not inherently unreasonable. *Traction Co. v. Elizabeth*, 58 N. J. Law, 619, 34 Atl. 146; *Trenton Horse R. R. Co. v. Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; *Wyse v. Board of Police Com'rs of New Jersey*, 68 N. J. Law, 127, 52 Atl. 281. The ordinance in question was passed under the authority granted to boards of health to pass ordinances relating to public health, of which we shall hereinafter speak. It surely is not unreasonable in providing for the notice of the death of such animals. This seems reasonable in order that there may be an investigation and suitable precautions taken to prevent infection or epidemic if need be. Nor is it unreasonable in providing for the removal of a dead animal if the owner fails to apply for a permit or to remove it within such time as in the judgment of the health officer or the board may be necessary to prevent it becoming a nuisance. An opportunity is given the owner to remove it, if he sees fit, and none of his legitimate property rights are invaded. So, too, it is not unreasonable to prohibit the transportation of such a dead animal through the streets without a permit from the board or health officer to be obtained on the written application of the owner. This merely places it within the power of the board, through the medium of a permit, to provide in each specific case, as a condition for the transportation through the streets, such regulations as, in the judgment of the board, are necessary and proper to preserve and protect the public health. The prosecutors are engaged in the business of buying and transporting to their "rendering factory" dead animals. They contend that the ordinance is unreasonable in that it hampers them in their business. Granting that it hampers them, we do not see that it does so unreasonably. It contemplates prompt inspection and grant of proper permit, for which no fee is charged. It applies alike to all citizens. The fact that the prosecutors happen to be engaged in the business of buying and transporting in their own wagons such dead animals is no reason why they should not be subjected to such regulations as will render it reasonably certain that the proper municipal authorities shall receive notice of the death of such animals, and be thus afforded an opportunity for inspection, and the imposition of such regulations as may be reasonably necessary for the preservation of the public health, one of the fundamental and foremost duties of a municipality.

The prosecutors refer us to *Kellam v. Newark*, 79 N. J. Law, 364, 75 Atl. 548, and contend that the ordinance in question comes within the prohibition of that case. We

think not. The ordinance there under review is quite different from the present one. There the ordinance prevented the transportation of a dead animal, except in carts licensed for that purpose. The word "permission" in that ordinance related only to the skinning or burying of a dead animal. To prohibit the removal of an animal except in a licensed wagon is a very different thing from prohibiting the removal or transportation of an animal without a permit. This distinction is recognized in this court in *Jersey City v. Foster*, 81 N. J. Law, 360, 79 Atl. 1052, where it was held that an ordinance in all material respects very similar to the one in question was not an effort to license the doing of a noxious thing, "since the ordinance does not provide for the granting of a license, but simply forbids the doing of an act dangerous or noxious to the public health, without permission of certain officers of the city." And, speaking on this point, the court said: "We perceive nothing of substance, therefore, in the argument with reference to the power to license, as the whole scheme seems to be an effort to afford a summary method of disposing of a nuisance." The ordinance in the *Kellam Case* was a broad attempt to require a license for carts when there was no power to do so. But the court in that case said that, while a dead animal was not per se a nuisance, it was likely to become such; "and, while the municipality in the exercise of its police power may provide against such a result, it may not do so to the extent of unduly interfering with the property rights of the owners of such carcasses." And, again: "That such municipality may lawfully make reasonable general regulations under its charter, prescribing a time within which dead animals must be removed or disposed of and the manner of such disposition, having due regard to the owner's rights, we have no doubt." It will be seen, therefore, that the ordinance in question does not violate the rule laid down in the *Kellam Case*. The ordinance recognizes the property rights of the owners of the carcasses, and it seeks merely to provide against such a carcass becoming a nuisance or dangerous to public health. Through the instrumentality of a permit it seeks to prescribe the regulations as to the time within which the dead animals must be removed and disposed of and the manner of such disposition, recognizing the owner's rights, at all times, in the carcasses, until such a time as they become or are likely to become a nuisance and until the owner has neglected to take means to dispose of them. The ordinance cannot be declared unreasonable because it may interfere or place additional burdens on the prosecutors in carrying on their business, because all businesses and vocations must submit to such reasonable regulations as are necessary for the welfare of society at large.

This same point was raised in the *Foster*

Case and decided adversely to the prosecutors' present contention. The court said: "It is insisted, also, that the enforcement of the ordinance is unreasonable, in that it interferes with the prosecutor in the prosecution by him in his own conveyance of his lawful business. The argument is based upon the assumption that the removal of dead animals, under any and all circumstances, through the streets of a city is a lawful business which is beyond the pale of municipal regulation. But the rule is as fundamental as the maxim 'Sic utere tuo ut alienum non lædas,' that, when a private business is transacted in such a manner as to become noxious to public health, morals, or convenience, it occupies in law the status of a public nuisance, and, where the power is conceded to the municipality, may be regulated or abated as public necessity or convenience may require." We are also of opinion that the ordinance is not discriminatory, and that it does not deny to the prosecutors the equal protection of the laws in violation of the state or federal Constitution.

The contention is that it is discriminatory because it does not provide that the official contractor shall be required to procure a permit. But the second section, in exempting the official contractor from the duty to procure a permit, applies to him only in his official capacity; that is to say, in removing animals from the streets and public places, and such animals as he may be directed by the board of health to remove pursuant to the third section. We are also of opinion that the ordinance is within the power of the board of health. The board was created pursuant to, and derives its powers, not from the city charter, but from the board of health act of 1904 (P. L. p. 343). *Board of Health v. New York, etc., R. R. Co.*, 77 N. J. Law, 15, 71 Atl. 259. By section 4 of that act boards of health in cities of the first class are empowered "to pass, enact, alter, amend and repeal ordinances relating to the public health of such cities, and to fix the amount of fines and penalties for the violation of said ordinances, and to provide for the collection, appropriation and disbursement of the same." That is a sufficient grant of power to enact the ordinance in question. It is much broader than the power held to be a sufficient warrant for the very similar ordinance under review in *Jersey City v. Foster*, 81 N. J. Law, 360, 79 Atl. 1052.

It is contended that the operation of the proviso in section 2 of P. L. 1895 (P. L. p. 492) deprives the board of health of Jersey City of the power to pass the ordinance in question. But that is not so for two reasons: First, the board as we have seen was created under and derives its powers from the act of 1904 which contains no such limitation, and the proviso mentioned, therefore,

would seem to have no application; and, secondly, if we assume that it has, the record in this case discloses that the county board and the city board at a joint meeting by ordinance conferred upon the city board jurisdiction to pass the ordinance in question, as was contemplated by such proviso. The contention that "the ordinance was passed for the sole purpose of protecting the contractor for the removal of dead animals from the streets of Jersey City," and hence should be set aside, cannot prevail. It is well settled that the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in enacting laws. In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of municipal boards in passing ordinances. *Dillon on Municipal Corporations* (5th Ed.) § 580. Assuming, however, without deciding, that their acts may be impeached for fraud actually consummated at the instance of the municipality defrauded or at the instance of persons injured thereby, it is sufficient to say that the proof in this case fails to disclose that any fraud was perpetrated in the present case.

Since no infirmity has been shown in the ordinance brought up by this certiorari, the writ will be dismissed, with costs.

MEE v. TOWN OF MONTCLAIR.

(Supreme Court of New Jersey. June 25, 1912.)

(Syllabus by the Court.)

1. MONEY RECEIVED (§ 9*)—WHEN ACTION LIES.

An action for money had and received *held* to lie against the town of Montclair, because it appeared that the said municipality had received the money through its chief of police, who had obtained it on behalf of the town from the plaintiff by duress.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. § 81; Dec. Dig. § 9.*]

2. MUNICIPAL CORPORATIONS (§ 1007*) — CLAIMS—VERIFICATION.

The act entitled "An act in relation to the expenditure of public money by municipal corporations" (3 Comp. St. 1910, p. 3665, § 726), requiring claims to be verified before payment thereof can be demanded, is not applicable to a claim of the nature of the plaintiff's claim, and therefore he was not precluded from a recovery thereon without first making such verification and presentation of it to the municipality for payment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1007.*]

3. MONEY RECEIVED (§ 19*)—INTEREST ON CLAIMS.

The municipality having received the money which had been obtained from the plaintiff, by duress, was chargeable with interest thereon from the time it actually received it.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 73-80; Dec. Dig. § 19.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court of Newark.

Action by Michael J. Mee against the Town of Montclair. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued November term, 1911, before TRENCHARD, MINTURN, and KALISCH, JJ.

Robert M. Boyd, Jr., of Montclair, for appellant. Riker & Riker, of Newark, for appellee.

KALISCH, J. The plaintiff, Michael J. Mee, a patrolman of the town of Montclair, appellant, recovered a judgment against it for \$81.37, with costs, in the first district court of the city of Newark, the court sitting without a jury. The state of the case shows that the plaintiff, as such patrolman, received from the town of Montclair the sum of \$72.85 salary per month. On September 30, 1909, there was due the plaintiff from the appellant one month's salary, for which a check was drawn to his order by S. H. Wenck, the town treasurer. It further appears from the state of the case that the custom was that the checks payable to the patrolman should go through the hands of the appellant's chief of police, who distributed them to the various patrolmen to whom they were payable, and that the plaintiff's salary check for September, 1909, came by this routine into the possession of the chief of police, to be turned over by him to the plaintiff. The plaintiff applied to the chief of police for his salary check, and was informed by that official that there was no money coming to him for salary, because he, the plaintiff, owed the entire amount of his month's salary to the appellant for fines imposed upon him, for delinquencies in the performance of his duties as patrolman. A few days later, the chief of police placed the salary check on his desk and said to the plaintiff, "Sign that, Mee, sign that." The plaintiff, in pursuance of the command of his superior officer indorsed the check, and then the chief of police took the check and placed it in his desk. It further appeared that on the check, above the indorsement made by the plaintiff, were the words, "Pay to the Town of Montclair," which the plaintiff denied were there at the time he was ordered to indorse the check. The check was returned by the chief of police to the town treasurer. The trial judge found as a fact that the payment made by the plaintiff was made under duress, and, there being testimony to support such finding, it is not reviewable. The plaintiff's state of demand contained two counts—one for one month's salary due from the town of Montclair to the plaintiff for the month of September, 1909, and the other for money had and received by the said town of Montclair to the use of the said plaintiff. The judgment of the trial court is founded on the count for money had and received, and includes interest on the amount so received, from the time of its reception up to the time of the

rendition of the judgment, September 13, 1911.

[1] It is conceded by the appellant in its brief that the only claim that the plaintiff can have against the defendant is for money had and received by the defendant for the use of the plaintiff. But it is claimed by the appellant that the testimony fails to establish such a right of action in the plaintiff. We think that there was testimony from which the court could have reasonably found that the plaintiff indorsed the check under duress, and therefore it came within that class of cases, which according to the opinion of Hornblower, C. J., in *Sergeant et al. v. Stryker*, 16 N. J. Law, 470, 32 Am. Dec. 404, will support an action for money had and received.

[2] The appellant's further contention is that, even though an action for money had and received could be maintained against the defendant, by virtue of the statute of 1871 (3 Comp. St. p. 3665, § 726) it was a condition precedent, before the plaintiff was entitled to bring his action, that his claim should have been first verified and presented to the town of Montclair. The statute and the cases cited by counsel for appellant, in support of his contention, are not applicable to the present case. In *Downie v. Passaic*, 54 N. J. Law, 226, 23 Atl. 955, *Beasley, C. J.*, commenting on this statute, said: "The statutory prohibition seems to be applicable when a claim is undisputed. A verification of an account can serve no useful purpose when the debt is wholly repudiated and the creditor is obliged to prove the justice of his demand in a court of law." And in *Rulon v. Woolwich*, 55 N. J. Law, 494, 27 Atl. 908, where the objection was that a bill of costs had not been first verified when presented for payment to the township of Woolwich, before proceedings were commenced thereon, the court said: "There could be no fraud in this bill. An affidavit could make it no more correct than it was on its face. The reason of the statute being to prevent frauds upon the public does not apply to this claim." Now, in the case before us, we are unable to perceive what beneficial end a verification of the claim made by the plaintiff against the town of Montclair could have served. The town of Montclair had received the money. It had the means of knowing the exact amount which it received from the plaintiff by an inspection of its treasurer's books. No fraud as to the amount claimed could have been perpetrated. A verification would have served no useful end. The defendant was retaining money which the plaintiff claimed belonged to him and which the defendant did not intend to yield without the intervention of a court of law. We think that the statute does not apply to a case like the present one, and therefore the plaintiff's right to sue was unaffected by a lack of verification and presentation of his claim to the town of Montclair.

It is finally objected, against the validity of the judgment, that the court included in the judgment interest on the amount of the check from the time the said check was indorsed over to the town of Montclair by the said plaintiff, until the time of the rendition of the judgment September 13, 1909.

[3] The appellant's contention is that no interest was recoverable, and it cites in support of this contention *Curley v. Freeholders*, 66 N. J. Law, 401, 49 Atl. 471. An examination of that case will at once show its inapplicability to the one before us. The court there held that interest on a demand required by "An act in relation to the expenditure of public money by municipal corporations," approved April 4, 1871 (2 Gen. Stat. p. 2237), to be verified before payment is legal, can only be allowed from the date at which such verified demand is presented for payment. Since we have held that the plaintiff's claim did not come within the purview of the act, in that it need not be verified and presented, the nonapplicability of that case is apparent.

The trial judge having found the facts in favor of the plaintiff, which was to the effect that the plaintiff had paid the money to the town of Montclair under duress and that, therefore, the town of Montclair had been wrongfully withholding plaintiff's money from him, we are unable to perceive upon what principle of law or justice interest on the sum could have been legally denied him.

The judgment will be affirmed.

ELECTRIC PARK AMUSEMENT CO. v. PSICHOS.

(Supreme Court of New Jersey. July 6, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 546*)—EXPERTS—EXCLUSION OF EVIDENCE.

The appellant sought to prove the rental value of certain stands in an amusement park, leased by the plaintiff to the defendant, by a witness who admitted that he had no knowledge whatever of the rental value of such stands in the locality where they were situated, whereupon the court interposed an objection that the witness was not competent to give such testimony (the plaintiff having failed to interpose any objection), and overruled the question propounded to the witness, by the appellant, as to the rental value of such stands. *Held*, that the interposition by the court, on its own motion, and its overruling the question, did not thereby deprive the appellant of any substantial right to which he was entitled.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

2. EVIDENCE (§ 546*)—EXPERTS—COMPETENCY—OBJECTIONS TO EVIDENCE—WAIVER.

Where a witness is called to give expert testimony, the question whether he is so qualified is a preliminary one for the court to decide, and counsel cannot by either express or implied waiver of proof of such qualification of the witness deprive the court of its prerogative to pass upon the competency of such wit-

ness to give expert testimony, and to require that his qualifications to testify as such expert should be first established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

Appeal from District Court of Newark.

Action by the Electric Park Amusement Company against Nicholas P. Psichos. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Thomas L. Raymond, of Newark, for appellant. Paul G. Roder, of Newark, for appellee.

KALISCH, J. This case was tried before the court without a jury. From the state of the case, as settled by the court, it appears that an action was brought by the plaintiff to recover \$500 from the defendant, alleged to be the balance due it on a lease existing between the plaintiff, lessor, and the defendant, lessee. The lease contained this description of the demised premises: "Stands as always used with two additional stands in the new addition, which lessee must build himself." It appeared that the words "stands as always used" referred to three stands in the old part of the park. The defendant sought to recoup damages against the rent upon the ground that the plaintiff refused to permit him to erect two stands in the new addition, thereby claiming that there had been an eviction. The trial judge found as a fact from the evidence "that the plaintiff had never interfered with the defendant in any way in his exercising the rights under the contract (Exhibit P-1), and that he had given him every facility to obtain the benefit of the contract, had erected the three stands in the old part of the park, and could at any time have erected the two stands in the new part of the park if he so desired," etc. As a part of the defendant's case, the defendant sought to show the rental value of certain stands in the park, which undoubtedly would have been a matter of material inquiry if defendant's proof had tended to establish that there had been an eviction by the plaintiff. In order that the defendant should succeed, in his defense, it was incumbent upon him to establish an eviction. The court found, as a fact, that there was no eviction, by which finding we are bound; there being testimony to support such a finding.

The insistence on part of the appellant is that the judgment should be reversed because the court excluded the testimony of a witness, called by the defendant, as to the rental value of the rights mentioned in the lease, of which the plaintiff alleged he was deprived by the defendant. The question put to the witness was not objected to by the plaintiff's attorney, but an objection was

interposed thereto by the court, and the witness precluded from answering it on the ground that he had not qualified so as to be able to testify to the rental value. The witness was then examined as to his qualifications, and it appeared that the only experience the witness had in renting stands was in Bronx Park, in the city of New York. The question was then repeated by counsel for defendant and overruled by the court, and an exception was taken. This witness was then asked what offers he had made him to purchase from him the privileges mentioned in Exhibit P-1, and how much had been offered, to which the court interposed an objection and overruled the question, to which ruling an exception was taken.

The appellant's contention is that the trial judge, by interposing his own objections and overruling the questions, when no objections were made by the plaintiff, deprived the appellant of a substantial right which he had to introduce the testimony. The theory of appellant's counsel seems to be that the fact that plaintiff's counsel made no objection to the lack of qualification of the witness to testify as an expert, and made no objections to the questions put to the witness, operated as a waiver by the plaintiff of any and all objections to the competency of the witness and to the competency, materiality, and irrelevancy of the testimony of such witness, and that, therefore, the court had no legal right to interpose its objections to the questions put by the appellant's counsel against such tacit consent. The cases cited by counsel for appellant in support of his contention and theory are not strictly applicable to the situation which presented itself to the trial court in the present case. In the case sub judice the effort was made to establish a fact by opinion evidence. The indisputable rule of law governing the admission of expert testimony is that the person called upon to give such testimony must first establish that he has such special knowledge of the subject in controversy between the parties that qualifies him to give an opinion.

[1] It is undoubtedly true that such qualification may be waived by the parties by express stipulation or by not objecting to the testimony when offered. But it is an equally well-established rule of law that the question whether a witness is duly qualified to give expert testimony is a preliminary question for the court to decide. We are not prepared to say that this prerogative of the court may be waived by the parties against the consent of the court.

In the case of *Rowland v. Rowland*, 40 N. J. Eq. 281, relied on by the appellant to sustain his contention, it appears that there was a decree in favor of the administrator, in a suit to foreclose a mortgage given by Rowland and wife to the decedent. The tes-

timony was taken before a master, and Rowland testified, without any objection being made, to transactions with and statements by the deceased mortgagee. A motion was afterwards made to suppress it, and it was suppressed. The Court of Errors and Appeals, in an opinion by Reed, J., on page 283 of 40 N. J. Eq., said: "That parties may be witnesses is now the settled policy of the state. The exception ingrafted upon the general competency of all parties, that, where one is dead and is represented in the suit, then the living party shall not be permitted to testify, is only a regulation to secure mutuality in the action itself. The admission of such testimony affects no one but the parties, and none but the parties are interested in the exercise of the power given to exclude this testimony." It is to be observed that the testimony admitted was evidential, and that the bar interposed to its admissibility, which was for the benefit of the parties interested, could be waived by the act, of the parties. And on page 282 of 40 N. J. Eq., the learned justice said: "But testimony to be subjected to such judicial exclusion must be such as would be incompetent upon one of the grounds included by legal writers upon evidence among classes of testimony excluded from reasons of public policy." Now, this is not meant to be a narrow public policy, but a broad one, which will meet all the exigencies that a proper administration of justice may require. The case of *Berryman v. Graham*, 21 N. J. Eq. 370, which appellant cites as supporting his contention, does not seem applicable to the case under review.

We have not been referred to any case which holds that a court may not on its own motion object to the competency, materiality, or relevancy of a question put to a witness, and either overrule it or admit it. We think it may do so. As a matter of course the party prejudicially affected by the ruling of the court is entitled to an exception. And undoubtedly where it is within the power of the parties to agree to waive the incompetency of a witness, this may be done. But it seems to us that an entirely different question is presented when the witness produced to be sworn is to give opinion evidence. We think since the qualification of the witness to give such testimony is one to be passed upon by the court, it may not be waived by the consent of the parties without the consent of the court. To adopt any different rule would produce much mischief in the trial of causes, in that witnesses who were wholly incompetent to give opinion testimony on matters for which they were called by reason of lack of qualifications could be called upon by counsel on either side *ad libitum* and against the will of the court, and thus the trial be protracted by the introduction of worthless testimony, and to the inconvenience and delay of other litigants

waiting to have their causes tried. Every practitioner is aware how easily and in what great quantity opinion evidence is obtainable in every branch of profession or trade, and the use that can be made of it, and it is a salutary rule that requires the competency of such witnesses to be first passed upon by the court, and public policy requires that this power reposed in the court should not be ignored by the consent of the parties against the consent of the court. In an orderly and efficacious course of legal procedure, due regard must be had to the fundamental principles governing the law of evidence, in order to prevent chaos in the trial of causes and to attain substantial justice. It is therefore clearly against the policy of the law that the legal principles which control the admission or rejection of testimony should be subject to be waived by consent of the litigants, without the consent of the court; for it is self-evident that by such a method of procedure testimony not evidential of any fact in a cause or which is expressly forbidden by reasons of public policy could be introduced, and the trial of the cause unnecessarily protracted and the record encumbered with testimony which the court must finally instruct the jury to disregard. From a discriminatory examination of the cases referred to by the appellant, it is made clear that where the objection goes to the competency of a witness by reason of his personal status to give testimony, such testimony otherwise being evidential of some fact pertinent to the issue being tried, a waiver of such incompetency may arise from an express or implied consent of the parties which the court would be legally obligated to sanction unless there were reasons of public policy which forbade it. We find numerous examples in the books that confirm the extent of the rule laid down. Thus formerly a person was disqualified from testifying if he had an interest in the cause in which he was called to testify. Undoubtedly such incompetency could be waived by express or implied consent of the parties to the litigation. And it was upon this theory that it was held by our courts that testimony coming from such a witness without objection could not be subsequently struck out. A familiar example to which the above rule would be strikingly applicable is an action or suit for or against the estate of a deceased person where by consent of the parties, either express or implied, the incompetency of a party in interest to testify to transactions with or statements by the deceased is waived.

[2] In the case before us it appears from the admission of the witness that he had no special knowledge on the subject on which he was asked to express his opinion, and therefore any opinion expressed by him under such circumstances would not have been entitled to any consideration whatever. The

mere consent of counsel that he might be permitted to express an opinion without a proper foundation having been first laid to make such an opinion evidential cannot make it so. It may very well be that after the testimony is in without objection that it should not be struck out, simply upon the ground of its incompetency, but there is a wide difference in the action of a court in striking out testimony which under the rules of law, upon objection, should have been excluded, and where the court makes the objection at the time when such testimony is offered and upon its own motion excludes it. The true reason of the rule that testimony already in, although subject to have been ruled out on the ground of incompetency, if it had been objected to by counsel, should not be struck out, springs from the implied consent of counsel and court to its admission and to prevent unfairness, in that, if the counsel offering the testimony were made aware of the objection to the testimony at the time, he would have had an opportunity to cure it. And in the cases of *Rowland v. Rowland*, supra, and *Berryman v. Graham*, 21 N. J. Eq. 370, cited by counsel to support his contention, proceeded upon the ground that the testimony was in without objection, and therefore should not be struck out, upon the ground that it was incompetent, as such incompetency could have been waived by counsel, and, no objection having been made to the testimony coming in, it must be deemed that its incompetency was waived. But no such situation is present in the case sub judice. The question put to the witness was met at once with an objection from the court, and counsel was at once apprised of the ground of the objection, and therefore had an opportunity to qualify the witness to give such testimony, if it could be done. We think the court was warranted in overruling the question.

Now, as to the second question, which was put to the witness, what offers had been made to him to purchase from him the privileges mentioned in the lease, and how much had been offered, was incompetent upon the issue between the parties. It was of no evidential value, because an offer is not evidence of value unless accepted, and the court was not bound to let the introduction of such testimony go in unchallenged, because counsel for the plaintiff made no objection thereto.

In another aspect of the case, even if it were assumed that the court was not legally justified in excluding the testimony offered by the defendant, it does not appear how, under the state of the case before us, he was in any wise injured or prejudiced thereby. The testimony offered tended to establish the damages which the defendant claimed he had sustained by reason of the plaintiff not having fulfilled his contract and for interfering with the defendant's rights under

the contract between them, so as to offset the same against the rent sued for. But the judge having found as a fact from the evidence before him that the plaintiff had never interfered with the defendant, in any way in his exercising the rights under the contract, and that the plaintiff had fully complied with the contract, it clearly follows that in no view of the case did the appellant suffer any injury or prejudice by reason of the action of the court in overruling the testimony.

The court having found that there was no eviction, therefore any error committed by the court in reference to the proof tending to establish damages would be inconsequential, and not affect the result.

ANDERSON v. PUBLIC SERVICE CORPORATION OF NEW JERSEY.

(Supreme Court of New Jersey. June 21, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1006*)—INSUFFICIENCY OF EVIDENCE.

When the law of the case as settled in the course of litigation has been correctly applied, the verdict rendered by the jury upon the third trial of the case will not be set aside, unless demonstrably without any support in the evidence.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.*]

Action by Christian A. Anderson against the Public Service Corporation of New Jersey. Verdict for plaintiff. Rule to show cause denied.

See, also, 81 N. J. Law, 700, 80 Atl. 480.

Argued February term, 1912, before GUMMERE, C. J., and SWAYZE and GARRISON, JJ.

Lefferts S. Hoffman and Leonard J. Tynan, both of Newark, for the rule. George S. Silzer, of New Brunswick, opposed.

GARRISON, J. On this rule to show cause the defendant seeks to set aside the verdict rendered on the third trial of this case. The first trial took place on January 9, 1908, and the verdict for the plaintiff was set aside as against the weight of the evidence. *Anderson v. Public Service Corporation*, 78 N. J. Law, 285, 73 Atl. 840.

On the second trial, which was held on June 20, 1910, a judgment of nonsuit was ordered, in supposed compliance with the rule absolute obtained by the defendant, which was set aside upon error on June 20, 1911; the opinion delivered in the Court of Errors saying that "both the contributory negligence of the plaintiff and the negligence of the defendant belonged to the province of the jury." *Anderson v. Public Service Corporation*, 81 N. J. Law, 700, 80 Atl. 480.

This was the law of the case, which was

correctly applied in the present trial, which took place on October 9, 1911.

The jury having again found the weight of evidence as to the manner in which the accident happened in favor of the plaintiff, its verdict will not be disturbed, unless demonstrably without any support in the testimony. *Brown v. Paterson Paper Co.*, 69 N. J. Law, 474, 55 Atl. 87; *Fulton v. Grieb Rubber Co.*, 72 N. J. Law, 35, 60 Atl. 37; same case in Court of Errors, 75 N. J. Law, 525, 68 Atl. 116.

The verdict is not thus unsupported, and, now that the law of the case has been settled and followed, will not again be set aside.

MURPHY-HARDY LUMBER CO. v. RODER.

(Supreme Court of New Jersey. June 18, 1912.)

(Syllabus by the Court.)

TRIAL (§ 136*)—QUESTIONS FOR JURY—TELEPHONE CONVERSATION.

Where, in the course of a business transaction, one party calls up another on the telephone by his number, recognizes and identifies his voice, and discusses with him some phase of the business they have together, it is for the jury to determine, if the conversation is denied, whether or not it took place and of what it consisted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 324, 326, 327; Dec. Dig. § 136.*]

Action by the Murphy-Hardy Lumber Company against Paul G. Roder. Heard on rule to show cause. Rule discharged.

See, also, 82 Atl. 94.

Argued February term, 1912, before GUMMERE, C. J., and SWAYZE and GARRISON, JJ.

Paul G. Roder, of Newark, for the rule. Guild & Martin, of Newark, opposed.

GARRISON, J. The chief attack upon this verdict is that it rests upon testimony of telephone conversations between the plaintiff and the defendant. The question arose in this way: Paul G. Roder had a contract with one Frank Angellilo to furnish material and erect a house for him. There was evidence that the work was delayed or stopped by Angellilo's lack of credit, and it was not disputed that Roder ordered from the plaintiff lumber to the amount of \$400, for which he paid. The dispute arose over a bill of upwards of \$700, which the plaintiff claims was also delivered on Roder's order, which the latter denies. There is no dispute that the lumber in question went into the construction of the defendant's house and was delivered to his contractor for that purpose. The dispute is whether such delivery was upon the order of Roder. This question was submitted to the jury, who found in favor of the plaintiff. The defend-

ant now contends that this verdict was against the weight of evidence, because produced by the illegal admission of testimony as to what Roder had said to the plaintiff over the telephone. If Roder said what the testimony shows that he said, there is no denial that a jury question was presented. The jury had the testimony of various officers of the plaintiff that, when Angellilo would call at its office with an order for lumber to go into Roder's house, it was not furnished to him until Mr. Roder had been called up on the telephone, and had, on being told of the situation, ordered the lumber to be delivered to Angellilo, or to be furnished on his (Roder's) account.

It is unnecessary to go into the broad question of telephone conversations, or to lay down any general rule touching communications of this sort, for the reason that there was testimony that the voice of Mr. Roder was identified, and that the conversations were with him directly or through a person at the phone, taking orders from him; both voices being heard. This was evidence for the jury which renders it unnecessary to consider the more difficult questions discussed by Mr. Wigmore in volume 1, § 669, and volume 3, § 2155, of his work on Evidence.

There was corroboration of the plaintiff's case that was also for the jury, and, on the other hand, there was a denial by the defendant of the plaintiff's testimony.

In view of the commercial use of the telephone and its general trustworthiness as tested by average experience, the rule to be adopted is that where, in the course of a business transaction, one party calls up another by his telephone number, recognizes and identifies his voice, and discusses with him some phase of the business they have together, it is for the jury to determine, if the conversation is denied, whether it took place and of what it consisted.

It is not intended to be intimated that this is the extent of the rule, but only that it is all that the decision of the present case requires.

The plaintiff's testimony was not illicit, and if believed by the jury there was no lack of proofs to support its verdict.

The rule to show cause is discharged.

MOONEY v. CAMDEN IRON WORKS.

(Supreme Court of New Jersey. June 18, 1912.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 31*)—LIMITATIONS APPLICABLE—ACTION FOR INJURIES.

The amendment to "An act for the limitation of actions" approved March 24, 1896 (P. L. 1896, p. 119), applies to actions for personal injuries caused outside of this state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 142; Dec. Dig. § 31.*]

Action by Michael J. Mooney against the Camden Iron Works. Heard on demurrer to plea. Judgment on demurrer for defendant.

Argued February term, 1912, before GUM-MERE, C. J., and GARRISON and SWAYZE, JJ.

Wilson & Carr, of Camden, for plaintiff. Bleakly & Stockwell, of Camden, for defendant.

GARRISON, J. The declaration in this case states a cause of action for damages for personal injuries caused in the state of Massachusetts on the 29th day of March, 1906. To this declaration the defendant pleaded specially that it was not guilty of the supposed trespass at any time within two years next before the commencement of the suit.

To this plea the plaintiff demurred, thereby raising the question whether the amendment to "An act for the limitation of actions" (P. L. 1896, p. 119) applies to actions for personal injuries caused outside this state.

The act of 1896 is as follows:

"Every action upon the case for words shall be commenced and sued within two years next after the words spoken and not after, and that all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after."

The contention of the plaintiff is that the words "within this state" are a part of the description of the tort, and that the legislative intent that is thus expressed is that a plaintiff, if injured in this state, shall lose his right of action in the courts of this state in two years; but, if injured in any other state, he may bring his action in our courts at any time within six years.

As persons injured in this state are likely to be its citizens, and those injured in other states the citizens of such states, it would require a very clear use of language to make us ascribe to the legislation the intention of investing strangers with a right three times more favorable than that accorded to its own citizens.

We do not think that this is the natural sense or the proper interpretation of the statute, the subject of the second clause of which is actions accruing in this state. In the statutory statement of this subject all that comes between the participle "accruing" and the words "within this state" constitutes the description of the sort of torts to which the statutory limitation applies. The words "within this state," being thus properly used in the description of the actions with which the statute deals, are to be giv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

en no force in the description of the torts for which such actions may be brought.

If punctuation and the position of the words are to control, "within this state" would qualify "corporations"; but we think that the other is the proper interpretation of the statute.

This appears to have been the interpretation placed upon this amendment in the case of *Tomlin v. Hildreth*, 65 N. J. Law, 438, 47 Atl. 649, although the point we are now deciding was not involved in that case.

Judgment upon demurrer will be entered for the defendant.

CLEVINGER v. QUINN.

(Court of Errors and Appeals of New Jersey.
March 21, 1912.)

1. DEEDS (§ 171*)—RESTRICTIONS—BUILDING RESTRICTIONS—ENFORCEMENT.

A deed contained an interlineation which referred to "a deed or agreement." At the time of the execution of the deed no agreement in fact existed, but one was contemplated. The grantee was informed that the interlineation should give him the privilege of having his lots face on either street. The agreement as afterwards made embodied also a building line. The grantee had no knowledge of any plan which contemplated a building line, and he never consented to it. *Held*, that he was not bound by any building restrictions fixing a building line.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 537-542; Dec. Dig. § 171.*]

2. DEEDS (§ 176*)—BUILDING RESTRICTIONS—ENFORCEMENT.

Where a deed of two lots contained a covenant that their division line should not be changed, but similar covenants in deeds of other lots had been disregarded by the erection of buildings contrary thereto, pursuant to an agreement signed by all the owners except the grantee in the first deed, who refused to sign because it contained a new restriction, the covenant was not enforceable against such grantee by the owners of the other property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 546; Dec. Dig. § 176.*]

Appeal from Court of Chancery.

Suit by William M. Clevenger against James A. Quinn. There was a decree of the Court of Chancery denying relief, and complainant appeals. Affirmed.

The following is the opinion of Leaming, V. C., in the Court of Chancery:

"I am convinced that an injunction cannot be properly issued in this case.

[1] "1. As to the 12 feet building line restriction: The original covenants printed in the deeds contained no restriction against building out to the property lines on the four corners of Stenton Place and Atlantic avenue, and it is entirely clear that the building restrictions contained in the agreement of March 12, 1905, cannot be enforced against defendant. The interlineation in defendant's deed, which refers to a 'deed or agreement,' is wholly meaningless, standing alone. When considered in connection with

the circumstances which surrounded and entered into the transaction, it is ascertained that no agreement in fact existed at that time, and that at that time an agreement was, at most, contemplated, and that defendant was informed by Mr. Wootton that these words which were interlined in his deed were to give defendant the privilege to have his lots face on either street, and that the agreement as it was afterwards made embodied, in connection with the privilege referred to, a restriction that a building should not be erected nearer than 12 feet to Stenton Place. The evidence discloses that defendant had no knowledge or intimation of any plan, or contemplated plan, which included the building restriction, and has never consented to it. Under these circumstances he manifestly cannot be bound by it. It seems entirely clear that the 12 feet building restriction on Stenton Place cannot be enforced against defendant.

[2] "2. As to the dividing lines: I am also satisfied that this court cannot properly enjoin the erection of the building in such manner that it may extend across the dividing line between the two lots as they were originally delineated on the map. Assuming that the fifth covenant of the printed deed means that the dividing lines of the lots on Atlantic avenue should never be changed under any conditions—that is, that these lots should always remain as lots fronting on Atlantic avenue of the width shown on the map, and extend in depth 100 feet therefrom—the evidence discloses that this covenant has been disregarded as to three of the corners of Stenton Place and Atlantic avenue. It is now sought to enforce that covenant as to the remaining corner. The disregard of that covenant on the three corners referred to, and the erection of the buildings contrary thereto, was pursuant to an agreement signed by almost every person in interest, except defendant. Defendant refused to sign the agreement, because it also contained a provision requiring that the buildings which should be erected contrary to the terms of the original covenant should be erected 12 feet from the property line of Stenton Place. The fact that complainant and the other persons who signed the agreement determined to abandon the old dividing line covenant, on condition that a new restrictive covenant accompany the abandonment of the old one, cannot be operative to defeat the effect of the abandonment. Defendant at no time consented to the new restriction, or to a conditional abandonment of the old one. The result of the action of complainant and his associates has been to destroy the dividing line covenant on the three corners nearest to defendant's property, and it seems clear that complainant is not now in a position to say to defendant that defendant must observe the covenant

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which complainant and his associates have disregarded, merely because defendant is unwilling, in disregarding it, to adopt a new restriction to which he is in no way bound, and which complainant regards as beneficial.

"It is also urged in behalf of defendant that the dividing lines of lots are not 'changed' by merely erecting a building across the dividing lines; that the dividing line can only be changed by a sale, and not by the use to which the land is devoted; and that a covenant against use cannot be created by implication. *Fortesque v. Carroll* (Court of Errors and Appeals) 76 N. J. Eq. 583, 75 Atl. 923, Ann. Cas. 1912A, 79, is referred to in support of this contention. I think it unnecessary to give consideration to this contention by reason of the views already expressed."

W. M. Clevenger, of Atlantic City, pro se.
Bourgeois & Coulcombe, of Atlantic City, for respondent.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

FAGAN v. MAYOR AND COUNCIL OF HOBOKEN et al.

(Supreme Court of New Jersey. Nov. 5, 1910.)

1. NEWSPAPERS (§ 1*)—DESIGNATION OF OFFICIAL PAPER—REVIEW OF DECISIONS.

There is sufficient doubt as to the liability of a city of the second class for the publication of official notices in a newspaper not designated as the official newspaper of the city, as required by Act 1892 (2 Gen. St. 1895, p. 2329), to justify the issuance of a writ of certiorari to review a resolution directing payment of the claim for such publication.

[Ed. Note.—For other cases, see *Newspapers*, Cent. Dig. §§ 1-13; Dec. Dig. § 1.*]

2. CERTIORARI (§ 26*) — PROCEEDINGS OF COUNCIL—REVIEW OF DECISIONS.

The review by certiorari of a resolution of a city council directing payment of a claim is not defeated by the fact that the warrant for such claim has been cashed, as it is possible that the city can recover back the money.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 39; Dec. Dig. § 26.*]

Petition of Lawrence Fagan for a writ of certiorari against the Mayor and Common Council of Hoboken and others, renewed in open court after its denial by a justice of the court. Writ allowed.

See, also, 81 Atl. 365.

Argued June term, 1910, before PARKER and BERGEN, JJ.

Merritt Lane, for prosecutor. Leon Abbett, for defendants.

PER CURIAM. The question in this case is whether a writ of certiorari should be allowed to review a resolution of the common

council of Hoboken directing payment of a claim of the Inquirer, a newspaper, for city advertising. Application was previously made to a justice of this court for such writ, and he allowed a rule to show cause which was subsequently discharged; and the application is now renewed in open court as authorized by the ruling in *Key v. Paul*, 61 N. J. Law, 133, 38 Atl. 823.

The ground of the application is that by act of 1892 (G. S. 2329, pl. 31) the common council of any city of the second class (to which class Hoboken belongs) should, with the consent of the mayor, designate by resolution an official newspaper, in which should be solely published all official notices, etc. This act has been held to supersede all previous legislation on the subject. *Wilson v. Trenton*, 56 N. J. Law, 469, 29 Atl. 183. It appears that in 1903 such a resolution was passed designating another newspaper, which resolution has never been repealed, nor has there been any subsequent designation by similar resolution of any other paper, but that the city work has been given out to the Inquirer and the bills for the same audited and paid from time to time. In the present case the warrant was delivered and cashed before the rule to show cause was served.

[1] We think the writ should be allowed. It may be that the city by acceptance of the work and resolutions directing payment therefor became liable to the Inquirer for the amount designated; but we think this is at least very doubtful. The power of the city to advertise is restricted by the statute to advertising in the designated newspaper, and it would seem that such advertising should not be treated as supplies ordered under general powers.

[2] The fact that the warrant was cashed does not stand in the way; for it may be that the city can recover back the money.

Counsel may present a writ.

ERVIN v. BURKE et al.

(Supreme Court of New Jersey. June 18, 1912.)

(Syllabus by the Court.)

FALSE IMPRISONMENT (§ 7*)—CIVIL LIABILITY —ILLEGALITY OF ARREST.

A conductor of a street railway car may lawfully eject a passenger who refuses to pay his fare. The fact that the passenger was a city policeman, whom the company under a city ordinance was required to carry free of charge, did not justify him in arresting the conductor for putting him off the car.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

Action by Frederick Ervin against Patrick J. Burke and another. Heard on demurrer to plea. Judgment on demurrer for plaintiff.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Argued February term, 1912, before GUM-MERE, C. J., and GARRISON and SWAYZE, JJ.

Frank Bergen, of Newark, for plaintiff.
Charles C. Hommann, of Perth Amboy, for defendants.

GARRISON, J. The declaration avers that the plaintiff, while engaged in his duty as a conductor of a street railway car, was assaulted by the defendants Burke and Harding, dragged from his car, and imprisoned. A special plea filed by the defendant Harding alleges that he was at the time of the alleged assault a city policeman on duty, and while lawfully riding on the car in question was forcibly ejected for refusal to pay the five cents fare demanded of him by the plaintiff, and that he thereupon took the plaintiff into custody in order to convey him before the city recorder. To this plea the plaintiff has demurred.

Upon the facts of the declaration that are uncontradicted and those of the plea that are admitted the question presented by this demurrer is whether a conductor of a street car may lawfully be arrested without a warrant for the ejection of a passenger, who was in fact a policeman, for refusal to pay his fare.

We think not.

Assuming that the defendant, by force of certain city ordinances under which the street railway company had constructed its line, was entitled to free transportation, and that he has an action against such company based upon the breach of such contract or duty, whichever it may be, that circumstance did not render his ejection for refusal to pay a fare an unlawful act of the conductor.

Controversies of this nature are not to be settled in a wrangle between a passenger and the conductor over the payment of a fare, nor is the latter the agent selected by the company to determine its legal rights and duties, or to represent it in controversies in which they come in question. The matter is set entirely at rest by the decision of the Court of Errors and Appeals in the case of *Shelton v. Erie Railroad Co.*, 73 N. J. Law, 558, 66 Atl. 403, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883, where, speaking of the agency of the conductor in this respect, it was said: "It is all comprised in his duty to collect a fare from every passenger or to eject him from the train." As between the plaintiff and the defendant, the plaintiff was in the right in ejecting the defendant, and the defendant, for anything set up in his plea, was in the wrong in arresting the plaintiff. We do not dwell upon the fact that the defendant was not in uniform, or did not tell the conductor that he was a policeman, or that he was on duty. Deeming these circumstances to be

unimportant, in view of the broad rule as to the carriage of passengers laid down by the case cited. The right of a policeman to arrest without warrant for a breach of the peace committed in his presence has, of course, no rational application to a case where the policeman himself provoked the breach and was in the wrong, and the man he arrested was in the right.

Judgment on demurrer is given for the plaintiff.

GOLDSTEIN-FINEBERG CO. v. STATE BOARD OF ASSESSORS et al.

(Supreme Court of New Jersey. June 26, 1912.)

(Syllabus by the Court.)

TAXATION (§ 376*) — CORPORATE STOCK — LIABILITY TO TAX—"OUTSTANDING."

Stock once issued is and remains outstanding, within the purview of the franchise tax act (4 Comp. St. 1910, p. 5295, § 519), although owned by the corporation issuing the same, until retired and canceled as provided by statute for the reduction of capital stock.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5123.]

Certiorari at the prosecution of Goldstein-Fineberg Company against the State Board of Assessors and others to review a franchise tax. Assessment affirmed.

Argued February term, 1912, before TRENCHARD, J., under the Statute.

Fisk & Fisk, of Jersey City, for prosecutor. Francis H. McGee, of Trenton, and Edmund Wilson, Atty. Gen., for State Board of Assessors.

TRENCHARD, J. The franchise tax act (4 Comp. St. p. 5295, § 519) imposes on certain domestic corporations an annual license fee or franchise tax of one-tenth of 1 per centum on all amounts of capital stock issued and outstanding on January 1st up to \$3,000,000. The prosecutor, one of these corporations, failed to make a return to the state board of assessors for the year 1910 as required by law, and that board levied upon the corporation a tax of \$200 for that year upon the basis of \$200,000 authorized capital stock. It appears that prior to December 6, 1909, 2,000 shares of its stock of the par value of \$200,000 were issued and outstanding.

The prosecutor claims that on December 6, 1909, such capital stock was decreased to \$50,000, and now contends that its tax should be reduced to \$50. In support of that claim we are referred to the minutes of a directors' meeting held December 6, 1909, showing a proposal in writing, dated that day, signed by the three holders of all the capital stock of the corporation (who were also the directors thereof), setting forth that "whereas said parties deem it advisable that

the amount of capital stock of said company outstanding should be reduced to 500 shares by reducing the amount held by each of said parties to one-quarter of that now held by them," and, therefore, that such stockholders offered to "give and assign" 1,500 of such shares to the company. The minutes further show that at such meeting the directors, by resolution, accepted such offer for the company; the resolution, however, providing "that the said shares of stock shall be retained by this company and shall not be retired." It further appears that such stockholders thereupon presented their stock certificates, with assignments indorsed thereon, thus transferring their shares to the company, that they were marked "canceled," and new certificates were then issued to them in proper proportion, so that in the aggregate they held 500 shares instead of the total authorized capital stock. I am of the opinion that the proofs fail to show that the capital stock of the company was decreased in such manner as to relieve the corporation from the tax in question. By section 49 of the corporation act (2 Comp. St. p. 1630) a corporation may issue stock to the amount of the value of property purchased, and this the company appears to have done.

The depositions show that substantially the entire amount of the capital stock in question was issued to these stockholders in payment for property purchased at the time of the organization of the company, but when the company was organized does not appear. It is now claimed that the property purchased was inadvertently overvalued by the directors, and that their revised judgment as to value resulted in the transaction in question. Whatever the motive for the action may have been, there is no proof that the value originally placed upon the property was excessive at the time it was purchased and paid for in stock.

The only question to be considered, therefore, is, What is the effect of the transaction as exhibited by the minutes? The rule is that stock once issued is and remains outstanding within the purview of the franchise tax act (4 Comp. St. p. 5295, § 519), although owned by the corporation issuing the same, until retired and canceled, as provided by statute for the reduction of capital stock. *Knickerbocker Imp. Co. v. Board of Assessors*, 74 N. J. Law, 583, 65 Atl. 913, 7 L. R. A. (N. S.) 885. Plainly, the stock in question was not retired. It was given and assigned to the company upon the express condition that it should be retained by the company and should not be retired. Moreover, the method provided by sections 27, 29, and 30 of the corporation act (2 Comp. St. p. 1612 et seq.) was not followed. Notably there was no written evidence of the action taken lodged with the Secretary of State, and pub-

lished in a newspaper, as required by such sections. *Knickerbocker Imp. Co. v. Board of Assessors*, 74 N. J. Law, 583, 65 Atl. 913, 7 L. R. A. (N. S.) 885. See, also, *Siegmán v. Electric Vehicle Co.*, 72 N. J. Eq. 403, 65 Atl. 910.

The assessment by the state board of assessors was, therefore, lawfully made, and will be affirmed, with costs.

KEARNS v. SIMPSON.

(Supreme Court of New Jersey. June 24, 1912.)

(Syllabus by the Court.)

JURY (§ 25*)—DISTRICT COURTS—RIGHT TO JURY TRIAL.

Where a party to an action in the district court fails to demand a jury at least one day prior to the return day of the summons, the fact that the case upon appeal has been reversed does not entitle him to demand a jury upon the second trial, but relegates the parties to their former status upon a trial de novo before the district court.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

Appeal from District Court of Orange.

Action by Patrick J. Kearns against William H. Simpson. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

William A. Lord, for plaintiff. Fort & Fort, of Newark, for defendant.

MINTURN, J. The defendant appeals from a judgment obtained against him in the Orange district court by the plaintiff for the value of certain earth filling and field stone which the plaintiff delivered to defendant. The defendant admitted the correctness of the item for field stone, and paid the amount due therefor into court.

Exception was taken to certain trial errors, but the gist of defendant's argument here was directed to an attack upon the trial court's refusal to grant a trial by jury. Upon a previous trial in the same court the defendant had not demanded a jury trial, but went to trial before the court without a jury, and upon an appeal from the judgment then rendered secured a reversal upon the ground of the admission of illegal testimony. Prior to the second trial, defendant paid the fees and demanded a jury trial. The statute regulating proceedings in the district court (P. L. 1898, p. 556) is supplemented by chapter 253 of the Laws of 1905, which provides, in substance, that, unless either party demand a jury trial "at least one day before the return day of the summons," the court shall try the issue, and give judgment. Upon the first trial no objection was entered to the court trying the case, and no demand was made for a jury trial, and hence upon the present trial it was impossible for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant to comply with the provisions of the statute. He now attacks its constitutionality upon the ground *inter alia* that he is forced back after his success upon the former appeal to try the case *de novo* before a court which previously had rendered judgment against him, and also because it is in derogation of paragraph 4, § 7, art. 4, of the state Constitution.

The first objection is met by the response that as a rule all reversals, whether of fact or of law, result in reframing the issue and sending it in its corrected form to the same court for retrial. Our jurisprudence is based upon that theory of judicial procedure which both experience and precedent have sanctioned as not unjust in its operation or illegal in principle. The constitutionality of the act in question has been settled by this court in former adjudications, and we are not at liberty, therefore, upon this argument, even if so minded, to question them. *Phoenix Pottery Co. v. Perkins*, 79 N. J. Law, 78, 74 Atl. 258; *Haythorn v. Van Keuren*, 79 N. J. Law, 101, 74 Atl. 502. The same act was under consideration by this court in *Home Coupon Co. v. Goldfarb*, 78 N. J. Law, 146, 74 Atl. 143, and the judgment was sustained after a review of the requirement in question. The effect of the reversal of the former judgment, therefore, was to relegate the parties to their former status upon a trial *de novo* before the district court, but such reversal did not confer any new rights upon them.

The disposition of this objection leaves for our consideration certain alleged trial errors. The plaintiff proved the sale and delivery of the dirt, and defendant denied the delivery in quantity as alleged. The court found as a fact that the dirt had been delivered, and, there being ample evidence to sustain this finding, it is well settled we will not review it. The plaintiff testified that he saw the dirt delivered, but his testimony was in part at least shaken upon cross-examination, and defendant's counsel moved to strike it all out upon the ground of hearsay. Such an objection was too general, since, concededly, it was not all hearsay. Whether the plaintiff saw the actual delivery of the dirt is questionable. He testified that he did, and that he recorded it every night in his book, but there is enough in his testimony to warrant the finding of the court. There is nothing in the objection that the court admitted in evidence an agreement in writing without the testimony of other witnesses than the plaintiff and his brother-in-law, who plaintiff testified saw defendant sign it. There was no evidence that the others were attesting witnesses, and in any view of the question the document was a mere statement, and plaintiff sufficiently proved it by testifying that defendant signed it in his presence.

The defendant also objected to the court's

refusal to allow a witness to say whether the signatures on a check which was shown to him, and the signature on an agreement which was not shown to him and which was not in evidence were identical. This was clearly incompetent, and properly rejected. The refusal to nonsuit was proper, if for no other reason than that the defendant admitted the correctness of part of the plaintiff's demand; but, in any event, the question at issue was one of disputed fact, which the court properly ruled should be determined after hearing the entire case. The amendment of the state of demand by the court upon the plaintiff's motion was also objected to, but this was concededly a matter within the discretion of the court, and it is not perceived that the amendment worked injury to the defendant.

The objection that the amount of the judgment cannot be computed from the testimony is without substance. The defendant paid what he admitted to be due into court, and the proper practice was to include that amount in the judgment; the purpose of paying money into court being to stay the running of interest thereon. The objection otherwise extends to the weight of the evidence. It was entirely a question of fact under the testimony whether the payments alleged by defendant to have been made were in fact made, and the determination of the trial court upon that subject, there being sufficient evidence to support it, cannot be challenged here.

The judgment will be affirmed.

GAHAN et al. v. PLANT et al.

(Supreme Court of New Jersey. June 24, 1912.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 334*)—REMEDIES OF PURCHASER — RECOVERY OF PURCHASE MONEY PAID.

Where the parties to a contract of sale have rescinded, the vendor accepting the property and taking possession of it, the vendee is entitled to maintain an action to recover the money paid on account of the sale.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

Appeal from District Court of Teaneck.

Action by Matthew L. Gahan and others against Nellie Plant and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

John B. Zabriskie, of Hackensack, for appellants. R. M. Hart, of Hackensack, for appellees.

MINTURN, J. The plaintiffs contracted with the defendant while she was feme sole to purchase certain lots of land at Teaneck,

in Bergen county, and defendants agreed to erect thereon a dwelling house, and to charge the plaintiffs only the actual cost of construction. After having paid a number of installments upon the contract, and after the dwelling was completed, the plaintiffs discovered that the cost of construction as charged by defendant was in excess of the actual cost, and brought suit, after rescinding the contract of purchase, to recover the sum of \$190 paid on the contract. The plaintiffs refused to pay the excess of charge beyond the cost, and, after some preliminary discussion and negotiation, rescinded the contract and abandoned the premises. The present suit was instituted upon the theory of false representation made by defendants to the plaintiffs through defendants' agent. The district court judge rendered judgment for the plaintiffs, and found as a fact that one of the considerations forming the basis of the sale of the lots was the construction of the house by the defendants, the plaintiffs to be charged only the actual price of construction. The court also found that plaintiffs subsequently, in pursuance of notice to that effect, surrendered the premises to defendants, who are now in possession thereof.

The defendants, in the trial court, presented several objections to the legal recognition of the plaintiffs' demand, but the finding of the trial court that the promise of the defendants was pro tanto an inducement for the purchase of the property, that the promise was not fulfilled, and that finally the plaintiffs rescinded the contract, and that the defendants are now in possession of the premises, makes the consideration of the legal propositions advanced by defendants irrelevant to the real question at issue as now formulated. The doctrine of caveat emptor, which the defendants invoke, can play no part in an issue of this character, where the transaction is one not relating entirely to the title or quality of the real estate sold. *Broomis, Legal Maxims*, 605. The fundamental theory of that doctrine is that upon a sale the buyer has presented to him the opportunity and the object to inspect; but that, where this opportunity is not offered and the buyer is ex necessitati dependent on the judgment and the honesty of the seller, as he was in this case, the main reason for the application of the maxim is wanting. *Mody v. Gregson*, L. R. 4, Exch. 49; *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

In the case at bar the parties entered into an executory contract, the essential feature of which was, as found by the trial court, that the house should be delivered to the vendee at a certain figure. This contract the vendor failed to perform, and for the failure to perform the vendee rescinded, and the vendor accepted the property, retains

possession of it, and refuses to pay to the vendees the amount paid by them on the contract. In reality the parties are relegated to the same position by mutual acquiescence as where they began, and the plaintiffs' action should have been under this status in assumpsit for money had and received. The state of demand, though sounding in deceit for false representation, has annexed to it the common counts, and that these will be sustained by an implied promise to pay under the findings of the trial court from the testimony in the case has been settled since the doctrine was enunciated in *Slades Case*, 4 Coke, 925.

The findings of fact by the trial court, as alluded to, render unnecessary and unprofitable any extended discussion of the questions of tender and laches in the plaintiffs' act of rescission, as contended for by defendants, and the judgment below will therefore be affirmed.

WICHERN v. UNITED STATES EXPRESS CO.

(Supreme Court of New Jersey. June 24, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 165*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.

Where there was no evidence offered by defendant by which the \$50 limitation of its liability of a common carrier contained in an express receipt could be said to have been called to the shipper's attention, and there was evidence in behalf of the plaintiff that neither her attention nor the attention of her agent had been called to it, *held*, that the common-law liability of the defendant as a common carrier prevailed, and was not qualified by the limitation contained in the receipt.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 729, 730; Dec. Dig. § 165.*]

2. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUANCE OF VALUE SHOWN.

The value of the trunk when delivered to the initial carrier having been fixed by the testimony, that value will persist as the value of the property when delivered to the express company, in the absence of testimony to the contrary.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 87, 88, 103; Dec. Dig. § 67.*]

Appeal from District Court of Jersey City.

Action by Amelia A. Wichern against the United States Express Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued February term, 1912, before PARKER, TRENCHARD, and MINTURN, JJ.

McDermott & Enright, of Jersey City, for appellant. Roberson & Demarest, of Jersey City, for appellee.

MINTURN, J. The Second district court of Jersey City gave judgment in favor of the plaintiff upon the following facts: The plaintiff, about to return to her home in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Bayonne, from a vacation at Haines Falls, in the Catskill Mountains, in the state of New York, checked her trunk to New York City. The plaintiff's fiancé received the baggage check from her and delivered it to the defendant company, taking its receipt, which is the basis of the suit. It is admitted that the trunk was never delivered.

[1] The defendant at the trial offered no testimony, and admitted its liability, but requested the court to limit the recovery to the sum of \$50, upon the ground that such a limitation was contained in the liability clause printed in the usual form upon the receipt accepted by the plaintiff. The trial court refused to limit the liability, but upon proof of the value of the contents of the trunk rendered a judgment for the plaintiff for the value.

The main insistence upon the part of the defendant is that its liability was limited by the terms of the receipt. The legal effect of the acceptance of such a receipt was considered and determined in *Hill v. Adams Express Co.*, 81 Atl. 859, by the Court of Errors and Appeals. It was there laid down that, when a common carrier undertakes to transport merchandise, the presumption is that he does it subject to the common-law liability, that this presumption remains until it is overcome by proof of a special agreement, and that the burden of showing such an agreement rests upon the carrier. It was also held in that case that assent to such a limitation did not arise from the mere acceptance in silence by the shipper of the receipt. In the case at bar it appears without contradiction that the limited liability clause of the contract was not called to the attention of the shipper or her agent, who accepted it in return for the baggage check, and therefore the burden placed upon the defendant by the *Hill Case* was not discharged. *Cohen v. U. S. Express Co.*, 81 N. J. Law, 355, 79 Atl. 1053. In reaching its judgment upon this uncontradicted testimony, the trial court must have concluded, and we think quite properly, that the evidence was conclusive that in no manner was the attention of the plaintiff or her messenger who for the purposes of this case was her agent (*Russell v. Erie R. R.*, 70 N. J. Law, 808, 59 Atl. 150, 67 L. R. A. 433, 1 Ann. Cas. 672) directed to the limitation of liability contained in the receipt, and that, as a consequence, the defendant's common-law liability for the value of the trunk was the applicable rule.

[2] The next ground of objection to the judgment is that the plaintiff failed to prove the value of the trunk's contents at the time of its delivery by the railroad company to the defendant. The proof was uncontradicted as to the value of the trunk and its contents at the time of delivery to the railroad company, and the presumption of value

shown at the time of delivery to the initial carrier will persist in the absence of testimony to the contrary by the defendant. *Hutchinson on Car*. 761; 6 Cyc. 490, and cases cited. The question presented to this court as to the construction of the contract under the New York law is not legally before us, since it was not presented in the trial court. *Bierman v. Reinhorn*, 71 N. J. Law, 422, 58 Atl. 1063; *Winfield v. Ludwig*, 81 N. J. Law, 375, 79 Atl. 1036.

The final objection urged is that, since the plaintiff gave no detailed value of her possessions in the trunk, the court should have ignored her testimony as to general value. It should suffice to say in reply to this that it was within the power of the defendant to elicit the desired information by cross-examination, and its failure to do so cannot be taken advantage of now to question the correctness of the estimate given by the plaintiff and accepted without objection by the trial court.

The judgment will be affirmed.

GOLDMAN v. BEACH FRONT REALTY CO.

(Supreme Court of New Jersey. June 18, 1912.)

1. LICENSES (§ 58*) — PRIVILEGE TO USE PROPERTY—REVOCATION.

A license or privilege to use real property is revocable unless coupled with an interest.

[Ed. Note.—For other cases, see *Licenses*. Cent. Dig. §§ 116-120, 121; Dec. Dig. § 58.*]

2. LICENSES (§ 63*)—REVOCATION OF LICENSE TO USE REAL PROPERTY—REMEDY.

On the revocation of a license for the use of real property not coupled with an interest, the licensee cannot recover in tort, but only for breach of contract.

[Ed. Note.—For other cases, see *Licenses*. Cent. Dig. § 126; Dec. Dig. § 63.*]

3. EASEMENTS (§§ 3, 26*)—EASEMENT IN GROSS—PRIVILEGE TO USE REALTY.

Under an instrument by which the owner of land, who operated thereon a merry-go-round, leased to plaintiff the privilege to use a certain space at the entrance to the merry-go-round for the renting of rolling chairs, to be occupied only on Sundays and between the time the merry-go-round closed in the evening until 6 o'clock in the morning on week days, and giving plaintiff that privilege exclusively at a fixed monthly rental, the privilege conferred was an easement in gross, which was not discontinued by the discontinuance of the merry-go-round and the transfer of the fee.

[Ed. Note.—For other cases, see *Easements*. Cent. Dig. §§ 8-12, 72½-74, 80-82; Dec. Dig. §§ 3, 26.*]

4. EASEMENTS (§ 1*)—DURATION.

Ordinarily an easement is a right in fee, but it may be for an estate less than a fee or for a term of years.

[Ed. Note.—For other cases, see *Easements*. Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. § 1.*]

5. EASEMENTS (§ 63*)—DISTURBANCE—REMEDY—FORM OF ACTION.

The remedy for disturbance of an easement is an action on the case.

[Ed. Note.—For other cases, see *Easements*. Cent. Dig. § 130; Dec. Dig. § 63.*]

G. TRIAL (§ 165*)—ACTION FOR DAMAGES—MOTION FOR NONSUIT.

The amount recoverable by plaintiff as damages for disturbance of an easement in gross is not in question on defendant's motion to nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from District Court of Atlantic City.

Action by Herman I. Goldman against the Beach Front Realty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Chandler & Robertson, of Atlantic City, for appellant. Garrison & Voorhees, of Atlantic City, for appellee.

PARKER, J. The action is in tort and is based upon the forcible deprivation by the defendant of plaintiff's privilege of using, at certain hours, a portion of the entrance of the business property fronting on the board walk at Atlantic City for the purpose of plaintiff's business of renting rolling chairs. It appears that the corporation, known as Young's Amusement Company, owned a piece of land and building thereon, with an entrance on the board walk where that company operated what is known as a merry-go-round. Under date of June 1, 1911, by instrument under seal, which in its general provisions is in the form of a lease, and very probably was drawn on a printed form of lease or adapted therefrom, the Amusement Company "did grant, demise, lease, and to farm let" to the plaintiff the "privilege" to use a certain space situate on the board walk, etc., and known as the entrance to the merry-go-round of the Young's Amusement Company "for the renting of rolling chairs, to be occupied only on Sundays and between the time the merry-go-round shall be closed in the evening until 6 o'clock in the morning on week days." Then follow certain restrictions as to the way the rolling chairs ought to be placed; the rent is named as such and fixed at \$15 a month, payable in advance on the second day of each month. And it was further agreed that the plaintiff was to have the exclusive privilege of renting the rolling chairs on the premises of the Young's Amusement Company. Then follow a covenant to pay rent and a covenant not to assign the lease, "or any part thereof," or permit the use thereof for any other purpose than the renting of rolling chairs nor to suffer alterations to be made therein, and for surrender of the lease and a covenant for quiet enjoyment; in short, the operative words of the covenants and conditions are all those of an ordinary lease. The term was to extend until January 2, 1913.

Plaintiff seems to have enjoyed the right

or privilege conferred by this instrument so long as the Young's Amusement Company continued to operate the merry-go-round; but during the term that company sold the property and agreed to remove the merry-go-round, and did so, the grantee wishing to conduct another business there, and said grantee notified plaintiff to vacate, and on his refusal to do so there were certain forcible acts which resulted in the entire exclusion of plaintiff from the privileges theretofore enjoyed under the instrument in question. He brought suit for damages in tort, claiming for loss of profits, and was awarded a judgment of \$171 for the period between November 16, 1911, and December 4, 1911.

The sole ground of appeal is that the court erred in refusing to nonsuit the plaintiff. Motion to nonsuit was put upon the grounds, first, that the agreement was not a lease in contemplation of law; second, that the removal of the merry-go-round by the grantor of the privilege operated as a cancellation of the agreement; and, third, that "it was not assignable."

The last ground is vague and to us meaningless, because there was no assignment of the plaintiff's privilege, and, if it is meant that the privilege ceased with the conveyance of the fee and the change of use, this point is covered by the second ground. The appellant contends that the agreement did not constitute a lease, but that it conferred only a license, and that this was revocable. It may be conceded that it was not a lease, although, as already noted, it was completely drawn in form as such.

[1, 2] If it was a license, it was properly revocable, unless coupled with an interest (18 Cyc. Law [2d Ed.] 1147; East Jersey Iron Co. v. Wright, 32 N. J. Eq. 248); and in such case there can be no recovery in tort, but only for breach of the contract (Wood v. Leadbitter, 13 M. & W. 838, 16 E. R. C. 49; Shubert v. Amusement Co., 83 Atl. 369, decided at the present term of this court). The present action being in tort, these rules would apply and would bar a recovery in this case.

[3] We are of opinion, however, that the instrument in question conferred more than a license, and that what was created thereby was an easement. Ordinarily the existence of an easement is predicated upon that of a tract of land to which it appertains as respects another tract of land subjected thereto, but there is a class of easements or of interests in land akin thereto and called for convenience easements in gross, and which are well recognized in the law. It is plain from an examination of the instrument under seal, constituting the contract between the parties, that the plaintiff was invested with the right (called a privilege) to go upon a certain portion of

the land afterwards conveyed to the defendant at certain periods of the 24 hours constituting a day and on all of Sunday, and there conduct a certain specified business, such privilege to last for a definite term of about 19 months.

[4] Ordinarily an easement is a right in fee, but not necessarily so, and that it may be for an estate less than a fee, or even for a term of years, is fully recognized by the Court of Errors and Appeals in *Newhoff v. Mayo*, 48 N. J. Eq. at page 623, 23 Atl. at page 267, 27 Am. St. Rep. 455, where the court said: "Such a right, while it endures, has every characteristic of an easement, and should be governed by the rules relating to such incorporeal hereditaments." The present case closely resembles *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758, where plaintiffs, in consideration of building a fence around a race track under written contract, were granted the privilege of using the fence for advertising purposes, and, after the sale of the fee, were prevented from so doing, and it was held that they were entitled to enforce their right by injunction.

[5] The remedy for disturbance of an easement is an action on the case (14 Cyc. 1216; *Osborne v. Butcher*, 26 N. J. Law, 308), and the state of demand, designated in tort, may be properly regarded as a declaration in case.

We cannot see that the discontinuance of the use of the premises for the purposes of a merry-go-round could result in a discontinuance of the easement. The only thing on the face of the written instrument that is uncertain is the hour when the merry-go-round closes at night, and the usual hour of closing could of course be readily ascertained by oral proof.

[6] The amount recoverable by plaintiff as damages for disturbance of the easement is, of course, not in question on the motion of nonsuit. If the plaintiff were entitled to no more than nominal damages in the present case, a motion to nonsuit could not prevail.

The judgment should be affirmed.

BROOKS v. SEA ISLE CITY.

(Supreme Court of New Jersey. June 13, 1911.)†

1. MUNICIPAL CORPORATIONS (§ 911*) — BONDS—PURPOSE OF ISSUE.

Act March 22, 1904 (P. L. p. 86), authorizing cities to issue bonds, the proceeds to be used to retire floating or bonded indebtedness, does not authorize the issuance of bonds to build lighting plants.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1899, 1901; Dec. Dig. § 911.*]

2. MUNICIPAL CORPORATIONS (§ 918*) — BONDS—POPULAR REFERENDUM.

Where a municipal charter authorizing the issuance of bonds conferred the power of ap-

propriating the proceeds, not upon the voters, but upon the council, an ordinance providing for a bond issue to macadamize streets and purchase fire hose is invalid where submitting to popular referendum the issuance of bonds in specified amounts for each purpose; the power of the voters being limited to passing their judgment upon the bond issue as a concrete proposition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

3. MUNICIPAL CORPORATIONS (§ 918*) — BONDS—ORDINANCE—VALIDITY.

Under Act March 21, 1899 (P. L. p. 130) § 70, providing that when bonds are issued for a public improvement, a part of the cost of which may be returned by a special assessment, such assessment should be applied pro tanto to the retirement of the bonds so issued, the duty of imposing and collecting the assessment cannot be legally delegated by the referendum to the voters of the city, and so an ordinance providing for the issuance of bonds for the macadamizing of streets is invalid where submitting to popular referendum the amount of the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.*]

Original application by George H. Brooks for writ of certiorari against the City of Sea Isle City to review two ordinances. Ordinances set aside.

Argued February term, 1911, before SWAYZE, BERGEN, and MINTURN, JJ.

Grey & Archer, of Camden, for prosecutor. James M. E. Hildrèth, of Cape May City, for defendant.

PER CURIAM. The writ of certiorari brings up for review two ordinances of Sea Isle City; one providing for a bond issue of \$20,000 for the construction of a lighting plant, and the other providing for a bond issue for street improvements and the purchase of a fire apparatus. The city is incorporated under the provisions of the act of 1899, p. 96, which confers power upon it to issue bonds not to exceed in amount 8 per centum of the ratables; the proceeds to be used for the purposes prescribed in the act and for other lawful purposes, when such municipal action shall be approved by a majority vote of the voters of the municipality.

The improvement of streets is included in the powers thus conferred, but the construction of a lighting plant is not included therein. The latter delegation of power it is contended is conferred by the act of 1906 (P. L. p. 711) upon all cities that may adopt the act; and on July 1, 1910, a resolution was adopted by the city council fixing August 16, 1910, as the time for voting on the question of the adoption or rejection of this act. Prior thereto and on June 13, 1910, a resolution was passed by the same body submitting to the voters the question of an issue of \$80,000 of bonds to be apportioned as follows: Sewage disposal plant, \$35,000; gas

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†Received for publication July 15, 1912.

plant, \$20,000; macadamizing streets, \$20,000; hose carriages, \$5,000.

[1] The vote upon this issue was directed to be taken on August 18, 1910. The vote upon the two questions, viz., the adoption of the ordinance and the ratification of the bond issue, seems to have been taken upon the same ballot, and, while the legal propriety of this procedure may be questioned, it is not raised in the case. The vote resulted in the adoption of the act of 1906. That act empowers all cities adopting its provisions to build a lighting plant and to issue bonds not to exceed 1 per centum of the ratables to cover the cost thereof; such issue of bonds to be ordered by municipal ordinance without the necessity of a popular vote of ratification to legalize it.

But the difficulty in fact is that the ordinance provides for a bond issue of \$20,000, of which issue \$14,000 is to be raised under the provisions of the act of 1906, and \$6,000 under the provisions of the act of 1904, p. 86, which authorizes cities to issue bonds to the extent of 15 per centum of their ratables, the proceeds "to be used to retire any floating or matured bonded indebtedness." This limitation it is not contended comprehends the object or purpose of the ordinance under review, since the conceded object as expressed in that ordinance is the creation of a new indebtedness. We think, therefore, that the ordinance No. 45 is invalid in this respect and must be set aside.

[2] The other ordinance (No. 44) provides for the macadamizing of streets and the purchase of fire house by a bond issue, to be approved by a popular referendum. The charter of the city confers this power. But the difficulty we perceive in the case is that the act confers the power of appropriating the proceeds of the bond issue, not upon the voters, but upon council. The power of the voters was limited to passing their judgment upon the bond issue as a concrete proposition of the public policy of a municipal expenditure, and not to the subdivision of the proceeds and the application thereof to the specific improvements contemplated by the referendum, as was done in this case.

[3] Section 70, P. L. 1899, p. 130, requires that when bonds are issued for a public improvement, a part of the cost of which may be returned to the municipality by assessment upon the property specially benefited, the assessment, when collected, shall be applied pro tanto to the retirement of the bonds so issued. In this case the duty of imposing the assessment and the collection thereof devolved upon the municipality, and the appropriation of the amount collected was a duty which also devolved upon them and could not be legally delegated to the legal voters of the municipality by a referendum.

For this reason we think this ordinance also should be set aside.

MCGRATH v. MAYOR AND COUNCIL OF CITY OF BAYONNE.

(Supreme Court of New Jersey. June 26, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 192*)—OFFICERS—REMOVAL OF BUILDING INSPECTOR—NECESSITY OF HEARING.

Plaintiff, an exempt fireman holding the position of assistant building inspector, was removed therefrom by resolution without charges or complaint made against him; *Held*, that under the provisions of P. L. 1911, p. 444, protecting exempt firemen from removal except upon charges and complaint and an opportunity to be heard, the resolution was illegal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 530-532; Dec. Dig. § 192.*]

2. STATUTES (§ 101*)—LOCAL AND SPECIAL ACTS.

The act protecting exempt firemen from removal except for cause, and after charges presented and an opportunity to be heard (P. L. 1911, p. 444), is constitutional.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 113; Dec. Dig. § 101.*]

3. MUNICIPAL CORPORATIONS (§ 192*)—OFFICERS—REMOVAL OF BUILDING INSPECTOR—CERTIORARI TO REVIEW—"OFFICE"—"POSITION."

The plaintiff holding a position, and not an office, as defined by law, certiorari, and not quo warranto, was the proper remedy to test the legality of his removal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 530-532; Dec. Dig. § 192.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 4921-4931; vol. 8, p. 7736; vol. 6, pp. 5460, 5461.]

Certiorari by Thomas J. McGrath against the Mayor and Council of the City of Bayonne to review dismissal of prosecutor by defendant Council. Resolution of dismissal set aside.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Benny & Cruden, of Bayonne, for prosecutors. Daniel J. Murray, of Bayonne, for defendant.

MINTURN, J. [1] The prosecutor, who held the position of assistant building inspector in the city of Bayonne, was dismissed by the board of council without complaint or charges preferred against him. He contests the dismissal upon the ground that since he is an exempt fireman, holding a certificate evidencing that fact, he could be legally removed only for good cause and after an impartial hearing. In support of this contention we are referred to P. L. 1911, p. 444, which, in substance, provides, *inter alia*, that no person holding a salaried position or office in any municipality of the state who is an exempt fireman, holding an exempt fireman's certificate, shall be removed from such position, "except for good cause shown after a fair and impartial hearing, but such exempt fireman shall hold his position or office

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

during good behavior, and shall not be removed for political reasons." The prosecutor is an exempt fireman, and is in possession of the certificate of exemption required by this statute. He was appointed to the position of assistant building inspector by resolution of the council on March 1, 1910, at a salary of \$1,000 per annum, for the unexpired term of Thomas Nolan. He continued to serve until January 1, 1912, when, without notice, William Dwyer was substituted at the same salary to fill the position.

The office of building inspector was created by an act of the Legislature passed in 1886 (C. S. vol. 1, p. 623), and, under the provisions of that act, the mayor and council provides by ordinance for the appointment of a building inspector, but no provision was made, either in the statute or in the ordinance, for the appointment of an assistant building inspector, the latter appointment being made presumably under the general power contained in the charter of Bayonne. P. L. 1873, p. 466.

[3] The distinction established by this court between an office and a position has been the subject of repeated adjudications, and we are of the opinion, in the light of these adjudications, and the testimony presented by this record, that the prosecutor was the occupant of a position, and not of an office. *Bownes v. Meehan*, 45 N. J. Law, 189; *Stewart v. Freeholders*, 61 N. J. Law, 117, 38 Atl. 842. Such being the status of the prosecutor, certiorari, and not quo warranto, was the legal remedy for the assertion of his claim, and the prosecutor, therefore, is properly here upon this writ. *Peterson v. Salem*, 63 N. J. Law, 57, 42 Atl. 844.

[2] The final objection of moment is directed to the constitutionality of the act of 1911, as in contravention of article 4, § 7, par. 11, subd. 7, of the state Constitution, inhibiting the passage of local or special laws. The act is entitled, "An act regarding exempt firemen of volunteer fire departments, volunteer fire engine, hook and ladder, hose or supply companies, or salvage corps, of the cities, towns, townships, boroughs and fire districts of the state." We consider the title of this act sufficiently indicative of the legislative intent to grant to the generality of exempt firemen the privilege accorded by the act. The fact that the body of the act requires such exempt firemen to hold an exemption certificate is a mere detail of procedure, which it is presumed exempt firemen, or those entitled to be so classed, can readily comply with. This general definition of the class to which the provisions of the act shall apply is sufficiently comprehensive under our adjudications to include all exempt firemen who are legally entitled to that appellation, and the act thereby fulfills the constitutional requirement. *State ex rel. Walter v. Town of Union in Hudson County*,

33 N. J. Law, 350; *Rader v. Township of Union*, 39 N. J. Law, 509; *Smith v. Willetts*, 81 N. J. Law, 372, 79 Atl. 1038.

We have examined the defendant's remaining objections to this proceeding, and find them without substance.

The resolution in question will be set aside.

GOSMAN v. PFISTNER.

(Court of Chancery of New Jersey. June 24, 1912.)

1. VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

Where the record title to land shows a conveyance by a trustee to a third person, and a reconveyance to the trustee individually, a purchaser will not be compelled to take such title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

2. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE.

A purchaser of land has constructive notice of what appears in antecedent title deeds.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 502-512; Dec. Dig. § 230.*]

3. VENDOR AND PURCHASER (§ 180*)—SALE OF TRUST PROPERTY—PURCHASE BY TRUSTEE.

Where a conveyance of land by a trustee to a third person, and a reconveyance to himself individually, were made only eight years before a suit for specific performance, the title will not be held marketable under the rule that after the lapse of a long period of time equity will presume that a trustee accounted to the beneficiaries and that all claims against him were barred by delay.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

4. VENDOR AND PURCHASER (§ 130*)—MARKETABLE TITLE.

An outstanding tax title does not render the title to land unmarketable, where no entry under such tax title has been made within 20 years, since it is barred by the common-law limitation.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.*]

5. SPECIFIC PERFORMANCE (§ 10*)—SUFFICIENCY OF TITLE.

Specific performance of a contract for the sale of three lots will not be decreed as against the purchaser, where the title to one of the lots is defective.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 20-25, 50; Dec. Dig. § 10.*]

Bill for specific performance by John W. Gosman against Henry Pfistner. On final hearing. Decree for defendant.

J. H. Harrison, of Newark, for complainant. Spaulding Frazer, of Newark, for defendant.

HOWELL, V. C. This is a bill for the specific performance of an agreement to convey real estate. The defendant objects

to the title tendered by the complainant for the reason that it is not a marketable one, and he relies upon the title deeds for a demonstration and defense of his position. There are three tracts described in the agreement, as to one of which there is no objection; as to the other two the objections are as hereinafter stated. For the sake of convenience I will refer to these two as tracts "A" and "B."

[1] The record shows that prior to June 3, 1876, one William Nelson held a mortgage on tract A, which mortgage after his death was foreclosed. At the foreclosure sale the land was bought in by the executors and trustees under his will and the title taken from the sheriff to them as such executors and trustees on the date last named. No other step occurs in the transaction until August, 1906, during which time two of the executors and trustees died, leaving Thomas Nelson as sole surviving executor and trustee. On the last-named day he in his capacity of executor transferred the title to William H. Robinson, who in turn transferred it back to Thomas Nelson individually; both deeds being in consideration of \$1 and other valuable considerations. Thomas Nelson subsequently died leaving a will by which he gave to his executors a power of sale of his real estate, by virtue of which power they conveyed the premises in question to one Kilmbach, who conveyed to the complainant, Gosman. The question in regard to this tract is whether enough appears upon the record to make the title unmarketable. It was held in the leading case of *Smith v. Drake*, 23 N. J. Eq. 302, that, if an administrator or other trustee directly or indirectly should purchase lands at a sale made by himself as such, the sale would be set aside on application of the parties interested. In that case an administrator sold lands at public auction and obtained therefor a fair price, but the property was bid in for himself by one of his friends. The sale was set aside and an accounting ordered upon the ground that the administrator became a constructive trustee for the parties in interest.

[2] A purchaser of land is bound by constructive notice of what appears in the antecedent title deeds. Here is a disclosure by these documents that Thomas Nelson held the title to the land in question as trustee under his father's will for 30 years, and that he then procured the land to be conveyed to himself. This is notice to the defendant of an irregularity which might affect the title to the lands. The case of *Tillotson v. Gesner*, 33 N. J. Eq. 313, is almost on all fours with the case in hand. That was a case for specific performance in which it appeared that there was a conveyance of land voluntary on its face made by a defendant in a suit just before a judgment for a large sum was rendered against him, which would have

been a lien on the land if such conveyance had not been made. Specific performance of the agreement was not enforced upon the ground that there was apparent upon the face of the papers a situation which might subject the purchaser to litigation and make the title doubtful, and that if the title to land be doubtful equity will not compel the defendant to take it and so expose himself to the hazard of litigation. Upon this theory courts of equity have frequently declined to compel a purchaser to accept a title which, though questionable, the court believed to be good. The case cited was followed in this court by *Cornell v. Andrews*, 35 N. J. Eq. 7, and affirmed by the Court of Errors and Appeals in *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, 30 L. R. A. (N. S.) 25, Ann. Cas. 1912A, 319, and *Doutney v. Lambie*, 78 N. J. Eq. 277, 76 Atl. 746. The effect of the constructive notice is discussed in *Smith v. Vreeland*, 16 N. J. Eq. 198; *Spielmann v. Kliest*, 36 N. J. Eq. 199; *Jennings v. Dixey*, 36 N. J. Eq. 490; *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160; *Roll v. Rea*, 50 N. J. Law, 264, 12 Atl. 905; *Schwoebel v. Storrie* 76 N. J. Eq. 406, 74 Atl. 969. I am therefore driven to the conclusion that the record title contains a notice to any purchaser that the title to the land in question might become subject to litigation to which he could be made a party on the ground of notice.

[3] It was held in *Starkey v. Fox*, 52 N. J. Eq. 758, 29 Atl. 211, and afterwards affirmed by the Court of Appeals, that a Court of Equity would presume, after the lapse of a long period of time, that the trustee had accounted to the beneficiaries and that all claims against him were barred by long delay; but that case is not authority for the position taken by the complainant here. In this case it appears that Thomas Nelson held the title in his fiduciary capacity until 1906, and that his breach of trust, if breach of trust it was, began at the time when he caused the land to be conveyed to himself. This is but eight years ago, and it could hardly be said that sufficient time had elapsed to bar claims under the authority of *Starkey v. Fox*, and so that case is differentiated from this, and still leaves the matter in such doubt as that the court ought not to force the title on the defendant.

[4] Lot B is in a different class. There the objection is to a tax title outstanding in the name of a third person. No entry has been made under it within 20 years last past, so that the common-law limitation has run against it. The title therefore to lot B cannot be deemed doubtful. *Beatty v. Lewis*, 68 Atl. 95.

[5] Although two of the lots are unobjectionable, the court cannot compel the defendant to accept them. He bargained for the three lots by one contract and at an inclusive price, and he cannot be driven to

take a part only; he has the right to all or none.

I will advise a decree in accordance with these views.

BOARD OF TENEMENT HOUSE SUPERVISION OF NEW JERSEY v. SCHLECHTER.

(Supreme Court of New Jersey. June 25, 1912.)

(Syllabus by the Court.)

1. STATES (§ 215*)—COSTS—STATE AGENCIES.

In a prosecution for a penalty under the Tenement House Act (4 C. S. 1910, p. 5321), the board of tenement house supervision created by section 203 of that act, being a state agency, is not liable for costs.

[Ed. Note.—For other cases, see States, Cent. Dig. § 203; Dec. Dig. § 215.*]

2. STATES (§ 215*)—PERSONS LIABLE—STATUTORY PROVISION.

In this respect section 242 of the Practice Act (3 Comp. St. 1910, p. 4126) applies to district courts as provided by section 68 of the District Court Act of 1898 (2 Comp. St. 1910, p. 1977).

[Ed. Note.—For other cases, see States, Cent. Dig. § 203; Dec. Dig. § 215.*]

3. APPEAL AND ERROR (§ 374*)—PROCEEDINGS TO TRANSFER CAUSE—APPEAL BOND.

Hence, in an appeal from a judgment for defendant upon such prosecution in the district court, the board need not enter into an appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2005-2010; Dec. Dig. § 374.*]

4. APPEAL AND ERROR (§ 567*)—RECORDS—STATE OF THE CASE—SETTLEMENT.

The extension of time to agree upon or settle state of the case on appeal from district courts (2 C. S. p. 2017, § 213d) must not necessarily be granted by the judge that tried the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2215-2522; Dec. Dig. § 567.*]

5. APPEAL AND ERROR (§ 817*)—HEARING—TIME FOR HEARING—STATUTORY PROVISIONS.

If the time be so extended as to make it impracticable to bring on the appeal by due notice at the next term, the requirement that such appeal be heard at the next term after the "determination or direction" of the district court is not applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3198; Dec. Dig. § 817.*]

6. PENALTIES (§ 83*)—ACTIONS FOR PENALTIES—SUFFICIENCY OF EVIDENCE.

In a prosecution under a penal statute, the evidence should show a case clearly within the terms of the statute.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. §§ 31-34; Dec. Dig. § 83.*]

7. HEALTH (§ 88*)—VIOLATIONS OF REGULATIONS—ACTIONS FOR PENALTIES.

The question being whether the lowest inhabited floor of a tenement house should count as a "story," and this depending on whether it was a "basement" more than five feet above the "grade," and assuming that "grade" is synonymous with "curb level" as used in the statute, but the word "curb level" being susceptible of two meanings one of which would

result in the lowest floor being counted as a story and the other would not, it was incumbent on the plaintiff to show facts which would require the application of the former meaning.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 37; Dec. Dig. § 88.*]

Appeal from District Court.

Action by the Board of Tenement House Supervision of New Jersey against Mary J. Schlechter. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Josiah Stryker (Edmund Wilson, Atty. Gen., on the brief), for appellant. Hugh B. Reed, for appellee.

PARKER, J. We take up first the motion to dismiss the appeal. This is urged on several grounds. The first ground is that no bond was entered into as required by Act 1902, p. 565, as amended in 1910 (2 C. S. 2016, pl. 213a).

[1] But it is plain that the appellant is a state agency. 4 C. S. p. 5354, § 203. Consequently the usual rule as to costs does not apply. See 30 N. J. Eq. 667, note.

[2] Section 242 of the Practice Act (3 C. S. p. 4126) is no doubt applicable under section 68 of the District Court Act. (2 C. S. p. 1977.)

[3] As there is no money judgment for defendant, there is nothing for a bond to secure.

[4] The next ground is that the judge was without jurisdiction to settle the state of the case. The judgment was rendered on September 8th and normally the case should have been settled by September 23d. 2 C. S. p. 2017, pl. 213c. Under the power given by that section to extend the time, Judge Day of the district court of Morris county as acting judge of the court when the case was tried (2 C. S. p. 1959, § 19) granted an extension until October 20th; and on October 17th Judge MacLear of the trial court granted a further extension until November 24th. The case was settled by Judge Day on November 17th. The point made is that the extension by Judge MacLear was invalid, as he did not try the case, but this is not essential; for it should be remembered that primarily the case is to be settled by the parties or their attorneys, and there is no reason why the power to extend the time for them to agree on a case, if possible, should be confined to the judge that tried the case. The extension of time may properly be granted by the judge conducting the court for the time being, and in granting this extension Judge MacLear was manifestly attending to the business of his own court. The ultimate settlement of the case properly devolved on the trial judge.

[5] The last ground is that the appeal was

not heard in this court at the next term after the judgment below, and that more than 20 days intervened between such judgment and the next term of this court. 2 C. S. 2017, pl. 213d. This is another section of the appeal act of 1902 (page 566). All the sections of that act should be read together; and clearly the Legislature never meant to cut off appeals in cases where the court below by extensions of time, perhaps at request of parties, puts it out of the power of appellant to bring the appeal on for hearing according to the course of practice in this court. In the present instance, when the case was settled on November 17th, this court had closed its regular session for oral argument of cases some days previously. Inasmuch as this appeal is classified as litigated common business, being in the nature of a certiorari (*Green v. Heritage*, 64 N. J. Law, 567, 46 Atl. 634), it cannot be brought on except by giving 10 days' notice and for the beginning of a term. Rule 76. The appeal act should not be construed to require impossibilities, and the requirement that the appeal should be heard at the next term after judgment is plainly inapplicable to cases where the state of the case is lawfully delayed so long as to render it impracticable under the law and rules of court to bring the appeal on for oral argument during the session of the court at such next term. The motion to dismiss the appeal will be denied; and this brings us to the merits.

[7] The action was brought to recover a penalty for violation of the Tenement House Act (4 C. S. 5321, 5351, § 190) against appellee as owner in failing to provide the house owned by her and described in the proceedings with fire escapes as required by the act. The requirement in question is in section 35, which reads in part as follows: "Every now existing nonfireproof tenement house, more than three stories high, unless provided with outside fireproof stairways directly accessible to each apartment, shall have fire escapes located and constructed as hereafter described. * * *" The building in question had no fire escapes or outside fireproof stairways, and the decision turned upon the question whether it was more than three stories high. If the basement should be counted under the statutory scheme as a story, the judgment was erroneous; if not, it was correct. This leads to an examination of some definitions contained in the statute itself. The word "story" is not defined. By section 9 a "basement" is a story partly, but not more than one-half, below the level of the grade, and for the purposes of this act shall be counted as a story "if more than five feet above the *grade*, unless otherwise

specifically stated." By section 10 "a cellar is a story more than one-half below the level of the *curb* and for the purposes of this act shall *not* be counted as a story unless otherwise specifically stated." (*Italics mine*). Paragraph 17 provides that "the word 'curb' for the measurement of heights shall be taken to mean the level of the established curb line where the same exists, taken at the center of the street frontage; where the walls of a building do not adjoin the street or building line, then the average level of the ground on which the building stands may be taken as the curb, *at the direction of the board*." There is no definition of the word "grade" in the statute. Bearing these particulars in mind, we proceed to apply them to the findings of fact.

The building was known as No. 17 Breintnall place. It does not appear whether or not it adjoined the street or building line, "nor that the board, if it did not, made any direction that the average level of the ground be taken as the curb." It does appear that the "basement" was inhabited, that its floor was on a level with the curb in Breintnall place, and that the ceiling was 5 feet 3 inches above such level, and that the natural surface of the lot was three feet higher than such curb, and consequently three feet of the "basement" was below such natural surface, which should properly be regarded as synonymous with the "average level of the ground on which the building stands" in the language of the statute. If this low-ceiled basement, only 5¼ feet high, was a "cellar," it would not count as a story. It was a "cellar" if more than one-half below the level of the "curb." If it was a "basement," it did not count as a story if not over 5 feet above the "grade." Counsel for appellant maintain that "grade" as used in the statute is synonymous with "curb," and that the curb in Breintnall place is the datum of elevation. Granting for the sake of argument the first proposition, we cannot accede to the second.

[8] The action being for a penalty, plaintiff must show a case strictly within the statute. 30 Cyc. 1358; *Allaire v. Howell Works Co.*, 14 N. J. Law, 21. It was incumbent on the plaintiff below to show whether or not the walls of the house in question adjoined the street or building line, and, if not, whether there had been any direction of the board fixing the "curb" as the average level of the ground.

The proof not being sufficient to justify a finding that the "basement" was more than five feet above the grade, or that it was not a "cellar," the judgment for defendant was proper, and should be affirmed.

ROSENSTEIN v. BURR.

(Court of Chancery of New Jersey. June 14, 1912.)

JUDGMENT (§ 619*)—CAUSES AND DEFENSES MERGED AND CONCLUDED.

A defendant in a suit for specific performance of a contract for the sale of land, who has previously brought an unsuccessful suit to cancel the contract on the ground that it was invalid for fraud, and because executed on Sunday, is estopped by the decree holding the contract valid from defending the suit for specific performance on the ground that the contract was invalid on other grounds than those specified in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1132; Dec. Dig. § 619.*]

Bill for specific performance by William Rosenstein against Horace B. Burr. On final hearing on bill, answer, replication, and proofs. Judgment for complainant.

Thomas P. Fay, of Long Branch, for complainant. W. M. Seufert, of Englewood, and C. J. Parker, of Manasquan, for defendant.

HOWELL, V. C. On July 22, 1907, the defendant, Burr, was the owner of a tract of land at Oceanport which the complainant desired to purchase. The complainant sent Nivison, his agent, to Burr, the defendant, to negotiate for the purchase. Nivison gave Burr a check for \$200, and took from him an agreement of which the following is a copy: "Received from Mr. William Rosenstein a check for \$200.00 on purchase price of my farm at Oceanport and a check is to be forwarded to me on Tuesday for \$300, or more, making in all five hundred dollars, balance of \$3,000 to be paid on or before October the 1st, 1907. \$3,000 to remain on bond and mortgage with privilege to pay off at any time at 5 per cent. and I to pay the taxes and insurance, purchase price six thousand and five hundred dollars, everything on the place to go in purchase price. Except furniture all tools, horse, cow, chickens, wagons and farming utensils if said William Rosenstein fails to pay the three thousand in, on or before October the first, 1907, he forfeit said five hundred he paid and gives up possession. Money possession to be given July 25, 1907. H. B. Burr. Witnessed by Henry L. Nivison. Dated July 22, 1907."

This is claimed by the complainant to be a contract for the sale of lands, and he files his bill against the defendant for the specific performance thereof.

On September 18, 1907, before the time for the performance of the contract had arrived, Burr filed a bill in this court which prayed for the cancellation of the said instrument on the ground (1) that it had been obtained from him by fraud, and (2) that it was executed in Connecticut on Sunday, and that it was void because violative of the Connecticut Sunday laws. An issue was made which was heard before this court in

1908. It was held that no fraud was shown, and that there was no evidence of violation of the Connecticut Sunday law, and the bill was therefore dismissed. Burr v. Nivison, 71 N. J. Eq. 320, 69 Atl. 1094. An appeal was taken from this decree which was heard and decided in 1909. The decree dismissing the bill was affirmed. Burr v. Nivison, 75 N. J. Eq. 241, 72 Atl. 72, 138 Am. St. Rep. 554, 20 Ann. Cas. 35. This court held that Nivison was the agent of Burr in the transaction. The appellate court held that Nivison was the agent of Rosenstein. The record of the first suit was made evidence in this suit by the stipulation of counsel, and it will therefore be assumed throughout that Nivison was the agent of Rosenstein.

The bill in the specific performance case alleges the so-called agreement and a tender of the purchase price, and prays that the defendant may be required to convey the premises in pursuance of the terms of the agreement. Two defenses are interposed; one is that the agreement relied upon is invalid for the reason that its terms were rejected by Burr before they were or could have been accepted by Rosenstein, the other is that there was a stipulation that the agreement should not be binding on Burr until it should have been made the subject-matter of a formal document to be drawn by a scrivener and formally executed. Neither of these defenses appears in the answer; they were developed at the hearing. The answer confines itself to a denial of the due execution of the so-called agreement and of the tenders alleged by the bill.

The defenses now interposed appear to be an afterthought devised for the purpose of evading the prayer of the bill. When the first suit was brought to set aside the so-called agreement, the facts on which these defenses are based existed and could have been used by Burr as affirmative weapons of attack. In addition to his allegations of fraud and violation of law, he might have added the matters on which he now relies; they are entirely consistent with the causes that he did allege, and they tended toward the result for which he then prayed. It is the duty of one who brings a suit to include in it every cause of action which is consistent with the general purpose of his bill to put all his grounds of action in one complaint. In *Fourniquet v. Perkins*, 7 How. 160, 12 L. Ed. 650, it was held that a judgment in a district court, being generally for the defendant, must be supposed to cover the whole case and not to have rested upon only a branch of it, viz., a release which was pleaded by the defendant; and that, where a bill was filed in the circuit court by the same petitioners against the same defendant, it was correct for that court to consider the question as *res adjudicata*. And in *Northern Pacific Railroad Co. v. Slaght*, 205

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 83 A.—50

U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738, the court said: "Although there may be very different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, and plaintiff claims the property in a certain thing, there can be no other action maintained against the same property for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not, and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated."

To the same effect is *U. S. v. Cal. & O. Land Co.*, 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476. There a decree was rendered upon a bill in equity brought under an act of Congress to have patents for land declared void and forfeited and to establish the title of the United States to the land. This was held to be a bar to a subsequent bill brought against the same defendants to recover the same land, on the ground that it was excepted from the original grant as an Indian reservation. Speaking of the two suits, the court said: "The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee." See, also, *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205. The decision of the case, therefore, appears to rest upon the principles which control the action of the court in relation to res adjudicata.

It was held by the Supreme Court of the United States in the leading case of *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, that a judgment was a finality as to the claim or demand in controversy, concluding parties, and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose; and it cites the case of a judgment rendered upon a promissory note which is conclusive as to the validity of the instrument and the amount due upon it, although it might be subsequently alleged that perfect defenses actually existed of which no proof was offered, such as forgery, want of consideration, or payment, but it was held in the same case that there was a difference between the effect of the former judgment as a bar or estoppel against the prosecution of a second action upon the

same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the first case the judgment is an absolute bar; in the second case it operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

This case has been followed in this state (*Paterson v. Baker*, 51 N. J. Eq. 49, 26 Atl. 324; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 858, 37 Atl. 599; *Mercer County Traction Co. v. United N. J. R. R. & Canal Co.*, 64 N. J. Eq. 588, 54 Atl. 819), and may be considered as settled law in this court. The converse of the proposition to be worked out in this case was decided in *N. Y. Life Insurance Co. v. Bangs*, 103 U. S. 780, 26 L. Ed. 608. There an action at law was brought against the Life Insurance Company on policies of life insurance in which the plaintiff recovered. Subsequently the company brought suit in equity to set aside the policies on the ground of fraud, to which the former recovery was pleaded as a defense. The court said: "The judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies; a fraudulent purpose in procuring them subsequently carried into execution would have been a good defense. It was in fact originally pleaded and afterwards withdrawn; its withdrawal did not authorize a suit in another form for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant, denying its obligation either from payment or release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action." These principles apply directly to the case in hand. In the former suit the issue was whether the so-called contract was valid. Two grounds of invalidity were asserted; two further grounds of invalidity existed but were not alleged, and are now made the basis of a second attack upon the validity of the contract. It is quite manifest that the question now raised was raised and decided adversely to the present defendant in the former suit, and he therefore cannot have the question relitigated in this proceeding. He is bound by the decree in a former suit. Besides the parties ought not to be given the opportunity to split up their causes of action or their defenses and attempt to hold them in reserve for purposes of attack or defense in future litigation, for the reason that it is to the interest of the state that there should be an end to litigation.

Upon these considerations I am compelled to reach the conclusion that the defendant has had his day in court, and must make a conveyance in accordance with the terms of his contract.

I will advise a decree in accordance with these views.

KUNTZ v. KUNTZ.

(Court of Chancery of New Jersey. June 18, 1912.)

1. HUSBAND AND WIFE (§ 19*)—NECESSARIES—COUNSEL FEES.

In a wife's suit for maintenance, the court cannot, after the parties have become reconciled and resumed cohabitation, order the husband to pay a counsel fee to the wife's attorney on the theory that the attorney's services were necessities, since the husband's liability is only for such necessities as are required to maintain her as his wife, and not such as to provide for her future condition as a single woman.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 121-138; Dec. Dig. § 19.*]

2. HUSBAND AND WIFE (§ 295*)—ACTION FOR MAINTENANCE—ABATEMENT.

Where, while a bill for maintenance was pending, the husband and wife were reconciled and resumed cohabitation, the cause of action was thereby abrogated, although the bill was not formally dismissed, and neither party could take any action adverse to the other, and hence a motion by the wife's counsel for counsel fee, necessarily made in her name, was not maintainable.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1084-1088; Dec. Dig. § 295.*]

Bill for maintenance by Carrie Kuntz against Jacob Kuntz. On motion for counsel fees. Motion denied.

A. J. David, of Elizabeth, for the motion.

HOWELL, V. C. [1] This is a suit between husband and wife; she files her bill for maintenance under the statute. Before the suit had proceeded to hearing, a reconciliation was effected between the parties by the efforts of counsel, and, as was stated by counsel at the argument, all offenses were condoned and cohabitation between them was resumed. Counsel for the complainant now moves for a counsel fee to be paid by the husband. The motion is undefended, and the question is whether, under the circumstances, it can be allowed. It was claimed on the part of the complainant's counsel to be payable on the ground that it comes within the category of necessities for which the husband is bound at common law. There may be cases which hold this, but the better opinion is the other way.

The Supreme Court of Connecticut, in *Shelton v. Pendleton*, 18 Conn. 423, held that the duty of providing necessities for the wife is strictly marital and is imposed by the common law in reference only to a state of coverture and not a divorce. By that law a valid contract of marriage was and is in-

dissoluble, and therefore by it the husband could never have been placed under obligation to provide for the expenses of its dissolution. Such an event was a legal impossibility. Necessaries are to be provided by a husband for his wife to sustain her as his wife, and not to provide for her future condition as a single woman or perhaps as the wife of another man. To the same effect are the opinions of *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 769. It will be found, upon an examination of the cases, that the courts which have decided otherwise have been constrained to do so by the terms of some controlling statute. It has been held in this state that an action will not lie directly against the husband for services rendered by a solicitor to the wife on an application in defending a divorce suit, and that the solicitor's only remedy is by application to the Court of Chancery for an allowance. *Westcott v. Hinckley*, 56 N. J. Law, 343, 29 Atl. 154.

[2] There is, however, another reason why this motion cannot prevail, and that is that the reconciliation between the parties has abrogated the cause of action, and the suit as a legal proceeding no longer exists. It is true that it has not been formally ended by a dismissal of the bill, but it is likewise true that neither party can take any adverse step in the cause, for the reason that no cause of action exists. The present motion is by the counsel for the wife, but it is made in her behalf, because all proceedings of this nature must be in favor of the wife, and all costs and counsel fees which are awarded in the suit must be awarded to her, and only she can proceed in her own name for costs and counsel fees or prosecute the husband for disobedience of an order in relation to the same. To permit a motion of this sort to be prosecuted on behalf of the wife against her husband, after they have been reconciled to each other and have resumed cohabitation and are living together in a state of amity, would be an anomaly. It would be continuing the litigation after the parties had put an end to it, and would have a tendency to break up the reconciliation and cause a resumption of the litigation.

In *Haddon v. Haddon*, 18 Q. B. D. 788, 56 L. J. M. 69, the facts were that a husband had been summarily convicted of an aggravated assault upon his wife. The justices before whom he was convicted made an order under the matrimonial causes act that the wife be no longer bound to live with him, and that he should pay her one pound a week for her support. After a short separation the husband and wife became reconciled and lived together for a year, when they finally separated. It was held that the legal existence of the support order was put an end to by the subsequent reconciliation

of the parties. Mr. Justice Hawkins says: "In my opinion the effect is to put an end to the legal existence of the order and render it no longer operative. The court or magistrate has only power to make the order for separation if satisfied that the future safety of the wife is in peril, and, when made, the only effect of it is to relieve her from any obligation to cohabit, leaving her at full liberty to do as she pleases. If, before acting upon the order, she thinks fit to abandon it and become reconciled to her husband, and continues to cohabit with him, she may do so, so also after separation for a time, she may return to cohabitation; but in either of these events the validity of the order ceases just as a decree for judicial separation would under similar circumstances." This doctrine appears to have been announced by Lord Eldon in *Bateman v. The Countess of Ross*, 1 Dow. P. C. 235, and also in *Nicol v. Nicol*, L. R. 31 C. D. 524. *Linton v. Linton*, L. R. 15 Q. B. D. 239, 54 L. J. Q. B. 529, *Haddon v. Haddon*, and *Bateman v. The Countess of Ross*, supra, were followed in the divorce division in *Williams v. Williams*, [1904] P. 145, 73 L. J. P. 31. These authorities are so consonant with reason that I do not hesitate to adopt them and to make them the basis of my decision of this motion.

The wife by returning to her husband, and the resumption by them of their wonted marital relations, has ended all litigation between them, and has rendered it impossible for this court to make any adverse order in the cause or perhaps any order whatever except an order dismissing the bill.

GATTA v. PHILADELPHIA, B. & W. R. CO.
(Superior Court of Delaware. New Castle.
Nov. 27, 1911.)

1. NEGLIGENCE (§§ 121, 122*) — PRESUMPTIONS—BURDEN OF PROOF.

Ordinarily, there is no presumption of negligence, either on the part of the party injured or on the part of the defendant, from the mere fact that the injury occurred, but it is essential, to create a liability, that the plaintiff prove that the injury resulted from defendant's negligence and that the negligence of the person injured did not enter into the accident and was not the proximate cause thereof.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-234, 271; Dec. Dig. §§ 121, 122.*]

2. NEGLIGENCE (§ 1*) — WHAT CONSTITUTES.

"Negligence" is the failure to observe, for the protection of the interests of another, that degree of care, prudence, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It is the want of such care as a reasonably prudent and careful person would exercise under similar circumstances.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4748-4763; vol. 8, pp. 7720-7731.]

3. NEGLIGENCE (§ 98*) — MUTUAL NEGLIGENCE.

Where, in an action for injuries, it appears that there has been negligence on the part of both plaintiff and defendant, and that each was operative at the time of the injury complained of, no recovery can be had, as the law will not measure the proportion of blame or negligence to be attributed to either party.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 93; Dec. Dig. § 98.*]

4. RAILROADS (§ 367*) — OPERATION—WARNING.

A railroad company, switching cars in a yard, is bound to give warning of the approach and movement of its engines and trains to all persons who may be put in danger thereby, and the sufficiency of such warning depends on the character of the place at the point of danger, the position of the persons endangered, and the right, lawfulness, and purpose of their presence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 367.*]

5. RAILROADS (§ 367*) — NEGLIGENCE—OPERATION OF TRAINS—WARNING.

Where a railroad company is charged with negligence in failing to give timely and suitable warning of danger to be avoided by the approach of engines or trains in the yard, the warning, in point of time and sufficiency, has relation to and is controlled by the peculiar conditions of the place, the established and recognized habits and customs of its occupants, and the peculiar dangers to be encountered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1257, 1258; Dec. Dig. § 367.*]

6. RAILROADS (§§ 275, 278*) — OPERATION OF CARS—INJURIES TO WORKMEN—WARNING.

Where decedent, a Pullman car employé, was crushed between two cars by the operation of a switch engine in a yard, and plaintiff claimed that defendant was negligent in failing to give timely and sufficient warning of the movement of the engine on that track, plaintiff was entitled to recover if defendant was negligent in failing to give such timely and sufficient warning, and by reason thereof deceased, without fault on his part, was killed as he attempted to pass between the cars; but if timely and sufficient warning was given, and deceased disregarded it, and was killed, or if, at the time deceased was about to pass between the cars, the bell of the engine was ringing, and he was expressly warned not to go between the cars, then plaintiff could not recover.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 873-877, 891-900; Dec. Dig. §§ 275, 278.*]

7. TRIAL (§ 306*) — CONFLICTING EVIDENCE—CONSIDERATION.

Where evidence is conflicting, the jury should reconcile it, if possible; and, if they cannot, they should give credit to that which, under all the circumstances, appears most worthy of credit, and reject the balance, considering the opportunity and advantages of each witness for seeing, observing, and knowing the things of which they testified, as well as their apparent fairness and intelligence, and any other elements which might properly bear on the accuracy of their testimony.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 731, 742; Dec. Dig. § 306.*]

8. DEATH (§ 95*) — DAMAGES.

In an action for wrongful death of plaintiff's husband, plaintiff's damages were such a sum of money as would reasonably compensate her for any and all damages that she had sustained, or might thereafter sustain, by reason of decedent's death, based on the number of

years he would probably have lived, had he not been killed, and governed by the proportion of his gross earnings or income plaintiff would probably have received from him.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

9. NEW TRIAL (§ 6*) — GROUNDS — DISCRETION.

The granting of a new trial is a matter addressed to the discretion of the court, and will be allowed only where injustice has been done by misdirection of the court to the jury, by a rendition of a verdict contrary to the law and the evidence, by a verdict for excessive damages, by mistake of the jury, by reason of newly discovered evidence, because of surprise, by misconduct of the jurors, parties, or counsel, etc.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

10. NEW TRIAL (§ 117*) — APPLICATION — FILING.

Under the court rule that reasons for a new trial must be filed with the prothonotary within four days next after the trial, an affidavit for a new trial, filed on the day of the hearing of the motion, several days after the expiration of the four-day period, was too late.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-241; Dec. Dig. § 117.*]

Action by Frances Theresa Gatta against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff.

See, also, 1 Boyce, 293, 76 Atl. 56; 80 Atl. 617.

Argued before BOYCE and RICE, JJ.

Anthony Higgins and Horace G. Eastburn, both of Wilmington, for plaintiff. Andrew C. Gray, of Wilmington, for defendant.

At the trial, after the jury had been sworn and before proceeding to hear any testimony in the case, counsel for the plaintiff stated to the court that they relied wholly upon the amended declaration heretofore filed. Whereupon counsel for the plaintiff called the court's attention to the fact that the amended declaration was filed on the 21st day of January, A. D. 1910, more than one year after the death of the plaintiff's husband, on the 28th day of June, A. D. 1907, also to the fact that the defendant relied upon the pleas of not guilty and the act of limitation which latter provided "that from and after the passage of this act no action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of one year from the date upon which it is claimed that such alleged injuries were sustained" (chapter 594, volume 20, Laws of Delaware, p. 712), and moved that the jury be instructed to return a verdict for the defendant for the reason that the amended declaration set forth a new and different cause of action from that set forth in the original declaration.

This action was brought on the 9th day of August, A. D. 1907, and the original declaration which is not now relied upon was

filed on the 8th day of August, A. D. 1908. The court denied the motion, adopting and incorporating in its opinion the decision of the court in this case upon a similar motion, as reported in 1 Boyce, beginning on page 296 and ending on page 306, 76 Atl. 56.

BOYCE, J. (charging the jury). Gentlemen of the jury: The court decline to give you binding instructions to find for the defendant, and submit this case to you for your determination under the evidence before you and the law which we will announce to you.

This action was brought by Frances Theresa Gatta, the plaintiff, against the Philadelphia, Baltimore & Washington Railroad Company, the defendant, to recover damages for the death of Charles Gatta, her husband, alleged to have been occasioned by the negligence of the defendant company. The material allegations in the plaintiff's amended declaration, containing five counts, and relied upon in this case, are in substance (1) that the deceased was an employé of the Pullman Company, in this city; (2) that the defendant company was engaged in taking cars to and from the property of the Pullman Company; (3) that openings between the cars on the tracks had been made for the convenience of the Pullman Company's employés and that the deceased was injured while passing between two cars in the discharge of his duty as an employé of the Pullman Company by reason of the failure of the defendant company to sufficiently warn him of the movement of the cars; and (4) that the defendant company was guilty of negligence generally in the movement of its shifting engine at the time of the accident.

The first count in the declaration will convey to you the general scope of the averments therein. It reads, in part, as follows:

"For that whereas, the plaintiff is the widow of a certain Charles Gatta, deceased, and that, heretofore, to wit, at the time of the committing of the grievances hereinafter mentioned, the said Philadelphia, Baltimore & Washington Railroad Company, the defendant above named, was and still is a corporation existing under the laws of the state of Delaware, operating a certain line of railroad in the city of Wilmington, in the county of New Castle and state of Delaware, and being such corporation so engaged as aforesaid, before and at the time of the committing of the grievances hereinafter mentioned, had and used a siding from its said certain line of railroad to the property of the Pullman Company, a corporation existing under the laws of the state of Illinois, doing business in the said city of Wilmington, which said siding of the defendant connected with a certain siding or sidings on the property of the said the Pullman Company and was used with the sidings

on the property of the Pullman Company for the purpose of drawing cars to and from the property of the said Pullman Company to the said certain line of railroad of the defendant; that, heretofore, to wit, on the 28th day of June, A. D. 1907, at the said city of Wilmington, at New Castle county aforesaid, the said Charles Gatta, the plaintiff's husband, was in the service and employment of the said Pullman Company as a mechanic at their car works located on their said property in the said city of Wilmington, and was at work on a car, which was located on what was known as 'B' track on the property of the Pullman Company, there being another track or siding known as 'A' track on the property of the said Pullman Company, between the car shops or buildings of the said Pullman Company and the said 'B' track, on which was then and there standing the said car that the said Charles Gatta was working upon; that then and there several cars, commonly known as Pullman cars or coaches, were standing on said 'A' track in the yard of the said car works of the said Pullman Company; that two of said cars or coaches were not coupled together, but were several feet apart from each other, leaving an open space of that extent between said two cars, through which the employees of the said Pullman Company could pass and re-pass while in and about their said employment; that the said defendant then and there operating and having control of a shifting engine or locomotive, negligently, carelessly and recklessly, without ringing the bell or blowing the whistle of the said shifter, engine or locomotive, and without giving any other warning to the said Charles Gatta, caused the said shifting engine or locomotive of the said defendant to push one of said two cars against the other of said two cars, suddenly and with such violence, that the said Charles Gatta, who, then and there in the exercise of due care and caution on his part, was in his employment as aforesaid passing between said two cars, was caught between said two cars, to wit, at New Castle county aforesaid, and thereby and by means of," etc.

This gives you the general scope of the plaintiff's complaint in this case. It is not controverted that Charles Gatta, the plaintiff's husband, was, on the 28th day of June, A. D. 1907, the day on which the accident, causing his death, occurred, and had been for a considerable time, employed by the Pullman Company; that the Pullman works and yards were then and now are on the east side of and adjoining the right of way and tracks of the defendant company, in this city, and were connected with the tracks of the defendant company by a siding; that the Pullman Company has within its yards its own private tracks on which its cars are placed from time to time for repairs and other purposes; that these pri-

vate tracks are known as tracks "A," "B," and "C," respectively, and that track "A" is next to the buildings, and is paralleled by the other two in alphabetical order.

It is admitted that the defendant company owned the engine and was, at the time of the accident, lawfully engaged in shifting cars on track "A" for the Pullman Company, and that the deceased was caught between two cars on said track and killed.

The plaintiff claims that, on the morning of and before the accident, the servants of the defendant company had been engaged in shifting cars on track "C" in the yard of the Pullman Company; and while so engaged, the deceased left the car on track "B," in which he had been working and went into what is known as the trimming building of the Pullman Company to see his foreman with reference to his work; that in going to see his foreman, he crossed track "A" in some unknown manner; and that while the deceased was in said building, the shifting engine was moved from track "C" to the entrance of track "A."

It is not denied that the engine was moved from track "C" to track "A," and that before the shifting on track "A" was begun, the usual warning was given by shouting aloud along track "A," upon which there were several cars, "Look out for cars on track A," and that the warning was heard by all the men present and employed in and about the tracks and cars on tracks "A" and "B."

The plaintiff claims that this warning was given from two to four minutes before the accident and while the plaintiff's husband was with his foreman in the said building, and that after the said warning had been given and had ceased from two to four minutes, the deceased came out of the said building some eight or ten feet in advance of his foreman, and that when the latter appeared at the door of said building and had taken a step or two, the deceased, in the exercise of due and reasonable caution and without any warning that the shifter was on track "A," and about to move, went between two cars standing apart two and a half or three feet on track "A," and was caught and received the injuries by the movement of the shifter, while between the cars, from which he died very soon thereafter. The defendant claims that the deceased knew that the shifter was in the yard, engaged in shifting on track "C" when he left the car in which he was working on track "B" to go to his foreman in the said trimming building, and that when the shifter was moved from track "C" out of the yard of the Pullman Company to track "A"—the engine and tender were stopped upon entering on track "A"—with the engine only inside of the yard, and that then the servants of the defendant company, as well as servants of the Pullman Company, gave the usual warning up and down track "A," by crying aloud along the track on

both sides, "Look out for cars on track A," and that when the signal was given to the engineer to move forward with the engine on track "A," and before the engine had been started, the bell was rung and continued to be rung after the deceased came out of the building, and was ringing at the time the deceased went between the cars and until after the accident; that the deceased, on coming out of the building walked fast, with his head downward, between the building and track "A" some fifteen or twenty feet when he passed between the cars, and that immediately before, and at the time he was about to go between the cars, he was expressly warned not to do so.

And the defendant claims that the accident from which death resulted to the plaintiff's husband was not due to any negligence attributable to it or its servants, but was occasioned by the fault or negligence of the deceased to exercise due and reasonable care and caution after timely and sufficient warning. We have now stated to you substantially the contention of the parties. We have carefully considered the prayers of counsel. We cannot charge you either in the language or to the extent we have been requested to by some of the prayers. Our charge to you upon the law which we are about to deliver, covers substantially, we think, the law applicable to the facts of this case.

[1] This action is based upon negligence. Ordinarily, there is no presumption of negligence, either on the part of the plaintiff, or on the part of the defendant, from the mere fact that a person is injured, that is, there is no presumption that the injury resulted from negligence, such as is necessary to create liability for the injury.

To recover for such injury, it is necessary for the plaintiff to satisfy the jury by a preponderance of the proof—that is, the greater weight of the evidence, that the negligence of the defendant caused the injury in the manner alleged.

[2] Negligence has been defined as the failure to observe for the protection of the interests of another, that degree of care, prudence, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances.

[3] In an action of this kind, if the jury should find from the evidence that there was mutual negligence, that is, negligence on the part both of the plaintiff and of the defendant, and the negligence of each was operative at the time of the injury complained of, a recovery cannot be had for such injury.

If the negligence of the deceased entered into the accident and was the proximate cause of the injuries which resulted in his death, even though the defendant was guilty of negligence, operating at that time, a re-

covery cannot be had; for where there is contributory negligence the law will not attempt to measure the proportion of blame or negligence to be attributed to either party. Like as the plaintiff must sustain his allegation of negligence by satisfactory proof before he can recover, so the defendant when he relies upon contributory negligence on the part of the plaintiff as a defense must satisfy the jury that the contributory negligence of the plaintiff entered into and was the proximate cause of the injury complained of.

[4] The law imposes upon a railroad company the duty to give warning of the approach and movement of its engines and trains to all persons who may be put in danger thereby, and, under the varied conditions of their operation, requires generally that such warning shall be timely and sufficient. What constitutes a warning that in time and manner is sufficient to enable others to avoid danger, depends upon the character of the place at the point of danger, the position of the persons endangered and the right, lawfulness and purpose of their presence.

[5] When the act of negligence charged against a defendant railroad company is its failure to give timely and suitable warning of the danger to be avoided, the warning in point of time and sufficiency, has relation to and is controlled by the peculiar conditions of the place, the established and recognized habits and customs of its occupants and the particular dangers to be encountered. *Gatta v. P., B. & W. R. Co.*, 1 *Boyce*, 293, 76 *Atl.* 56.

You have before you in evidence photographs of notices posted upon the buildings in the yard of the Pullman Company. By these notices "employés must not work under cars or on scaffolds or ladders inside of cars or pass between cars while cars are being shifted in the yard." In order for you to determine whether the warning given by the defendant company in this case was timely and sufficient, you should consider all the conditions surrounding the deceased at the time of the accident as they have been detailed to you by the witnesses.

We do not understand that it is claimed that there was any danger in crossing the tracks and passing between the cars on the tracks when shifting of cars was not going on in the yard. And it is not denied that it was the custom of the employés of the Pullman Company to both cross the tracks and pass between cars without any warning when shifting was not being done.

The danger in crossing the tracks or passing between the cars arose from the presence of the engine about to be engaged in shifting the cars in the yard. Immediately before and at the time shifting was to begin by the defendant company, on track "A," or on any one of the tracks, for that matter, the particular track became a place of danger, and it became the duty of the defendant company to give timely and sufficient warning of the approach and movement of its engine to pre-

vent injury to employes working in and about the cars or who might be dangerously near the track upon which shifting was to be done. With notice of the presence of the engine for the purpose of shifting and after timely and sufficient warning it became equally the duty of the servants of the Pullman Company, including the deceased, to exercise due and reasonable care to avoid being injured.

In cases of this character, the duties imposed upon the parties, defendant and plaintiff, are correlative and each is required to use such reasonable care as the circumstances require—the one being required to exercise such care in order to avoid inflicting injury, and the other to avoid being injured.

The important questions for your determination are: Did the defendant company give timely and sufficient warning to the deceased of the approach and movement of the shifting engine on track "A"? Was such warning given, and did the deceased, notwithstanding, disregard it?

You have heard the testimony of the witnesses. The court is not permitted to comment upon the testimony if inclined to. You are the exclusive judges of the credibility of the witnesses and of the weight and value of their testimony.

[6] If you are satisfied from a preponderance of the evidence that the defendant company was negligent in not giving timely and sufficient warning to the deceased of the approach and movement of its shifting engine to and on track "A," and that by reason of such negligence, he the deceased, without fault on his part, attempted to pass between the cars and was killed, your verdict should be for the plaintiff. If, however, you should be satisfied from a preponderance of the evidence that the defendant company gave timely and sufficient warning to the deceased of the approach and movement of its engine to and on track "A," and he, the deceased, disregarded such warning and attempted to pass between the cars and was caught and killed by the movement of the engine, your verdict should be for the defendant.

If you should be satisfied from a preponderance of the evidence that at the time the deceased was about to pass between the cars the bell of the engine was ringing and that he was expressly warned not to go between the cars, your verdict should be for the defendant.

The jury in determining the value of testimony may and often should give greater weight to positive than to negative testimony. But all the testimony should be considered by the jury and given such weight as in their judgment it is entitled.

[7] When the testimony is conflicting, the jury should reconcile it, if they can; if they cannot, they should give credit to the testimony of those witnesses who, under all the circumstances appear to the jury to be most

entitled to credit, and reject such testimony as they may deem unworthy of credit, taking into consideration the opportunity and advantages of each for seeing, observing and knowing the things of which they testified, as well as their apparent fairness, intelligence and any other element which may fairly test the truthfulness and accuracy of each.

[8] If you find for the plaintiff, it should be for such a sum of money as will reasonably compensate her for any and all damages that she has sustained, or may hereafter sustain by reason of the death of her said husband, basing your verdict upon the number of years the deceased would probably have lived had he not been killed, and governed by what portion of the gross earnings or income the plaintiff would probably have received from the deceased if he had lived. Your verdict should be for that party in whose favor you find the preponderance or great weight of the testimony.

Verdict, for plaintiff.

Whereupon counsel for defendant moved for a new trial and in arrest of judgment, filed the following reasons:

1. That the verdict is contrary to the law and the evidence.
2. That the verdict is contrary to the evidence.
3. That the verdict is contrary to the law.
4. That the damages of \$9,000 awarded by the jury are grossly excessive.
5. That injustice was done to the defendant in the statement of the contentions of the plaintiff and defendant to the jury by the court, in that while all the contentions of the plaintiff were fully and plainly stated to the jury, all the contentions of the defendant were not so stated:

(a) While the court stated to the jury that the defendant contended that vocal warning had been given of the movement of the cars in question in the following or similar language: "Look out around the cars on track A"—yet the court did not state to the jury the contention of the defendant, that such vocal warning was continuous up to the very time of the accident.

(b) In that the court did not state to the jury that the defendant contended that the plaintiff's intestate could or should have seen the engine attached to the cars on track A while going from the shop door diagonally across the platform to the opening between the two cars at the place of the accident, and that the defendant contended that the evidence showed that such locomotive was in plain sight.

6. That injustice was done to the defendant by the failure of the court to charge as requested in the eighth prayer of the defendant, viz.:

"Where the physical facts make it certain that Gatta could have seen the danger in time to have averted the injury to him if

he had looked, he will not be heard to say that he looked but did not see, but he will be held to have seen what was obvious, and if he did not heed it his conduct will present the case of a person thrusting himself rashly into danger, in which case he cannot make his own rashness and folly the ground of recovery of damages from another."

7. Or in such modification of the language thereof as would embody the proposition of law therein contained without charging upon the facts in the case before them.

8. That the court erred in not charging the jury in relation to the law bearing upon the testimony produced in the case by witnesses of both the plaintiff and the defendant, showing or tending to show that if the plaintiff had looked he could have seen the engine in time to have prevented the accident.

9. That the verdict rendered by the jury is so grossly excessive as to shock the conscience of the court and to clearly demonstrate that it was the result of undue sympathy for the plaintiff, or compassion, prejudice, partiality or caprice on the part of the jury.

10. That the verdict rendered for the plaintiff was so clearly against the preponderance of evidence as to shock the conscience of the court and to clearly demonstrate that it was the result of undue sympathy for the plaintiff, or compassion, prejudice, partiality or caprice on the part of the jury.

At the same time counsel for defendant filed his reason in support of the motion for arrest of judgment theretofore filed in said cause; said reason being as follows:

"Because that as appears on the record of this cause the plaintiff abandoned the original declaration filed in said cause, and relied entirely upon an amended declaration filed in said cause, and that said amended declaration was filed in said cause upwards of one year after the happening of the accident complained of in said cause, and upwards of one year after the filing of the original declaration in said cause."

The following opinion was delivered by the court in denying the motion for a new trial and for arrest of judgment:

BOYCE, J. (delivering the opinion of the court). We have very carefully considered the very able arguments of counsel both in support of and against the motions for a new trial and in arrest of judgment in this case. The principles of law which govern in motions of this character have been repeatedly announced by this court, and we do not think we should depart therefrom.

[8] The granting of a new trial is a matter addressed to the discretion of the court, and is exercised only where injustice has been done by the misdirection of the court to the jury; by rendering of a verdict contrary to

the law and the evidence; by a verdict for excessive damages; by mistake of the jury; by reason of after discovered evidence; because of surprise; or by the misconduct of jurors, parties or counsel, and the like, and except on some such grounds tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial will not be granted; for it is a principle of law, long prevailing in this jurisdiction, that the verdict of a jury upon an issue of fact will not be disturbed except for some such reason as already stated, and especially is this so where the verdict is founded on conflicting evidence. Only in instances where injustice has been done and upon the policy that the verdict when wrong should not be conclusive will the court set the verdict aside and award a new trial. 1 Woolley on Del. Prac. § 733.

[10] Reasons for a new trial under rule of court must be filed with the prothonotary within four days next after the trial, and the affidavit filed in this case having been filed on the day of the hearing of the motion for a new trial, several days after the expiration of the four days after the trial, we do not think it was filed in time.

Without further discussing the law applicable to new trials as administered in this state or the evidence adduced at the trial, we decline to grant a new trial.

HUBBARD v. LIMERICK WATER & ELECTRIC CO.

(Supreme Judicial Court of Maine. June, 1912.)

1. DISMISSAL AND NONSUIT (§ 58*)—MOTION TO DISMISS—WHEN PROPER REMEDY.

Motion to dismiss a writ lies only to some defect which can be seen on inspection of the writ alone, and not where proof is necessary dehors the writ to support or resist it.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

2. EMINENT DOMAIN (§ 277*)—CONDEMNATION OF WATER RIGHTS—CLAIMS FOR DAMAGES.

Under Priv. and Sp. Laws 1907, c. 159, as amended by Priv. and Sp. Laws 1909, c. 117, authorizing a water and electric company to condemn property for its plant, an owner of lands on a river below a dam constructed by the company is not required to submit a claim for damages, where the company has not complied with the statute by filing any plan affecting the particular owner's property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 704; Dec. Dig. § 277.*]

3. EMINENT DOMAIN (§ 84*)—WATER RIGHTS—RIGHT TO COMPENSATION.

The right of a lower millowner to the natural flow of a river is a property right which can be condemned by a private corporation only in the manner required in condemning other property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

Report from Supreme Judicial Court, York County, at Law.

Action by Silas Hubbard against the Limerick Water & Electric Company. On report. Case remanded.

Action on the case to recover damages alleged to have been caused by the defendant unlawfully erecting and maintaining a dam across the Little Ossipee river, above the plaintiff's mill, "thereby diverting and cutting off a large part of the water which was accustomed to flow into the plaintiff's dam and pond, and stopping the natural course of the water and preventing the same from coming to the plaintiff's said mill." A motion to dismiss the action and an agreed statement of facts were filed. The case was then reported to the law court for determination.

Argued before WHITEHOUSE, C. J., and CORNISE, KING, BIRD, HALEY, and HANSON, JJ.

Foster & Foster, of Portland, for plaintiff. Lord & Fenderson and Frank M. Higgins, all of Limerick, for defendant.

HALEY, J. This is an action on the case brought by the plaintiff to recover damages alleged to have been sustained by the acts of the defendant in unlawfully erecting and maintaining a dam across the Little Ossipee river in the towns of Limerick and Waterborough, in York county, and wrongfully diverting the water from the river.

The declaration alleges, in substance, that the plaintiff was the owner and in possession of an ancient dam, mill, and privilege, and entitled to have all the water of said stream, without obstruction or impediment, flow into the pond connected with the mill and privilege, and that the defendant unjustly erected a new dam above the plaintiff's dam, and thereby cut off a large part of the water flowing into the plaintiff's privilege, and stopping the natural flow of said water and diverted and detained the waters of said river, and that by the acts of the defendant the plaintiff was unable to obtain sufficient water to operate his mill, and that by said obstruction and detention of the waters of the Little Ossipee river, as alleged, the plaintiff has been unable to obtain water to operate his mill in the manner he would have operated it, and did operate it, before the doing of the acts of the defendant complained of.

[1] A motion to dismiss the plaintiff's writ was filed, in which it was alleged that the defendant was duly incorporated as a corporation under the provisions of chapter 159 of the Private and Special Laws of Maine for the year 1907, as amended by chapter 117 of the Private and Special Laws of Maine for the year 1909; that said act, by section 4, reading as follows: "Said corporation shall be held liable to pay all damages that may be sustained by any person by the

taking of land or other property, by excavating through any land for the purpose of laying down pipes and aqueducts, building dams, reservoirs, by flowage, the erection of poles and wires or other structures, and any person sustaining damages as aforesaid, if he cannot agree with said corporation upon the sum to be paid therefor, may cause his damages to be assessed in the same manner and subject to the same conditions, restrictions and limitations as is provided by law in the case of damages by the laying out of highways"—has provided an express tribunal to have determined the damages, if any sustained by him, and for that reason this action should be dismissed.

The case is before this court upon said motion and an agreed statement of facts relating to the filing in the office of the register of deeds, at Alfred, of a plan and description showing the land and other property taken by the defendant under its charter which plan is a part of the case.

[2] The motion to dismiss must be denied. "Such a motion lies only to some defect which can be seen on inspection of the writ alone. It does not lie where to support or resist it proof is necessary dehors the writ." *Hunter v. Heath*, 76 Me. 219; *Shurtleff v. Reddon*, 109 Me. —, 82 Atl. 645. To sustain the defendant's motion, it is obliged to prove from the record in the registry of deeds the filing by it of a plan and description of the property taken by the defendant, which would be by evidence dehors the writ. The agreed statement shows that the defendant filed in the registry of deeds of York county a plan containing a description of the land flowed by it, and the length of the dam it erected across the Little Ossipee river six miles above the plaintiff's mill. The case does not now show that the defendant attempted by any plan or description filed in the registry of deeds to take any of the waters of the Little Ossipee river, to what height its dam was erected, or what part of the time, if not all of the time, it intended to hold back the water. If the defendant would justify the taking of property under its charter, it must show that it has complied with the requirements of law in the taking of the property.

[3] The plaintiff, as a lower millowner, had the right to the natural flow of the river, which right is regarded and protected as property, and, before the defendant had a right to take and detain the waters of the river, it was incumbent upon him to take the water in the same manner as it would be required to take other property. *Hamor v. Bar Harbor Water Co.*, 78 Me. 127, and cases cited upon pages 134 and 135, 3 Atl. 40; *Williams v. Water Co.*, 79 Me. 543, 11 Atl. 600; *Ingraham v. Water Co.*, 82 Me. 335, 19 Atl. 861.

The plan and description filed in the office of the register of deeds by the defendant in its attempt to comply with section 5 of chap-

ter 159 of the Private and Special Laws of 1907 only shows the length of the dam and the land flowed above the dam. It does not purport to take any of the water of the river or contain any statement of the time it intends to detain the water not used by it in supplying water to its patrons. This is not a compliance with the statute, and, until the defendant complies with the act under which it was organized, the owners of the property taken by it, and not taken in the manner prescribed by the act, are not bound to and cannot submit their claim for damages to county commissioners except by a reference to them as individuals.

As a court the county commissioners have no jurisdiction. There having been a taking of the water which the plaintiff was entitled to have flow to his mill, and the defendant, not having complied with the law authorizing it to take that water, cannot justify the taking, and the case must be remanded to nisi prius to be heard upon the question of damages.

Case remanded to be heard upon the question of damages only.

DUNN v. MORSE et al.

(Supreme Judicial Court of Maine. June, 1912.)

1. WILLS (§ 692*)—CONSTRUCTION—POWER TO DESIGNATE BENEFICIARIES.

Power in executors to designate any needy relatives of testator as heirs to a trust fund to such an amount as the executors may deem advisable gives them a discretion whether any such relatives shall so inherit, and, they not having designated in their lifetime any such needy relatives, the personal privilege or confidence reposed in them cannot be exercised by the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. § 692.*]

2. CHARITIES (§ 21*)—CHARITABLE BEQUESTS—VALIDITY.

A will empowering executors to designate any needy relatives of testator as heirs to a trust fund to such an amount as the executors may deem advisable, the residue "to be given to an institution or institutions for the relief of suffering humanity as may be deemed by" the executors most worthy of it, payable at expiration of the trust, constitutes a valid bequest for charitable uses.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 44-50; Dec. Dig. § 21.*]

3. WILLS (§ 440*)—CONSTRUCTION—TESTATOR'S INTENTION.

In construing a will, testator's intention should be ascertained, if possible, from the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

4. TRUSTS (§ 270*)—DUTY OF TRUSTEE.

A person accepting a testamentary trust must execute it by carrying out testator's intention as expressed by the language creating the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 379; Dec. Dig. § 270.*]

5. WILLS (§ 692*)—POWER OF APPOINTMENT—CHARITABLE BEQUESTS—DESIGNATION OF BENEFICIARY.

Where a will directed the executors to designate an "institution or institutions for the relief of suffering humanity" to receive trust funds on termination of the trust, but the executors, through death and infirmity, neglected to perform that duty, the courts will designate such beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. § 692.*]

6. WILLS (§ 692*)—TESTAMENTARY POWERS IN TRUST—LANGUAGE.

In construing an imperative power in or direction to a testamentary trustee, it is not necessary that the appointing words shall be a command; it being sufficient if the language is such that it is reasonably inferable therefrom that it was the intention that it should be imperative.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1654; Dec. Dig. § 692.*]

Report from Supreme Judicial Court, Penobscot County.

Bill by Charles J. Dunn, trustee, against Sarah Morse and others, to construe a will. On report. Bill sustained and decree directed.

In addition to the defendants named in the bill, the Bangor Young Men's Christian Association located at Bangor, and the Good Samaritan Home, also located at Bangor, were by leave of court admitted as parties defendant. Answers were filed by all the defendants. The cause was then reported to the law court "to be determined by that court upon the bill and answers"; it being "agreed that the facts set forth in the bill and answers are true." It was also stipulated as follows: "If the court sustains the trust, it is agreed that the Good Samaritan Home and the Bangor Young Men's Christian Association may be further heard before a single justice upon the merits of their application for a portion or the whole of the property in question."

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Charles J. Dunn, of Orono, pro se. Charles H. Bartlett, of Bangor, for all defendants except three. John Wilson, of Bangor, for Eastern Maine General Hospital. Edgar M. Simpson, of Bangor, for Bangor Young Men's Christian Association and Good Samaritan Home.

HALEY, J. This is a bill in equity brought by the plaintiff, as trustee under the will of James P. Parker, asking for a construction of certain provisions of the will of said Parker, and directions as to his duties as trustee under said will, with the stipulation that, if the court sustains the trust, the Good Samaritan Home and the Bangor Young Men's Christian Association may be further heard before a single justice upon their application for a portion or the whole of the property in question.

James P. Parker died at Bangor, of which city he was a resident, on August 1, 1892, leaving as his next of kin and heirs at law Robert W. Parker and Esther A. Cromble. His will was duly proved and allowed at the August term, 1892, of the probate court of that county; it being the court that had jurisdiction of the estate of said Parker. Robert W. Parker and Esther A. Cromble were named as executors in said will, and their appointment was confirmed by the probate court allowing the will. They were also, by the terms of said will, appointed trustees; but their appointment as trustees was never confirmed by the probate court, and they never gave bond as trustees, presumably thinking that, because they were by the will excused from giving bonds as executors, they were excused from giving bonds as trustees. They acted jointly as executors and as trustees under said will until the death of Robert, who died March 24, 1905, leaving a will, by the terms of which his entire estate was devised and bequeathed to his widow, Belle C. Parker, who died April 19, 1906, and whose heirs at law are defendants, and claim one-half of the residue of the estate of said James P. Parker as heirs of Belle C. Parker. After the death of Robert W. Parker, said Esther A. Cromble acted as sole and surviving trustee until, because of mental incapacity, she was removed, and Charles J. Dunn, the plaintiff, was appointed and qualified as trustee under the will of said James P. Parker. Esther A. Cromble died intestate, on September 4, 1910, and her heirs at law are defendants, and claim one-half of the residue of the estate of said James P. Parker as heirs of said Esther A. Cromble.

By the first item of the will of James P. Parker, he gave and bequeathed to his brother Robert W. Parker and to his sister Esther A. Cromble, each, the sum of \$2,500. Item 2 of said will, which is the one item upon which there is a disagreement, is as follows:

"Second. I give, bequeath and devise to my brother, Robert W. Parker, and my sister, Esther A. Cromble, jointly or to the survivor, in trust, as hereinafter specified, all the rest, residue and remainder of my estate, real and personal and mixed of every description, however located and wherever situated.

"I authorize my said trustees, or the surviving trustee, to lease, sell, convey and invest, any and all of my said estate, and invest and reinvest the proceeds of same, and all moneys that may come to hand from my said estate in any way.

"And the income therefrom to be equally divided between the said Robert W. Parker and Esther A. Cromble said trustees during their lives.

"In case of death of one of said trustees, the surviving trustee to have the sole management of the trust estate, retaining one half of the income to him or her own use

and benefit, and from the other half of the income paying to the husband or widow of the deceased trustee, so much of said income not exceeding five hundred dollars, provided, the half of the income amounts to five hundred dollars. Where the one-half of the income exceeds the five hundred dollars the trustee may carry the surplus to the trust fund, or may use such part as he may designate to assist any needy relative of James P. Parker, or use it for any other purpose they may deem proper.

"The trustees shall see that the family burial lot received proper and perpetual care, and they shall have the right to make any change, or get any stones or monuments they may think best, drawing from the trust fund the amount necessary for such expense.

"In case of death of both trustees, a trustee is to be appointed by the probate court on petition of the surviving husband or widow or the survivor of them, and said income as hereinbefore designated to be paid to them or the survivor during their life.

"The said Robert W. Parker and Esther A. Cromble during their lives or during the life of the survivor, may designate any needy relatives of James P. Parker as heirs to the trust estate, to such an amount as they deem advisable; and the residue to be given to institution or institutions for the relief of suffering humanity as may be deemed by said Robert W. Parker and Esther A. Cromble or the survivor of them, as most worthy of it, and shall be designated as the James P. Parker legacy. To be paid over and transferred at the expiration of the trust, after the death of said Robert W. Parker and Esther A. Cromble and the widow and husband of said Robert W. Parker and Esther A. Cromble.

"In case the trustees cannot agree in regard to the carrying out any of the provisions of this will, they shall refer all such matters to any justice of the Supreme Judicial Court."

During the lifetime of said Robert W. Parker and Esther A. Cromble, they designated the Eastern Maine General Hospital as one of the institutions to receive \$4,000 of the trust fund, and this sum was turned over to the said hospital in the lifetime of said trustees, with the agreement that, during the lifetime of either of them, or their surviving widow or husband, the income should be paid according to the terms of said will, and at the death of both of said trustees, and their widow and widower, if any, the fund should become the absolute property of the Eastern Maine General Hospital, and said hospital claims that by that designation they became one of the institutions mentioned in the will and entitled to share in the residue of the trust fund, and are defendants in this bill, and have filed an answer thereto claiming the fund. The Young Men's Christian Association of Bangor have, by leave of court, been made a

defendant, and have filed an answer claiming that they are an institution entitled to share in said fund. The Good Samaritan Home, a charitable corporation located at Bangor, have also, by leave of court, been made a defendant, and have filed an answer, asking the court to turn over to them said fund, or a part thereof, to be used by them for the benefit of suffering humanity.

It is the claim of the heirs of Robert W. Parker and Esther A. Crombie that, as said Robert W. Parker and Esther A. Crombie, during the lifetime of both, or said Esther A. Crombie during her lifetime as the surviving trustee, did not designate or select any institution or institutions for the relief of suffering humanity to receive the residue of said estate held by them in trust, the gift to them as trustees determined, lapsed, and became part of the estate of James P. Parker and descended to his heirs or next of kin, and one-half thereof passed by the will of Robert W. Parker to Belle C. Parker, the widow of Robert W. Parker, and one-half to the heirs of Esther A. Crombie.

It is claimed, on the other hand, that the residue of the estate after the death of said Robert W. Parker and Esther A. Crombie, the widow of Robert W. Parker, and the husband of Esther A. Crombie, should be used for the relief of suffering humanity and given to some institution or institutions, for that purpose, as provided in the will; that said Robert W. Parker and Esther A. Crombie, by neglecting during their lifetime to designate the institution, or institutions, which should receive the fund, did not defeat the object of the testator; that it was a gift for charitable uses; and that the court should not allow the bequest to be defeated, but devise a scheme whereby the intention of the testator may be carried out.

No claim is made but that it was the duty of the trustees to carry out the provisions of the will as far as it related to the burial lot of James P. Parker. This not having been done, it is the duty of the present trustees to carry out the wishes of the testator as to the burial lot and charge the trust fund with the expense thereof.

[1] The first question raised is as to the right of the relatives of James P. Parker to share in the trust fund under the following provisions of the will:

"The said Robert W. Parker and Esther A. Crombie during their life, or during the life of the survivor, may designate any needy relative of James P. Parker as heirs to the trust fund to such an amount as they deem advisable."

The above must be construed as vesting in Robert and Esther a discretion as to whether or not any of the relatives of James P. Parker should inherit from the trust fund. It was a personal privilege or confidence given to them, and, they not having designated in their lifetime any such needy relatives, it is to be presumed that it was their

judgment that it was not advisable that the relatives should have any part of the trust estate, and that the personal privilege or confidence cannot be exercised by the court. It was only such as they, or the survivor of them, deemed advisable that were to inherit, and the provision of the will that the residue of the trust fund, after the death of Robert and Esther, and their widow and widower, if any, should be paid over to an institution, or to institutions, for the relief of suffering humanity, clearly shows that the testator did not intend that any of his needy relatives should inherit unless they were designated to share in the fund by Robert and Esther, or the survivor of them.

[2] That the bequest to R. W. and E. A. was a valid bequest for charitable uses is too well established to be questioned. *Drew v. Wakefield*, 54 Me. 291; *Everett v. Carr*, 59 Me. 325; *Fox v. Gibbs*, 86 Me. 87, 29 Atl. 940; *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Minot v. Baker*, 147 Mass. 350, 17 N. E. 839, 9 Am. St. Rep. 713; *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401.

[3] In construing the will of the testator we must ascertain, if possible, from the will itself the intention of the testator. What was the object that James P. Parker had in mind in making the trust provision contained in his will? He had provided for his brother Robert and his sister Esther by giving to them absolutely \$2,500 each. He provided that they should have the income of the trust fund during their lifetime, or the lifetime of the survivor, and that the widow and widower, if any, should have the income during their life. His object seems to have been to protect his brother and sister, husband and wife, during their lifetime by the terms of his will and the trust created thereby. There seems to have been no other relative whom he desired should receive any part of his estate. Having made all the provisions that he desired to make for his relatives, his object was to give the trust fund, after the death of the parties therein named, to charity. He had made all the provisions for them that he desired, unless Robert W. and Esther A. should designate certain relatives as heirs to the trust fund, which he gave them the power to do. He intended to dispose of all his property by the will. That he did not intend to die intestate as to any of his property is conclusively shown by the provision that the remainder of the trust fund that included all not specifically disposed of was to be paid over and transferred at the expiration of the trust, after the death of Robert W. and Esther A. and the widow and husband of said Robert W. and Esther A. It being the intention of the testator to dispose of all

his estate, the residue was to be given to an institution, or institutions, for the relief of suffering humanity, and the power of selecting the institution, or institutions, who were to receive the residue of the trust fund, was conferred upon Robert W. and Esther A., who were the trustees of the fund, held the legal title, and had a beneficial interest in the income for their lives.

They having accepted the trust, and received the income for themselves under the terms of the trust, it was their duty to exercise the powers given them by the will under which they held the fund, and carry out the intention of the testator, and to designate the institution, or institutions, for the relief of suffering humanity, that they deemed most worthy of it; but, by reason of death and infirmity, they neglected to perform that duty.

[4, 5] "In this class of cases the power is so given that it is considered a trust for the benefit of other parties, and when the form of the gift is such that it can be construed to be a trust, the power becomes imperative, and must be executed." 1 Perry on Trusts, § 372. A person accepting a trust is bound to execute the trust, and to carry out the intention of the testator as expressed by the language creating the trust. In this case it was the intention of the testator that the residue of the trust fund should be given to an institution, or institutions, for the relief of suffering humanity, and R. W. and E. A. having accepted the trust, the power of selecting the institution, or institutions, became an imperative power or direction, and, not having been executed in their lifetime, the court will not allow the trust to fail for lack of a trustee, but by its decree will execute the power, the execution of which was neglected in the lifetime of Robert and Esther. In other words, the court will see to it that the intention of the testator is not defeated by the neglect of those to whom he had intrusted the power to designate the institution, or institutions, to receive the fund. The court will put itself in the place of the trustee, and will execute the power by the most equitable rule: "If the trust or power can by any possibility be exercised by the court, the nonexecution by the party intrusted shall not prejudice the party beneficially interested or the cestui que trust." Perry on Trusts, 249; *Drew v. Wakefield*, 54 Me. 291; *Cutter v. Burroughs*, 100 Me. 379, 61 Atl. 787; *Woodroof et al. v. Hundley*, 147 Ala. 287, 39 South. 907; *Sawtelle v. Williams*, 94 Wis. 412, 69 N. W. 72; *Towle v. Nesmith*, 69 N. H. 216, 42 Atl. 900; *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; *Minot v. Baker*, 147 Mass. 350, 17 N. E. 839, 9 Am. St. Rep. 713; Perry on Trusts, § 20; 1 Perry on Trusts, § 249.

[6] In constituting an imperative power or direction, it is not necessary that the appointing words shall be a command; it is sufficient if the language of the testator, in

creating the trust, and stating its purpose and object, is such that the reasonable inference of the language shows that it was the intention that it should be imperative. "In the ordinary cases of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intent to benefit the class is recognized, and the trust will not fail if the trustee accept it and then fails to make a selection." *Minot v. Baker*, 147 Mass. 350, 17 N. E. 839, 9 Am. St. Rep. 713. In this case the trust fund, with its beneficial use for life, went to R. W. and E. A. It was to be paid over after their death, and the death of their husband and wife to an institution, or institutions, for charitable purposes. They were given the power to designate that institution, or those institutions, and the reasonable inference to be drawn from the language is that he intended that they should carry out his intention and designate the institution, or institutions, and they so understood it and attempted by the gift to the Eastern Maine General Hospital of a part of the trust fund to execute the power which it was their duty to execute.

This case differs from the case of *Fontaine v. Ravenel*, 17 How. 369, 15 L. Ed. 80, the court holding in that case that, as the property had never passed out of the testator, it necessarily remained as a part of his estate. In this case the property did pass out of the testator's estate; it was given in trust to Robert W. and Esther A. The legal title passed to them, and the testator so understood it when he said, "They are authorized to lease, sell, convey and invest any and all of my said estate," and a time was fixed when the residue should be given to an institution, or institutions, for the relief of suffering humanity. The legal and beneficial interest (for the life of those mentioned in the will) passed from the estate of Robert to the trustees, and a valid trust was created, and, as said by the court in the above case, "a power, when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust in chancery is held to survive. * * * Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Eliz., or on principles similar to those of the statute, effect might be given to the bequest as a charity. The words as to the residue of his property were used in reference to the discretion to be exercised by his executors. Without that action he did not intend to dispose of the residue of his property."

In this case the testator did not intend, by giving to Robert W. and Esther A. the power of designating the institution, or institutions, to receive the fund, to confer a mere power, the property had been given to them in trust, it had passed from the estate of James P. Parker, and had become a

trust fund in which his estate had no interest, and by the will creating the trust the residue of the trust fund was to be applied to charitable purposes, and, as said in the above case, "Effect might be given to the bequest as a charity."

It being the opinion of the court that the bequest in question was a valid gift to charitable uses, that it was the duty of Robert W. and Esther A. to have selected the institution, or institutions, to receive the residue of the trust fund, and that by their neglecting to do so during their lifetime, the trust did not fail and fall into the estate of James P. Parker. That it is the duty of the court to place itself in the place of the trustees, and to devise a scheme to carry out the intention of the testator whereby the residue of the trust fund may be given to an institution, or to institutions for the relief of suffering humanity.

According to the stipulation, the case to be remanded and heard before a single justice, as to the proper charitable institution, or institutions, to share in the fund. Bill sustained, with cost. Decree accordingly.

MORSE et al. v. BALLOU et al.

(Supreme Judicial Court of Maine. June, 1912.)

1. WILLS (§ 686*)—CONSTRUCTION—DISPOSITION OF INCOME.

A will gave one-third of the residuary estate in trust to pay the income to R. and H. during B.'s lifetime, the principal to be transferred to R. and H. at B.'s death, and provided that if R. and H., or either of them, should not be living at the termination of the trust, the principal should be transferred to the legal heirs of R. and H., or either of them; "said heirs to take the same share as said R. or H. would have taken, if living." B. and R. are living, but H. died intestate. Held, that the income of H.'s share in the income passes to her legal representatives, and not to her heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631-1637; Dec. Dig. § 686.*]

2. WILLS (§ 629*)—VESTED INTERESTS.

Generally a devise or bequest to a testator's children gives a vested interest, unless a contrary intention is shown by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

3. WILLS (§ 627*)—BEQUESTS FOR DIVISION—INTEREST OF BENEFICIARIES.

On bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and, on death of a legatee before termination of the trust, the income must be paid to the legal representative of the estate of the deceased legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.*]

4. ACTION (§ 6*)—MOOT QUESTIONS.

A court will not determine in advance of the termination of a testamentary trust who will be entitled to the principal; what the situation may be or who the claimants to the

principal may be at that time being merely conjectural.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 40; Dec. Dig. § 6.*]

Report from Supreme Judicial Court, Penobscot County, at Law.

Bill by Walter L. Morse and others, trustees, against William R. Ballou and others to construe the last will and testament of Llewellyn J. Morse, late of Bangor. Answers were filed by the several defendants. At the conclusion of the hearing before the Justice of the first instance, the case was reported to the Law Court upon bill, answers, and proof; "the Law Court to render such final judgment as the legal and equitable rights of the parties require." Decree rendered.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and HANSON, JJ.

Louis C. Stearns, Jr. of Bangor, for plaintiffs. Irish & George, for Louisa Hill, Mark Langdon Hill, Walter Hill, and Marion Hill. George H. Worster, of Bangor, for William R. Ballou. William H. Irish, for Fred D. Hill, executor and guardian.

CORNISH, J. [1] Llewellyn J. Morse died at Bangor October 24, 1902, leaving a last will and testament which was duly approved and allowed at the November term of the probate court for Penobscot county.

The testator in the residuary clause of his will divided the residue of his estate into thirds and bequeathed one of these thirds to the plaintiffs, as trustees, in the following terms:

"The remaining one-third I give, bequeath and devise to Walter L. Morse, Carrie L. Higgins and Alfred J. Robinson above named, to have and to hold the same to the said Walter L. Carrie L. and Alfred J. their heirs, executors, administrators or assigns according to the nature and quality thereof respectively in trust, for the following purposes and uses, viz., to invest, manage and control the same as they may deem best, and during the lifetime of my deceased daughter's husband Willis B. Bridges, to pay over to the said Fannie Bridges Robinson and Louisa Bridges Hill, the net annual income and profits of the said one-third held in trust by them as aforesaid, said trust to continue until the death of the said Willis B. Bridges, and after his decease, then I order and direct said trustees to transfer and convey said one-third to the said Fannie Bridges Robinson and Louisa Bridges Hill, each to share and share alike, and in case they or either of them are not living at the termination of said trust, then I order and direct said trustees to transfer and convey said one-third to the persons who would be at the time the legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill, or either of them, said heirs to take the same share the said Fannie Bridges Robin-

son or Louisa Bridges Hill would have taken if living."

Willis B. Bridges is living, so that this trust has not yet terminated. Fannie Bridges Robinson is also living, but Louisa Bridges Hill died, testate, March 22, 1907, leaving a husband and four minor children by her marriage to him, and a son by a former marriage.

The plaintiff trustees, by bill in equity, in which all persons interested have been made parties, ask this court for a construction of the will.

1. The first question propounded is this:

"What disposition shall be made of one-half of the net annual income of said one-third of said residue from the death of Louisa Bridges Hill until said trust shall be terminated by the death of Willis B. Bridges?"

[2, 3] We think the intent of the testator as expressed in the will can be given effect under well-established rules of construction. He desired his two daughters to share equally in this one-third. He provided for a trust to continue during the life of Willis B. Bridges, the husband of a deceased daughter. During that period the daughters are to share the income. At the termination of that period they are to share the principal, and, in case of the death of either or both prior to the termination of the trust, the then legal heirs of such deceased daughter are to take such daughter's share in the principal. For that contingency, express provision is made. But nothing is said as to what shall be done with the daughter's share of the income accruing between her death and the termination of the trust. The gift of the income, unlike the gift of the principal, is made to the daughters alone. The heirs are not mentioned. The general rule is that a devise or bequest to children gives a vested interest unless the contrary intention is shown by the will, and we fail to find any contrary intention here.

It is also a well-settled rule that in the case of the bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and in the case of the death of a legatee before the termination of the trust, the income must be paid to the legal representative of the estate of the deceased legatee.

The following cases are directly in point:

In *Jones v. Randall*, 1 Jac. & W. 100, the testator gave his leasehold estates in trust to his executors, with directions to pay an annuity of £450 to his daughter during her life, and after her death to her surviving children in equal proportions, the trust to continue and the annuity to be paid during the life of the survivor of the children. The daughter died after the will took effect leaving four children, and subsequently one of these children died. The question then

arose as to whom the share of the annuity belonging to the deceased child should be paid, and it was held that it should be paid not to the three surviving children, but to the administrator of the deceased child.

In *Eales v. Cardigan*, 9 Sim. 384, a testatrix gave to her servants, Samuel Eales and Charlotte, his wife, an annuity of £200 a year, which was made a charge upon the estate, for their lives and the life of the survivor. The court construed this to mean that each was entitled to the annuity during the joint lives of both and the life of the survivor, and upon the death of the husband the wife must continue to receive her one-half, while the other one-half passed to the legal representatives of the husband.

The same rule was recognized and followed in *Bryan v. Twigg*, L. R. 3 Eq. Cas. 42.

In *Stanwood v. Stanwood*, 179 Mass. 23, 60 N. E. 584, the will under discussion closely resembled the one in the case at bar, so far as the point under consideration is concerned. The testator devised all his real estate to a trustee for the equal benefit of his four children, who were to receive the net income equally during a certain period, at the termination of which the trustee was to divide the property held by him under the trust equally among the testator's "said children and their heirs and assigns." One of the children died after the testator but before the termination of the trust. The court held that the children took a vested interest in the income as tenants in common, and that the share of this deceased child in the income went to the executor of the child.

The opinion cites and follows the three English cases above referred to. The very recent case of *Federhen v. Kibbey*, 201 Mass. 291, 90 N. E. 417, reaffirms the same principle.

But the learned counsel for the son of Mrs. Hill by her first marriage, while apparently admitting the force of these decisions, contends that they do not apply here, because he claims that the last clause of this section, "such heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living," in terms divides the income as well as the principal among the heirs, and negatives the idea that it should pass to the legal representative of the deceased daughter.

We do not think this clause was intended to have or has such an effect. It is not to be taken by itself, but is to be read with what precedes it, and when so read it manifest that this last clause is intended to make clear the testator's meaning. At the termination of the trust he orders the trustees "to transfer and convey said one-third to the persons who would be at the time legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill or either of them." This does not say in terms that the distribution is to be made by right of re-

resentation, but transfers the trust estate to all the heirs of the two daughters, if both had passed away. In order to make it perfectly clear that each branch shall receive only its share, he added the last clause, which leaves it beyond a doubt, "such heirs to take the same share, the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living." Without this last clause the will might be given the same effect; but, with it, every possible doubt is cleared away as to who shall receive the principal and in what proportions.

This clause was therefore not unnecessary, as the son claims, but was wisely added.

Moreover, this last clause cannot by any fair construction be made to apply to the income to be distributed before the termination of the trust estate. The word "such" forbids it. The preceding sentence provides for the distribution of the corpus of the estate among her then living heirs in case of the death of a daughter. The date of the termination of the trust fixes the heirs who shall be entitled to receive the principal, and this last clause says "such heirs" shall take the share the daughter would have taken. How can it be possible for the income to be paid over to heirs, when the persons so entitled to take cannot be ascertained until years afterward when the trust ceases. For instance, William R. Ballou, the son who now claims a portion of the income, may never be entitled to any portion of the principal. His right depends upon his being alive at the termination of the trust estate. He will then be one of "such heirs." And only "such heirs" will then take. Until that time he has no interest in the estate.

1. In answer to the first question, therefore, the court would say that one-half the net annual income of said one-third of the residue, from the death of Mrs. Hill until the termination of the trust, should be paid to Fred D. Hill, the executor of her will.

[4] 2. The second question propounded is this:

"At the death of said Willis B. Bridges and the termination of said trust, who will be entitled to the principal of one-third of said residue?"

We think this question is premature. The trust is still in existence. What the situation may be, or who the claimants may be, at the death of Willis B. Bridges, is now a mere matter of conjecture. The situation now and the situation then will doubtless differ greatly. It may change so that no instructions will then be needed or requested. It is certainly a moot question at the present time, and therefore it is unnecessary for the court to consider it.

Taxable costs and reasonable counsel fees may be allowed by the judge of probate from the trust estate.

Decree in accordance with this opinion.

GETCHELL v. MERCANTILE & MFRS.' MUT. FIRE INS. CO.

(Supreme Judicial Court of Maine. June, 1912.)

1. INSURANCE (§ 124*)—FIRE INSURANCE— NATURE OF CONTRACT.

A contract of insurance against fire is a contract of indemnity to reimburse insured for his actual loss not exceeding an agreed sum.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.*

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677.]

2. INSURANCE (§ 115*)—FIRE INSURANCE— "INSURABLE INTEREST."

Whether one has an insurable interest in property is tested by the question whether he will be directly and financially affected by loss of the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.*

For other definitions, see Words and Phrases, vol. 4, pp. 3670-3674; vol. 8, p. 7690.]

3. INSURANCE (§ 115*)—FIRE INSURANCE— INSURABLE INTEREST.

Plaintiff had an interest in a building insurable to the amount of \$1,000, though the building was owned by his mother, where he had possession under an oral agreement that he might have a storeroom therein as long as his mother should live, at a monthly rental, where he made improvements in the building costing \$1,000 or more, involving rearrangement of the rooms of his store, changing shelving and putting an ell on the rear of the building, especially where insurer's president was fully informed of the situation when he solicited the insurance, and plaintiff's application stated the facts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.*]

4. FRAUDS, STATUTE OF (§ 125*)—LEASES.

A parol lease of land for more than a year is merely voidable, and not absolutely void under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 275-277½; Dec. Dig. § 125.*]

5. INSURANCE (§ 499*)—FIRE INSURANCE— AMOUNT OF LOSS—ASCERTAINMENT.

Recovery of fire insurance is not defeated because the amount of loss cannot be determined without difficulty, and is to some extent a matter of estimate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1274; Dec. Dig. § 499.*]

6. INSURANCE (§ 503*)—LEASEHOLD INTERESTS—MEASURE OF LOSS.

Where a leasehold interest is insured, the value for the unexpired term is the measure of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1280, 1281; Dec. Dig. § 503.*]

7. INSURANCE (§ 503*)—FIRE INSURANCE— AMOUNT OF LOSS.

In an action on a fire policy covering plaintiff's leasehold interest in a building on which he had a lease during his mother's lifetime, the amount of the loss was properly ascertained by taking the present worth 60 days after proof of loss of the aggregate amount representing the difference between the reasonable rental value and the rental cost to plaintiff during the mother's expectancy of life.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1280, 1281; Dec. Dig. § 503.*]

Report from Supreme Judicial Court, Somerset County, at Law.

Action by Thomas E. Getchell against the Mercantile & Manufacturers' Mutual Fire Insurance Company. On report. Judgment for plaintiff.

Argued before WHITEHOUSE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and HANSON, JJ.

Manson & Coolidge, of Pittsfield, for plaintiff. W. G. Chapman, for defendant.

CORNISH, J. On February 22, 1910, the defendant issued its policy of fire insurance insuring the plaintiff for one year to the amount of \$1,000 on a two-story, frame building, and additions thereto, etc., situated at Pittsfield village, Me.; the plaintiff paying a premium of \$3 and giving his premium note for the further sum of \$85. The premises were destroyed by fire on January 9, 1911. The case is before this court on report.

The defendant introduced no evidence, but the following facts are fairly proved by the evidence introduced by the plaintiff: The plaintiff's mother, Amanda R. Brown, was the owner of the building at the time of the fire, and had been the owner for a period of 15 years prior thereto. She had placed insurance upon the building in her own name to the amount of \$2,000, and received \$1,800 in settlement of her loss after the fire.

The building was occupied by three tenants, the plaintiff occupying the street floor for a hardware store, with rooms in the rear for storage purposes, and the other tenants occupying, respectively, the basement and the tenement in the second story.

About 15 years ago, the plaintiff's mother was anxious for him to have a business of his own, and agreed orally with the plaintiff to let him have this store 65 by 30, with two back rooms, at a rental of \$15 per month, as long as she should live. Acting under that agreement, the plaintiff entered into possession of the premises and has occupied them ever since. He has made improvements, rearranging the back rooms, changing the shelving, and putting an ell on the back side of the building, at a total cost of \$1,000 or more. A fair rental value of the premises at the time the insurance was placed and also at the time of the fire was \$30 per month. It further appears that the president of the defendant company, who solicited this insurance, fully understood that the title to the premises was in the plaintiff's mother, and what the plaintiff's interest actually was; that the plaintiff's application stated these facts, although its precise terms are not in evidence, because it was not produced by the defendant, although it was filed with the company when the policy was issued, and is referred to by the secretary of the company in a letter written to the plaintiff after the fire in which he says: "Upon looking up your letter and application, I find

that the building you occupy is owned by Mrs. Brown, who you state is your mother, and that the amount placed in our company was simply to take care of any interest which you might have." There is no claim of fraud or false representation in the procurement of the policy by the plaintiff, or in his application.

The plaintiff therefore claims that, under the facts as stated above, he had a pecuniary interest in the preservation of the property to the amount of \$180 a year during the life of his mother, that being the annual difference between the rent charged under the agreement, \$15 per month and the fair rentable value of the premises, \$30 per month; that this was an insurable interest; that the defendant insured it, and should now respond in damages to the amount of his pecuniary loss.

The defendant, on the other hand, contends that the plaintiff's testimony as to the agreement with his mother is uncertain, unsatisfactory, and in a measure self-contradictory, and that he was, at most, a mere tenant at will, with no other or greater rights than the other tenants in the same building or than tenants at will generally, and that he had no such interest as the law regards as insurable.

[1-3] It is true that the plaintiff varies somewhat as to the terms of the agreement with his mother, but the fair conclusion from his testimony as a whole is, we think, as stated above. Assuming his statement to be true, did he have an insurable interest at the time when the policy was taken and also when the fire occurred?

The term "insurable interest" has been defined in somewhat varying terms, yet with substantially uniform meaning. The scope of the rule that only an insurable interest can be legally insured may be determined in some measure from the reason that created it. It was this. A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss not exceeding an agreed sum. Wagering policies are forbidden as against public policy. A. should not be allowed to insure for his own benefit B.'s property in which A. has no concern, and by the loss of which A. would not be directly and financially affected. To hold otherwise would be to increase the moral hazard and to permit one man to profit by the losses of another. The crucial question therefore is, Will the insured be directly and financially affected by the loss of the property insured. If so, he has such an interest as the law will recognize. The loss must not be indirect or sentimental, but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property, and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field, and the decisions take an

extensive range with a growing tendency to expand rather than to contract the scope of the term. It has therefore been held that it is sufficient if the insured has any legal interest whatever, as an owner in fee, a mortgagee, a tenant for life, or a lessee, or an equitable interest, as a mortgagor, even after foreclosure proceedings begun, but not perfected, or a purchaser under a bond for conveyance, or if the insured has a right derivable out of some contract about the thing insured of such a nature that the insured may be benefited by its preservation and prejudiced by its destruction, as a common carrier of goods of others in transportation, or a bargainee of goods who has advanced a portion of the purchase price.

In other words, without attempting to coin a new definition but reversing the usual order, it may be said that any direct pecuniary loss negatives the idea of a wagering policy and presupposes an insurable interest, and an insurable interest can be insured.

We find, therefore, as we would expect, the term defined in broad and comprehensive language: "If such a relation exists between the assured and the property that injury to it will, in natural consequence, be a loss to him, he has an insurable interest therein." *Wilson v. Jones*, L. R. 2 Exch. 139. "Any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Eastern R. R. Co. v. Insurance Co.*, 98 Mass. 423.

"If a person has such an interest in property that he will suffer pecuniary loss by its destruction, he has an insurable interest." *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. But no more comprehensive definition has been given than by this court in *Gilman v. Insurance Co.*, 81 Me. 488, 17 Atl. 544, where the language is as follows: "It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property he has an insurable interest therein."

An application of this test brings the interest of the plaintiff in the case at bar clearly within the rule.

This is not the case of an ordinary tenant at will, whose sole interest in the property or in its preservation could not extend beyond the time which would be required to evict him.

But the Supreme Court of Iowa has held that even that interest constitutes a right of possession for a definite term of at least 30 days, and is insurable. *Schaeffer v. Insurance Co.*, 118 Iowa, 652, 85 N. W. 985.

[4] The rights of the plaintiff in the case at bar, however, are superior to the rights of the ordinary tenant at will. He had made a contract with the owner for a tenancy to

continue during the owner's life, a specific term. It is true that the contract was not reduced to writing, and was therefore voidable under the statute of frauds, but it was not thereby rendered absolutely void and nonenforceable. "Parol leases are not void." *Elliott v. Stone*, 1 Gray (Mass.) 571. Having entered into possession under the contract and partly performed it, having with the owner's knowledge made valuable improvements and additions, presumably in consequence of the contract, we are not prepared to say that equity would have left him remediless in case the owner had attempted to evict him. He had, in effect, paid the difference between the agreed rent of \$15 per month and the fair rental value of \$30 per month in advance by the making of the improvements, and he could only be made whole by a continuation in occupancy during the agreed term. These facts might have furnished ground for equitable interference had occasion required, and the fact that the agreement was oral would not have deprived the plaintiff of his remedy. Specific performance has been successfully invoked under oral contracts voidable under the statute of frauds, when part performance has been made. *Ash v. Hare*, 73 Me. 401; *Green v. Jones*, 76 Me. 563; *Woodbury v. Gardner*, 77 Me. 68; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49.

But, whatever the plaintiff's remedy may have been had the owner repudiated the contract, the fact remains in this case that she had never done so. She recognized the lease as existing at the time of the fire and the plaintiff as her tenant under it. The tenancy was admittedly of value to the plaintiff. He derived a profit of \$180 a year under it. His removal to equally good quarters increased his annual rent by that amount. He was interested pecuniarily and directly in the preservation of the property, and its destruction meant to him a personal financial loss. The following cases have a bearing upon the propositions involved: *Insurance Co. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Schaefer v. Insurance Co.*, 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470; *Welch v. Fire Ass'n*, 120 Wis. 456, 98 N. W. 227; *Amsinck v. Insurance Co.*, 129 Mass. 185.

It is therefore the opinion of the court that the plaintiff had such an insurable interest in the property as permitted him to effect the insurance and to recover in case of loss.

This conclusion is reached in this case with less hesitation because the president of the insurance company was fully informed of the situation when he solicited the insurance and the plaintiff's written application also stated the facts.

With a full knowledge of the plaintiff's

relation to the property and of his mother's ownership in fee, the company issued the policy, and received and has since retained the premium and premium note. Under such circumstances, it should require unusual reasons to satisfy the court that the interest insured was not insurable.

The fact that the policy in terms covers the buildings, and does not specify the plaintiff's interest, is immaterial. The company knew the facts, and independent of that, in the absence of any specific inquiry on the part of the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest, is necessary. *Gilman v. Ins. Co.*, 81 Me. 488, 17 Atl. 544, and cases cited.

[5-7] The only question remaining is the amount of the plaintiff's loss. The determination of this question is not without difficulty as it is to some extent a matter of estimate, but, while this may require a balancing of probabilities, it is not insurmountable. *Doyle v. Insurance Co.*, 181 Mass. 139, 144, 63 N. E. 394. Similar problems often arise in actions for personal injury. The life tables were introduced in evidence in the case at bar showing that the mother's expectancy of life, her age being 76 at the time of the trial, was 5.88 years, and at the time of the fire, a year before, it was 6.88 years. It was also shown that her health is good, and that she comes of a long-lived family on one side at least; her mother living to the age of 93 and her maternal grandfather to the age of 83. It would seem, therefore, conservative and just to reckon upon the plaintiff's tenancy continuing for a term of seven years after the date of the fire, and, where a leasehold interest is insured, the value of the unexpired term is the measure of loss. *Niblo v. Insurance Co.*, 1 Sandf. (N. Y.) 551; *Carey v. Insurance Co.*, 33 Hun (N. Y.) 315; *May on Ins.* (2d Ed.) p. 648. In *Schaefer v. Insurance Co.*, 133 Iowa, 205, 100 N. W. 857, 110 N. W. 470, it was held that the loss to the insured from the destruction of a building which he had a right to occupy during his life was determined by the difference between the reasonable rental value and the rental cost to him for the remainder of the term, such term to be computed from the life tables and other material evidence. Reckoning, therefore, on the basis of \$180 a year for seven years from January 9, 1911, a total of \$1,260, the loss is approximately determined by taking the present worth of that amount on May 7, 1911; that being 60 days after proof of loss was received by the company.

The amount so ascertained exceeds slightly the amount of the policy.

Therefore the entry must be:

Judgment for the plaintiff for \$1,000 and costs.

HAAKENSEN v. BURGESS SULPHITE FIBRE CO.

(Supreme Court of New Hampshire. Coos. June 4, 1912.)

1. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—PLATFORMS AND SCAFFOLDS.

If an employer undertakes to furnish to an employé the staging on which he is to work as a completed structure, it is his duty to see that it is reasonably safe and suitable for the purpose for which intended, and he cannot escape liability for the negligent performance of this duty by delegating its execution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

2. MASTER AND SERVANT (§ 103*)—INJURIES TO SERVANT—SAFE PLACE TO WORK—PLATFORMS AND SCAFFOLDS.

If an employer does not undertake to furnish the staging on which employés are to work as a completed structure, but it is either expressly or impliedly agreed that the employés shall build the staging as a part of their work, the duty resting on the employer is that of using reasonable care to provide material suitable in quantity and quality and of employing suitable men to do the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Whether an employer undertook to furnish the staging on which his employés were to work as a completed structure, or whether it was understood that the employés should construct such staging, is a question of fact, and, if the evidence is conflicting, cannot be determined as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Where it was a question for the jury whether an employer furnished the staging on which the employés were to work, and there was evidence that the support at one end of the staging was so constructed as to be unsuitable for the purpose and likely to fall, that the staging did fall as soon as the employés went on it, and that if the support had been properly constructed it would not have fallen, there was sufficient evidence of the employer's failure to furnish a proper staging to require its submission to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

Exceptions from Superior Court, Coos County; Pike, Judge.

Action by Julius Haakensen against the Burgess Sulphite Fibre Company. To the denial of a nonsuit, defendant excepts. Exception overruled.

Case for personal injuries caused by the fall of a staging upon which the plaintiff was at work laying brick. Trial by the jury, resulting in a disagreement. At the close of the plaintiff's evidence, which was all that was introduced, the defendants moved for a nonsuit. The motion was denied, and they

excepted. The evidence tended to prove the following facts: The plaintiff was employed to lay brick. He was not hired to build the stagings upon which the masons worked, and had nothing to do with their construction; this work being intrusted by the defendants to carpenters, or to carpenters and the boss mason. The plaintiff and the men engaged with him in laying brick never went upon the stagings until they were notified that they were completed and ready for use, and he did not go upon the staging in question until he was so notified. The negligence complained of was the use of an unsuitable ledger board or support at one end of the staging.

Matthew J. Ryan, of Berlin, and Rich & Marble, of Gorham, for plaintiff. Drew, Shurtleff & Morris, of Lancaster, and Sullivan & Daley, of Berlin, for defendant.

BINGHAM, J. [1] If the defendants undertook to furnish the staging as a completed structure for the plaintiff to work upon, it was their duty to see that it was reasonably safe and suitable for the purpose for which it was intended. In such case their duty would be a personal one, for the negligent performance of which they could not escape liability by delegating its execution to servants or agents. *Thompson v. Bartlett*, 71 N. H. 174, 51 Atl. 633, 93 Am. St. Rep. 504; *English v. Amidon*, 72 N. H. 301, 56 Atl. 548; *Lambert v. Company*, 72 Vt. 278, 282, 47 Atl. 1085; *Arkerson v. Denison*, 117 Mass. 407, 412; *Callahan v. Academy*, 180 Mass. 183, 62 N. E. 260; *McCone v. Gallagher*, 16 App. Div. 272, 279, 280, 44 N. Y. Supp. 697; *Richards v. Hayes*, 17 App. Div. 422, 45 N. Y. Supp. 234; *Chicago, etc., R. R. v. Maroney*, 170 Ill. 520, 524, 48 N. E. 953, 62 Am. St. Rep. 396; *Cadden v. Company*, 88 Wis. 409, 417, 60 N. W. 800.

[2] On the other hand, if the defendants did not undertake to furnish the staging as a completed structure, but it was either expressly or impliedly agreed that the plaintiff and the men employed with him should build the staging as a part of the work they had undertaken to do, then the duty resting upon the defendants was that of using reasonable care in providing materials suitable in quantity and quality for the object in view and in employing suitable men to do the work. *Robichaud v. Mendell*, 75 N. H. 391, 74 Atl. 1049; *McLaine v. Company*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Manning v. Manchester Mills*, 70 N. H. 582, 49 Atl. 91.

[3] It is thus apparent that the application of the legal principles involved in either of the above propositions depends upon the determination of the question whether the defendants undertook to furnish the staging as a completed structure, or whether it was understood that the plaintiff and the men employed with him to lay brick would also

build the staging as an incident of their work. This question, like all questions of fact, is to be determined by the jury upon evidence (*McGill v. Company*, 70 N. H. 125, 129, 46 Atl. 684, 85 Am. St. Rep. 618; *Donnelly v. Company*, 90 Me. 110, 116, 117, 37 Atl. 874; 2 Labatt, M. & S. 1780, 1784); and as the evidence in this case is conflicting, to say the least, it cannot be held as a matter of law that the defendants did not undertake to provide the staging as a completed structure.

[4] There remains to be considered the further question whether there was any evidence from which reasonable men could find that the staging furnished was unsuitable and that the plaintiff's injury was attributable thereto. It appeared that the ledger board, or support upon which the put logs rested at one end of the staging, was spliced at a point about halfway between the 8x10 posts to which it was nailed; that the distance between these posts was 6 to 8 feet; that a ledger board of this nature was unsuitable; that a staging constructed with such a support would fall eight or nine times out of ten, when put to use; that this staging fell almost as soon as the plaintiff and one of the masons engaged with him went upon it, causing them to be thrown to the floor below; and that, had the ledger board been suitable, the staging would not have fallen. We are therefore of opinion that reasonable men might find from this evidence that the fall of the staging was due to the defective ledger board, and that the plaintiff's injury was attributable thereto.

Exception overruled.

PARSONS, C. J., and YOUNG, J., found no evidence that the defect in the ledger board caused the injury. The others concurred.

PERHAM v. LANE.

(Supreme Court of New Hampshire. Merri-mack. June 4, 1912.)

ABATEMENT AND REVIVAL (§ 15*)—PENDENCY OF FORMER ACTION.

A bill to foreclose a mortgage for default in payment of principal and interest will not abate because a former suit to foreclose for an earlier default was not dismissed after being settled, but is still pending.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 111-117; Dec. Dig. § 15.*]

Exceptions from Superior Court, Merri-mack County; Pike, Judge.

Action by Margaret A. Perham against Nellie W. Lane. Decree for plaintiff, and defendant excepts. Exceptions overruled.

Bill in equity to foreclose a mortgage. The defendant filed an answer, denying the execution of the conveyance, and also alleging that, if she did, it was to secure the pay-

ment of her husband's debt. Upon the trial the plaintiff produced evidence showing that the mortgage was given by the defendant to secure the purchase price of the property mortgaged, and that there was a default both as to interest and principal. The defendant's motion for a nonsuit was denied, and she excepted. A previous bill had been filed on account of a default of an interest payment. The amount then due, with the costs, was paid; but the bill had not been dismissed when the present one was filed. The defendant moved that this bill be dismissed because of the pendency of the prior one. The motion was denied, and she excepted. No evidence was introduced by the defendant. A decree for the plaintiff was ordered, and the defendant filed a bill of exceptions.

Remick & Jackson, of Concord, for plaintiff. Hugh Moore, of Nashua, for defendant.

PEASLEE, J. The defendant's counsel has not furnished a brief, and no debatable question has been found in the case. The evidence, instead of being conclusive in favor of the defendant, was conclusive against her. *State v. Harrington*, 69 N. H. 496, 45 Atl. 404. The former bill was for an earlier default, and not for those relied upon here. In such a case the doctrine that a second suit must abate has no application.

Exceptions overruled. All concurred.

KING v. GARDINER, BEARDSSELL & CO.
(Supreme Court of New Hampshire. Hillsborough. June 4, 1912.)

MASTER AND SERVANT (§ 286*)—INJURY TO EMPLOYÉ—SUFFICIENCY OF EVIDENCE.

In an employé's action for injuries from a leather-cutting machine with which he was working, evidence held sufficient to warrant submission of the case to the jury upon the question of negligence of the employer in failing to equip the machine with the necessary spring to prevent repeating.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1010-1050; Dec. Dig. § 286.*]

Exceptions from Superior Court, Hillsborough County; Chamberlin, Judge.

Action by Frank E. King against Gardiner, Beardsell & Co. Verdict was for plaintiff, and defendants except. Exceptions overruled.

Case for personal injuries sustained by the plaintiff while in the defendants' employment, and alleged to have been caused by their negligence. Trial by jury, and verdict

for the plaintiff. Transferred from the superior court on defendants' exceptions to the denial of their motions for a nonsuit and the direction of a verdict in their favor.

Doyle & Lucier, of Nashua, for plaintiff. Branch & Branch, of Manchester, for defendants.

BINGHAM, J. In this action the plaintiff complains that he was injured while in the defendants' employment, through their negligence in providing him with a machine for cutting out shoe heels that was not equipped with a spring to prevent the power hammer, which drove the die that cut the leather, from repeating and coming down when his foot was not upon the treadle, and when he was adjusting the die in the usual manner preparatory to cutting the leather. There was a verdict for the plaintiff. The contention of the defendants is that there was no evidence from which it could be found that they were negligent and that the plaintiff was in the exercise of due care.

It appeared that it was customary to equip machines like the one in question with a spring, to obviate the likelihood of its repeating a blow when the operative was adjusting the die upon the leather; that the machine upon which the plaintiff was set to work was not so equipped; that it was the only machine of the kind the plaintiff had worked upon, and he was ignorant of the necessity for the spring; that, while a man of long experience might with reasonable safety operate the machine without a spring, it was dangerous to permit a person of no greater experience than the plaintiff was shown to have had to do so. It also appeared that the die, upon being struck by the power hammer, often stuck in the wooden block on which the leather was placed, requiring the operative to strike it with his hand to enable him to remove and reset the die; that in so doing his thumb would pass over the arm or top of the die; that this was what the plaintiff was doing when the machine repeated, and caught his thumb between the die and the hammer; that, while the plaintiff knew it was dangerous to place his thumb above or on top of the die when his foot was upon the treadle which released the hammer, he did not know that the machine was liable to repeat when his foot was not upon the treadle, which was what happened at the time he received his injury. Upon this evidence we think the superior court was warranted in submitting the case to the jury.

Exceptions overruled. All concurred.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ROBERTS et al. v. W. H. HUGHES CO.
et al.

(Supreme Court of Vermont. Rutland. June 10, 1912.)

1. CORPORATIONS (§§ 657, 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE AND DEFEND ACTIONS.

A foreign corporation which has not complied with P. S. 774, 776, prohibiting a foreign corporation from doing business in the state without procuring a certificate of compliance with the law, and providing that no corporation shall maintain any action in the state on any contract made by it in the state, unless it has procured such certificate, may maintain or defend actions to protect its rights under a contract fully executed, and it may defend the validity of a deed conveying property to it; the statute not rendering executed contracts void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2544, 2546, 2552-2554, 2563-2567; Dec. Dig. §§ 657, 661.*]

2. CORPORATIONS (§ 428*) — NOTICE TO OFFICERS—NOTICE TO CORPORATIONS.

The rule that notice to the president or managing official of a corporation is notice to it does not apply where the transaction is one in which the official is dealing with the corporation on his own account, and the knowledge of one continuing to act for himself until he had executed and delivered a deed of his property to a corporation of which he was a director is not imputable to the corporation, though he was one of the officials authorized to issue stock constituting the main consideration for the conveyance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 423.*]

3. FRAUDULENT CONVEYANCES (§ 162*) — FRAUD OF GRANTOR — VOLUNTARY CONVEYANCE.

The creditors of a grantor may avoid a voluntary conveyance for the fraud of the grantor alone.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 504, 505; Dec. Dig. § 162.*]

4. MORTGAGES (§ 174*) — UNRECORDED MORTGAGES—SUBSEQUENT PURCHASERS FOR VALUE WITHOUT NOTICE.

A mortgagee who does not record his mortgage may have his lien defeated by a subsequent conveyance to a purchaser for value without notice, but a subsequent grantee giving no consideration does not gain a priority by an earlier record.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 413-416; Dec. Dig. § 174.*]

5. FRAUDULENT CONVEYANCES (§ 9*)—FRAUD IN LAW.

The fraud of which creditors may complain may be merely the fraud which the law imputes from the condition of the grantor's estate and the necessary consequences of the conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 10-14; Dec. Dig. § 9.*]

6. CORPORATIONS (§ 174*)—NATURE OF "CORPORATION."

A "corporation" is a legal entity distinct from the stockholders, and this rule applies, though all the stock is owned by one person, but

in cases of fraud the courts will treat as identical a corporation and its stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. § 174.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1608-1621; vol. 8, pp. 7619, 7620.]

7. FRAUDULENT CONVEYANCES (§ 187*)—GRANTEE AS BONA FIDE PURCHASER.

Where an insolvent person conveyed his property to a corporation issuing stock in payment, the corporation is not a bona fide purchaser as against creditors of the insolvent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 593, 594; Dec. Dig. § 187.*]

8. FRAUDULENT CONVEYANCES (§ 187*)—GRANTEE AS BONA FIDE PURCHASER.

An individual engaging in business was financially embarrassed, and he gave mortgages to secure loans. The mortgages were not recorded. Thereafter a corporation was formed, and the mortgaged property was conveyed to it in consideration of stock issued. He and the mortgagees were stockholders and directors. A third stockholder and director knew of the unrecorded mortgage, but the remaining two stockholders and directors had no knowledge thereof. The arrangement provided that the individual should have substantially all of the stock and the avails of the remainder in cash, which was not paid. *Held*, that the corporation was but an instrumentality to enable the individual to hold his property, and continue his business in the name of the corporation, and it was not a purchaser for value as against his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 593, 594; Dec. Dig. § 187.*]

9. BANKRUPTCY (§ 268*)—TRUSTEE'S SALES—TITLE OF PURCHASER.

Where a trustee in bankruptcy announced before a sale of corporate stock of the bankrupt all the facts, including the existence of an unrecorded mortgage on the property of the bankrupt, which had been conveyed to the corporation to enable the bankrupt to continue his business, a purchaser acquired no better title than the bankrupt; for the trustee took the estate subject to liens and equities not declared void by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

10. CORPORATIONS (§ 149*) — STOCK — BONA FIDE PURCHASER.

A purchaser of stock with notice of an unrecorded mortgage on property conveyed to the corporation from one having no notice is a bona fide purchaser, and succeeds to all the rights of his vendor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

11. CORPORATIONS (§ 149*) — TRANSFER OF STOCK—BONA FIDE HOLDER FOR VALUE.

A finding that a certificate of stock was taken by a bank to secure an overdraft of the owner of the stock is a finding that the certificate was taken to secure an existing indebtedness within the rule that one is a holder for value only when he parts with value at the time of the transaction and on the faith of the transfer, and the bank is not a bona fide holder as against a mortgagee of the owner in an unrecorded mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

12. CORPORATIONS (§ 149*) — TRANSFER OF STOCK—BONA FIDE HOLDER FOR VALUE.

A finding that a certificate of stock was taken by a bank as collateral security on notes indorsed by the owner of the stock is a finding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes,

that the certificate was taken at the time of the discounting of the notes by the bank, and it is a holder for value as against a mortgagee of the owner in an unrecorded mortgage, in the absence of any effort by the mortgagee to procure a more definite finding.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

13. CORPORATIONS (§ 685*) — FOREIGN CORPORATIONS—RECEIVERSHIP IN FOREIGN JURISDICTION—EFFECT.

An order of the court of a sister state appointing a receiver of a foreign corporation owning real estate in Vermont, authorizing the issuance of receiver's certificates to provide for the payment of employees of the corporation, does not impose a lien on real estate in Vermont as against a mortgagee of the real estate in an unrecorded mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2667; Dec. Dig. § 685.*]

14. CORPORATIONS (§ 480*) — BONDS—MORTGAGES—LIENS.

The bonds of a corporation legally issued and received without actual notice of incumbrances created subsequent to the mortgage, are a lien prior to such incumbrances, though issued subsequently thereto.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 480.*]

15. CORPORATIONS (§ 621*)—APPOINTMENT OF RECEIVER — SUSPENSION OF CORPORATE FUNCTIONS.

An order appointing a receiver of a corporation on petition of its directors for the dissolution thereof, which directs the corporation to transfer its property to the receiver, suspends all corporate action, and deprives the officers of the corporation of all authority over its property, and an unexecuted authority conferred by a prior vote of the directors terminates with the appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461-2469, 2471; Dec. Dig. § 621.*]

16. CORPORATIONS (§ 685*)—APPOINTMENT OF RECEIVER — SUSPENSION OF CORPORATE FUNCTIONS.

Though neither the appointment by the court of a sister state of a receiver of a foreign corporation, nor the terms of the order of appointment, nor any authority conferred on the court or receiver by the statute of the sister state, can affect the title of the corporation to real estate in Vermont, yet the court of the sister state by virtue of its jurisdiction over the corporation and its directors, petitioning for the appointment of a receiver for the dissolution of the corporation, may compel the transfer of the title to the receiver, and hence the order appointing the receiver is effective to prevent any corporate or official action incumbering the real estate in Vermont.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2667; Dec. Dig. § 685.*]

17. CORPORATIONS (§ 479*)—BONDS — BONA FIDE HOLDER.

The delivery of bonds of a corporation as collateral to certificates of the receiver of the corporation issued to obtain money to pay an indebtedness of the corporation gives to the transferee notice of the facts involved in the issuance of the bonds, whether the delivery is by the receiver or by the attorney of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

18. CORPORATIONS (§ 479*)—BONDS — BONA FIDE HOLDER.

Though a transferee of corporate mortgage bonds is presumed, in the absence of evidence to the contrary, to be a bona fide holder for value, a bank receiving mortgage bonds as collateral security of debts evidenced by certificates of the receiver of the corporation is not a bona fide holder, where it was charged with knowledge of the order under which the certificates were issued and of the fact that the bonds were pledged by the corporation whose debt was being provided for by the certificates, and, where the bonds were void because issued after the appointment of the receiver and during the time corporate functions were suspended, it acquired no rights to the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872-1874; Dec. Dig. § 479.*]

19. MORTGAGES (§ 174*)—WAIVER OF LIEN—FAILURE TO RECORD.

A mortgagee in an unrecorded mortgage who participated with the mortgagor in forming a corporation, and in procuring a conveyance of the mortgaged property to the corporation without disclosing his lien, was not estopped from asserting his claim against the mortgagor and against the corporation which took the mortgagor's title without paying value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 413-416; Dec. Dig. § 174.*]

20. MORTGAGES (§ 183*)—PRIORITY—ESTOPPEL.

A mortgagee in an unrecorded mortgage participated with the mortgagor in forming a corporation to which the mortgaged property was conveyed without disclosing his lien, though he had reason to believe that some of the directors and stockholders were ignorant of the mortgage, and he subsequently joined in executing an instrument which declared that a mortgage then given by the corporation to secure its bonds was a first lien on all property of the corporation. The bonds issued were invalid because they were issued at a time corporate functions were suspended because of an order of court appointing a receiver of the corporation. The bonds were issued to secure certificates of the receiver issued to provide money to pay corporate indebtedness, but the validity of the bonds was not questioned. Held, that the mortgagee was estopped from asserting that the bonds were not a lien on the mortgaged premises prior to his mortgage as security for the debt evidenced by the receiver's certificate, but the estoppel did not extend to a loan to meet the receiver's expenses not within the scope of the vote of the directors directing the pledging of the bonds.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 442-445, 447, 448; Dec. Dig. § 183.*]

21. CORPORATIONS (§ 487*) — ULTRA VIRES ACTS—RIGHTS OF CREDITORS.

Where one provides money for the legitimate uses of a corporation, though under an arrangement which it has no authority to make, equity will award him proper relief in case his remedy at law is ineffectual.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

22. CORPORATIONS (§ 388*)—ACTS OF OFFICERS —ESTOPPEL.

Where a director whose private interests are involved in the affairs of the corporation takes part in the procurement of money for the corporation by a transaction which is invalid because of a suspension of the powers of the corporation, and the corporation is estopped from asserting the invalidity of the transaction, the

director is also estopped from asserting its invalidity for his own benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1556-1587; Dec. Dig. § 388.*]

23. MORTGAGES (§ 173*)—FAILURE TO RECORD—ESTOPPEL.

The mere fact that a person loaning money to one relied in part on another to look after his interest in connection with the transaction and who consented that the mortgage taken as security might be left unrecorded did not estop him, but subjected him to the ordinary consequences of a failure to record the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 412, 419-424; Dec. Dig. § 173.*]

24. INSURANCE (§ 585*)—RIGHT TO PROCEEDS—PAYMENT OF PREMIUMS.

A husband and wife at the time of obtaining a policy on his life agreed that the amount of the policy at maturity should belong to her. For over 20 years she kept boarders, doing all the business, including the purchasing and collecting, and paid the premiums from the yearly savings from the boarding business. It was also understood between them that he would turn over to her from his earnings a specified sum monthly for the support of the family, and that she should have the savings from the boarding business. The receipts from the boarding business were deposited in a bank in the husband's name, and such of the bills for supplies as were charged and the insurance premiums were paid therefrom by checks. *Held*, that the money payable at the maturity of the policy belonged to the wife.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.*]

25. PRINCIPAL AND SURETY (§ 175*)—OTHER SECURITY—RIGHTS OF SURETIES.

Where several persons agreed to indorse notes for the benefit of another who should give security therefor, and security was given for the benefit of the several persons by the execution and delivery of a mortgage, and the several persons relied thereon, all of them were entitled to the benefit of the mortgage without a finding that the agreement specified what the security consisted of, or that all of the several persons had personal knowledge of the mortgage.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

26. PRINCIPAL AND SURETY (§ 175*) — INDEMNITY MORTGAGE—DELIVERY.

Where several persons agreed with a third person to indorse notes for his benefit on his giving security, and a mortgage was executed and handed to one of them for safe-keeping, the mortgage was sufficiently delivered to be effective for the benefit of all.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 505-509; Dec. Dig. § 175.*]

27. BILLS AND NOTES (§ 97*)—CONTRACTS (§ 310*)—CONSIDERATION — SUFFICIENCY — BANKRUPTCY.

Where one received a note pursuant to a contract binding him to procure loans for the maker, and he procured some loans and indorsed notes therefor, the note he received was supported by a sufficient consideration, though he failed to fully perform the contract, but such failure was excused by the bankruptcy of the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-181, 185-192, 196-198, 200, 202-205, 208-212, 1372-1376; Dec. Dig. § 97.* Contracts, Cent. Dig. § 1447; Dec. Dig. § 310.*]

On Motions for Rehearing.

28. EQUITY (§ 420*)—FINAL DECREE—DECREE PRO CONFESSO.

A final decree on the merits of a suit in equity determines the rights of the defaulted defendants as if no decree pro confesso had been entered.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 970; Dec. Dig. § 420.*]

29. APPEAL AND ERROR (§ 842*)—QUESTIONS REVIEWABLE—CONCLUSIONS OF LAW.

Where a party having the burden to show that corporate stock was acquired by the adverse party with notice of equities or without paying value failed to meet the burden of proof, the court's disposition of the issue was a conclusion of law, and not an inference of fact, and was reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

30. APPEAL AND ERROR (§ 934*)—JUDGMENT—PRESUMPTIONS.

The Supreme Court will presume in favor of the judgment that the trial court inferred such facts from those certified up as it ought to have inferred, or as it fairly might have inferred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

31. CORPORATIONS (§ 685*) — RECEIVERSHIP—PREFERRED CLAIMS.

The fact that the statutes of a sister state made the wages of employes of a corporation a preferred claim in receivership proceedings does not make the bonds of the corporation to secure certificates of a receiver appointed by a court in such state valid if unlawfully issued, nor create a lien on the property of the corporation in Vermont mortgaged to secure the bonds, but the holders of the bonds may have an equity which will enable the court to protect them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2667; Dec. Dig. § 685.*]

32. ESTOPPEL (§ 115*)—PLEADING—PROOF.

The fact that a defendant claims a larger estoppel against plaintiff than the court will allow does not prevent defendant receiving such benefit from his claim of estoppel as the case warrants.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 305; Dec. Dig. § 115.*]

33. EQUITY (§ 288*)—PLEADINGS — AMENDMENT.

Equity will permit amendments of the pleadings to correspond with the case as tried, and, where a feature of estoppel is within the issues as tried, an amendment of the answer setting up estoppel to conform to the proof may be had.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 547; Dec. Dig. § 288.*]

34. REFERENCE (§ 101*) — RECOMMITTAL TO REFEREE.

A recommitment to a referee based wholly on the failure of the parties to anticipate certain lines of decision as to the correctness of which no question is made will not be granted where a recommitment will involve a trial of a large part of the case, and sanction a change to new lines of inquiry resting wholly on facts known at the time of the trial.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.*]

Watson and Powers, JJ., dissenting.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal in Chancery, Rutland County; Eleazer Waterman, Chancellor.

Suit by Robert J. Roberts and others against the W. H. Hughes Company and others. Heard on the pleadings, master's report, and defendants' exceptions thereto, and the exceptions were overruled and a decree entered for all of the orators, and defendants appeal. Reversed and remanded.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

T. W. Moloney, H. L. Clark, and S. E. Everts, for orators. O. M. Barber and J. B. McCormick, for defendants.

MUNSON, J. In the fall of 1901, W. H. Hughes of Granville, N. Y., a manufacturer of roofing slate operating quarries in Pawlet and Wells, in this state, became embarrassed financially, and applied to D. D. Woodard, president of the Granville National Bank, for a loan of \$30,000. Negotiations followed which resulted in an arrangement between Woodard, W. H. Hughes, his mother, Sarah Hughes, a resident of Easton, Pa., and Robert J. Roberts and his wife, Ann, residents of Pawlet, that W. H. Hughes and his wife should execute notes for \$30,000, that Sarah Hughes should indorse one-third of that amount and Roberts and his wife one-third, that W. H. Hughes should give the indorsers security, and that Woodard should procure the money. There was a further agreement between W. H. Hughes and Woodard that Woodard should carry the remaining \$10,000 without indorsers and continue the entire loan for two years, and that in consideration thereof Hughes should give Woodard 24 notes of \$200 each. The notes so arranged for were delivered to Woodard on or about November 27, 1901, and those making up the \$30,000 were discounted and the avails thereof paid to W. H. Hughes. Nothing was paid upon these by the makers, and they were finally taken up by the indorsers above named, who now hold them. On the same 27th day of November W. H. Hughes executed to Sarah Hughes, Robert J. Roberts, and Ann Roberts an assignment of a lease of certain quarry rights in Pawlet, and a mortgage of certain parcels of land in Pawlet and Wells, to secure them for their indorsements. At the time these papers were executed and delivered Hughes suggested that they be left in the possession of Woodard for the benefit of the mortgagees, because the recording of them might injure his credit. No objection being made by Robert J. Roberts, the only one of the mortgagees present, Woodard took the papers and placed them in his safe, and they remained there until July 13, 1903, the day Hughes made his assignment as hereinafter stated, when Woodard handed them to Roberts, who took them to the clerk's office for record. The assignment and the mortgage were recorded in Pawlet

July 14, 1903, and the mortgage was recorded in Wells December 19, 1904.

In the fall of 1902 W. H. Hughes began to confer with John Gilroy, his counsel, the orator Robert J., who was a foreman in his employ, and others, as to the advisability of forming a corporation to take his property and carry on the business; and on the 2d day of April, 1903, a certificate of incorporation of the W. H. Hughes Company was filed in the office of the Secretary of State at Albany. W. H. Hughes and Robert J. Roberts were two of the five persons named therein as directors for the first year. The capital stock was to consist of 2,500 shares of \$100 each, 2,430 of which were subscribed for by Hughes, 25 by Roberts, and the remainder by the 3 other directors. The officers of the corporation were elected at a meeting of the directors held April 6th, W. H. Hughes being chosen president. At a meeting of the stockholders held April 9th, Hughes offered his property for 2,430 shares of stock and \$7,000 in cash, with possession from May 1st; and the president and treasurer were thereupon authorized to issue 2,430 shares of the capital stock to W. H. Hughes upon his delivering to the treasurer a deed and assignment of leases of his slate property. The value of the property at this time is not found, but its value 15 months later is put at \$95,000. A warranty deed of the property was executed to the W. H. Hughes Company April 10, 1903, and was recorded in the clerk's office of Pawlet May 2, 1903, but was not recorded in Wells. This sale and transfer covered the property embraced in the mortgage and assignment given to Sarah Hughes, Robert J. Roberts, and Ann Roberts as before stated. April 29, 1903, the W. H. Hughes Company authorized the execution of a mortgage of its entire property to the Security Trust Company of Troy, N. Y., to secure an issue of its bonds to the amount of \$100,000; and the mortgage so authorized was executed May 1, 1903, and was recorded in Pawlet May 2d. There was an early issue of \$32,000 of bonds, as to which no question arises. There was a subsequent issue of bonds amounting to \$18,000, authorized as herein-after stated, which were placed with the Adirondack Trust Company as security for funds obtained for the payment of employees; and this indebtedness and collateral are now held by the Farmers' National Bank. The 2,430 shares of stock voted to Hughes were issued to him April 30, 1903. Twenty-five shares had already been issued to Roberts. The only others who held stock previous to May 2d were the remaining directors—H. J. Stevens, the treasurer, W. C. Clark, the secretary, who was Hughes' clerk, and E. C. Whittemore. There was an original issue of 10 shares to Stevens, and one of 5 shares to Clark. The report states in separate findings that the only consideration for the Stevens issue was service rendered in the

organization of the company, and that the only consideration for the Clark issue was service rendered to Hughes in the organization of the company. There was also an issue of 25 shares to Whittemore, of which 10 shares and 5 shares were transferred to Stevens and Clark, respectively, on the following day. In connection with this issuance and transfer, Whittemore credited Hughes \$1,000 on an old note, and Stevens gave Hughes a check for \$1,000. Nothing further appears regarding the matter of consideration.

The company went into business in Vermont May, 2, 1903. The only person then holding stock other than those above named was D. D. Woodard, who received on that day a transfer from Hughes of 50 shares. From May 4th to July 7th Hughes made about 50 transfers of stock, covering nearly all his holding. Four hundred and forty-seven shares went to about 35 different persons in amounts ranging from 1 to 50. Five hundred shares were transferred to Sarah Hughes May 6th, and 760 shares July 7th. The Farmers' National Bank received 250 shares May 11th as collateral on notes indorsed by Hughes, and July 7th it received 100 shares to secure an overdraft. There was a further transfer on July 7th of 360 shares to H. B. Nelson.

W. H. Hughes made an assignment for the benefit of his creditors July 13, 1903; and C. C. Van Kirk was appointed trustee of his estate in bankruptcy in the following September. His assets and liabilities are not given, but it appears incidentally that his estate paid about 16 cents on the dollar. Sarah Hughes was adjudged a bankrupt on her own petition September 10, 1903, and Frank Reeder was appointed trustee of her estate on the 20th. Her estate paid her debts in full, including her \$10,000 liability on the W. H. Hughes notes, and, on receiving her discharge, these notes were reassigned to her. Van Kirk received as a part of the W. H. Hughes estate 1,645 shares of the capital stock of the W. H. Hughes Company, and sold them at auction June 21, 1904, for \$33,900 to one who bid by the direction of Eugene R. Norton, in behalf of said Eugene, his brother James E. Norton, and certain others, all of whom are still holders of the stock. The Sarah Hughes claim and the Roberts claim were each reduced by the sum of \$1,650.80 received from the trustee of W. H. Hughes. The day after Hughes made his assignment, the directors of the W. H. Hughes Company took measures looking to the appointment of a receiver and a voluntary dissolution of the corporation, and their petition in that behalf was filed July 16th, and Ellis Williams was appointed receiver on the 18th. Williams was subsequently appointed receiver in ancillary proceedings in this state, and January 9, 1904, he procured a certificate of authority for the corporation to do business in this state, none having been

had before this. The dissolution proceedings and the receivership were closed soon after the Nortons obtained control of the corporation by their purchase of the Hughes' stock.

The original bill was brought by Robert J. Roberts, Ann Roberts, and the trustee in bankruptcy of Sarah Hughes, and was filed January 27, 1904. The defendants were Ellis Williams as receiver of the W. H. Hughes Company, C. C. Van Kirk as trustee of W. H. Hughes, bankrupt, the administrator of W. H. Hughes then deceased, the Security Trust Company, the Farmers' National Bank, and many others, holders of the bonds or stock of the W. H. Hughes Company. The W. H. Hughes Company and Eugene R. Norton and James E. Norton were brought in by a supplemental bill filed July 12, 1904. Sarah Hughes was admitted as an oratrix on her supplemental bill filed January 20, 1908. The only parties now defending are the W. H. Hughes Company, the Norton brothers, and the Farmers' National Bank. The bill sets up that the W. H. Hughes Company took its conveyance with notice of the rights of the orators, and prays for a foreclosure of the equities of all persons entitled to redeem the premises from the mortgages of the orators, or that the property be sold, and the proceeds distributed among the parties entitled thereto. The answers of the contesting defendants deny the priority of the orators' lien, claim that the orators are estopped from asserting it, and allege that the orators' assignment and mortgage were withheld from the record to defraud the defendant company. The master's report negatives the existence of any fraudulent purpose on the part of the orators.

[1] The orators contend that the defendant company cannot assert its title against their unrecorded conveyances because of its failure to procure a certificate of authority to do business in this state before taking its deed. Our statute provides that no foreign corporation, with certain exceptions, shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with the requirements of law in that behalf, and that its business is such as a Vermont corporation, incorporated for a like business, may lawfully carry on, and which provides, further, that no such corporation shall "maintain any action in this state upon any contract made by it in this state, unless, prior to the making of such contract, it has procured such certificate." P. S. 774, 776. The W. H. Hughes Company is not here seeking to maintain an action, but is here as a defendant; and it is held that a foreign corporation which is prohibited from maintaining a suit may defend one brought against it. *J. R. Alsing Co. v. New England Quartz, etc., Co.*, 174 N. Y. 536, 66 N. E. 1110; *Swift v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635. The orators' brief treats the transaction between Hughes and the company as

an executed contract, as it evidently is; and it is held that a prohibition of this character will not prevent the corporation from maintaining or defending suits to protect its rights under a contract fully executed. 19 Cyc. 1303; *Mobile Electric Lighting Co. v. Rust*, 117 Ala. 680, 23 South. 751. Our statute prevents the enforcement of the contract, but does not declare the contract void. The deed to the defendant company was an effective transfer of the title, and the company may protect the rights thus acquired. To hold otherwise would be to subject the property of the corporation to forfeiture at the instance and for the benefit of a private party. The orators claim that the corporation is chargeable with the knowledge that Hughes had of the existence of their unrecorded conveyances; and, as the matters connected with the issuance of the stock had not occurred at the time the purchase of the Hughes property was voted and the deed to the company executed, we take up the question independently of its relation to the character of the incorporation.

[2] It may be stated as a general rule that notice to the president or other managing official of a corporation is notice to the corporation. This is upon the ground that the official is the agent of the corporation, and that it is his duty to communicate the knowledge to his principal. The rule has no application when the transaction is one in which the official is dealing with the corporation on his own account. He is not then a representative of the corporation, but a party contracting with the corporation as represented by others. His independent and adverse attitude is an essential and manifest feature of the transaction. In this case it was necessarily understood that Hughes would continue to act for himself until he had executed and delivered the deed which the company was to receive. As he was not the agent to make the purchase, his knowledge was not the knowledge of the company. Note 6 Ann. Cas. 680; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Barnes v. Trenton Gaslight Co.*, 27 N. J. Eq. 33; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736. The fact that he was one of the officials authorized to issue the stock which constituted the main consideration did not affect his relation to the transaction itself. But the orators contend that the defendant company, if not chargeable with Hughes' knowledge, holds the property subject to their lien because not a purchaser for value.

[3] When a conveyance is without consideration, the grantee's want of knowledge is immaterial, and creditors may avoid it for the fraud of the grantor alone. Note 14 Am. St. Rep. 748. See *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429; *Fairhaven Marble, etc., Co. v. Owens*, 69 Vt. 246, 37 Atl. 749; *Corey v. Morrill*, 71 Vt. 51, 57, 42 Atl. 976.

[4] By leaving their conveyances unrecorded, the orators took the risk of having their lien defeated by a subsequent conveyance to a purchaser for value without notice; but a subsequent grantee who gave no consideration could not gain priority by an earlier record. Pom. Eq. Jur. § 759. See *Downs v. Belden*, 46 Vt. 674. It sufficiently appears that Hughes was insolvent when he deeded to the Hughes Company, and, if the corporation is to be treated as the holder of a voluntary conveyance, it has no equity equal to that of the orators. The absence of a finding that Hughes intended to defraud the orators or his creditors generally is immaterial.

[5] The fraud of a voluntary grantor may be merely the fraud which the law imputes to him from the condition of his estate and the necessary consequence of his act. *Wilson v. Spear*, 68 Vt. 145, 34 Atl. 429.

[6] It is true that a corporation is a legal entity which is entirely distinct from the individuals who compose it, and that the courts will ordinarily maintain this distinction, even when all the stock of the corporation is owned by one individual. But the courts will not permit this doctrine to become a shield for the contrivers of fraudulent schemes. It has even been said that in an appropriate case, and in furtherance of the ends of justice, a debtor corporation and the individual owning all its stock and assets will be treated as identical, independent of any question of fraud. *Pott v. Schmucker*, 84 Md. 535, 36 Atl. 592, 35 L. R. A. 392, 57 Am. St. Rep. 415. But cases of this class, in which the individual is held liable merely because he owns all the stock of the corporation, have been spoken of as of doubtful authority. *Cook, Cor.* § 664. However this may be, there is ample authority for saying that in cases of fraud the courts will look behind the corporation to the individuals composing it. The business of an individual or partnership is often continued through the formation of a corporation, and the transfer to it of the property of the individual or partnership in exchange for the stock of the corporation.

[7] A fraud upon creditors may be effected by this process as well as by a conveyance to an individual, and, when the one who makes use of it is insolvent, the corporation issuing the stock for the property will not be treated as a bona fide purchaser. *Booth v. Bunce*, 33 N. Y. 139, 88 Am. Dec. 372; *Metcalf v. Arnold*, 110 Ala. 180, 20 South. 301, 55 Am. St. Rep. 24; *Kellogg v. Douglas County Bank*, 58 Kan. 43, 43 Pac. 587, 62 Am. St. Rep. 597. The fact that a small amount of the stock is held by persons other than the debtor will not be permitted to stand in the way of a creditor's relief. The existence of a certain number of directors is necessary to the organization of a corporation, and this requires that a few shares of the stock be held by others. It has been

repeatedly said that the relief will be granted when the debtor owns substantially all the stock. *Cook on Cor.* (8th Ed.) § 663; *First National Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834; *In re Rieger* (D. C.) 157 Fed. 609; *Blair v. St. Louis, etc., R. Co.* (C. C.) 22 Fed. 36; *Gormully, etc., Co. v. Bretz* (C. C.) 64 Fed. 612; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311. In the case last cited, *Sherman and Dean*, the persons whose acts were in question, owned 4,996 shares out of 5,000. The ownership of one of the other shares was shown to be unreal, and the court considered it no violent presumption that the ownership of the remaining shares was the same. Upon this statement the court said the corporation was but a contrivance whereby the same property was held by the same parties under a different name, and that in conveying to the corporation the grantors were but conveying to themselves. In *Pott v. Schmucker*, above cited, the court reviewed this case, and said of it that the court looked through the disguise of a corporation in which *Sherman and Dean* had clothed themselves, and proceeded to deal with the case precisely as though the title to the land had not been conveyed by *Sherman and Dean* to the corporation, but still stood in their names.

[8] We have seen that two of the five stockholders and directors of the defendant company, *Hughes and Roberts*, were parties to the unrecorded transfers. Of the remaining three, *Clark* is found to have had knowledge of the transfers, but apparently on certain hearsay evidence; while *Stevens* and *Whittemore* are found to have had no knowledge of them. Twenty shares went to *Stevens* and 10 to *Whittemore*; and we have seen that *Whittemore* credited *Hughes* \$1,000 on an old note. The only cash shown to have been paid on account of stock was that paid by *Stevens*, who gave *Hughes* a check for \$1,000. It does not appear that the corporation received any benefit from this payment by way of entries on its books. The report says that the 10 shares issued to *Stevens* for his services in connection with the organization was the only stock, other than that issued to *Hughes*, for which the company received consideration. Nothing appears to indicate the value of *Stevens*' services, except what can be gathered from the record of the proceedings, and this discloses nothing from which the court would be justified in saying that they were a substantial consideration for the stock he received on that account. The arrangement was, in effect, that *Hughes* should have 2,430 shares of stock and the avails of the remainder—\$7,000 in cash. The report says that the \$7,000 which *Hughes* was to have in cash was not paid. Upon these facts, we think it must be considered that the corporation was but an instrumentality for enabling *Hughes* to hold his property and continue his busi-

ness in another name and a different manner, that in conveying his property to the corporation he was in effect deeding it to himself, and that the corporation, in exchanging its stock for his property, was but returning his property in a different form. The property which he at first held by title he afterwards held through the stock. In this situation the defendant company is not entitled to be treated as a purchaser for value. But *Hughes*' deed was effective to convey the property to the corporation subject to the orators' lien, and this property is represented by the capital stock. It is not claimed but that the corporation was legally organized and the stock regularly issued. The stockholders, as owners of their several shares, are independent of the corporation and of each other, and their interests must be separately considered. All the stock held by contesting defendants was transferred from the original issues to *W. H. Hughes*. All transfers were regularly entered on the books of the corporation. It appears from the report that the holders of certain certificates, representing stock transferred directly from *Hughes*, and covering 357 shares, are not shown to have had knowledge of the orators' mortgage and assignment. None of these parties are defending, and nothing appears as to any change in the ownership of their stock.

[9] We have seen that 1,645 shares of stock were sold by the trustee of *Hughes*' estate. At the time of the sale the orators' papers had been on record in *Pawlet* over a year. *Eugene R. Norton*, by whose direction the stock was bid off, had been given all the details of the transaction by *Roberts* as early as September, 1903. The trustee made public announcement of the facts before making the sale, and it is found that all the purchasers of stock at this sale knew of the orators' mortgage and assignment. Having bought from *Hughes*' estate with this knowledge, they can stand in no better position than *Hughes* did. The trustee took the estate subject to all liens and equities not declared void by the act. 5 Cyc. 341; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

[10] *Eugene R. Norton* has, in addition to his stock purchased at the trustee's sale, three certificates, covering 15 shares, which were transferred to him in April and May and on June 14, 1904, by persons who received them before the orators' mortgage and assignment were recorded, and who are not shown to have had notice of them. As to these shares, *Norton*'s rights are those of a bona fide purchaser; for, when a person with notice buys of one who was without notice, he succeeds to all the rights of the one from who he takes the title. *Pom. Eq. Jur.* 754; *Barber v. Richardson*, 57 Vt. 408. We have seen that a certificate for 250 shares and another for 100 shares are held by the *Farmers' National Bank* as security. The

master says he is unable to find that when these shares were taken any officer of the bank had notice of the existence of the orators' mortgage and assignment.

[11] It is found, however, that the smaller certificate was taken to secure an overdraft, and we construe this to mean that it was taken to secure an existing indebtedness. One is a holder for value within the meaning of the rule only when he parts with value at the time of the transaction and on the faith of the purchase or transfer. 10 Cyc. 636, 637; *Downs v. Belden*, 46 Vt. 674.

[12] The report says that the larger certificate was taken as collateral security on certain notes indorsed by Hughes. We understand this to mean that it was taken at the time the notes were discounted. If the construction is open to doubt, the burden was on the orators to procure a more definite finding. Fifty shares of the Hughes stock were transferred to D. D. Woodard, who had knowledge of the conveyances in question; and it is apparent from the facts reported that these were not included in the trustee's sale. This would leave 13 shares of the Hughes stock undisposed of, while according to the list of transfers the remainder should be 38 shares. However the difference may be reconciled, it is clear that the remaining shares are either in Hughes' estate or in the hands of persons who are not defending. July 18, 1903, Williams, as receiver in New York, was authorized to issue receiver's certificates to the amount of \$10,000, to provide for the payment of the June wages of the company's employes, and August 15, 1903, he was authorized to issue additional certificates to the amount of \$4,000 to pay the wages of the receiver's employes and the current expenses of the receivership. Both orders were made on notice to the Security Trust Company. Neither contained any provision purporting to give the certificates priority over existing liens. It appears from the report and the exhibits that the \$14,000 obtained on these certificates was furnished by the Adirondack Trust Company, and was, either wholly or in part, the loan for which the \$18,000 of bonds before referred to were placed with that company as collateral. The defendants claim that these bonds are a lien prior to the claim asserted by the orators.

[13] The first question arises in connection with the issuance of the certificate for \$10,000. It is not necessary to inquire as to the power of a court to give priority to a loan authorized for the payment of pre-existing labor claims in the case of a corporation of this character, nor as to the effect of an order which does not express an intention to give priority. No such question of priority can arise here. The lien which the orators are seeking to establish is confined to lands in this state, and no action of the New York court could impose a lien on lands lying outside its territorial jurisdic-

tion. *Story, Con. Laws, § 543; Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528. If the Farmers' Bank has any right superior to that claimed by the orators, as regards the \$10,000 loan, it must be through the bonds held as collateral, and not by force of the certificate.

[14] When these bonds were negotiated, the orators' mortgage and assignment had been on record in Pawlet four days. If the rule applicable to one who takes title by deed is applicable here, as the orators claim, both the Adirondack Trust Company and the Farmers' National Bank took the bonds with constructive notice of the orators' mortgage. But it is clear that the rule is not applicable. The relations of the bondholder to the trust deed are such that his rights are not dependent upon the condition of the record title at the time of his purchase. The trustee for the bondholders is the grantee in the deed and the owner of the estate conveyed, and the rights of priority are to be determined by the conditions which existed when its deed was recorded. Whatever the trustee can claim under the deed inures to the benefit of those for whom it holds the title. The scheme of the loan contemplates the issuance of bonds from time to time as their sale can be effected in the general market. In the absence of express provision to the contrary, the entire issue is referred to the date of the mortgage, regardless of the time of sale. It follows that bonds legally issued, and received without actual notice of incumbrances created subsequent to the mortgage, are a lien prior to such incumbrances, although issued at a later date. *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. Rep. 539; *Camden, etc. Co. v. Burlington Carpet Co. (N. J.)* 33 Atl. 479; *Pittsburg, etc., Ry. Co. v. Long Island, etc., Co.* 172 U. S. 493, 514, 19 Sup. Ct. 238, 43 L. Ed. 528, 535.

So it is necessary to inquire whether there was a valid issue and authorized use of the bonds; and for the consideration of this question a further statement of facts is necessary. The assignment of W. H. Hughes was announced at a special directors' meeting held in the forenoon of July 14th, and it was thereupon voted that the board go to Saratoga to confer with Edgar T. Brackett with the view of employing him as counsel for the company, and the board then adjourned to meet at Saratoga that evening. At this adjourned meeting it was voted to proceed for the appointment of a receiver, either in voluntary dissolution, or by a bill in equity, or such other method as would effectively conserve the property and interests of the company, and that Edgar T. Brackett be employed as counsel to take such steps as were necessary to accomplish this result. The board then adjourned to meet July 16th at the office of the company.

and at this meeting the treasurer reported that there were not sufficient funds on hand to meet the pay roll due the 18th, and it was thereupon voted that W. C. Clark be authorized and instructed to sell the stock of slate on hand, or to obtain a loan of \$10,000 to meet the pay roll, and give a mortgage on the slate and place as collateral to said mortgage as many bonds as were necessary to secure such loan. On this same day the directors' application for a voluntary dissolution of the corporation—the same on which the receiver was afterwards appointed—was filed in the Supreme Court. The meeting of the 16th was adjourned to the 17th, and it was then voted that W. C. Clark be instructed to go to Saratoga that evening, and "confer with Senator Brackett with the view of obtaining a loan of \$10,000 to meet the coming pay roll, and that he be authorized to sign and execute such papers and place as collateral thereto such bonds" as were "necessary to obtain such loan." These facts appear from the company's record book, which is found to be a full and correct statement of the transactions of the corporation, and is made a part of the report. The receiver was appointed July 18th, upon the application above mentioned, on motion of Edgar T. Brackett, counsel for the applicants; and the order of appointment recited that the wages of the employes became due and payable that day, and authorized the raising of \$10,000 on receiver's certificates "to be forthwith applied to the payment of said wages." The master reports that the bonds "were negotiated with Senator Brackett for the Adirondack Trust Company as security for funds obtained to meet the July pay roll and some other obligations, amounting to \$14,000, as shown by "the orders authorizing the certificates. The separation, as regards authorization and date, of the two loans combined in this condensed statement, appears from our previous recital of the papers referred to. We have nothing further regarding the transaction. Nothing appears regarding the corporation laws of New York, the statutory powers of the court in receivership matters, or the status of the pay roll in such cases. It does not appear that the court proceeded any further in adjusting the affairs of the corporation. After the Norton interest obtained the majority of the stock, the corporation assumed the payment of its obligations, and the dissolution proceedings and receivership were closed. Nothing appears as to the terms or requirements of the final order. The master says regarding these bonds: "I understand there is a stipulation on file in reference to the bonds and the bondholders, but it has not been submitted to me." No reference to such a stipulation has been made by counsel.

The orators do not question the legality of the meeting at which the use of the bonds was authorized. The only objection made to

the sufficiency of the vote is that it was taken when all the directors were aware of the orators' claim. It is not necessary to consider this objection as regards either fact or law. No claim is made but that the bonds were properly certified by the trustee. The real contention of the orators is that the bonds are invalid because not issued until after the receiver was appointed. The claim of the defendants is that the directors' votes of the 16th and 17th placed these bonds under the security of the trust deed. There is no finding of the master or suggestion of counsel as to the exact time of the issue. The records show what Clark was authorized to do with the bonds, and when he was directed to proceed on his mission, but there is no finding as to what he actually did. We know nothing of any conference between Clark and Brackett on the evening of the 17th or later, and the report is silent as to the precise manner in which the loan was effected. The only finding regarding this is that the bonds were negotiated with Senator Brackett for the trust company as security for the funds obtained to meet the obligations provided for by the orders of the court. The fair meaning of this is that the bonds were negotiated to the trust company in connection with the delivery of the certificate. The defendants' brief claims no other construction for the finding. With the case standing thus, the issuance of the bonds cannot be separated from the procurement of the money by the receiver. They were pledged as collateral to the receiver's certificate, and there could be no receiver's certificate until after the receiver was appointed. This fixes the date of the issue at a time subsequent to the inception of the receivership.

[15] The order of appointment directed the corporation to transfer its property to the receiver, but contained no order enjoining the exercise of its corporate functions. No such order was needed. The appointment of a receiver over a corporation generally suspends all corporate action, and deprives its officers and agents of all authority over its property. High, Rec. § 290; Linville v. Hadden, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222; Lenoir v. Linville Imp. Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146; Treat v. Penn., etc., Co., 199 Pa. 326, 49 Atl. 84, 85 Am. St. Rep. 788. There would seem to be no question as to the application of this doctrine to dissolution proceedings had on petition of the directors. The origin and purpose of such proceedings are inconsistent with the recognition of any subsequent action of the directors affecting the status of the property. But the taking of such action was in fact prohibited; for the order to transfer the property to the receiver forthwith was in effect an order to transfer the property as it then was. Clark could do nothing by virtue of his authorization that could not have been done by the corpora-

tion at the time he acted. An unexecuted authority conferred by an earlier vote of the directors must fall with the termination of the power of the corporation over the subject-matter. See *Story, Agency*, §§ 462, 481. So the vote which otherwise would have authorized the delivery of the bonds was deprived of its effect by the intervening action of the court, unless a different conclusion is required by the fact that the mortgaged property was outside the court's territorial jurisdiction.

[16] The fact that all the property covered by the trust deed is real estate in Vermont, or chattels located here which the deed provides shall be treated as real estate, does not restrict the effect of the order. It is true that neither the appointment of the receiver, the terms of the order making the appointment, nor any authority conferred upon the court or receiver by the New York statute could affect the title to this property. See *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853. But the New York court, by virtue of its jurisdiction over the corporation and its directors, could have compelled the transfer of the title to the receiver. Having this power, the order it made must have been effective to prevent any corporate or official action which would have enlarged the incumbrance on the property. The want of power in the court to create a further lien upon the property does not imply an inability to prevent the corporation from doing it. The propriety of this view is apparent when we consider that the administration of the whole estate, and the final marshaling and distribution of the assets is through the domiciliary receivership. See, upon the general subject, *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Kimball v. St. Louis, etc., Ry. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250. There is no question here as to the protection of creditors of the corporation residing in this state. The appointment of the receiver having been operative as a restraining order, and there being no limitation of its effect by reason of the location of the incumbered property, it must be held that the bonds were improperly issued.

[17] Our next inquiry is whether the bonds are held bona fide. The bonds were received and are held as collateral security for \$10,000 which were obtained and used to pay an unquestioned indebtedness of the corporation. The Adirondack Trust Company was a purchaser for value, but it cannot be said that it took the bonds without notice of the invalidity of the issue. It seems clear that the delivery of the bonds as collateral to a receiver's certificate, whether delivered by the receiver or by the attorney of the corporation, was enough to put the purchaser on inquiry as to the circumstances in which they were issued, and charge it with knowl-

edge of the fact that the actual issuance of the bonds was after the receiver was appointed.

[18] We think the Farmers' National Bank stands in no better position than the Adirondack Trust Company. It is true that the transferee of a bond is presumed, in the absence of evidence to the contrary, to be a bona fide holder for value, and that the only finding regarding the bank's acquirement of the bonds is that they "were subsequently transferred" to it as collateral security for the \$14,000. But the indebtedness secured was evidenced by receiver's certificates, and the original creditor's receipt of the bonds would have, in ordinary course, no earlier date than the certificates themselves. The bank was charged with knowledge of the order under which the certificates were issued, and this precluded the supposition that the bonds were used by the receiver under an order of the court. The only natural inference left was that the bonds were pledged by the corporation whose debt was being provided for. So the bonds must be considered invalid in the hands of the Farmers' National Bank. As regards this branch of the case, no separate consideration of the later certificate and the additional loan of \$4,000 need be had.

[19] We come now to the question of estoppel. The defendants contend that Roberts is estopped from asserting his claim against the W. H. Hughes Company by participating in the proceedings connected with the purchase of the Hughes property without mentioning his lien. This contention is disposed of by the view we have taken of the character of the incorporation. It is certain that Roberts was not estopped from asserting his claim against Hughes. No more is he estopped from asserting it against the corporation which took Hughes' title without paying value.

[20] The case presents the further question whether the orators or any of them are estopped from asserting the invalidity of the bonds, and this requires a further statement regarding Roberts' conduct as a director. Before voting to mortgage its property, the Hughes Company employed Mr. Gilroy, an attorney, to examine the title; and at a stockholders' meeting held on the 29th of April, which was attended by the five directors, who were the only stockholders, Gilroy reported that he found the title clear of incumbrances. A written consent to the execution of the mortgage, which declared it to be a first lien on all the property of the company, real and personal, and was signed by all the stockholders, was presented at the same meeting; and it was thereupon voted that the mortgage be given, and that the consent be spread on the record. Roberts then submitted the form of a bond and moved its adoption, which was agreed to. The mortgage recited that the consent of the

stockholders was recorded in the office of the clerk of the county of Washington, and in the offices of the town clerks in the towns of Wells and Pawlet in the state of Vermont. The bonds were styled "first mortgage bonds" in both the deed and the bond.

It is not necessary to inquire as to the admissibility of the evidence on which the master finds that Roberts did not hear Gilroy's statement that the property was unincumbered, and that, if he did hear it, he did not understand it. The question here is not whether he heard something said that required him to speak, but whether something was being done that required him to speak. He knew that an examination of the records would not disclose the existence of his mortgage without hearing a report to that effect. The rejection of this finding would not invalidate the other findings as to the part taken by Roberts in the business of that meeting.

It will be remembered that as the case stands a majority of the body in which Roberts was acting, although not bona fide holders of stock, were without knowledge of the orators' lien. Knowing that he held this unrecorded mortgage, and having at least some reason to believe that three of his associates did not know it, Roberts took part without objection in all the proceedings by which the property of the company was mortgaged to secure its prospective creditors. In the course of these proceedings he joined with the other stockholders in executing a paper which declared that the mortgage then given was a first lien on all the real estate of the company. This was not only a material statement, but it was embodied in a writing which was an essential part of the process by which the funds were to be obtained. Moreover, this writing was to be recorded in public offices, and the attention of the public was to be directed to it by a reference in the deed. In signing a paper of this character for such a use and purpose, Roberts must be taken to have understood the effect of the material statements contained in it. He must also be taken to have intended that the statement should be acted upon, for that intent inhered in the nature of the transaction. There is no need of a direct finding that the party taking the bonds had knowledge of and relied upon any particular feature of Roberts' conduct. The issuance of further bonds under the security of the trust deed was in itself a representation of their priority over the orators' lien; and it is to be presumed that the holder was induced to purchase by the advantages of the opportunity as presented. The course of the orator Roberts was calculated to induce persons to invest their money in the bonds when it is reasonable to suppose that they would not have done so if they had known that there was an unrecorded prior incumbrance on the property. He not only

concurred in authorizing the trust deed as above stated, but took part in the corporate action by which the issue in question was directed. If that issue was sufficiently effective to sustain an estoppel, it is clear that Roberts is brought within the application of the rule.

We have held that this issue of bonds was invalid, and that the purchaser and its transferee were charged with knowledge of the fact which made the issue invalid. The invalidity, however, was not due to any original want of power in the corporation, but to a suspension of its functions resulting from an order of the court. The prohibition of corporate action was not expressed in terms, but was a result which followed the order of appointment by force of law. So knowledge of the impeaching fact was not the same as knowledge of the invalidity. There is nothing here to justify the conclusion that the Adirondack Company was acting in bad faith. No question touching the moral quality of the act is involved. The transaction was not one expressly or impliedly prohibited by charter or statute. There was no failure to comply with any requirement essential to its validity. The want of authority was due to a power which intervened between the inception and completion of the corporate action. The bonds were issued in disregard of an implied injunction, through the instrumentality of an officer or other agent of the corporation, in pursuance of a vote of the directors, proper in form and valid when taken, which was deprived of vitality by the appointment of a receiver before the bonds were delivered to the pledgee.

[21] It is not necessary to enter into any general discussion of the law applicable to the unauthorized acts of private corporations. It is enough to say that the law recognizes in appropriate cases the equities of one who has provided money for the legitimate uses of a corporation, although under an arrangement which the corporation had no authority to make; and that, when the nature of the case is such that remedies at law would be ineffectual, equity will afford such other relief as the case may require. If the pay roll of the Hughes Company had been a secured claim, and the transaction with the corporation a loan without security, the Adirondack Company would have been subrogated to the rights of the creditors whose claims had been thus satisfied. 3 Pom. Eq. Jur. § 1300. Where the directors of a corporation had raised money for the legitimate purposes of the company by an issue of certain bonds prohibited by the statute, it was held in dissolution proceedings that, so far as the money raised on the bonds had been applied in paying off debts which would not otherwise have been paid, those who advanced the money should be reimbursed before anything was paid to the

stockholders. *Re Cork, etc., Ry. Co., L. R. 4 Ch. 748, 760, 761.* In this case the loan was to the receiver for the benefit of the corporation, and the transaction between the corporation and the lender was a mere pledging of bonds as collateral to the loan. So, if relief is to be afforded here, it must be through an enforcement of the pledge. The pay roll provided for by the money advanced on the faith of these bonds was the only general indebtedness of the Hughes Company existing at the time the orators' papers were placed on record. If other persons became unsecured creditors during the four days which intervened before the appointment of the receiver, they are not here complaining. As against the stock, the pay roll and the bonds stand the same. Neither the trustee of the bondholders nor any holder of the first issue is defending. Neither the corporation nor any minority stockholder is questioning the validity of the bonds. The corporation could not question their validity if it would. The case leaves these bonds outstanding in the hands of the Farmers' National Bank as security for the money obtained on a receiver's certificate to meet the company's pay roll. This amounts to an affirmative finding that there was no judicial adjustment of the affairs of the corporation covering the loan evidenced by the certificate. It follows that, when the corporation took back its property from the court upon an undertaking to pay its obligation, it assumed the payment of the loan for which it had pledged the bonds. So in this suit in equity, in determining the rights of the orators and the defendant bank, the bonds will be treated as good against the corporation until redeemed by the repayment of the loan. It may safely be said that there are no other equities to be considered when the bondholders of the first issue, the trustee of the bondholders, the general creditors, if any, and the stockholders as such, are content. This discussion has been had to aid us in determining whether Roberts is estopped from asserting the invalidity of the issue.

[22] When a director whose private interests are involved in the affairs of the corporation takes part in the procurement of money for the corporation by a transaction which is invalid because of a suspension of the powers of the corporation, and the circumstances are such that the corporation is estopped from asserting the invalidity of the transaction, it is difficult to see how the director who is responsible for this position of the corporation can assert the invalidity for his own benefit. In *Moss v. Averell*, 10 N. Y. 449, the defendant had signed the contract and notes in question as president of the corporation, and the court held that he was estopped from denying the validity of the transaction, saying that his act amounted to an assertion that the corporation had

a right to make the purchase, and that the proper managing agents of the corporation had authorized it to be made, and that to hold otherwise would work great injustice to the other contracting party, and enable the defendant to make a profit out of his own wrong. We think Roberts is estopped from saying that these bonds are not a lien on the mortgaged premises prior to his claim as security for the \$10,000 loan. But we think the estoppel goes no further. The \$4,000 loan was not obtained to provide for any liabilities incurred by the corporation. A loan to meet the receivers' expenses was not within the scope of the vote which directed the pledging of the bonds. There is nothing to show that the corporation, or any officer or member of it, had any part in the attempt to bring this loan under the security of the bonds. Roberts' part in the various matters relating to the trust deed and the bonds ought not to make him responsible for a use of the bonds which was not only unauthorized, but was to procure money for the payment of debts not incurred by the corporation. It is not necessary to consider Roberts' conduct as a director as bearing on the rights of the purchasers of the Hughes' stock. We have seen that Eugene R. Norton holds 15 shares as a bona fide purchaser, and that the holders of 357 shares, regularly transferred, are not shown to have had knowledge of the orators' conveyances or to hold without paying value. These last are not defending, but the status of their shares will be determined by the holding regarding the 15 shares of Norton. *Kopper v. Dyer*, 59 Vt. 477, 489, 9 Atl. 4, 59 Am. Rep. 742. The rights of the holders of this stock are superior to the equities of the orators, and as to them the defense of estoppel is unimportant. On the other hand, those who took their stock directly from Hughes' estate with actual notice of the orators' unrecorded conveyances are not in a position to say that they have been injured by Roberts' conduct as a director, and so cannot avail themselves of this defense. With this stock must be classed the holdings of those who took their stock at the organization with knowledge of the orators' lien or without paying value.

[23] The conduct of Roberts cannot operate as an estoppel on Mrs. Roberts or Mrs. Hughes. The facts that they relied in part on Roberts to look after their interests in connection with the transaction in which their notes were given, and that Roberts consented that the conveyances taken as security might be left unrecorded, did not subject them to anything beyond the ordinary consequences of a failure to record.

[24] The oratrix, Ann Roberts, claims a separate interest in the decree prayed for. Two thousand dollars of the note indorsed by Robert J. Roberts and his wife were paid from the avails of a bank note signed by both, and this note was paid out of the pro-

ceeds of the sale of certain real estate bought by the wife in May, 1903, upon which \$1,050 had been paid out of \$3,000 received from a policy of insurance on the life of the husband issued in 1888. Fifteen hundred dollars more of the insurance money was used in paying a mortgage of \$8,000 on real estate of the husband, given for money used in taking up the indorsed note. When the insurance was obtained, it was understood between the husband and wife that the amount payable at the maturity of the policy should belong to the wife. For over 20 years Mrs. Roberts kept boarders, doing all the business, including the purchasing and collecting. It was understood and agreed between Roberts and his wife that he would turn over to her from his earnings \$40 a month towards the support of the family, and that she should have what was saved from the money paid by the boarders. The receipts from the boarders were deposited in the bank in the husband's name, and such of the bills for supplies as were charged, and the insurance premiums, were paid therefrom by his checks. The yearly savings from the boarding business were sufficient to pay and did pay the insurance premiums. All payments made and received in connection with the insurance were made and received by the husband. All business matters in which they were jointly interested were kept in his name. Upon these facts the master submits the question whether any part of the indorsed notes was paid by Mrs. Roberts.

We think the findings bring the case within the decision in *Potter v. Potter*, 64 Vt. 298, 23 Atl. 856. There the wife's invalid father came to reside in the family on an understanding between her and her husband that whatever was paid for his care and nursing should be hers; and it was held that, when a husband allows his wife to earn property during coverture, the right to reduce it to possession does not exist, and that the presentation and allowance of the claim in the name of the husband will not make it his property. The cases cited by the defendants are not authority to the contrary. In most of them there was no finding of an arrangement between the husband and wife. In considering questions touching the effect of possession and the rights of creditors, a distinction must be made between gifts of existing property and the rights which spring from a permission given the wife to earn for her benefit. The fund in question never belonged to the husband. It came into existence as the property of the wife.

[25] The defendants insist that there can be no decree covering the interest claimed by Mrs. Hughes. They argue from the report that she had no knowledge of the existence of the mortgage and assignment until after the failure, and contend that there was no legitimate evidence of an agreement

for the execution of such papers. It is not necessary to inquire as to the admissibility or sufficiency of the evidence from which the master has found that there was such an agreement. The report makes Mrs. Hughes a party to an agreement by which she and others were to indorse certain notes for the benefit of her son and he was to give them security. Security having been given for her benefit under that agreement, and delivered to a person whom she relied upon to look after the business, she is entitled to the benefit of that security without a finding that the agreement specified what the security should consist of, or that she had personal knowledge of the deed and assignment.

[26] It is claimed in this connection that there was no acceptance of the deed and assignment by Mrs. Hughes or Mrs. Roberts. It is found that after the execution of the papers they were delivered by Hughes to either Everts or Roberts, but that, before the parties separated, they were handed to Woodard for safe-keeping. This, in connection with the findings that the arrangement to which Mrs. Hughes and Mrs. Roberts were parties provided that the indorsers should have security and that they apparently left the whole matter to Hughes, Woodard, and Roberts, is enough to show an acceptance in behalf of the grantees who were not present. It is also claimed that Mrs. Hughes' estate received the purchase price of the shares transferred to her by W. H. Hughes shortly before his assignment and afterwards sold by the trustee of his estate in bankruptcy, and that this should preclude her from asserting her claim against the purchasers of the stock. Exhibit 18, which is referred to in this connection, was received for a purpose not connected with this question, and is elsewhere claimed by the defendants not to have been admissible for any purpose; and without this exhibit there is nothing in the case that even tends to show that the facts were as stated.

[27] The defendants insist that, if Mrs. Hughes prevails, the amount of her claim should be reduced by \$4,800, the amount Hughes paid to Woodard on notes given him for his services and undertaking in connection with the loan. It is said that no consideration for these notes appears, and that Woodard did not carry out his contract regarding the loan, and that it was Mrs. Hughes' duty to compel him to indorse the amount of his notes on the notes she was to pay. It appears that Woodard indorsed the \$20,000 of notes indorsed by the orators, and procured the money by discounting them at different banks, and indorsed the renewal notes by which the loan was kept on foot. These facts show a consideration for the notes he received. *Ricker v. Clark*, 54 Vt. 289. His failure to proceed under the contract for the full time, if there was such failure, was excused by the bankruptcy of Hughes. The defendant excepted to certain

findings based wholly or in part on the testimony of Robert J. Roberts and his appearance as noted by the master, on the ground that he was made an incompetent witness by the death of the other contracting party. The findings pointed out under this exception, other than one already considered, are in substance that Roberts and his wife were friendly to Hughes, had confidence in him, and were willing to do anything they could to assist him; that Roberts speaks broken English, and as a witness seemed somewhat troubled to understand; and that he did not hear the reason Hughes gave for not wanting the papers recorded. The court has made no use of any of these findings, and it may be said of all of them except the last that they are not of a kind that could have influenced the master in reaching his ultimate and controlling conclusions. The finding that Roberts did not hear Hughes' reason for not wanting the papers recorded might have been the basis of the finding that Roberts had no fraudulent intent in permitting them to remain unrecorded, but that possibility is negated by the statement that no facts are found on the testimony of Roberts that are not specifically stated to have been so found.

Decree reversed, and cause remanded, with mandate that a decree be entered adjudging that as against the W. H. Hughes Company the conveyances of W. H. Hughes to the orators are an incumbrance prior to his deed to said company; that 1,860 shares of the stock of the W. H. Hughes Company are held subject to the rights of the orators; that the trust deed of the W. H. Hughes Company and the bond issue of \$32,000 are prior to the lien of the orators, but that as to the orators the bonds subsequently issued are invalid; that the orator Robert J. Roberts is estopped from asserting this invalidity as against the \$10,000 loan; that the oratrix Ann Roberts has a separate interest of \$2,550 in the decree; and that the orators have a decree of foreclosure in accordance with their several interests and rights as herein determined.

WATSON and POWERS, JJ., dissent from the holding that Robert J. Roberts is estopped.

On Motions for Rehearing.

MUNSON, J. The majority opinion in this case was read at the opening of the October term, in 1911, and the opinion and accompanying mandate were thereupon handed to counsel without directing an entry, to afford an opportunity for any suggestions which counsel might desire to make. No one representing the defendants being in attendance, the case was held open until the close of the term and then entered with the court. The orators Robert J. Roberts and Ann Roberts now move for a reconsideration and

revision of the conclusions of the court and the proposed mandate in three respects; one relating to the effect of a decree heretofore entered on default in the court of chancery against the defendants interested only as holders of stock transferred from Hughes, one as to the effect which should be given to the final decree as regards such holders, if treated as still in the case, in the absence of a finding that they were holders for value, one regarding the construction given by this court to that part of the report which relates to the 250 shares taken by the Farmers' Bank as collateral security on certain notes.

The defendants move for a rehearing, and an opportunity to make further showing if necessary, in respect to three points, first, as to the construction given by the court to the term "overdraft" as used by the master with reference to the 100 shares placed with the Farmers Bank as collateral; second, as to the holding of the court that the receivership proceedings, and the order made therein for an immediate transfer of the property to the receiver, deprived the corporation of the power to issue further bonds; third, as to the failure of the court to recognize the pay roll as a preferred claim, which could have been established as a lien upon the property prior to the orators' mortgage.

[28] This court was aware that a decree of the court of chancery had been taken against defendant stockholders who had not appeared, although no special claim regarding it was made in argument; and such stockholders were treated simply as parties not defending. No reference to this decree was made in the orators' briefs. The decree and a subsequent modification thereof, as these were said to appear from the files, were recited in the defendants' brief; and it was afterwards said of these in the brief: "A decree hereinbefore referred to against such stockholding defendants has been entered, and some advantage to orators may be claimed to accrue therefrom. We do not conceive what. Said decree was upon service by publication, and, if effective, has entirely destroyed the value of such stockholding defendants' stock." We think the settled law applicable to pro confesso decrees against some of several defendants jointly charged justified us in treating these stockholders as we did. Our own case of *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742, was the only authority cited, but there are numerous decisions to the same effect. The nature, propriety, and effect of such a decree are fully presented in *Frow v. De La Vega*, 15 Wall. 552, 21 L. Ed. 60. The final decree on the merits determines the rights of the defaulted defendants the same as if no decree pro confesso had been entered. The view of the case taken in the opinion leaves no ground on which it can be said that the interest of E. R. Norton as holder of the 15 shares and the interests of the defaulted

stockholders are distinct. Both are treated as holders for value without notice.

[29] But the orators say there is no evidence or finding that Norton as the holder of 15 shares, or any of the other owners of stock, were holders for value, and that it must be presumed in support of the decree for the orators that the chancellor inferred from the facts reported that they were not. The orators assume that the action of the court is a reversal of an inference of fact drawn by the chancellor, but this is an error. The opinion proceeds upon the theory that the burden was on the orators to show that the stock was taken with notice or without paying value; and, the orators having failed to meet this burden, the court's disposition of the matter was a conclusion of law, and not an inference of fact.

[30] The orators urge that the finding regarding the 250 shares should not be given, for the purpose of reversal, a construction different from that of the court below. The finding is that these shares were taken as collateral security on two notes of Robert R. Jones indorsed by Hughes. The natural and obvious construction is that the collateral was put up to procure the discount of the notes mentioned, and there was nothing in the case from which the court could infer anything different. There is a limit to the presumptions that will be made in support of a judgment. The rule is that this court will presume in favor of the judgment that the court below inferred such facts from those certified up as it ought to have inferred, or as it fairly might have inferred. *Pratt v. Page*, 32 Vt. 13; *Chamberlain v. Whitney*, 65 Vt. 488, 27 Atl. 72.

It appears from an affidavit of counsel accompanying the orators' motion that in the trial of the case the orators relied upon the decree of the court of chancery as being in force, and as relieving them from the necessity of procuring any findings as to the good faith of the stockholders purchasing from Hughes. It appears, further, from the brief submitted by the orators that they tried the case upon the theory that the company had taken the property with notice, and that the defendant stockholders, as purchasers of the stock of a corporation charged with notice, had the burden of showing that they had suffered from the purchase, and that in consequence of this no attempt was made by the orators to secure and present the facts in relation to these defendants. Whether these misapprehensions should, in the circumstances, entitle the orators to some further opportunity, may be left for later consideration.

It appears, also, from the orators' brief that counsel construed the finding as to the 250 shares as a finding that the stock was pledged to secure an existing indebtedness, and so did not apply to the master for a more definite finding; and they therefore request that the report be recommitted to the

master for a more definite statement of his finding upon the evidence already before him. The consideration of this request may also be deferred. But the orators' brief concludes with a request that, if the case is returned to the master on any ground, the recommitment may cover all their points.

The first objection raised by the defendants relates to the holding regarding the 100 shares which are found to have been taken to secure an overdraft. No distinction was made in argument between the two blocks of stock. The orators treated both as having been taken to secure existing debts. The defendants treated both as held in good faith for a valuable consideration. The defendants now present the definitions of an overdraft given by standard dictionaries, and claim that the court was not justified in its construction of the term. But, after giving these definitions due consideration, we still think that a simple statement that stock was taken to secure "an overdraft" indicates that it was taken to make provision for an existing condition.

It is said that the question of the effect of the receivership proceedings upon the power of the corporation to issue its bonds as collateral to receiver's certificates was not raised in the trial below nor in the argument made here, and that the briefs submitted nowhere raise or discuss any question touching the validity of the issue made. We confine our consideration of this objection to what appears in the master's report and the briefs; and the matters recited must be viewed in connection with the fact that no question was raised at any stage of the proceedings as to the validity of the \$32,000 issue. The master says: "I am requested by both parties to make certain findings relative to the Hughes Company bonding its property." He thereupon refers to the records of the company as a correct statement of its doings, and reports the further facts set up in the majority opinion as to the manner in which the bonds were negotiated. The orators' brief, after claiming that their lien is prior to any lien of the Farmers' Bank represented by these bonds, and that the answer of the bank shows that it took them pending the litigation and therefore with notice, proceeds, "Moreover, the bonds were issued as collateral certificates," to which the court did not attempt to give priority, "and were issued to the Adirondack Trust Company after the appointment of the receiver. * * *" And later, but in the same connection, refers to the \$32,000 issue as bonds against which no question is made. The presentation of the claim regarding the subsequent issue is merger, but accurate. The use of the word "moreover" characterizes the matters following as further grounds for questioning the validity of the collateral security as plainly as if this were stated in so many words. The defendants evidently understood

that the validity of these bonds was in question. Their argument upon the subject opens with the proposition that the mortgage bonds pledged to the Adirondack Trust Company to secure the advancement made by it to the Hughes Company, or its receiver, are valid and secured by the trust mortgage. In speaking of the authority given the receiver to borrow money on his certificates, it refers to the contemporaneous order on the corporation that it forthwith execute and deliver to the receiver a conveyance and transfer of all its property, and proceeds as follows: "Equity will presume that to be done which ought to have been done, and that the property was thereupon immediately conveyed to the receiver." It refers to the votes taken in the directors' meeting of the 16th and 17th, and says that this corporate action must have placed the \$18,000 of bonds under the security of the trust deed. It seems clear that, if the power of the corporation to issue these bonds was not argued in terms, it was necessarily involved in matters which were argued. It is evident that the parties were presenting the case under the general law relating to receiverships, without considering that there were statutory provisions in New York affecting their rights. The defendants' present claim that the corporation had the power to issue these bonds after the appointment of the receiver is based upon various sections of the New York statutes attached to their motion, and not otherwise before the court.

[31] It is agreed on all sides that no fact, claim, or suggestion touching the status of the pay roll appeared in the case as submitted to the court. The defendants now refer in support of their motion to a section of the New York statutes, and offer to show that the wages of the employes was a preferred claim. If this were shown, it would not make the bonds valid if unlawfully issued, nor create a lien upon the mortgaged property. It might give the holders of the bonds an equity which would enable the court to work out a remedy on other lines. The claim of the defendants amounts to this: That they have a line of defense of which they did not avail themselves on the trial because of their failure to anticipate the court's disposition of some of the questions involved in matters necessarily for consideration. Some of the reasons which lead courts to look with disfavor upon applications of this kind are indicated in *Morgan v. Houston*, 25 Vt. 570.

The orators do not make the court's treatment of the question of estoppel a basis of their motion, but they incidentally suggest the possibility that the court may now be able to agree upon the views announced by the minority. The majority would willingly treat this suggestion as an application and act accordingly, if satisfied that they were

in error. But after a careful reading of the minority opinion, which was prepared after the majority opinion was promulgated, we see no reason to change our view. In touching upon this matter we confine ourselves to what appears from the report and the exhibits. The transcript was not referred to, and it does not appear that any exceptions to the report were filed by the orators.

The dissenting opinion stands upon the ground that the defendants neither pleaded nor claimed in argument the estoppel found by the court, and that the court was bound to presume in support of the decree that the chancellor inferred that the bonds were pledged by the receiver. The defendants, for obvious reasons, sought to make Roberts' conduct estop all the orators from asserting priority over Hughes' deed to the defendant company. But the facts of Roberts' conduct had another and very obvious bearing. The delivery and acceptance of the Hughes deed are assumed by the votes of April 29th, and nothing appears to give them an earlier date. So the completion of the purchase and the authorization of the trust deed and bonds were both transactions of the meeting which acted on Gilroy's report that the title was clear. The entire records of the stockholders' and directors' meetings, which showed Roberts' attendance and action and covered copies of the papers connected with the trust deed, were referred to and found correct; but, not content with this, the defendants requested and procured an insertion in the report itself of the facts that Roberts was present at all the stockholders' and directors' meetings until the receivership, which included the directors' meetings of July 16th and 17th; that he signed the consent to the mortgage, which declared that it would be a first lien on all the real estate, and that he moved the form of the bond, which contained the statement that it was a first mortgage bond. The defendants' brief, while attempting to make the estoppel sustain the priority of the defendant company's title deed, argues this group of subsequent facts as bearing upon Roberts alone, in a way which could not fail to suggest their true relation to the case. And in a subsequent part of the brief, where the claims of the defendant bank are specially considered, it is said to make strongly against the orators' claim of priority as regards these bonds, that the orator Robert J. Roberts was present at both of the meetings "at which the issue of these last-named bonds was specially authorized."

[32] The fact that the defendants claimed a larger estoppel than the court allows will not prevent their receiving such benefit from the claim as the case may warrant. Nor can the majority yield the point regarding the issuance of the bonds. No question is made as to the fullness and exactness of our statement of the facts reported; and we cannot

presume that the court below inferred from those facts that the bonds were issued by the receiver without the semblance of an authorization from the court, and in violation of his official duty.

[33] It is a common procedure in equity to permit amendments of the pleadings to correspond with the case as tried. *Harrigan v. Bacon*, 57 Vt. 644; *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. 317; *Olmstead v. Abbott*, 61 Vt. 281, 18 Atl. 315. The majority think this feature of the estoppel was within the issues of the case as tried, and an amendment of the answer in this respect may be had. The manner in which the case is presented should be stated more fully. Both sides submit affidavits in support of their respective claims regarding the stock held by the Farmers' Bank. The defendants' brief is accompanied by a transcript of the evidence taken by the master, for examination upon the points made. The orators attach to their brief in reply to the defendants an affidavit of counsel presenting statements made in the brief submitted to the master by defendants, and certain requests for findings submitted by both parties; and further affidavits presenting extracts from the petition for the discharge of the receiver and from the order made thereon. The defendants object to the consideration of the affidavits regarding the statements and requests of counsel, and ask that provision be made for a hearing on the question of fact if such affidavits are considered.

[34] The questions regarding the stock held as collateral, and the question whether the validity of the bonds was raised and argued on the trial, have been disposed of without reference to the affidavits. The only matters covered by the opposing briefs which remain for disposition are those presenting the orators' situation with regard to the 357 shares of stock as to which no inquiry was made, and those relating to the claims of the defendants which depend upon proof of the laws of New York. If the report were to be recommitted for a further hearing on the claims of the defendants, it might be difficult to say why the benefit of a recommitment should be denied to the orators. A recommitment on the claims of both would involve a retrial of a large part of the case, based wholly on the failure of the parties to anticipate certain lines of decision, as to the correctness of which no question is made. A recommitment on the claims of the defendants would sanction a change to new lines of inquiry, resting wholly on facts known at the time of the trial; and this after the property has been controlled by the defendants during eight years of contest. As the case stands, we think the discretion of the court should be thrown in favor of closing the litigation.

Both motions denied.

WATSON and POWERS, JJ., dissent.

POWERS, J. (dissenting). I cannot believe that Roberts is estopped, and I therefore dissent on that point.

1. It is the settled law of this state that an estoppel, to be available, must be pleaded, if, as here, the party relying upon it has an opportunity to plead it. *Sawyer v. Hoyt*, 2 Tyler, 288; *Lord v. Bigelow*, 8 Vt. 445; *Brinsmaid v. Mayo*, 9 Vt. 31; *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372. Every fact essential to the estoppel must be pleaded with accuracy. *Gray v. Pingry*, 17 Vt. 419, 44 Am. Dec. 345. If not pleaded, when the circumstances are such as to require it to be pleaded, the estoppel is waived. *Brinsmaid v. Mayo*; *Isaacs v. Clark*. The defendants evidently had this rule in mind, for they attempt to set up an estoppel in their answers. But the estoppel set up in the answers and the estoppel argued before us is not the one found and established by the majority opinion. That Roberts was estopped to assert the illegality of the issue of the \$18,000 in bonds held as collateral to the receiver's certificates by the Farmers' National Bank had entirely escaped the vigilance of counsel. Indeed, these bonds were of so little consequence or importance in the estimation of the answering defendants that no mention of them is to be found in the answers until after the special master had filed his report. Then, for the first time, though it had filed what is called a "full answer" to the original and supplemental bills, the Farmers' National Bank, in a supplemental answer, makes mention of these bonds. But it contents itself with asserting that it owns them, that they are security for the \$14,000, and that they are secured by the trust deed. There is not a suggestion anywhere in the case that Roberts is estopped to contest these bonds on the ground that they were unlawfully issued. The estoppel which the Hughes Company attempts to set up in its answer, and which the Farmers' National Bank attempts to make a part of its answer by reference, is that Roberts stood by and allowed the Hughes Company to buy the property supposing it was getting full title, and allowed the company to sell stock to those who supposed the property was unincumbered, and consequently he will not be allowed to assert his mortgage to their injury. It was said by this court as recently as *Conn. Valley Lumber Co. v. Rowell*, 84 Vt. 25, 77 Atl. 873, that, "when parties go into special pleadings, they are confined strictly to the matters put in issue, for the court tries only such issues as the parties make by their pleadings." I submit that this rule is applicable though this is a suit in chancery.

The circumstances being such that the estoppel should have been pleaded, no advantage can be taken of it, though it may have appeared from evidence introduced to establish the defense set forth in the answers. *Poole v. Mass. Mut. Accident Assoc.*, 75 Vt.

85, 53 Atl. 331. So the majority has gone quite outside of the case made by the pleadings and argument to find that Roberts cannot be heard to say that these bonds were illegally issued and cannot be ahead of his mortgage; and this for the sake of reversing a decree made upon consideration and not pro forma. I say, then, that the defendants waived the estoppel established by the majority by not pleading it; and they waived it again by not briefing it. This court in chancery appeals sits only as a court of error. *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 698. When reviewing this kind of a decree, it will make every reasonable presumption in favor of its correctness. It will decline to pass upon questions not raised below and confine parties to the theories there advanced. Errors should not be sought for outside the record, nor questions settled which were not passed upon below. In this case, so far as estoppels are concerned, the questions raised below were correctly decided, and I should decline to consider any others. "The habit that has sometimes prevailed of 'dragging' a case in this court, as for something lost, to find a fault that was undiscovered and unheeded in the trial of a cause, is ever unavailing to the client, and a deviation from professional propriety and duty," was Judge Redfield's rebuke in *Sequin v. Peterson*, 45 Vt. 255, 12 Am. Rep. 194. I wonder what he would have said if the court had, in his day, not only deliberately reversed a case on a point not raised below, but reversed it on a point not raised at all, either here or below.

2. The decree below having been made upon consideration, it should be sustained by this court if that result can be reasonably attained. To that end, if a fact essential to the correctness of the decree is omitted from the findings, and such fact can reasonably be inferred from those certified up, it is the duty of this court to assume that the court made such inference. *Russell v. Davis*, 69 Vt. 275, 37 Atl. 746; *Sowles v. St. Albans*, 71 Vt. 418, 45 Atl. 1050; *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557; *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103; *Perkins & Co. v. Perley*, 82 Vt. 524, 74 Atl. 231; *Whitehead v. Whitehead*, 84 Vt. 325, 79 Atl. 516. But, if the result will be a reversal, this court should not assume that the court below drew any inference not affirmatively shown by the record, unless the same is a necessary inference from the facts found. *Whitehead v. Whitehead*, supra; *Adams v. Ladeau*, 84 Vt. 464, 79 Atl. 996; *Plumley's Adm'r v. Plumley*, 84 Vt. 290, 79 Atl. 45. In no event can this court draw the inference. It is an inference of fact, and it is not for this court to supply a fact, either for affirmance or reversal. "It is never the province of a court of errors to deduce inferences of fact from a case agreed, a special verdict, or a report of referees or auditors," said this court in *Abbott v. Camp*,

23 Vt. 650. And all along down through our cases runs the idea that, if any inferences are to be drawn from the facts certified, they must be drawn by the trial court and not by this court.

As pointed out in the majority opinion, the report is silent as to the particular circumstances under which these \$18,000 in bonds were issued to the Adirondack Trust Company. By whom they were actually pledged is a fact not found. That they were pledged by either the receiver or the corporation is probably a necessary inference. But that it is so plain that they were pledged by the corporation—the theory on which the majority opinion is based—that that conclusion is compelled by the facts found, I wish to register a very respectful, but vigorous, disagreement. There may be circumstances of more or less significance indicating this, but it cannot be said that they are sufficiently decisive to be determinative of the question. There is room for reasonable men to differ in their conclusions on this subject—opposing inferences may be drawn from the facts reported—and therefore this court should assume that the court below drew the one which will support the decree. "We ought not, for the purpose of reversing a judgment, to read into the finding of facts something which is not there and which is not a necessary inference from the facts found." *Adams v. Ladeau*, 84 Vt. 464, 79 Atl. 997. To my mind it is vastly more reasonable to infer from the facts found that the receiver, finding the bonds all prepared and ready for delivery, assuming to carry out the previous plan of the corporation, took them, and pledged them as collateral to his certificate. If this view is even possible, under the rule referred to, the decree should be affirmed; for no one suggests that Roberts could be estopped by what the receiver did. In passing upon the possibility of the conclusion suggested, keep in mind the situation: Here was a corporation shorn of its power to incur debts or pay them; its functions suspended, and its activities paralyzed by the receivership; its assets and affairs had been ordered by the court to be transferred; its corporate powers, so far now involved, terminated by an implied injunction; and yet to reverse a decree the majority assumes that the court of chancery by force of necessity inferred in the very teeth of the court's order and injunction that the corporation assumed to issue \$18,000 in bonds, thereby increasing its mortgage indebtedness by \$14,000. I ought to say in passing that, if the bonds were issued by the receiver as I have suggested, they would be wholly invalid. A receiver has no authority to issue bonds of his own execution, and these were of no validity if executed by the corporation and issued by him. *Woodford v. Darwin*, 3 Vt. 82, 21 Am. Dec. 573, and *Woodworth v. Downer*, 18 Vt. 522, 37 Am.

Dec. 611, involved the power of a partner to issue promissory notes after dissolution of the partnership. In principle these cases are much like this. After the corporation went into the hands of the receiver, corporate action was forbidden, and the receiver could not give vitality to the unissued bonds by delivering them. Believing as I do that it is not only possible but reasonable to assume that the court of chancery inferred from the findings that the bonds were pledged by the receiver, I would so assume and affirm the decree.

3. I call attention to another assumption made by the majority which I regard as unwarranted: A copy of the bond is found in the corporate records. From this it appears that the bonds were not to be obligatory until duly certified by the trustee. Whether or not the bonds here in question bore this certificate does not appear from the report. Is it a necessary inference from the finding made that they do bear this certificate? The finding reads: "It appears from the testimony of Eugene R. Norton, and I so find the fact, that there are outstanding \$18,000 more of said bonds, which \$18,000 were negotiated with Senator Brackett for the Adirondack Trust Company, as security for funds obtained to meet the July pay roll and some other obligations * * *." I admit that the inference would be a natural one, but I deny that it would be a necessary one, unless it can be said as matter of law that bankers never made mistakes.

4. One who relies upon an estoppel for his protection must prove it. He takes the burden of establishing every fact essential to the estoppel. *Robinson v. Morgan*, 65 Vt. 37, 25 Atl. 899; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888; *Spear v. Spear*, 97 Me. 498, 54 Atl. 1106; *Kroll v. Close*, 82 Ohio St. 190, 92 N. E. 29; 16 Cyc. 811. One of these essential facts is that he relied upon the act or conduct specified, and was thereby induced to change his position. 957 Vt. Dig. 38. The master has wholly failed to find this fact in the case in hand. The absence of this finding is recognized by the majority, for it is said in the opinion that "there is no need of a direct finding that the party taking the bonds had knowledge and relied upon any particular feature of Roberts' conduct," and that "it is to be presumed that the holder was induced to purchase by the advantages of the opportunity as presented." Remembering that we are now dealing with necessary inferences only, can it be said that the question of a creditor's reliance upon collateral security is never open to inquiry? If a perfectly solvent borrower deposits collateral as security for his note, does the law conclusively presume that the lender relies upon the security? Here again the presumption may be very strong, but I cannot believe it is conclusive.

5. There is another fact essential to an

estoppel: It must be made to appear that the party seeking to avail himself of it has altered his position to his prejudice—has been misled to his injury. *Woolen v. Edson*, 35 Vt. 214; *Earl v. Stevens*, 57 Vt. 474; *Goodell v. Brandon National Bank*, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766. An estoppel is protective only, and its whole office is to shield one from a loss which, but for it, he could not escape. *Smith v. Powell*, 98 Va. 431, 36 S. E. 522; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 83 N. W. 230, 81 Am. St. Rep. 575; *Lindsay v. Cooper*, 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. Rep. 106; *Atkins v. Payne*, 200 Pa. 557, 50 Atl. 158; *Schwab v. Edge*, 214 Pa. 602, 64 Atl. 80; *Stewart v. Parnell*, 147 Pa. 523, 23 Atl. 838. It is plain enough to me that the Farmers' National Bank is in no danger here. It cannot lose a cent by this transaction. The corporation is behind their loan. Nobody claims that the corporation is insolvent, and, if they did, it sufficiently appears otherwise by the record. In the first place, it is shown that the trustee in bankruptcy of Hughes came into possession of 1,645 shares of the stock of the corporation, which he sold at auction in June, 1904—long after all these bonds and receiver's certificates had been issued—to one who knew all about the liabilities of the corporation, including the Roberts debt, for \$33,900. One cannot believe that the Nortons were paying more than \$20.50 a share for the stock of an insolvent corporation, when they knew all about its assets and liabilities. Moreover, the master finds that the value of the property conveyed to the corporation by Hughes was at the time the stock was bid off for the Nortons \$95,000, and the liabilities of the corporation then amounted to \$72,000, to which should be added the notes here sought to be foreclosed. The margin of solvency thus established is not a very large one, I admit, but is apparently safe. Not only this. It appears that after the Nortons acquired their interest the receivership was terminated, and the corporation resumed control of its affairs. Does anybody believe that the court relinquished its control without making any provision for the payment of the sums represented by the receiver's certificates which had been issued by its authority? Of course not. But we are not left to conjecture on this point. The corporation says in its answer that it "is required and compelled" to pay the expenses of the receivership, and that they amount to \$18,000. The Farmers' National Bank is amply protected without resort to the bonds; but the orators are not creditors of the corporation. They only hold the obligations of Hughes. So their only protection depends upon the availability of their security, and, if they lose their mortgage, they lose all. The debt is an honest one. Ignorance rather than dishonest purpose is responsible for the present situation of the orators. And if it

be urged that, though the bank might escape loss as suggested, the burden would then fall upon the corporation, my reply is that there is just where it ought to fall, for it took with full notice, as did those owners who are not protected by the majority opinion.

6. It is held by the majority that the Farmers' National Bank took the bonds with notice of the illegality of their issue. How, then, can Roberts be estopped from asserting it? What has he ever said or done to mislead the bank or anybody else on that subject? Assuming that the corporation issued them, what did he have to do with it? The legality of the issue of the bonds is a subject on which Roberts has never spoken, either expressly or by implication. But it is said by the majority that the corporation had the benefit of this loan—that its avails went to pay its debt—and therefore the corporation is estopped to deny the validity of the bonds pledged to secure it, and that Roberts, being a director, is also estopped to deny it. I do not agree that the corporation is estopped. The Adirondack Trust Company and the Farmers' National Bank knew all about it. They knew every single material fact. Their mistake, if there was any, arose from their ignorance of their legal rights, just as Roberts' did when he omitted to record the mortgages. They knew they were dealing with a receiver—that this corporation was in the hands of the court. What fact did the corporation suppress that it should now tie the hands of this honest creditor? Knowing these facts, they were bound to know that the corporation could not make a legal issue of bonds, and that the receiver could not. Indeed, this is the view of the majority, and the very ground on which the invalidity of the bonds in the hands of the bank is put in the opinion.

One cannot be estopped when the other party knows the truth. Deception is of the very essence of estoppel; and this deception must be as to material facts, for one knowing the facts is presumed to know the law.

If estoppels are ever available to relieve from a mistake of law, this case affords no opportunity for the application of one of that class. Without admitting, then, that Roberts' estoppel would follow that of the corporation without some participation in the wrongful act, I insist that the corporation was not estopped because the bank knew the truth. *Boynton v. Braley*, 54 Vt. 92; *Pond v. Pond's Est.*, 79 Vt. 359, 65 Atl. 97, 8 L. R. A. (N. S.) 212; *Beach*, Eq. Jur. § 1108; *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 228; *Sanborn v. Van Duyne*, 90 Minn. 215, 96 N. W. 41; *Lash v. Rendell*, 72 Ind. 473; *Estis v. Jackson*, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784; *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

It necessarily follows that Roberts' representations about the condition of the title arising from his failure to record or give notice of his mortgage becomes entirely immaterial; for if the bonds are invalid in the hands of the bank, as the majority says, and Roberts is allowed to say so, it is of no possible consequence whether they are, or would be if legally issued, a first or second lien on the property. They are unenforceable, and Roberts' implied representation that the title was clear was utterly harmless to the bank.

It requires no very careful study of this case to discover that the result reached by the majority not only does great injustice to Roberts, but accomplishes no benefit to the Farmers' Bank in whose behalf the estoppel is established. The corporation and its owners reap the benefit, though they took with notice, and are now enabled, by shielding themselves behind an estoppel to which they are strangers, to avoid an incumbrance valid as to them, and thus escape the payment of the debt secured thereby. It cannot be that in foro conscientiæ such a rank injustice should be tolerated.

I should affirm the decree.

WATSON, J., concurs in this dissent.

HELFENBEIN v. WOHLFELD.

(Supreme Court of Pennsylvania. March 18, 1912.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE.

In an action by an employé to recover for an injury to his hand while operating a machine in defendant's factory, a nonsuit was properly entered, where it appeared that plaintiff had worked at the machine for 15 months, and at the time of the accident was instructing an apprentice in its use; that the machine was in proper condition; and that any remote danger was fully understood by plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where an employé had worked at a machine for 15 months, and at the time of the accident to him was instructing an apprentice in its use, and the machine was in proper condition, and any remote danger was understood by plaintiff, he had assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Israel Helfenbein against Samuel Wohlfeld, trading as the American Novelty Manufacturing Company. From a judgment refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, MOSCHZISKER, and STEWART, JJ.

Bernard Harris, for appellant. Ira Jewell Williams, for appellee.

PER CURIAM. The plaintiff's hand was injured while he was engaged in operating a machine in the defendant's factory, by which small sheets of flexible fiber board were creased to adapt them to use in the manufacture of small boxes. The machine consisted of an iron table over the middle of which, and seven-eighths of an inch above its surface, was a frame in which the blade which produced a crease worked up and down. In operating the machine the boards were fed into the narrow space under the frame and pressed by the blade. The operator handled the boards from the edge nearest himself and had no occasion to place his hands within several inches of the blade. Back of the blade there was a movable gauge against which, when the machine was fed from the front, the boards were pressed in order that they should be uniformly creased. A crease nearer than two inches from the edge of a board could not be made when the operator stood at the front of the machine, and when a narrower margin was desired he went to the back of the machine, adjusted the gauge at the right distance, and placed the edge of the board nearest him against it. The gauge was not intended as a protec-

tion for the operator, but only to secure uniformity in creasing. The plaintiff was 37 years old, he was familiar with the operation of the machine, and had worked at it 15 months. At the time he was injured he was at the back of the machine instructing an apprentice in its use.

[1] It appeared from the plaintiff's testimony that the machine was of the kind in ordinary use, that it was in proper condition, and that any danger in its use was exceedingly remote and was fully understood by him. We find no evidence of negligence on the part of the defendant.

[2] The risk to which the plaintiff was exposed was incident to the business and was obvious and consequently assumed by him. It follows that the nonsuit was properly entered.

The judgment is affirmed.

FAULKNER v. McHENRY.

(Supreme Court of Pennsylvania. March 18, 1912.)

1. MORTGAGES (§ 280*)—TRANSFER OF MORTGAGED PROPERTY—CONSTRUCTION—"UNDER"—"SUBJECT."

The words "under" and "subject" in a deed import that the grantee takes subject to an incumbrance, the amount of which has been deducted from the price, and a covenant is inferred that the grantee will protect the grantor therefrom.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6705-6710; vol. 8, pp. 7807, 7157.]

2. MORTGAGES (§ 292*)—SALE OF MORTGAGED LAND—DEFAULT OF GRANTEE—RIGHTS OF MORTGAGOR.

Where a grantee of land subject to a mortgage defaults, and the land on foreclosure is sold for a sum insufficient to pay the mortgage, and a judgment is obtained against the mortgagor's estate for the deficiency, the administrator of such estate cannot recover of the grantee on an implied contract covenant of indemnity without showing payment of the judgment or some loss sustained.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 762-771, 790; Dec. Dig. § 292.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles A. Faulkner, administrator, against Hugh McHenry. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

M. T. McManus, for appellant. James L. Monihan and Robert A. Meier, for appellee.

FELL, C. J. This appeal is from an order discharging a rule for judgment for want of a sufficient affidavit of defense. The de-

feudant purchased land under and subject to a mortgage made by his grantor, and, because of his default, the land was sold by the sheriff under proceedings on the mortgage for an amount insufficient to pay the mortgage. An action was then brought on the bond of the mortgagor, and a judgment was obtained against the administrator of his estate for the deficiency. This action was by the administrator against the grantee of the land on the implied covenant of indemnity.

There is much in the facts that appear in the statement and in the averments in the affidavit of defense to give rise to the inference that the action was not brought in the interest of the estate of the grantor, but to secure to the mortgagee an advantage of which Act June 12, 1878 (P. L. 205), deprives the owner of an incumbrance unless the grantee has expressly assumed a personal liability therefor, and which provides that the use of the words "under and subject" to the payment of an incumbrance shall not be construed to impose a personal liability on the grantee. But the main question before the court, and that upon which its decision was based, was whether the plaintiff, who had not paid the judgment nor sustained any loss by reason thereof, could maintain the action.

Any apparent want of harmony in the decisions as to the right of a party indemnified to recover without proof of loss by the payment of the debt or otherwise disappears when the nature of the undertaking is considered and the distinction between an obligation to do a specified thing and one of indemnity against loss resulting from nonperformance is observed. Where the indemnity is against liability, there is a right of recovery as soon as a liability is incurred. Where it is against loss by reason of a liability, there is no right of recovery until a loss occurs. *Stephens v. Pennsylvania Casualty Co.*, 3 Ann. Cas. 478, note. In 16 Am. & Eng. Ency. of L. (2d Ed.) 178, the rule is thus stated: "Where the contract is strictly one of indemnity the indemnitee cannot recover until he has suffered actual loss or damage. The mere incurring of liability gives him no such right; but, where the contract is to protect against liability, the indemnitee may recover as soon as his liability has become fixed and established, even though he has

sustained no actual loss or damage at the time he seeks to recover." This distinction was pointed out in the recent cases of *Wheeler v. Equitable Trust Co.*, 206 Pa. 428, 55 Atl. 1065; *Weightman v. Union Trust Co.*, 208 Pa. 449, 57 Atl. 879; *Equitable Trust Co. v. Surety Co.*, 214 Pa. 159, 63 Atl. 699, 6 Ann. Cas. 465. In the opinion in *Weightman v. Union Trust Co.*, supra, it was said by our Brother Potter in speaking of an agreement to do a particular thing and an agreement to save the plaintiff harmless from loss occasioned by the failure to carry out a contract: "The distinction between the two agreements is simply that between an affirmative covenant for a specific thing and one of indemnity against damages by reason of the nonperformance of the thing specified. The object of both agreements may have been substantially the same, in that both were intended to save the plaintiff from loss, but the legal effect of the two agreements is essentially different." In the cases in which a recovery has been had without proof of loss or damage, there was a general indemnity, an indemnity against claims, or a covenant to do a particular thing. In *McAbee v. Cribbs*, 194 Pa. 94, 44 Atl. 1066, mainly relied upon by the appellant, the obligation was not one arising from a purchase of land under and subject to a mortgage, but an express covenant, made after the sale for the purpose of adjusting disputes, to assume the payment of a mortgage.

[1] The words "under and subject" in a conveyance import that the grantee takes the land subject to an incumbrance, the amount of which has been deducted from the agreed price, and the covenant to be inferred from it is that of indemnity for the protection of the grantor. *Moore's Appeal*, 88 Pa. 450, 32 Am. Rep. 469; *Merriman v. Moore*, 90 Pa. 78; *May's Estate*, 218 Pa. 64, 67 Atl. 120. This is the doctrine of all our cases on the subject.

[2] The contract on which this action was brought being one of indemnity to the grantor, a recovery could not be had without proof of loss. The statement of claim did not show a loss, and it is averred in the affidavit of defense that no loss had been sustained.

The order discharging the rule is affirmed.

BECK v. SCHEKTER et al.

(Supreme Court of Pennsylvania. March 18, 1912.)

1. APPEAL AND ERROR (§ 103*)—DECISIONS REVIEWABLE—ORDER DISCHARGING RULE FOR JUDGMENT.

Act April 18, 1874 (P. L. 64), allowing an appeal from an order discharging a rule for judgment for want of a sufficient affidavit of defense was intended to reach only clear cases of error in law, and thus prevent delay of trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 699-710; Dec. Dig. § 103.*]

2. PLEADING (§ 348*)—MOTIONS—JUDGMENT FOR WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE.

In an action against the owners of land for the principal of a dower fund alleged to have been charged on the land by a deed executed after partition proceedings, where the intention of the parties to the deed is left in doubt, on account of misrecitals and unskillful conveyancing in the deed itself and in subsequent conveyances, but such uncertainty may be cleared up by parol evidence, a rule for judgment for want of a sufficient affidavit of defense is properly dismissed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

Appeal from Court of Common Pleas, Philadelphia County.

Action of assumpsit by Sarah A. Beck against George Schekter and another to recover charge on land. From an order discharging rule for judgment for want of sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHIZSKER, JJ.

Joseph R. Embery and Richard Crankshaw, Jr., for appellant. Theodore F. Jenkins, for appellees.

FELL, C. J. [1] In *Griffith v. Sitgreaves*, *81 Pa. 378, the earliest case that reached this court under the act of April 18, 1874 (P. L. 64), allowing an appeal from an order discharging a rule for judgment for want of a sufficient affidavit of defense, it was said that the act was intended to reach only clear cases of error in law and thus prevent the delay of a trial; that, since its effect was often to produce two appeals in the same cause, writs of error for the refusal of judgment were not to be encouraged; and that in doubtful cases, especially those requiring broad inquiry into facts, the matter in controversy should go to the jury. This ruling has been approved and followed in a long line of cases, among the more recent of which are *Leiby v. Lutz*, 224 Pa. 377, 73 Atl. 345, and *Wilson v. Trust Co.*, 225 Pa. 143, 73 Atl. 1071. In *Radcliffe v. Herbst*, 135 Pa. 568, 19 Atl. 1029, in commending the first ruling upon the subject and referring to the growing practice to bring up cases on the re-

fusal of the court to enter judgment, it was said: "The instances are rare where any benefit results therefrom. Frequently the cases could have been tried below in less time than is required to bring them here on appeal. The practical effect of such a mode of practice is to delay instead of speeding causes and to add materially to the expense of litigants."

[2] This action was brought to recover the principal of a dower fund alleged by the plaintiff to have been charged on the land of the defendants. In 1873, by a decree in partition proceedings, the real estate of a decedent was apportioned among his four children in practically equal shares. The purport of one of his children, the plaintiff, consisting of four tracts, was charged with owelty of a few dollars, which she paid, and with the interest of the sum of \$4,067, to be paid annually to the widow during her life in lieu of her dower. In 1886 the widow and the plaintiff agreed to an apportionment of the dower charged on the four properties taken by the plaintiff, and an amount was agreed upon as to each property, the interest on which was to be paid annually, and the widow covenanted that she would accept the interest on each amount in full satisfaction of her dower. In 1887 the plaintiff sold two of the properties under and subject to the dower as apportioned in said deed and the interest thereon. In the deed of apportionment and in subsequent conveyances of the properties down to the defendants, the decree was misrecited to the effect that the widow had agreed with the plaintiff that a sum named would be accepted with interest thereon in lieu of dower. In their affidavit of defense, the defendants denied that they had at any time agreed, expressly or by implication, to pay the sum claimed, and averred that they had bought with the understanding that the property was subject to the dower of the widow, and that upon her death it would be free of any reservation or charge.

In the foregoing recital of facts we have referred only to so much of the conveyances as is necessary to disclose the nature of the controversy and the basis of the plaintiff's claim. Upon the merits of the defense we express no opinion. The decree in partition made no charge of the principal sum, but of the interest only. The partition being in equal shares, there was no reason for charging the principal of the dower on the purports (*Williams v. White*, 35 Pa. 514), and the widow had no power to make a charge. It may have been the intention of the parties to the deed of 1887 to fix a new charge on the land but this is left in doubt by misrecitals and unskillful conveyancing. The case is one which may be cleared up by parol evidence but because of ambiguity the

rights of the parties are not so fixed by the deed that they can be determined on a rule for judgment.

The judgment is affirmed.

KAYLEY et al. v. McCOURT et al.
(Supreme Court of Pennsylvania. March 18, 1912.)

BENEFICIAL ASSOCIATIONS (§ 16*)—SUBORDINATE DIVISIONS—PROPERTY RIGHTS.

The majority of the members of a subordinate division of a benefit association cannot carry the division and its property over to another society, with which it has sustained no relations, against the will of the minority.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. §§ 32-35; Dec. Dig. § 16.*]

Appeal from Court of Common Pleas, Allegheny County.

Bill by Henry Kayley and others, officers of Division No. 3 of the Ancient Order of Hibernians, against Anthony McCourt and others, officers and members of an alleged Division No. 3, Ancient Order of Hibernians, and others. From decree for plaintiffs, defendants appeal. Affirmed.

Ferguson, J., found the facts and law as follows:

"Findings of Facts.

"(1) The Ancient Order of Hibernians is a beneficial order duly incorporated under the laws of the state of Pennsylvania.

"(2) Division No. 3 of the Ancient Order of Hibernians, a subordinate branch or division of the incorporated body, was organized by the authority of the main body in the year 1872.

"(3) From the year 1872 the said Division No. 3 has been known and recognized by the parent or main body, and at the time of the filing of the bill in this case there had accumulated from dues, fines, etc., contributed by its members, the sum of \$1,066, then on deposit in the Beneficial Savings Fund Society, and the additional sum of \$468 in the Sterling Building & Loan Association, represented by shares of stock. The sum on deposit and the shares of stock were in the name of the Division No. 3, Ancient Order of Hibernians, and by the rules of the division could be withdrawn only upon resolution of the division authorizing the president or secretary so to do.

"(4) The purpose for which the Ancient Order of Hibernians was organized as expressed in its constitution and by-laws was: 'To promote friendship, unity and Christian charity among its members by raising and supporting a fund of money for maintaining the aged, sick, blind and infirm members; for the payment of funeral benefits; for the advancement of the principles of Irish nationality; for the legitimate expenses of the

order and for no other purpose whatsoever.'

"(5) In July, 1909, the membership of Division No. 3, Ancient Order of Hibernians, numbered about 117.

"(6) On July 11, 1909, the regular stated meeting was held at St. Michael's Hall, Germantown avenue and Jefferson street, Philadelphia. About 38 members were present. The then president, Anthony McCourt, one of the defendants, presided. Thomas Cassidy, the then recording secretary, Joseph McGuckin, the then vice president, Joseph Woods, the then financial secretary, and Michael McNamee, Jr., the then acting treasurer, were present.

"(7) At the meeting a resolution was offered by a member named Burns, to the effect that the division sever its connection with the Ancient Order of Hibernians in America and affiliate with the Ancient Order of Hibernians, Board of Erin in Ireland. The motion was debated, and the minutes show that the motion was carried unanimously. In point of fact the motion was not carried unanimously, for Henry Kayley, one of the complainants, voted in the negative. There had been offered previously a motion condemning certain conduct on the part of the national president, which was adopted by a vote of 31 to 7, and, although the vote on the motion to secede was called for and one man voted in the negative, the actual count of the vote was not announced. After further business the meeting adjourned.

"(8) On August 8, 1909, another meeting was held, 40 to 45 members being present. at which time a dispute arose over the approval of the minutes of the meeting of July 11th. The minutes of the August meeting show that Kayley moved to lay the minutes on the table, which was lost by a vote of 1 to 29. In point of fact, the actual motion that was put was this, 'All those in favor of reading the minutes to suit Kayley,' which was apparently voted down. There was much confusion, in the course of which Kayley was fined. Subsequently a motion was passed to adjourn the meeting sine die, after which the president requested all present to take the obligation as members of the Board of Erin.

"(9) After the meeting adjourned as a division of the Ancient Order of Hibernians in America, the president and most of those present adjourned to an anteroom, and organized as a division of the Board of Erin. Kayley, on behalf of himself and several other members who refused to leave the room, demanded the money, books and papers of the organization, which were refused.

"(10) At the time of the meetings in July and August, 1909, Kayley was a member and in good standing.

"(11) On August 21, 1909, Kayley and 13 other members who declined to join the divi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sion as a member of the Board of Erin reorganized by the election of the following officers: President, Henry Kayley; vice president, James Bigley; recording secretary, Thomas Brosman; financial secretary, Hugh Doyle; treasurer, Patrick Dugan; stewards, Patrick Hughes, Michael Daley; trustees, Thomas Murphy, James Davis, and John Carroll. The division as thus reorganized was recognized by the State President of the Ancient Order of Hibernians in America as Division No. 8 of the order.

"(12) The Board of Erin is an organization having its original foundation in Great Britain and Ireland, with some divisions in America. It has no organic connection with the Ancient Order of Hibernians in America, but a system of comity and fraternity has for years existed between the two orders, as a result of which members sometimes were enabled to transfer their allegiance from one body to the other without the formality required of new members not affiliated with either body, but this facility of securing entrance to membership was not obligatory, but was optional with the members of the different divisions.

"From these facts the following conclusions of law are made:

"Conclusions of Law.

"(1) The majority of the members of the Division No. 3, Ancient Order of Hibernians in America, were without power to remove the organization bodily from one order into another without the unanimous consent of the members. From the facts as found it follows that when a majority of the members present at the meetings in July and August, 1909, decided to secede and to join the Board of Erin, their act was the act of individuals, and not of the division itself.

"(2) The members of the Division No. 3 who refused to secede, and who perfected an organization after the secession, which was recognized by the state body, continued and maintained the existence of the division.

"(3) The act of secession was not an act of dissolution of Division No. 3, but was a voluntary withdrawal from its membership. These members who remained and preserved the organization are entitled to the possession of the books, papers, and other property of the organization and the seceding members are entitled to no part or portion thereof.

"(4) An injunction should issue restraining the defendants from withdrawing or transferring or in any wise interfering with the funds of the division now on deposit in the Beneficial Savings Fund Society or to its credit in the Sterling Building & Loan Association.

"(5) That an injunction should issue restraining the Beneficial Savings Fund Society and the Sterling Building & Loan Association from paying any of the funds in their

hands to the credit of Division No. 3, Ancient Order of Hibernians in America, to the defendants, or to any one else other than the properly constituted and authorized officers of Division No. 3, Ancient Order of Hibernians in America, as represented by the complainants herein."

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHZIS-KER, JJ.

E. Spencer Miller, for appellants. Frank Rogers Donahue, for appellees.

STEWART, J. This appeal raises no question that was not distinctly ruled in *Gorman v. O'Connor*, 155 Pa. 239, 26 Atl. 379. We do not understand from the argument of the learned counsel for appellant that he entertains any different view. His reliance is upon the later case of *State Council Jr. Order United Am. Mechanics of Pa. v. Emery*, 219 Pa. 461, 68 Atl. 1023, 15 L. R. A. (N. S.) 336, 12 Ann. Cas. 870, which he regards as irreconcilable with that of *Gorman v. O'Connor*; and his contention is that the later case is to be taken as the controlling authority rather than the earlier. We meet and dispose of the only issue therefore when we settle the question of conflict between the two cases. A brief statement of the facts in each will show how widely dissimilar they are both with respect to their facts and the questions of law involved. The earlier case presents little to distinguish it from the present one. There, as here, a majority of the members of a subordinate division of this same order, acting under the supposed authority of a resolution which had been adopted by a majority vote, undertook to carry the division and its property over to another society with which it had sustained no relations whatever, against the will of a minority, who, adhering to the original order, at once reorganized the division, and re-established it in its relations with the original order. Two contending divisions resulted, each claiming title to the property that had been acquired before the separation. The court held that neither the majority vote, nor the withdrawal of the majority and their uniting with a division of another body, nor both together, had worked a dissolution of the original division, or divested it of any of its rights or powers; but upon the reorganization by those of the minority immediate resumption of all its functions followed. The governing consideration upon which the determination rested was the continued existence of the division from which the majority had separated. This fixed its legal status as the rightful owner of the property.

In the later case of *State Council Jr. Order United Am. Mechanics of Pa. v. Emery*, the State Council of the society, in the exercise of proper authority, revoked and annulled the charter of a subordinate council. This of necessity dissolved the subordinate

council, and it at once ceased to exist. The controversy that arose was between the State Council and the persons who had composed the subordinate council with respect to the moneys which had been collected and had been held by the subordinate council during its existence as a sick and beneficial benefit fund. The subordinate council having ceased to exist, the individuals who, as members of the subordinate council, had contributed the fund, denied the right of the State Council to any part of it or to the control, contending that notwithstanding the dissolution of the council, the funds should still be appropriated to the uses for which it had been set apart—that is to say, for the benefit of the sick and families of the dead of those who were members—and the court sustained their contention. To state briefly the distinction between the two cases: *Gorman v. O'Connor* decides that under the facts of that case there had been no dissolution of division No. 3, but that the division remained in proper exercise of its rights and functions, and consequently that no one was in position to dispute its right to possession and control of its own property. State Council Jr. Order *United Am. Mechanics of Pa. v. Emery de-*

cided that a fund collected by an existing council through voluntary contribution for a specific charitable use in relief of its own members was in the nature of a trust fund, and could not be appropriated by State Council upon the dissolution of the subordinate council, but that it remained for the benefit of those for whose relief it was donated. The cases are wholly unlike; indeed, so far apart removed from each other that conflict is impossible. Each is authority for what it decides. The opinion in the later case affords no suggestion that any possible conflict with the earlier was in the mind of the court; and certainly there is none. The contention that the earlier case allowed a diversion of the assets of the society has nothing to support it. The fund there accumulated remained to be employed under the laws and regulations of the society in relief of its members. If in that case some of those who contributed were denied all benefit of the fund accumulated, it was in consequence of their voluntary withdrawal from the society. Ceasing to be members, they had no right to participate.

The assignments of error are overruled, and the decree is affirmed.

NEWPORT WATERWORKS v. TAYLOR,
City Treasurer.

(Supreme Court of Rhode Island. July 6,
1912.)

1. CONTRACTS (§ 147*) — CONSTRUCTION — INTENTION — CONSIDERING WHOLE INSTRUMENT TOGETHER.

In construing a contract, the instrument should be considered in its entirety, in order to ascertain the full scope of its operation and the general plan and intention of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. WATERS AND WATER COURSES (§ 203*) — SUPPLY TO MUNICIPALITY — CONTRACTS — CONSTRUCTION.

A contract between a city and the proprietor of a waterworks system provided that the latter should furnish water for public buildings, for sprinkling streets, for flushing sewers, and for drinking fountains for not to exceed \$10,000 a year, that water for specified purposes, including 14 spring drinking fountains and "one constantly running or flowing fountain on Washington Square," should be furnished the first year for a specified price, that additional "spring fountains of the kind above mentioned," additional hydrants, etc., should be furnished at specified rates, and that, when the total price at such rates should exceed \$10,000, only that amount should be paid. It also provided that the fountain on Washington Square should be of a capacity equal to the one then in operation there, and that the "other fountains" should be located by the city at its pleasure. *Held*, that the contract did not include water for more than one constantly running or flowing fountain in the maximum price of \$10,000, especially as the city, on erecting additional fountains of that character, by paying for the water therefor for a number of years in addition to the maximum price, showed that it did not regard such fountains as included in that price.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

3. CONTRACTS (§ 156*) — CONSTRUCTION — GENERAL AND SPECIFIC WORDS.

In the construction of contracts, general terms are restricted and limited by particular recitals in connection therewith.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 737; Dec. Dig. § 156.*]

4. WATERS AND WATER COURSES (§ 203*) — CONSTRUCTION BY PARTIES.

Where a contract between a city and a waterworks proprietor, providing a maximum price for a supply of water for all the purposes therein specified, was ambiguous as to whether constantly running fountains were included in the maximum price, evidence that, after such fountains were erected, the city for a number of years paid for water therefor in addition to the maximum price was relevant.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

Case Certified from Superior Court, Newport County.

Action by the Newport Waterworks against John M. Taylor, City Treasurer. Certified from the Superior Court under Gen. Laws 1909, c. 298, § 4, on an agreed statement of facts. Decision for plaintiff.

Sheffield, Levy & Harvey, of Newport, for plaintiff. Jeremiah A. Sullivan, City Sol., of Newport, for defendant.

JOHNSON, J. This is an action of assumpsit, brought by the plaintiff against the city of Newport to recover at the rate of \$300 for supplying water to three constantly flowing drinking fountains belonging to the city for and during a certain period. It was originally brought in the district court, where a decision was entered for the defendant and a jury trial was claimed by the plaintiff. The case has been certified to this court by the superior court under Gen. Laws 1909, c. 298, § 4, on an agreed statement of facts. The agreed statement of facts is as follows:

"In the above-entitled cause, the following facts are admitted as proved:

"(1) That the Newport Waterworks is a corporation created by law, and is the successor and assignee of the hereinafter mentioned George H. Norman, and that for the purposes of this action said corporation has all the rights and privileges and is subject to all the liabilities and obligations which the said George H. Norman would have possessed and incurred.

"(2) That on the 19th day of January, A. D. 1881, the following proposition was submitted to the qualified electors of the city of Newport, and by said electors adopted and approved by a majority of affirmative votes, namely: 'Shall the city council contract with George H. Norman to supply a full and ample quantity of water for the public use of the city, viz: For all public buildings, hydrants, reservoirs, and fountains, and for sprinkling streets and flushing sewers, subject to all proper and reasonable restrictions against unnecessary waste, said Norman to furnish, set up, and keep in repair, without expense to the city, but to be located by the city council, as many hydrants, not to exceed the number of 200, as shall be required by said city council, upon the following terms, namely: At an annual compensation not to exceed the sum of \$10,000, for a term of five years, said contract to carry the right to the city at the option of the city council, at the end of said term of five years, to continue or renew said contract for the remainder of the time of said Norman's exclusive right to lay down and maintain water pipes in the streets of Newport, the annual compensation to remain unchanged, unless the permanent population of the city shall grow to exceed 25,000 inhabitants, when the city and said Norman shall each appoint one person to determine by arbitration what increased annual compensation shall be paid him. Should said two persons fail to agree thereon, they two to appoint a third, and the decision of the three to be final and binding. Said city to be guaranteed and secured in

said contract the right at any time, without paying any further compensation, to place, connect, and use as many hydrants in excess of said 200 as the city council may deem necessary.'

"(3) That on the 23d day of February, A. D. 1881, George H. Norman, now deceased, and who, at that time, was the owner of the Newport Waterworks, and of its franchises, entered into a contract with said city of Newport for the supplying of said city with water, which contract, a copy of which is hereto annexed as part hereof, was afterwards approved by a vote of the city council on March 1, 1881, that part of which relating to the question at issue herein provided as follows: 'Now, pursuant to the terms of said proposition and by virtue of the said acceptance thereof by said electors, it is hereby agreed between George H. Norman, of said Newport, and the said city of Newport, a municipal corporation in the state aforesaid, acting herein by its city council as follows: Said Norman shall, for the next five years and after the 1st day of June, A. D. 1881, continuously supply said city of Newport with a full and ample quantity of fresh water, to the reasonable satisfaction of said city (from his waterworks and the pipes therewith connected laid in said Newport) for all the public uses of said city, from time to time and at all times, including and comprehending water for use in all the public buildings of said city, comprising the city hall, the police station, the fire engine houses, the public schoolhouses, and all other buildings, for the use of the fire department of said city in extinguishing, preventing, and guarding against fire, operating steam fire engines, and filling public reservoirs, for sprinkling streets and public places to lay the dust, for flushing sewers and for drinking fountains, and for all other public purposes, at an annual compensation which shall never exceed the sum of \$10,000, to be paid by said city in equal quarter-yearly installments, the first whereof shall be made on the 1st day of September, A. D. 1881. And the said Norman shall begin to furnish and supply said water on the said 1st day of June next, at the rate or price of \$7,810 per annum, payable quarterly as aforesaid, in the buildings and through the hydrants and fountains and at the price or upon the apportionment here presently set forth, to wit: Water for 14 spring drinking fountains of ordinary capacity, and one constantly running or flowing fountain on Washington Square, and for sprinkling streets and flushing sewers, say \$1,800.00. Water and the right to have hydrants, fountains, faucets, water-closets, and other means, conveniences, and facilities for using water, for public purposes as aforesaid, in addition to what are designated or enumerated in the statement or schedule aforesaid, shall be granted and allowed to said city from time to time by said Norman, whenever and

wheresoever said city may ask for the same. at these rates, that is to say: Spring fountains, of the kind above mentioned, at \$25.00 a year each. Hydrants, also of the kind above mentioned, at \$35.00 a year each. Steam fire engine houses, as above mentioned, at \$50.00 a year each. Hand fire engine houses, as above mentioned, at \$10.00 a year each. Schoolhouses, as above mentioned, at \$20.00 a year each. And whenever the price to be paid by said city for such work and the privileges and means of using the same at the rates aforesaid shall be equal to or exceed the rate of \$10,000.00 a year in all, then said city shall pay only at that last-mentioned rate of \$10,000.00 a year, and all additional or greater use and privilege and means of using said water by the city under this contract shall be free of charge; it being the intent hereof and of the parties hereto that said city may always have as much water as it may need or desire and never pay more than \$10,000.00 therefor in any year, unless upon and after the increase of population hereinafter mentioned. Said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by said city at its pleasure, and the water furnished hereunder for fountains and buildings shall be good, wholesome drinking water.' A copy of which said contract is hereto attached and marked 'Exhibit A.'

"(4) That on the 5th day of May, 1885, after oral negotiation with the Newport Waterworks, the city council of said city of Newport passed a resolution authorizing the erection of three Jenckes fountains similar to that on Washington Square, and approving the payment of the proportional part of three hundred (\$300) dollars for the balance of the year to December 31, 1885, for the use of water, a copy of which said resolution is hereto annexed and marked 'Exhibit B'; that in pursuance of said resolution the said three Jenckes fountains were erected in various parts of said city of Newport, and thereupon the said city council appropriated and ordered paid the sum of money necessary to erect said fountains, and also the proportional part of the sum of \$300.00 for supplying said fountains with water for the remainder of the municipal year.

"(5) That said three Jenckes fountains so erected were similar to the 'constantly running or flowing fountain' on Washington Square mentioned in said contract of February 23, 1881.

"(6) That on the 26th day of May, A. D. 1886, the city council passed a resolution, continuing the said contract made with George H. Norman and dated February 23, A. D. 1881, and said contract was continued and is now in force, a copy of which said resolution is hereto attached and marked 'Exhibit C.'

"(7) That after the erection of said three fountains the city of Newport paid to the Newport Waterworks, for supplying water to these three Jenckes fountains, the sum of three hundred (\$300) dollars a year in addition to the sum of ten thousand (\$10,000) dollars, which the aforementioned contract of February 23, A. D. 1881, had fixed as the maximum price for supplying water for one year as called for in said contract and that said city of Newport continued to pay to the said Newport Waterworks, for supplying water to said three Jenckes fountains, the sum of three hundred (\$300) dollars, annually up to the year 1892.

"(8) That in the year 1892 the said city refused to pay said sum of three hundred (\$300) dollars per year to the Newport Waterworks, as aforesaid, and said sum was not thereafter paid until the year 1896.

"(9) That on January 1, A. D. 1896, the Newport Waterworks presented to the city council of the city of Newport a claim for twelve hundred (\$1,200) dollars for the payment of the four years intervening at three hundred (\$300) dollars a year, and for which no payment had been made as aforesaid; that accompanying said claim was a communication from said Newport Waterworks, setting forth the facts upon which it based said claim, a copy of which said communication is hereto attached and marked 'Exhibit D'; that said communication was by said council referred to the committee on water supply, which said committee voted on the 26th day of February, A. D. 1896, to recommend the payment of said sum, and that at a meeting of the city council held March 3, 1896, a resolution was passed, authorizing the payment of twelve hundred (\$1,200) dollars 'for water supply for three constantly flowing public fountains used by the city in addition to the one constantly flowing fountain allowed by the contract between the city of Newport and the Newport Waterworks for the time ending November 30, A. D. 1895,' a copy of which said resolution is hereto attached and marked 'Exhibit E,' together with the voucher showing payment of the same, marked 'Exhibit F.'

"(10) That thereafter said city continued to pay said Newport Waterworks the sum of three hundred (\$300) dollars annually for said three fountains up to February 27, A. D. 1907, and ever since that time the said city has refused to pay anything over and above the sum of ten thousand (\$10,000) dollars.

"(11) That the said Newport Waterworks claims that the said city of Newport owed it at the time of the date of the writ in this cause for water furnished said three constantly flowing fountains (in addition to the constantly flowing fountain on Washington Square) the sum of three hundred (\$300) dollars up to November 30, 1907, and the proportional amount of three hundred (\$300) dol-

lars from said day to the day of the date of plaintiff's writ.

"Sheffield, Levy & Harvey,
"Attys. for Plaintiff.

"Jeremiah A. Sullivan,
"Atty. for Defendant."

The vital question in this case is whether any other constantly flowing fountain, than the one specified as located on Washington Square, is included in the contract set out in the agreed statement of facts. No other such fountain is included in specific terms. If such other fountain or fountains are included in the contract, such inclusion must be gathered from the terms of the whole contract.

[1] The instrument must be considered in its entirety, in order to ascertain the full scope of its operation and the general plan and intention of the parties as disclosed thereby. "It is a settled rule of construction of contracts that the intention of the parties must govern, when that intention can be clearly inferred from the terms of the contract, and can be fairly carried out consistently with the settled rules of law." *Hails, J., in Anthony v. Comstock*, 1 R. I. 454, 458. See, also, *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197, 202, 49 Atl. 707, 709. In this case *Rogers, J.*, quotes *Bramwell, J., in Fowell v. Tranter*, 3 H. & O. 458, 461: "The golden rule of construction is that words are to be construed according to their natural meaning, unless such a construction would either render them senseless, or would be opposed to the general scope and intent of the instrument, or unless there be some very cogent reason of convenience in favor of a different interpretation."

[2] The contract provides that said Norman shall furnish water to the city of Newport for the next five years, and after the date mentioned "continuously supply said city of Newport with a full and ample quantity of fresh water, to the reasonable satisfaction of said city (from his waterworks and the pipes therewith connected laid in said Newport) for all the public uses of said city, from time to time and at all times, including and comprehending water for use in all the public buildings of said city, comprising the city hall, the police station, the fire engine houses, the public schoolhouses, and all other buildings, for the use of the fire department of said city in extinguishing, preventing, and guarding against fire, operating steam fire engines, and filling public reservoirs, for sprinkling streets and public places to lay the dust, for flushing sewers and for drinking fountains, and for all other public purposes, at an annual compensation which shall never exceed the sum of \$10,000, to be paid by said city in equal quarterly installments, the first whereof shall be made on the 1st day of September, A. D. 1881"; that he shall begin to furnish and supply said water on said date "at the rate or price of \$7,810 per annum, * * * in

the buildings and through the hydrants and for fountains, and at the price or upon the apportionment here presently set forth, to wit: Water for 14 spring drinking fountains of ordinary capacity, and one constantly running or flowing fountain on Washington Square, and for sprinkling streets and flushing sewers, say \$1,800.00."

The contract then provides for water and additional facilities for the use thereof, whenever and wheresoever the city may ask for the same, at certain stated rates, viz.: "Spring fountains, of the kind above mentioned, at \$25.00 a year each. Hydrants, also of the kind above mentioned, at \$35.00 a year each. Steam fire engine houses, as above mentioned, at \$50.00 a year each. Hand fire engine houses, as above mentioned, at \$10.00 a year each. Schoolhouses, as above mentioned, at \$20.00 a year each." For the additional conveniences enumerated for the use of water, certain specific rates are given. It is to be noted that the only rate given for fountains is for "spring fountains, of the kind above mentioned." Said rates are to continue until "the price to be paid by said city for such water and the privileges and means of using the same at the rates aforesaid shall be equal to or exceed the rate of \$10,000.00 a year in all." The city is then to pay only at said last-mentioned rate of \$10,000.00 a year, "and all additional or greater use and privilege and means of using said water by the city under this contract shall be free of charge; it being the intent hereof and of the parties hereto that said city may always have as much water as it may need or desire, and never pay more than \$10,000.00 therefor in any year, unless upon and after the increase of population hereinafter mentioned."

If it was the intention of the parties that constantly flowing fountains might be added from time to time whenever and wheresoever said city might ask for the same, as was provided in regard to the additional facilities mentioned, it seems strange that no provision therefor should be made in this list. Immediately after the provision as to said maximum rate of \$10,000 per year follows the provision that "said fountain on Washington Square shall be of capacity of at least equal to that of the fountain now in operation there. The other fountains shall be located by the city at its pleasure, and the water furnished hereunder for fountains and buildings shall be good, wholesome drinking water." In this last provision the distinction seems to be clearly drawn. *The fountain on Washington Square is to be of a capacity at least equal to that of the fountain now in operation there, while the other fountains, which are clearly spring fountains, shall be located by the city at its pleasure.*

[3] Applying the rules of construction stated above, it seems clear that, looking to the contract as a whole, it was not the intent

of the parties to include under the maximum price of \$10,000 any constantly flowing fountain other than the one particularly specified. The designation of this one fountain constitutes a limitation upon the contract for supplying water for a maximum price. It is a familiar rule that, in the construction of contracts, general terms are restricted and limited by particular recitals, when used in connection with them. *Railton v. Taylor*, 20 R. I. 279, 283, 38 Atl. 980, 39 L. R. A. 246; *Richmond v. N. Y., N. H. & H. R. R. Co.*, 26 R. I. 225, 226, 58 Atl. 767, 768. In the latter case the court, Stiness, C. J., speaking of this rule, said: "Its purpose is to guard against an undue extension of a statute or a contract, when certain items have been specified and then general terms have been used, with the enumerated terms presumptively in mind and with the intention to cover things generally of that class. The rule applies only when there has been a preceding statement by which the subsequent provision may be qualified. *Pott Dwarria*, 236; *Suth. on Stat. Con.* § 263; *Railton v. Taylor*, 20 R. I. 279 [38 Atl. 980, 39 L. R. A. 246]."

[4] If it be urged that the contract is ambiguous upon its face, then evidence of the conduct of the parties set out in the statement of facts is pertinent. From said statement it appears that May 5, 1885, after oral negotiations with the Newport Waterworks, which had succeeded said Norman in the business of supplying water under the contract, the city council of said city of Newport passed a resolution authorizing the erection of three Jenckes fountains similar to that on Washington Square, and approving the payment of the proportional part of \$300 for the balance of the year to December 31, 1885, for the use of water; that in pursuance of said resolution the said three Jenckes fountains were erected in various parts of the city of Newport, and thereupon said city council appropriated and ordered paid the sum of money necessary to erect said fountains, and also the proportional part of the sum of \$300 for supplying said fountains with water for the remainder of the municipal year; that after the erection of said three fountains the city of Newport paid to the Newport Waterworks for supplying water to these three Jenckes fountains the sum of \$300 a year in addition to the sum of \$10,000 which said contract had fixed as the maximum price for supplying water per year, and continued to pay therefor annually at said rate up to the year 1892; that in that year said city refused to pay said compensation for said three fountains, and said sum was not paid thereafter until the year 1896; that January 1, 1896, the Newport Waterworks presented its claim for \$1,200 for the payment for the four years since 1892 for the supply of said fountains, with a communication setting forth the facts upon which it based its claim, and March 3,

1896, a resolution was passed authorizing the payment of said claim; that thereafter the city continued to pay said Newport Waterworks the sum of \$300 annually for said three fountains up to February 27, 1907, since which time said city has refused to pay anything over and above the sum of \$10,000.

These acts may properly be considered as evidence of the construction put upon the contract by the parties. *Davis v. Manchester*, 17 R. I. 577, 23 Atl. 1016; *Peck v. Goff*, 18 R. I. 94, 96, 25 Atl. 690. "Where the construction of an instrument in writing is doubtful, and the parties thereto have given a construction to it by acting upon it in a certain manner, courts will usually adopt and follow the construction of the instrument which has been adopted by the parties." *Mueller v. Northwestern University*, 195 Ill. 236, 255, 63 N. E. 110, 117, 88 Am. St. Rep. 194. "If this contract is to be regarded as somewhat indefinite or ambiguous, we may resort to the surrounding facts and circumstances as they existed when it was made to aid us in its interpretation, and also consider the practical construction which the parties have given it." *Martin, J.*, in *Sattler v. Hallock*, 160 N. Y. 291, 301, 54 N. E. 667, 670 (46 L. R. A. 679, 73 Am. St. Rep. 686). In *Woolsey v. Funke*, 121 N. Y. 87, 92, 24 N. E. 191, 192, *Peckham, J.*, says: "But if I am not clearly right in this interpretation of the language, it must be admitted, as it seems to me, that the language is somewhat ambiguous or indefinite. Under such circumstances the practical interpretation of this agreement by both parties is a consideration of very great importance." As was said by Mr. Justice Swayne in *Insurance Company v. Dutcher*, 95 U. S. 269, 273 (24 L. Ed. 410): "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

We are of the opinion that upon the terms of the contract, considered with reference to the situation and circumstances of the parties at the time of the execution thereof, and in the light of the construction given to the contract by the conduct of the parties since the same went into operation, only one constantly flowing fountain was contemplated by the contract as included under the maximum price of \$10,000 fixed in said contract for supplying water to the city of Newport.

The amount due the plaintiff on the date

of its writ was \$378.90. Decision for plaintiff for \$378.90 and costs. The papers in the case will be sent back to the superior court for Newport county, with the decision of this court certified thereon, for further proceedings.

McAUSLAN et al. v. McAUSLAN et al.

(Supreme Court of Rhode Island. July 6, 1912.)

1. APPEAL AND ERROR (§ 80*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION—"FINAL DECREE."

As a general rule, a decree, to be final within the meaning of the statute authorizing appeals from final decrees in equity cases, must terminate the litigation on the merits, so that, in case of affirmance, the court below will have nothing to do but execute the decree already rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

2. APPEAL AND ERROR (§ 73*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

Decrees in equity, which are in a strict sense interlocutory, will be held to have elements of finality, so as to permit an immediate appeal, where by reason of possible injurious consequences an immediate review is necessary.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 402-416; Dec. Dig. § 73.*]

3. APPEAL AND ERROR (§ 79*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

An equity decree as to one of several defendants, whose interests are not connected with a direction for the payment of costs as to that defendant, is final, although the case is still pending as to the other defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484-493; Dec. Dig. § 79.*]

4. APPEAL AND ERROR (§ 870*)—REVIEW—SCOPE.

In a suit to remove a testamentary trustee and for an accounting, a decree confirming the master's report was not a final decree; and hence proceedings prior thereto could be reviewed on an appeal from a subsequent decree removing the trustee, fixing the amount due the trust estate, and directing payment of such amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3451, 3487-3512; Dec. Dig. § 870.*]

5. APPEAL AND ERROR (§§ 82, 875*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

A supplemental decree or order for the execution of a final decree in equity is so far final as to support an appeal, but on such appeal only matters arising subsequent to the final decree can be reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 381, 478, 517-522, 3541-3548; Dec. Dig. §§ 82, 875.*]

6. EQUITY (§ 401*)—MASTERS—PROPRIETY OF REFERENCE.

In a suit to remove a testamentary trustee for mismanagement, resulting in loss to the trust estate, and for an accounting, where the answer admitted losses, but sought to explain

them, the court properly ordered a reference to the master to state the accounts of the trustee and report to the court particulars of the trustee's dealings with the trust fund, without first determining any of the issues, since on the pleadings complainants were entitled to an accounting, and the removal of the trustee depended on the propriety of his dealings with the trust estate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 869-873; Dec. Dig. § 401.*]

7. EQUITY (§ 402*)—MASTERS—ORDER OF REFERENCE.

Where an order of reference, entered after notice and hearing, particularly defined the scope of the reference, it was not objectionable as referring the cause before the issues were framed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 874, 879; Dec. Dig. § 402.*]

8. EQUITY (§ 399*)—MASTERS—PROPRIETY OF REFERENCE.

Under Gen. Laws 1909, c. 289, § 17, providing that a court of equity may hear any cause on oral testimony, or may send the pleadings and any issues therein to a master, who shall hear and report the evidence and rulings and his findings on such evidence, a reference, in a suit to remove a testamentary trustee and for an accounting, to a master to state the trustee's accounts and report the particulars regarding the estate and the trustee's dealings therewith, and also to report whether the trustee should be removed, was not objectionable as a delegation of the court's power to the master.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 864, 865, 867, 868; Dec. Dig. § 399.*]

9. CONSTITUTIONAL LAW (§ 314*)—DUE PROCESS OF LAW.

Where a reference in an equity suit was in accordance with the long-established practice in equity, it did not violate Const. U. S. Amend. as denying the parties due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 934; Dec. Dig. § 314.*]

10. APPEAL AND ERROR (§ 220*)—RESERVATION OF GROUNDS OF REVIEW.

Where the report of a master in equity was not objected to, and no exceptions were taken, his findings were conclusive on the parties, and could not be reopened on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1325-1332; Dec. Dig. § 220.*]

11. EQUITY (§ 410*)—MASTERS—REPORT—OBJECTIONS AND EXCEPTIONS.

Exceptions to a master's report cannot be considered, unless based on objections made before the master.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905-919; Dec. Dig. § 410.*]

12. TRUSTS (§ 167*)—REMOVAL OF TRUSTEE—DECREE.

A decree removing a testamentary trustee and requiring him to pay a sum due the estate within 30 days, in default whereof his interest in the trust estate should be applied to such payment, was not erroneous, because no extension of time for such payment in case of an appeal was provided for, as the trustee, on appealing, by complying with the statutory requirements, could procure a stay of proceedings.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 219, 220; Dec. Dig. § 167.*]

Appeal from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Bill in equity by Albert H. McAuslan and others against George R. McAuslan and oth-

ers. From the decree, the defendant named appeals. Affirmed.

Bassett & Raymond, of Providence (Russell W. Richmond, of Providence, of counsel), for appellant. Dexter B. Potter, James C. Collins, W. Arthur Countryman, Jr., and Everett L. Walling, all of Providence, for appellees McAuslan and others. Elliot G. Parkhurst, Eugene A. Kingman, and Edwards & Angell, all of Providence, for appellee Jastram.

SWEETLAND, J. This is an equity appeal. The bill is brought by certain cestuis que trust, beneficiaries under the trusts contained in the will of John McAuslan, and the assignee of certain interests in said trust estate, against the trustees named in said will and the assignee under the mortgage of the interest of certain other beneficiaries. The bill asks for the removal of George R. McAuslan, one of said trustees; that an account be taken of the trust property and the application thereof by said trustees; and for a decree ordering said trustees to pay to said trust estate what shall appear to be due from them on such account. The bill alleges, among other things: That said George R. McAuslan has assumed the active management of said trusts and practically has been the sole trustee; that said trusts have been mismanaged; that said George R. McAuslan is incompetent to perform the duties of trustee; that by reason of certain investments of the trust estate made by the trustees, as specified in the bill, the trust estate has lost large sums of money; that the trustees have failed to keep proper accounts, do not act in harmony, have become personally indebted to the trust estate in large amounts, and have been adjudged in contempt of court for failure to make payments of money from the trust estate in accordance with the decree of the superior court.

Of the respondents, other than the said trustees, one joins in the prayer of the bill, another has permitted the bill to be taken as confessed against him, and the others, as minors, have submitted their interests to the care of the court. The respondent trustee Amelia B. McAuslan in her answer admits all the essential allegations of the bill and joins in the prayer for a receiver. The other respondent trustee, George R. McAuslan, in his answer, among other things, admits that the trustees have made losses in the management of the trust estate, but sets out facts which he claims excuse him from blame. After replication filed, on motion of the complainants, and after notice to the respondents and hearing, the superior court, by decree entered April 2, 1910, referred the cause to a master, "to examine and state the accounts of the executors and trustees with the estate of the said John McAuslan and report to the court" a number of particulars regarding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the amount of the estate at the death of John McAuslan, the dealings of the trustees with the principal of the estate, the amount of the income received from the estate, and the disposition of said income by the trustees. The master by this decree was also directed to report to the court whether George R. McAuslan should or should not be removed as trustee of said estate.

After a number of hearings before the master, of which all the parties received due notice, the master prepared a draft of his report, and all the parties were notified by the master that said draft report was on file in his office for the inspection of the parties and their solicitors, and that at a certain day and hour named he would hear objections to said report. No objections were made by any of the parties, and the master filed his report unsealed in the superior court. On motion, of which the parties had due notice, the superior court, by decree entered on March 4, 1911, confirmed said report. By said report it appears that the master has taken testimony as to all the questions referred to him, and has endeavored by his consideration of such testimony and his conclusions thereon to give to the court the assistance which it had required. Thereafter the superior court, by decree entered April 15, 1911, removed said George R. McAuslan from being trustee as aforesaid, fixed the amount due from said trustees to said trust estate, ordered the said trustees to pay the sum so found to be due to the receiver of said trust estate, made said sum so found to be due a lien on the interests of said trustees in the trust estate, and provided that, if said sum so found to be due was not paid to said receiver within 30 days thereafter, the interests of the said trustees in the trust estate should be liable to be applied toward making good to the trust estate said sum, or such part thereof as might then remain unpaid. From this decree the said George R. McAuslan has appealed.

At the outset of the consideration of this appeal we are met by the objection of one of the respondents, whose interest in the present matter is similar to that of the complainants, that the reasons of appeal stated by the respondent George R. McAuslan cannot be considered, as they are objections to acts of the superior court preceding the decree confirming the master's report; that the decree of April 15, 1911, from which this appeal is taken, is merely auxiliary to the decree confirming the master's report, which is the final decree; that an appeal from the decree of April 15, 1911, can bring in question before this court only the proceeding in the superior court subsequent to the decree confirming the master's report, and cannot interfere with that decree; that the respondent George R. McAuslan could have raised the objections stated in his reasons of appeal only upon an appeal from the decree

confirming the master's report. This brings before us the question of what is the final decree in equity causes intended by our statute as the appealable decree in a cause. Previous to the passage of the Court and Practice Act equity appeals were unknown in our practice, since the period from 1867 to 1871, when appeals to the full court were permitted from both the final and interlocutory decrees made by a single justice of the Supreme Court. Under our present statute an appeal may be taken from the final decree of the superior court in an equity cause, and from the final decree alone, with these exceptions: An appeal may be taken from an interlocutory decree granting or continuing an injunction, appointing a receiver, or ordering a sale of real or personal property. *Hemenway v. Hemenway*, 28 R. I. 85, 65 Atl. 608.

What constitutes a final decree is a question not easily determined in every case. The decisions of the courts are far from uniform upon the subject. As was said by the court in *McGourkey v. Toledo & Ohio Ry.*, 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079: "Probably no question of equity practice has been the subject of more frequent decision in this court than the finality of decrees." The statutes of some of the states provide for an appeal from both final and interlocutory decrees, and the question before the courts in some reported cases has been whether a certain decree was an appealable one, not whether it was interlocutory or final. By the terms of the statutes of some states an appeal will lie in chancery from any decree or order "adjudicating the principles of the cause." In some jurisdictions, where the statutes permit appeals from final decrees alone, decrees which were strictly and technically interlocutory have been held to be final, when irreparable injury might result to a party if he was compelled to await the final outcome of the cause in the lower court before he could obtain a review in the appellate tribunal. For these and other reasons there is much confusion in the reports as to what constitutes a final decree for the purpose of appeal. Our statute regarding the appealability of decrees in equity is similar to the United States statute. It is in the federal courts that we find the subject, now under consideration, most frequently treated and the practice most consistent and reasonable.

We have frequently said, in regard to the removal of cases at law to this court for review, that the intent of the statute is that exceptions in such cases shall not be certified to this court until after all matters arising in the cause in the superior court have been determined. We see in the statute the same general intent with regard to appeals in equity, so far as the distinctive character of equity procedure makes such practice reasonable and expedient. From the nature of

proceedings in equity, it must be held that the final decree is not necessarily the last order in the case. On the other hand, a decree should not be considered final, although it purports to declare the rights of the parties and to regulate all "actions that may be expected to be taken in the future disposition of the case." Such decrees "have no efficacy until put into the form of a judgment that is capable of being carried into execution." *Patterson v. Hopkins*, 23 Mich. 541. A decree which directed a trustee to sell mortgaged property as the court might afterwards direct, and referred the cause to a master to report the prior liens, was held not to be a final decree, because it was not determined what the order of sale should contain, nor what should be the form of advertisement therefor. *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. Ed. 1122.

[1] With the modification which we shall consider later, we adopt, as a reasonable definition of a final decree in equity under our statute, the one approved in *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237: "The rule is well settled that a decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeal, must terminate the litigation of the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered." See, also, *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73, and cases therein cited. In its essential particulars this general rule has been followed by the courts of a number of the states: "A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination, so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision." *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. "According to the uniform decisions of this court, a decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is only to be regarded as final." *Ryan's Adm'r v. McLeod*, 73 Va. 367. "Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded, not as final, but interlocutory." *Rawlings' Ex'r v. Rawlings*, 75 Va. 76. "A decree never can be said to be final where it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved,

upon the coming in and confirmation of the report of the master." *Johnson v. Everett*, 9 Paige (N. Y.) 636. "A decree is final which provides for all the contingencies which may arise, and leaves no necessity for any further order of the court to give all the parties the entire benefit of the decision." *Gerrish v. Black*, 109 Mass. 474.

The strict observance of this general rule would in some instances result in such possible hardship and injury that appellate courts in such cases have taken cognizance of appeals from decrees, which were technically interlocutory in their character, before the merits of the cause had been determined in the court below. These cases must be considered as representing a modification of the ordinary rule. As was said by the court in *Dufour v. Lang*, 54 Fed. 913, 4 C. C. A. 663: "In the progress of an equity cause, orders and decrees may be made which so affect the parties or the property involved in the suit as to require that such order or decree, to be reviewed at all by an appellate court with effect, should be appealed promptly, and not await the full disposition of the whole suit; and whenever this is the case the decree is held to possess such an element of finality as to bring it within the terms of the statute limiting the right to appeal only from final decrees." In *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404, which is one of this class of cases, the court treats of the necessity for this modification of the ordinary rule as follows: "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute, and therefore there is no irreparable injury to the party by ordering his deed to be canceled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right."

This case of *Forgay v. Conrad* was an appeal from a decree of the Circuit Court adjudging that certain deeds should be set aside as fraudulent and void, ordering that certain lands and slaves should be delivered up to the complainant, that one of the defendants should pay a certain sum of money to the complainant, and that the complainant should have execution for these several matters, although the bill was retained in court for other purposes. The Supreme

Court, in holding that this decree authorized an appeal, said: "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury; for the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights." This case and others of like character are frequently cited as authorities for the extension of the ordinary rule in regard to appealable final decrees in equity. The case has been regarded by the United States Supreme Court itself as an exception to that rule. In *Barnard v. Gibson*, 7 How. 650, 12 L. Ed. 857, it was held that *Foray v. Conrad*, 6 How. 201, 12 L. Ed. 404, is supposed to be a departure from the uniform course of decision in the United States Supreme Court. In commenting on *Foray v. Conrad*, the court held, in *Craighead v. Wilson*, 18 How. 199, 15 L. Ed. 332, that, although it was stated that the part of the decree above recited was final, the principal ground on which the appeal was sustained was the peculiar circumstances of the case.

[2] In certain cases our statute has guarded against the possibility of injury arising from restricting appeals in all instances to final decrees, in the technical sense, by providing for appeals from interlocutory decrees granting or continuing injunctions, appointing receivers, or ordering a sale of property. Besides those provided for in the statute, other instances may present themselves of decrees, in a strict sense interlocutory, which by reason of their possible injurious consequences require an immediate review, and must be held for this reason to have such elements of finality as to permit an immediate appeal.

[3] There is another class of decrees which is to a certain extent a modification of the general rule. Of this class is a decree made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant. Such decree is final as to him, although the cause may be still pending in the court, as to the rest. *Royall's Adm'rs v. Johnson*, 22 Va. 421; *Dickinson v. Codwise*, 11 Paige (N. Y.) 189. Of this nature was the decree considered in *Doty v. Oriental Print Works Company*, 28 R. I. 372, 87 Atl. 586. In that case the court heard and determined an appeal from the decree denying and dismissing the petition of one Tenney for leave to intervene in the above-entitled equity cause as a preferred creditor of the respondent.

[4] It cannot be claimed in the case at bar that the decree confirming the master's report is within either of the exceptions to the general rule which we have discussed,

and that for such reason it should be considered as a final decree, from which an appeal could and should have been claimed, if the respondent George R. McAuslan wished to raise the objections stated in his reasons of appeal. Under the general rule which we have adopted, the decree confirming the master's report is not the final decree in the cause. More was required to give the complainants the relief which they desired in the cause, and which the superior court intended to grant, than the entry of a mere auxiliary decree or a decretal order in execution of the decree confirming the master's report. The final decree in an equity cause is the decree which finally determines the rights of the parties, provides for the relief which the court finds to be necessary that the parties may have the full benefit of the court's determination upon the merits, and at most merely requires one or more orders or supplemental decrees for its enforcement. The modifications which we have considered have been permitted to prevent the consummation of injury beyond redress during the progress of the cause, or because there has been a final determination of the cause as to one or more, but not as to all, the parties. These modifications have been permitted for the protection of the party aggrieved by the decree, and for that reason alone. They should be considered as exceptions to the general rule, and, if so considered, they will cause no confusion in practice. For the court at times to recognize further variations, suggested in the ingenious and sometimes persuasive arguments of counsel, based upon other considerations as to the finality of particular decrees, would be to throw our practice with regard to appeals in equity back into confusion, to place solicitors in uncertainty, and in some instances to cause injury to litigants. For if a party aggrieved by a decree may appeal, we think the weight of authority and regularity of procedure would require that he must appeal or lose his right to have the objectionable decree reviewed by this court.

We have spoken of the uncertainty which sometimes exists in the reported cases as to whether the particular decrees under consideration have been interlocutory or final. If the rules which we have adopted as to appealable decrees are not strictly observed, upon the entry of every decree with regard to the finality of which there may be question, the solicitor of the aggrieved party will be confronted with the uncertainty as to whether he should delay the progress of the cause and commence the prosecution of an expensive and perhaps ineffective appeal, or should risk his client's right ever to object to the decree. An appeal from a final decree in equity, as we have defined it, brings before this court for review all matters contained in such decree, and all previous rulings, orders, or decrees made or entered in

the cause previous to the entry of such decree, unless such decree or such previous rulings, orders, or decrees, from the circumstances or the manner in which they have been made or entered, are not reviewable, as a decree entered by consent, a decree confirming a master's report, to which no exception has been taken, and others; and said decree, or such previous rulings, orders, or decrees, are not reviewable, unless it is specifically stated in the reasons of appeal that objection is made to such decree, or previous rulings, orders, or decrees.

[6] A supplemental decree, or order for the execution of the final decree, as we have defined it, is also so far a final order or decree as to support an appeal; but an appeal from such order or supplemental decree will bring before the court for review only such matters as are involved in the order or decree itself, or matters arising subsequent to the entry of the final decree; but it cannot bring before the court any alleged error contained in the final decree itself, or any matters arising in the cause previous to the entry of the final decree, and, as is true of all appeals in equity, it only brings up for review the alleged errors which are stated in the reasons of appeal. Cases may be found in which this court has passed upon appeals from decrees which were not final under the rule which we have adopted. They were cases in which either the question was not raised, or for other reasons, which it is unnecessary at this time to consider, it was thought advisable to permit an immediate review of the particular decree in question. We adopt the foregoing conclusions, however, as rules applicable to all cases, and believe that they will provide a settled and uniform practice in equity appeals.

The appellant states in his reasons of appeal, and urges before us, that the decree of April 2, 1910, referring the cause to the master to examine and state the accounts of the trustees and report to the court, was improperly and improvidently entered, because the court sent the cause to a master before determining the issues raised by the pleadings and before issues were framed, because the court by such reference delegated to the master its function of determining the merits of the cause, and because the reference was unconstitutional and void as a delegation of judicial power. The appellant also urges that the proceedings following the reference to the master have not been in accordance with "due process of law" guaranteed under the fourteenth amendment of the Constitution of the United States.

[6, 7] We are of the opinion that these objections to the action of the superior court are without merit. The appellant in his answer admits sufficient of the allegations of the bill to warrant the court in making the reference after bill, answer, and replication filed. It was clear upon the pleadings that

the complainants were entitled to have an account taken. The question of the removal of the appellant as trustee was involved in the question of the nature and the propriety of the dealings of the appellant with the trust estate. The superior court, with perfect propriety, under our statutes and the settled practice of equity courts, directed the master, who was to take the account, to report to the court his conclusions upon the question of removal. There were no issues raised by the pleadings which required determination before the court should seek the assistance of the master upon the matters involved in this reference. Nor is there force in the objection that the reference preceded the framing of issues. The decree of reference was entered after notice and hearing, and in it the scope of the reference was particularly defined.

[8] Section 17, c. 289, General Laws 1909, provides as follows: "The court may, on motion of any party, hear any cause or proceeding in whole or in part on oral testimony, or it may send the pleadings and any issues therein (to be heard on oral testimony) to a master who, under the direction or rules, general or special, of the court, shall hear and report to the court the evidence and his rulings in such suit or proceeding and his findings on such evidence; and if such rulings or findings be not specifically excepted to within thirty days after the opening of said report (of which opening the clerk of said court shall at once notify in writing all parties or their attorneys of record), they shall be conclusive on all parties, except that for cause shown the time may be extended on motion filed within said thirty days." It cannot properly be said that by the reference the determination of the merits of the cause was delegated to the master. A court of equity cannot abdicate its functions; but our statute and the established practice in chancery permit the court to refer to a master such matters as were contained in this decree of reference, not for his determination, but that he may hear the testimony, and report it and his findings thereon to the court. The master's report may be objected to, and be the subject of exception from all parties. It is only after such exceptions as may be taken have been heard and passed upon by the court that the court can avail itself of the information contained in the report. There was no delegation to the master of the court's power of decision in the cause.

[9] No constitutional question under the fourteenth amendment of the federal Constitution is raised by this reference. It was made in accordance with the practice in equity long established in England and the United States. This court has said in *Carr v. Brown*, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855: "The words 'due process of law' mean a course of legal pro-

ceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

[10, 11] The appellant also states in his reasons of appeal that the decree of April 15th, from which the appeal was taken, is against the evidence and the weight thereof. In support of this the appellant urges that the master's findings were unjust under all the circumstances of the case. It is to be observed that this appellant presented no testimony before the master and gave him no assistance in stating the account between the trustees and the trust estate. The appellant made no objection to the draft of the master's report, submitted to the parties in accordance with the equity rules of the superior court, which rules have been approved by this court. Upon the filing of the report in the superior court, the appellant did not specifically except to the findings of the master; nor, unless based upon objections made before the master, would such exceptions have been considered if the appellant had attempted to file them. This court has said in *Teoli v. Nardolillo*, 23 R. I. 87, 49 Atl. 489: "Under the well-settled practice of this court, as well as the very uniform practice of equity courts generally, the rule is very strictly adhered to of not permitting exceptions to be filed when there have been no previous objections taken." Therefore under the statute the master's findings upon the state of the account between the trustees and the trust estate became conclusive on the parties. This appeal does not have the effect of again opening that matter before this court. In accordance with a well-recognized principle of appellate procedure, if the superior court should not have reversed the findings of the master in the absence of exceptions to his report, this court upon appeal will not consider the propriety of the master's findings and will not reverse or modify them. "But if the situation of the cause was such, at the final hearing, that the court below could not, upon the papers then before it and according to the settled course of proceeding, go back for the purpose of looking into the matter of the alleged error in a previous order or decree, it would be a violation of all principle for the appellate court to reverse the final decree, because the court below at the time of making such decree had not done what it had then no power to do. In other words, the final decree cannot be erroneous, so as to justify a reversal of it, upon an appeal from that decree alone, if at the time it was made the court below had no legal right to make any other, consistently with the justice and equity of the case as then presented for consideration and decision." *Bank of Orange County v. Fink*, 7 Paige (N. Y.) 87.

[12] The appellant also states as one of his reasons of appeal "that said decree is er-

roneous, in that it peremptorily, at the end of 30 days, makes disposition of this respondent's vested and contingent interests in said trust, irrespective of the outcome of any appeal from said decree which this respondent may take." There is no merit in this objection to the decree. The decree was not framed in contemplation of an appeal, but was the final decree which provided for relief. Further, the statute provides that upon compliance with the requirements, therein specified, as to claiming an appeal, all proceedings under the decree appealed from shall be stayed.

The appeal is dismissed. The decree of the superior court, appealed from, is affirmed, and the cause is remanded to the superior court for further proceedings in accordance with the decree.

CLARKE et al. v. JOSLIN et al.

(Supreme Court of Rhode Island. July 3, 1912.)

1. ELECTIONS (§ 299*)—CONTESTS—ADMISSIBILITY OF BALLOTS.

Where a town council did not mark as defective about 26 ballots rejected by them on the ground that the electors had placed marks on them by which they might be afterwards identified as the ones voted by them, or separate such ballots from the others cast at that election, but placed all ballots cast in each voting district in separate sealed packages, making it impossible to exactly determine the number of or to identify the rejected ballots, the court, on a quo warranto to contest the election, would not open the packages and recount the votes, searching for the ballots so marked, although it would examine the ballots if they could be identified.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.*]

2. ELECTIONS (§ 299*)—CONTESTS—POWER TO RECOUNT.

In quo warranto to contest an election, alleging that the town council in making its official count refused to count certain legal ballots in favor of petitioners, the court cannot assume the functions of the town council and recount the whole number of votes cast at such election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.*]

3. ELECTIONS (§ 295*)—CONTESTS—SUFFICIENCY OF EVIDENCE.

Evidence on a petition to contest an election held to warrant a finding that 23 or 24 votes cast for petitioners were not counted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297, 299; Dec. Dig. § 295.*]

4. ELECTIONS (§ 180*)—BALLOTS—FORM OF VOTER'S MARK.

A so-called "hook," placed upon a ballot by an elector, consisting of a slight curve at the top of one of the lines forming the cross, such as might naturally and unintentionally be made by him by a slight turn of the pencil in making the lines, and a Y-shaped mark, made by one line crossing another, but not extending the same length as the other, were legal voting marks, within the statute providing that one line crossing another at any angle shall be deemed a valid voting mark.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.*]

Petition in equity in the nature of quo warranto by Charles K. Clarke and others against William H. Joslin and others. Petition denied and dismissed as to plaintiff Round, and decree entered in favor of the other plaintiffs.

Wilson, Gardner & Churchill, of Providence, for petitioners. Willis B. Richardson and Arthur E. Munro, both of Providence, for respondents.

SWEETLAND, J. This is a petition in equity in the nature of quo warranto, brought under the provisions of chapter 328, Gen. Laws 1909. It brings in question the title to the offices of first, third, and fourth member of the town council and of the assessor of taxes for three years in the town of Scituate.

At the annual election for town officers in said town, held on May 15, 1912, the petitioners were the regular Republican candidates for said offices as follows: Charles K. Clarke, Frank F. Brown, and Joseph B. Round were candidates for the offices of first, third, and fourth member of the town council, respectively, and Benjamin Wilbur was a candidate for the office of assessor of taxes for three years. At said election the respondents William H. Joslin, Frank H. Wilbur, and George O. Rathbun were the regular Democratic candidates for the offices of first, third, and fourth member of the town council, respectively, and Manuel F. Williams was the regular Democratic candidate for said office of assessor of taxes for three years. There were no other candidates for either of said offices. At the official count of the ballots cast at said election, made by the town council, the respondent William H. Joslin was declared elected to the office of first member of the town council by a majority of 1 vote, the respondent Frank H. Wilbur was declared elected to the office of third member of the town council by a majority of 14 votes, the respondent George O. Rathbun was declared elected to the office of fourth member of the town council by a majority of 26 votes, and the respondent Manuel F. Williams was declared elected to the office of assessor of taxes for three years by a majority of 15 votes.

[1, 2] The petitioners claim that the town council, in making its official count, refused to count in favor of the petitioners certain ballots "in each instance approximately 26 ballots," which were legally cast at said election in favor of the petitioners. It appeared at the hearing upon this petition that said town council did refuse to count certain ballots cast at said election in favor of the petitioners, on the ground that the elector casting each of said ballots had placed a mark upon his ballot by which it might be afterwards identified as the one voted by him. The said town council did not mark as "defective" the said ballots so rejected

by them, nor did they separate said ballots from the others cast at said election, but placed all the ballots cast in each voting district in the town in separate sealed packages. It is therefore impossible at this time to determine with exactness the number of ballots so rejected, or to identify them, so that the court may scrutinize the so-called distinguishing marks, which said town council determined that the voters had placed upon these ballots. In the circumstances of the matter, we consider the action of the town council as most reprehensible in thus mingling the ballots which were counted with those rejected, and placing this obstacle in the way of a review of their action by the court. The petitioners have offered in evidence these sealed packages, and have requested the court to open the packages and recount the votes cast at said town election. We cannot do that in this proceeding. By the allegations of their petition and by their testimony before us the petitioners contest the title of the respondents to the offices in question on the ground that certain ballots, about 26 in number, cast in favor of the petitioners, were not counted, on the ground that they bore what were called distinguishing marks. Under this claim we would examine the ballots, if they could be identified and presented to us, and from such inspection we would review the legality of the action of the town council in thus rejecting them. But, because it is impossible to present that evidence to us, we cannot search through the packages and select a number, "approximately 26," which upon conjecture we conclude are the ballots rejected, and then inspect the marking upon the ballots so selected. Neither can we, upon the allegations in this petition, assume the functions of the town council and recount the whole number of votes cast at said election.

[3] We have permitted the parties to present the testimony of witnesses who represented the petitioners and the respondents before the town council, and who were permitted to examine the ballots at the time they were rejected. We have also received the testimony of members of the town council. These witnesses have testified as to the number of ballots cast for the petitioners which were rejected, and they have testified as to the nature of the so-called distinguishing marks. It was testified to by witnesses for the petitioners, and not denied, that the number of ballots rejected were 7 in voting district No. 1 and 19 in voting district No. 2; that of this number all but 2 or 3 were ballots cast for the petitioners. We therefore find that 23 or 24 votes cast for the petitioners were not counted.

[4] From the testimony presented on both sides it appears that nearly all the 26 votes rejected were so rejected because of certain so-called distinguishing marks, described as

"hooks" by the witnesses. And a few were rejected because the voters had used Y-shaped marks, instead of crosses, as voting marks. There was testimony given by witnesses for the respondents of other so-called distinguishing marks, or of instances of failure on the part of the voter to use the voting mark prescribed by statute. Some of the witnesses for the respondents, while upon the witness stand, reproduced upon paper these distinguishing marks as they remembered them to be. As to some of these marks, the action of the town council in not counting the ballots appeared proper; but it was clear from the testimony that more than 16 of the ballots cast for the petitioners were rejected because of the so-called "hooks" and Y-shaped voting marks. From the testimony of the witnesses and the drawings which some of them made, we are of the opinion that the so-called "hook" was not a mark placed upon his ballot by the voter by which it might afterwards be identified as the one voted by him. This so-called "hook" consists of a slight curve at the top of one of the lines forming the cross. It is such a curve as might naturally and unintentionally be made by a voter, by a slight turning of the pencil, in making the lines of the cross, probably in most instances in making the first line drawn. We are of the opinion that the so-called Y-shaped mark made by some of the voters in marking their ballots was a compliance with the requirements of the statute as to the form of voting mark. The statute provides that one line crossing another at any angle shall be deemed a valid voting mark.

By the testimony of witnesses for the petitioners and from the drawing of these marks upon paper by the respondents' witness Mr. Angell, president of the town council, it appeared that this mark was made by one line crossing another, but not extending to the same length as the other, thus producing a mark which to a certain extent resembled the letter Y. From the testimony and the drawings made by other witnesses for the respondents the lines did not cross, but from a consideration of all the testimony we find that in these marks there was a crossing of the lines. As we are not enabled to examine the marks themselves, even upon less convincing testimony than that presented to us in favor of counting these ballots, we should refuse to defeat the intention of the voter upon this ground.

We therefore find that more than 16 and less than 25 of the ballots which were cast for the petitioners at said election were illegally rejected by the town council and not counted for the petitioners. In this state of the facts, the claim of the complainant Round as to the office of fourth member of the town council is not supported. So far as the petition relates to the office of fourth

member of the town council, we find that the respondent George O. Rathbun was elected to that office and is entitled thereto. As to that office the petition is denied and dismissed. As to the petitioners Clarke, Brown, and Wilbur, we find that they were elected to the offices of first member of the town council, third member of the town council, and assessor of taxes for three years, respectively, and that each is entitled to said office, respectively.

A decree may be entered on July 6th at 10 o'clock a. m. in accordance with this opinion.

CARROLL et al. v. RYDER et ux.

(Supreme Court of Rhode Island. July 1, 1912.)

1. REFORMATION OF INSTRUMENTS (§ 19*)—RIGHT TO RELIEF.

Where from the circumstances and purpose of the purchase, the price paid, and the subsequent undisputed occupancy of the grantees, that by mutual mistake of the parties the deed described the wrong property, the grantees were entitled to have it reformed, so as to convey the property of which the grantees took possession.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.*]

2. REFORMATION OF INSTRUMENTS (§ 32*)—LACHES.

Where a deed by mutual mistake described the wrong property, and the grantees went into possession of the property intended to be conveyed, and occupied it for four years, and until after it was attached for a debt of the grantors, without the grantees having received any suggestion or knowledge that it was not the property covered by their deed, the grantees were not guilty of laches, precluding a reformation of the deed, over the objection of the attaching creditors.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

3. ATTACHMENT (§ 178*)—ATTACHING CREDITORS—RIGHTS.

Rights of attaching creditors must be determined by the state of the title at the time of the attachment, and, in the absence of fraud and statutory regulation, they only obtain the rights which the debtor then had in the property; such creditors not being in position of bona fide purchasers.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 528-534; Dec. Dig. § 178.*]

Appeal from Superior Court, Kent County; Christopher M. Lee, Judge.

Bill by Hugh V. Carroll and another against Thomas Ryder and wife. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

Hugh J. Carroll, of Pawtucket, and Lester T. Murphy, of Providence, for appellants. Quinn & Kernan, of Providence, for respondents Ryder. Edward C. Stiness, of Providence, for respondent Watts.

VINCENT, J. This is a bill in equity, brought by Hugh V. Carroll and Thomas M. Carroll, doing business as Carroll Brothers, against Thomas Ryder and Elizabeth Ryder, his wife, and prays for the reformation of a certain deed given by the respondent Thomas Ryder to the complainants, dated December 14, 1906, and covering two lots of land, in the town of Warwick, on what is known as the "William C. Nichols Plat." This cause was heard in the superior court upon bill, answer, and proofs. A decree was entered dismissing the bill, and the cause is now before us upon complainants' appeal from that decree.

On December 14, 1906, Thomas Ryder, one of the respondents, by a deed of warranty, conveyed to the complainants lots 15 and 16 on the said Nichols plat. Some months later it was discovered that the title to lots 15 and 16 was in Elizabeth Ryder, the wife of Thomas, before mentioned, whereupon Thomas and Elizabeth, on April 12, 1907, made a deed of said lots 15 and 16 to the Carrolls, which was designed to perfect the title of the Carrolls; such intention being expressed in the last-named deed. The complainants' bill sets forth that through a mutual mistake of the parties the land intended to be conveyed by the deed of December 14, 1906, from Thomas Ryder to them, was erroneously described therein as lots 15 and 16, on the Nichols plat, whereas it should have been described as lots 13 and 14 on said plat. Upon lots 13 and 14 there was a building, while lots 15 and 16 were without any improvements whatsoever.

[1] From an examination of the record it is at once apparent that it was the original intention of both of the parties to the deed of December 14, 1906, that the one was to sell and the others to purchase, the two particular lots with which the building was associated, viz., lots 13 and 14. This intention seems to us to be clearly evidenced both from the testimony and the circumstances surrounding the transaction. The testimony shows that the complainants were induced to make the purchase because they could use the building as a storehouse; that they occupied the premises, including both the building and the lots 13 and 14, from 1906, without any objection on the part of the respondents or any demand from them for rent; that the receipts given for the purchase money stated that such money was received for land and building; that since 1906 Mr. Ryder, one of the respondents, has himself used and occupied lots 15 and 16, Mr. Ryder also stating at different times that he had sold to the Carrolls the barn and two lots; and that it was intended that the Carrolls should get lots 13 and 14. Besides, the price paid for the property would be consistent with the purchase of lots 13 and 14, with the building thereon, but would be grossly in excess of the value of the unimproved lots 15

and 16. Upon the Nichols plat a street is indicated, running easterly and westerly, between the four lots mentioned; that is to say, lots 14 and 16 adjoin each other on the north side, and lots 13 and 15 adjoin each other on the south side, the two lots on one side being exactly opposite the two lots upon the other side. This tract of land, so indicated as a street, does not appear to have been dedicated, devoted to, or used for highway purposes; nor does it appear that any one has acquired any rights therein by way of easement or otherwise. It has always been regarded and treated as a part of the adjacent lots. In the deed of lots 15 and 16 from the respondent Thomas Ryder to the complainants, as well as in the latter deed from both respondents to the complainants, which last-named deed was designed to correct the errors of the first deed, the intervening land was particularly described as a part of the tract conveyed.

Some question has been raised as to the location of the building with reference to the westerly line of lot No. 13. The respondents contend that the building in question stands partly on the platted highway, partly on lot 13, and partly on lot 15, and that no part of said building rests upon lot 14. In view of other facts in the case, we do not consider this contention one of importance. The foundation of the building upon the westerly side consists of a wall of very unusual width and of a width much greater than is required for the support of the structure. The removal of the unnecessary portion of the wall would bring the building as a whole within the westerly line of lot No. 13, and also within a line drawn in continuation of that line to meet the westerly line of lot No. 14.

We think, therefore, that the complainants are entitled to have their deed from Thomas Ryder of December 14, 1906, so reformed that it will carry out the original intention of the parties to the transaction, which was to convey to the complainants lots 13 and 14 upon said William C. Nichols plat, with the improvements thereon, including also the land lying between said lots Nos. 13 and 14, as shown on said Nichols plat, and that upon the reformation of said deed as aforesaid the said complainants should reconvey to the respondent Elizabeth Ryder lots 15 and 16 on said plat.

[2] After the delivery, to the complainants, of the deed of December 14, 1906, and prior to the filing of their bill, to wit, on January 29, 1910, one James Watts, of Utica, in the state of New York, attached lots 13 and 14 in a suit against the respondent Thomas Ryder. On the 27th of June, 1910, Watts was made a party respondent to said bill, upon his own motion. On February 1, 1911, he obtained judgment against Ryder for \$250 and costs in the superior court for the county of Kent. He now contends that the relief prayed for in the complainants' bill

should not be granted to his prejudice, he having attached the lots 13 and 14 without notice of complainants' equity; that, the complainants having been guilty of laches in neglecting to assert their rights for a period of four years, they are not, therefore, equitably entitled to defeat his lien upon the attached property. An essential element of laches is knowledge. We cannot neglect that of which we have no knowledge or information. Under some circumstances the failure or omission to obtain knowledge, after such notice as might reasonably provoke inquiry, may, in itself, amount to laches.

The complainants negotiated with the respondent Thomas Ryder for the purchase of the storehouse building and a certain tract of land upon which such building was located. Later they received a deed of lots 15 and 16 on the William C. Nichols plat, which they assumed, in the absence of any knowledge as to numbers, comprehended the land and building which had been the subject of the prior negotiations. They accordingly took possession of such building and land, and occupied it for a period of some four years, without the slightest intimation or suggestion from anybody that it was not the property covered by their deed. Subsequently the complainants learned that the lots, which they had purchased and were occupying, should have been designated as 13 and 14, instead of 15 and 16, and within a reasonable time after obtaining such information they filed their bill for the reformation of the deed.

Applying the general rule, hereinbefore stated, to the above facts, we cannot find that the complainants have been guilty of such neglect as would preclude their relief in equity.

[3] The rights of attaching creditors must be determined by the state of the title at the time the attachment was made, and in the absence of fraud and statutory regulations they only obtain the rights which the debtor had in the property at the time, for the creditor is not in the position of a bona fide purchaser. The reason for this rule is that, if the attachment should fail of its purpose, the plaintiff would lose nothing, and, having parted with no value, would be in no worse position than he was before. See 4 Cyc. 632, 633, and cases cited. It is true that, by the record, lots 13 and 14 stood in the name of Thomas Ryder at the time of the attachment; but it is also true that they did so stand through a mutual mistake, which entitled complainants to a reformation of their deed, and to this reformation they were clearly entitled at any time, after December 14, 1906, when they should discover their difficulty and make application for its remedy. If we should consider the attachment of Watts as a lien upon lots 13 and 14, which must be discharged before relief could

be afforded to the complainants, it would, in effect, give them a relief coupled with a penalty, which, under the circumstances of the case, would not be justifiable.

The decree of the superior court, dismissing the bill, is reversed, and the cause is remanded to that court for further proceedings in accordance with this opinion.

TRAINOR v. LEE, City Treasurer.

(Supreme Court of Rhode Island. June 29, 1912.)

1. APPEAL AND ERROR (§ 254*)—MODE OF REVIEW—DEMURRER TO PLEA.

Where a demurrer is sustained to a plea, and defendant desires to have the ruling reviewed, the proper practice is to take an exception to the ruling on the demurrer, and not to attempt to prove the subject of the plea under the general issue, and present the matter by exceptions to the exclusion of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1486, 1487; Dec. Dig. § 254.*]

2. TOWNS (§ 29*)—DEBT LIMIT—TOWN OFFICERS—FEES—"INCURRING OF INDEBTEDNESS"—"ORDINARY CURRENT EXPENSE."

Gen. Laws 1909, c. 135, § 12, requires the town sergeant of each town annually in April to make a list of the keepers of dogs in the town, and return such list to the town clerk on or before May 1st, for which service he shall receive from the town treasury 20 cents for each dog listed, and section 13 provides for the killing of nonlicensed dogs and for the payment of a fee of \$2 out of the town treasury for each dog killed and buried. *Held*, that a city's liability for the salary of chief of police and town sergeant, and for the fees of the sergeant as dog lister, under such provision, constituted an "ordinary current expense" of the town, which, if, with other like expenses, it was within the town's limit of current revenues and such special taxes as it might legally and in good faith levy therefor, was not the "incurring of indebtedness" in excess of the limit fixed by Acts 1805, c. 1428; and hence the fact that the town's debt limit was exceeded was no defense to an action to enforce liability for such services.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 52; Dec. Dig. § 29.*]

For other definitions, see Words and Phrases, vol. 6, p. 5043.]

3. EVIDENCE (§ 158*)—BEST AND SECONDARY EVIDENCE—TOWN RECORDS.

Where, in an action for the services of a town sergeant, chief of police, and dog officer, it was claimed that no appropriation had been made by a proper authority therefor, the records of the town were the best evidence of such fact, which could not be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472-473, 474½, 504, 506-526; Dec. Dig. § 158.*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Action by Patrick Trainor against William M. Lee, City Treasurer. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Benjamin W. Grim, of Providence, for plaintiff. John P. Brennan, City Sol., of Cranston, for defendant.

PARKHURST, J. This is an action on the case to recover the sum of \$443.21 for services rendered by the plaintiff as chief of police, town sergeant, and dog officer of the town of Cranston and the city of Cranston. The suit was commenced in the district court of the Eighth judicial district, and on the entry day of the writ a jury trial was claimed by the plaintiff, and the case certified to the superior court. The case was tried before a justice of the superior court and a jury on the 2d day of November, A. D. 1911, and a verdict returned for the plaintiff for the full amount of his claim, with interest and costs, amounting to \$484.74, by direction of the court.

The defendant now comes before this court upon bill of exceptions; the exceptions being to the direction of the verdict for the plaintiff, and also to the exclusion by the court of testimony offered by the defendant to show that at the time when the services were rendered by the plaintiff the town of Cranston was indebted in excess of the statutory limit of 4 per cent. of the taxable property of the town, and to the further exclusion of testimony of counsel for the defendant, who offered himself as a witness for the defendant, that no appropriation of money was made from which the claims of the plaintiff could properly be paid. The proof showed that the plaintiff was the duly elected and qualified chief of police, town sergeant, and dog officer of the town and city of Cranston, town sergeant from April 1 to April 19, 1909, chief of police from April 18 to June 3, 1910, and dog officer in April, 1910, and that the services for which compensation was claimed were actually rendered by him between those dates, and that the claims had been duly presented to the town council of the town of Cranston in part, and to the city council of the city of Cranston as to the whole, and that no part thereof had been paid, and there was no dispute as to amounts claimed, as being correct.

The defendant pleaded the general issue, and two special pleas: (1) Setting up that the town of Cranston was indebted in excess of its debt limit, fixed by statute (chapter 1428, Acts 1895) at 4 per cent. of the taxable property of the town; (2) setting up that, at the time when the claims of the plaintiff for services are alleged to have been incurred and to have accrued, there was no authority to incur the same by virtue of any vote, resolution, etc., or by virtue of any authority on the part of any officer or agent of the town. The principal contention of the defendant was made under its first special plea, that inasmuch as the town of Cranston was, at the time when the services were rendered, indebted in excess

of its 4 per cent. debt limit, it could not lawfully incur such obligations to the plaintiff as he claims, because that would be to incur a debt in excess of the statutory limit.

To that plea the plaintiff duly filed its demurrer, on the following grounds: "First, that it does not appear in and by said plea that there was no money in the treasury of the town of Cranston, at the time said indebtedness was incurred, which had been specially set apart for the payment of claims like the one in suit; second, that it does not appear in and by said plea that the said town at that time had no money in its treasury to meet this indebtedness; third, that it does not appear in and by said plea that the said town at that time would be unable to meet this indebtedness from its current revenues."

[1] This demurrer was sustained by the presiding justice of the superior court, and to this ruling the defendant took no exception. Accordingly when the defendant, at the trial of the case before the jury, offered evidence tending to show that the town had exceeded its debt limit, the trial judge ruled in accordance with the said decision of the presiding justice on the demurrer, and excluded the evidence offered as immaterial. We think that, if the defendant desired to bring this question before this court, it would have been the proper course of procedure to have reserved exception to the ruling on the demurrer, and to have brought such exception before us in its regular course. But the defendant, not following such procedure, saw fit to attempt to offer such evidence under the general issue, and now insists that such evidence, showing that the plaintiff's claims are wholly void, was properly admissible under the general issue, in accordance with the liberal rules governing pleading in this state. Without deciding this question, however, on technical grounds, we think that, in view of the importance to the towns of this state of the question as to the admissibility and effect of such testimony, and in view of the novelty of the question in this state, we are justified in treating the question as fairly before us on the specific exception, and we proceed, therefore, to its consideration.

[2] It is to be observed at the outset that, as to the services of the plaintiff, here in suit, as chief of police and town sergeant, such services fall naturally and inevitably within the class of services properly and necessarily incidental to the ordinary daily affairs of a municipal corporation, and that the compensation therefor naturally and inevitably falls within the current expenses of such a corporation. As to the services rendered as dog officer, it is to be observed that chapter 135, Gen. Laws 1909, "Of Dogs," by section 12 provides as follows: "The town sergeant of each town, or such special constables as the town council of such town may appoint, annually in the month of April

shall ascertain and make a list of the owners or keepers of dogs in such town and return such list to the town clerk on or before the last day of May, and shall receive from the town treasury the sum of twenty cents for each dog so listed;" while by section 13 provision is made for killing dogs not licensed and a fee of \$2 for each dog killed and buried is to be paid out of the town treasury. So that by the express provisions quoted it is made one of the annual duties of the town to make such a list of owners of dogs, and the fees therefor and for killing and burying are expressly fixed by law, and payment therefor is expressly provided to be made out of the town treasury. Such service is, therefore, to be deemed to be properly and necessarily incidental to the management of the affairs of the town as a proper police regulation, and the compensation therefor fixed by law must be deemed to be one of the current expenses of the town.

The question here involved has never been squarely brought before this court; but it was, among other questions, incidentally considered in the case of *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588, where, upon a suit in assumpsit to recover for stone furnished the town of North Providence by the plaintiff, the defendant filed a special plea in bar, setting up that "at the time of contracting said debt the said town had incurred debts to the limit allowed by law, and also that there was no money in the hands of the defendant town treasurer at that time, nor has there been any money in his hand at any time since then, with which said debt could have been paid. To this plea the plaintiff demurs on the grounds: (1) That it is bad for duplicity; (2) that the fact that the town had reached its debt limit is not a good defense, because the duty of the town to keep its highways in repair is a statutory one, and is not suspended by reason of the fact that the town had reached its debt limit; (3) because, as the town council of said town, on October 22, 1894, allowed the plaintiff's claim and ordered it paid, the town is estopped from denying the validity thereof. We do not think the plea is bad for duplicity. A double plea is one which consists of several *distinct and independent* matters alleged to the same point and requiring different answers. Gould's Pleading, p. 420. But this rule is not violated by introducing several matters into a plea, if they be constituent parts of the same entire defense. 1 Chit. p. 512; *Handy v. Waldron*, 18 R. I. 567 [29 Atl. 143, 49 Am. St. Rep. 794]. Without the allegation objected to in the plea before us, it would not state a full defense to the action, and hence would be demurrable because, notwithstanding the fact that the town had reached its debt limit when this bill was contracted, yet there might have been money in the treasury at that time which had been

specially set apart for the payment of claims like the one in suit; and if the town had the means in its treasury to meet this indebtedness, or would have it in anticipation of its current revenue, the contracting of the liability, even though the town then was up to its debt limit, would not be a violation of the statute. Dill. Mun. Cor. (4th Ed.) § 135: *Dively v. Cedar Falls*, 27 Iowa, 227, 232; *Barnard v. Knox County*, 105 Mo. 382, 391 [16 S. W. 917, 13 L. R. A. 244]."

It is to be noted that the plea which was held good in *McAleer v. Angell*, supra, goes far beyond the plea in the case at bar, in that it sets up not only the excess of the debt limit, but also that there was not, and never had been, money in the hands of the defendant to pay the claim. The principle above incidentally alluded to and approved in the case cited has frequently been followed in other states. In the case of *Grant v. City of Davenport*, 36 Iowa, 396, an ordinance permitted the formation of a water company by certain persons, and granted to the company a privilege to supply water to the city for a term of years, and provided for payment of certain annual sums for fire hydrants and other service for a series of years. Upon a suit in equity brought by citizens and taxpayers to restrain the defendant from carrying the ordinance into effect, because the city would thereby exceed its legal debt limit, the court, after setting forth constitutional provisions limiting the powers of the defendant to incur debts, and the necessity and propriety of providing for a water supply for domestic purposes and fire protection, proceeds to the discussion of the effect of the ordinance and the powers of the defendant, as follows: "But, if it can induce individuals or a corporation to construct and maintain such works for the use and benefit of the municipality and its inhabitants, and can pay a just and fair rent, as agreed, out of its current revenues, and can also, out of such revenues, pay its other ordinary expenses, we can see no sufficient reason for holding that an agreement to pay such rent either weekly, monthly, quarterly, or annually creates an indebtedness against the city. If it did create an indebtedness, then an ordinance providing for the payment of the salaries to the officers of the city would also create an indebtedness, and would be invalid, where the maximum of indebtedness has already been reached. And such construction would also render invalid every contract for the delivery of lumber to repair a bridge or a sidewalk, or for the hauling of gravel to repair a street, or for the employment of a laborer to work thereon. And, to carry the illustrations further, it is very manifest that a city, already indebted to its maximum limit, could not purchase upon credit real property, with buildings thereon suitable for its offices, council room, etc.; nor could it, having the real estate, make valid

contracts upon its credit for the erection of such buildings; nor employ laborers to put up such buildings, and issue daily, weekly, or otherwise, its warrants for such labor, where its cost is manifestly above the amount it can pay out of its ordinary current revenue, and at the same time defray its other necessary and current expenses. But it may rent such real estate and buildings for a like use, and agree to pay, at fixed periods, a reasonable rent, not exceeding, with the other expenses, its ordinary current revenue; and such a contract for payment of rent would not be creating an indebtedness, for it is in effect a cash transaction, where the payments are made *pari passu* with the accumulation of the rent; and the length of time the contract is to continue, whether it be for 30 days or 30 years, does not alter its effect. Suppose a man having a family to support and is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for 10 years at \$300 per year, or \$3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of \$3,000? Does any fair or legitimate meaning of the word 'indebtedness' or 'indebted,' or does any general acceptance of its meaning, require us to affirm that he is indebted? We think not. Or if, instead of renting a house, he should contract for the board of his family for a like term, at \$1,000 per year, does he thereby become indebted in the sum of \$10,000? It seems to us not. From these illustrations, as well as from the plain and practical meaning of the language of the constitutional inhibition, the true rule and just interpretation is evolved, to wit, that where the contract made by the municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provisions. *Dively v. Town of Cedar Falls*, 27 Iowa, 227."

The principle above set forth was cited with approval in *Appeal of the City of Erie*, 91 Pa. 398, 403, although not applied, because the facts shown of record did not warrant such application. Again in the case of *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416, very similar in scope to the case of *Grant v. Davenport*, *supra*, where taxpayers attempted to enjoin the city from carrying out a contract for municipal water supply at an annual expense of \$6,000 for a period of 20 years, the court, after setting forth the facts showing the resources of the city and its annual revenue sufficient to pay

all its current annual expenses, including the water rent of \$6,000 per annum, and setting forth the provisions of law limiting its capacity to incur corporate debt, and reviewing a number of cases, proceeds as follows (97 Ind. 12, 49 Am. Rep. 416): "We have assumed that the supply of water is necessary to the welfare of the inhabitants of the municipality, and that it constitutes one of the items of current expenditure essential to the welfare of the corporation, and this assumption rests upon the facts pleaded in the answer. This distinguishes the case, as is well shown in *Grant v. City of Davenport*, *supra*, from the cases in which property is purchased or subscriptions made to the capital stock of railroad or other corporations. It is the items of expense essential to the maintenance of corporate existence, such as light, water, labor, and the like, that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purposes, even though the effect be to postpone judgment creditors. *Coy v. City Council*, 17 Iowa, 1 [85 Am. Dec. 539]; *Coffin v. City Council*, 26 Iowa, 515; *Grant v. City of Davenport*, *supra*. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate life, there cannot be said to be any debt. We do not assert that a debt may be created, even for current expenses, if its effect will be to extend the corporate indebtedness beyond the constitutional limit; but we do assert that, where the current revenues are sufficient to defray all current expenses without increasing the indebtedness, there is then no corporate debt incurred for such expenses. To illustrate our meaning: Suppose a laborer is employed on the 1st day of April to render services on the 1st day of May, that on the day of the employment there is no money in the treasury, but on the 1st day of May, when the services are rendered, there will be more than enough yielded by the current revenues, there is in such a case really no debt. Again, suppose that on the 1st day of April gas is needed for that month, and that on each day of that month the current revenues are sufficient to pay each day's gas bill, there will be no debt, even though there was not sufficient money to pay the month's account in the treasury on the day the contract was made. Such contracts do not create a debt prior to the rendition of the services in the one case, or to the furnishing of gas in the other. They simply devote to current expenses current revenues. While, as decided in *Sackett v. City of New Albany*, *supra* [88 Ind. 473], the debt cannot be made to exceed the constitutional limit, even for the current expenses, no matter how urgent, yet current revenues as they come in may be used to defray such expenses, and if they are sufficient for that purpose, then no debt

is created. If a bond, note, or other obligation is executed, then, doubtless, a debt is created; for such things constitute evidences of indebtedness, but that is not the case here. So, if the consideration of the contract is received at once, instead of being yielded in the future or at intervals, then it might be said that there was a debt; but where there is nothing owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary yearly expenses of the municipality, there will be no debt, if, when the thing is done or furnished, there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim without encroaching upon other funds. This we understand to be the case made by the answer, and we think it a case not within the inhibition contained in the constitutional amendment. If a different view be taken from that which we maintain, startling results would follow in the application of the principle to other cases. Take, for instance, a merchant having a large number of clerks employed for a year each, and at a fixed salary; could such a merchant, in making out his tax list, deduct the aggregate amount of all the salaries computed to the end of the year, on the ground that it constituted an indebtedness? Take, again, the same supposed case; and would any one say that the merchant's solvency was to be determined by taking into consideration the aggregate of the salaries that would be due his clerks at the end of the year? Take, for another example, the case of a private corporation actively engaged in business; could it be pushed to the wall, on the ground that it was insolvent, by evidence that it had contracted with a large number of men for a year's service, and that the aggregate sum due at the end of the year would be much greater than the value of its property at the opening of the year? Take still another example, a municipal corporation, and here there need be no supposition, with its officers (some of them with terms of several years), its policemen, and its firemen; is it indebted, at the beginning of the year, for the grand aggregate of all the salaries to the end of all the terms? In the case of the merchant and of the private corporation, it certainly would be held, without hesitation or doubt, that if the current income or profit would discharge the obligations there would be no indebtedness; and this must be true of municipal corporations in cases where there will be money in the treasury, derived from current revenues, sufficient to pay for services rendered or things furnished, as part of the current corporate expenses, when the services are rendered or the things actually furnished. Expenses of such a character should be deemed incidental expenses of the corporate business, and not debts, and as long, at least, as the current revenues

will pay these expenses, without taking from funds devoted to other purposes by command of the corporate charter what properly belongs to them, there is no indebtedness within the meaning of the Constitution."

The same general principles have been fully recognized, and applied or not, according to the facts developed, in the following cases: *Smith v. Town of Dedham*, 144 Mass. 177, 10 N. E. 782; *Barrett v. City of East St. Louis*, 89 Ill. 175; *Brashear v. City of Madison*, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; *City of Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593; *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743; *Town of Kankakee v. McGrew*, 178 Ill. 74, 52 N. E. 893; *Water Works Co. v. Cartersville*, 142 Mo. 101, 45 S. W. 279; *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 19 Sup. Ct. 77, 43 L. Ed. 341.

The sum of \$275.40, more than one-half of the plaintiff's claim in suit, is for his statutory fees as dog officer in making the list of dogs, etc., under the provisions of chapter 135, §§ 12, 13, above quoted. As to this portion of his claim, which is fixed by law as compensation for a duty imposed by law, it is well settled that the question of whether or not the town has exceeded its debt limit has no application. This was recognized in the case of *McAleer v. Angell*, 19 R. I. 688, 692, 36 Atl. 588, supra, and is also recognized in *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128; *Bloomington v. Perdue*, 99 Ill. 329; *Town of Kankakee v. McGrew*, 178 Ill. 74, 52 N. E. 893; *Smith v. Town of Dedham*, 144 Mass. 177, 180, 10 N. E. 782; *Security Co. v. Baker County*, 33 Or. 338, 54 Pac. 174. In view of all these cases, and of the principles therein so clearly set forth, this court is of the opinion that the evidence offered to show that the debt limit of the town of Cranston had been exceeded was immaterial, in the absence of proof showing that the town had not the means in its treasury to pay the claims, or that it would not have the means from its current revenues.

Defendant's counsel cites a few cases wherein there are some expressions of opinion which are claimed to be opposed to the doctrines above set forth, to the effect that even current expenses, or statutory fees and compensation fixed by law, cannot be provided for out of current revenue, where the debt limit has been exceeded. In *State ex rel., etc., v. City of Helena*, 24 Mont. 521, 63 Pac. 99, 35 L. R. A. 336, 81 Am. St. Rep. 453, where a contract for water supply was under consideration, providing for large payments per month for a term of years, and where the constitutional prohibition was against a city becoming indebted in *any manner or for any purpose*, in excess of certain fixed limits, it was found that by the terms of the contract the city would "be

come indebted" in excess of the prescribed limits, and so that the contract was void. But it expressly distinguishes the case from that of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, at page 20, 19 Sup. Ct. 77, at page 85 (43 L. Ed. 341), where the Supreme Court of the United States, considering a contract for municipal water supply, in discussing limitations as to incurring debts, under the charter of the city of Walla Walla, says: "The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes, to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation." The case of *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, cited by defendant's counsel, preceded the *Walla Walla Case* by several years, and it was a suit on numerous county warrants, issued for various expenses, when there appears to have been no money to pay them, and when the debt limit had already been exceeded, and the court found the warrants to be void; but this case is cited and expressly distinguished from the *Walla Walla Case*, 172 U. S. 21, 19 Sup. Ct. 77, 43 L. Ed. 341. In *Doon v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 222, 35 L. Ed. 1044, also cited by defendant, where it appeared that a certain school district issued and sold refunding bonds, the proceeds of which were to be used for refunding an old debt, but were not in fact so used, the court found, under the provisions of the Constitution of Iowa, that the issue was the present creation of a debt in excess of the debt limit, and the bonds were held void. The case has no application here. The cases of *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138, and *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, involved the question of the validity of the issue and sale of certain bonds for the purpose of raising money to build waterworks; and the court found that they were issued in excess of the debt limit prescribed by the Constitution of Illinois and were void. The cases have no application here. The case of *Prince v. City of Quincy*, 105 Ill. 138, 44 Am. Rep. 785, relates to the validity of a municipal contract for water supply, under the Constitution of Illinois, in all respects similar to the case of *State v. City of Helena*, supra, and is decided on the same principle, and is quite inapplicable to the case at bar. The case of *Commissioners v. Gillett*, 9 Okl. 593, 602, 603, 60 Pac. 277, also cited by defendant, expressly recognizes the validity of county warrants issued for current expenses in anticipa-

tion of taxes already levied, although the debt limit had been exceeded. In short, we find nothing in the cases cited by the defendant which in any way disturbs our conclusion above reached, in view of the numerous authorities cited, and from which we have quoted, that, under the facts and circumstances of this case, the evidence offered by the defendant relating to the debt of the town of Cranston was immaterial. The exception relating to the exclusion of this testimony is therefore overruled.

[3] The next exception relates to the testimony, offered by the defendant's counsel, that there was no appropriation made by any proper authority from which payment of the plaintiff's claim could properly be made. Defendant's counsel offered himself as a witness as to the facts, without attempting to produce, or to account for the lack of, record evidence on this point, where it was quite evident that such record evidence could and should have been produced, if it existed. It is quite manifest that it would have been error to allow him to offer his oral evidence of such matters. 3 Elliott. Ev. § 1942; *Owings v. Speed*, 5 Wheat. 420, 5 L. Ed. 124; *Hutchinson v. Pratt*, 11 Vt. 402; *Gilbert v. New Haven*, 40 Conn. 102; *Morrison v. Lawrence*, 98 Mass. 219, 221. This exception is overruled.

The only other exception is to the direction given by the trial judge to the jury to return a verdict for the plaintiff. The evidence before the jury was quite sufficient to warrant such a direction; in fact, there was no evidence admitted, or competent evidence offered, which in any way questioned or controverted the plaintiff's evidence.

We find no error. The exceptions alleged by the defendant are all overruled, and the case is remitted to the superior court, with direction to enter judgment upon the verdict for the plaintiff.

BAGLEY v. LEE, City Treasurer.

(Supreme Court of Rhode Island. June 29, 1912.)

1. TOWNS (§ 29*) — ORDINARY EXPENSES — DEBT LIMIT.

That a town was indebted in excess of its debt limit of 4 per cent. of its taxable property, in violation of Acts 1895, c. 1428, was no defense to its liability for compensation of its regularly appointed dog officer, employed during the month of April, 1900, to list all owners of dogs of the town at the rate of 20 cents a dog, required by Gen. Laws 1909, c. 135, § 12; such expense being a general expense, not within the debt limit.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 52; Dec. Dig. § 29.*]

2. TOWNS (§ 29*) — CLAIMS — POLICE DEPARTMENT — BICYCLE REPAIRS.

Where it was customary for plaintiff to repair bicycles of policemen at the expense of the town, and plaintiff's bill for such services was duly presented and allowed by the town

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

council in the regular course of business, the town was liable therefor.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 52; Dec. Dig. § 29.*]

Exceptions from Superior Court, Providence and Bristol Counties; Darius Baker, Judge.

Action by Isaac W. Bagley against William M. Lee, City Treasurer. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Benjamin W. Grim, of Providence, for plaintiff. John P. Brennan, City Sol., of Cranston, for defendant

PARKHURST, J. This is an action of assumpsit. The suit was commenced in the district court of the Eighth judicial district, and, on the entry day of the writ, a jury trial was claimed by the plaintiff. The case was tried before a justice of the superior court and a jury on October 23, 1911, and said jury returned a verdict for the plaintiff for the full amount of his claim, viz., \$283. The defendant filed a motion for new trial, and the same was denied. The case now comes before this court on a bill of exceptions.

There are only two exceptions before this court, to wit, the exception to the refusal of the lower court to grant the defendant's motion for a new trial, and the exception to the exclusion of certain testimony noted on page 10 of the transcript. The plaintiff was appointed dog officer of the town of Cranston on the 2d day of April, A. D. 1909, qualified on the 3d day of April, and during said month made a list of all the owners of dogs of said town, to wit, 1,190, for which the statute provides the payment of the sum of 20 cents for each dog so listed. Chapter 135, § 12, Gen. Laws 1909. A list was made out by him and delivered to the town clerk as directed by the statute. His bill for said services was presented to the town council and ordered paid. The balance of the plaintiff's claim, amounting to the sum of \$10.25, was for repairing bicycles belonging to the police officers of the town and used by them while in the performance of their duties. The plaintiff performed similar services before and subsequent to the date of contracting of this bill, and the same were paid for out of the regular appropriation for police. This item is a part of his claim approved in the account which he presented to the town council, and which was ordered paid. There was no dispute about the amount or the reasonableness of the entire claim, or any part thereof. In fact, the city solicitor, during the trial of this case, admitted that "the man who did this work is entitled to be paid for it."

[1] The defendant, by special plea to the effect that the town of Cranston was in-

debted in excess of its debt limit of 4 per cent. of the taxable property of the town (see chapter 1428, Acts 1895), attempted to claim that the town had no authority to contract for the services of the plaintiff, because the amounts coming due to the plaintiff would be in excess of the debt limit, thereby attempting to raise the same question as was chiefly relied upon in the defense of the case of Trainor v. Lee, 34 R. I. —, 83 Atl. 847, recently decided. For the reasons set forth in the opinion in that case, we think the court in this case properly refused to admit testimony regarding the debt limit; and inasmuch as the greater part of this plaintiff's claim is for enumerating and making the list of dogs required by statute, as referred to in the Trainor Case, the same applies to this case, as to the greater part of the plaintiff's claim.

[2] As to the small amount of \$10.25 claimed for repairing the bicycles of policemen, it appears that such repairs were customary, and had been frequently made by this plaintiff and paid for, and that his bill with this item included was duly presented to the town council and was allowed by it in regular course of business. There was no evidence offered by the defendant, nor does any such evidence appear in the record, in support of its special pleas, nor in dispute of the correctness and justice of the plaintiff's claims. The evidence fully supported the verdict, and the court below did not err in refusing a new trial.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict for the plaintiff.

GRIM v. LEE, City Treasurer.

(Supreme Court of Rhode Island. June 29, 1912.)

TOWNS (§ 29*)—CLAIMS—ATTORNEY'S SERVICES—DEFENSE OF OFFICER.

Where plaintiff, as town solicitor, after explaining to the town council the fact that a police officer had been sued in a civil suit for action taken by him in the discharge of his duty, was directed by the council to defend the officer, the town was liable for the reasonable value of plaintiff's services in that behalf, under its general power to indemnify its officers against claims for damages.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 52; Dec. Dig. § 29.*]

Exceptions from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Action by Benjamin W. Grim against William M. Lee, City Treasurer. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Clarence A. Aldrich and Benjamin W. Grinn, both of Providence, for plaintiff. John P. Brennan, City Sol., of Cranston, for defendant.

PARKHURST, J. This is an action of assumpsit to recover the sum of \$393 for salary as judge of probate and services rendered as town solicitor for the town of Cranston. The suit was commenced in the district court of the Eighth judicial district, and, on the entry day of the writ, a jury trial was claimed by the plaintiff. The case was tried before a justice of the superior court and a jury on October 30 and 31, 1911, and by direction of the court the jury returned a verdict for the plaintiff for the sum of \$432.55, the full amount of the plaintiff's claim with interest. The defendant now comes before this court with its bill of exceptions.

The defendant did not take an exception to the direction of a verdict by the court; the only exception being to the refusal of the court to charge the jury as follows: "(1) That the plaintiff cannot recover for that part of his claim from April 1, 1909, to April 23, 1909, because there was no appropriation made by the town for the payment of the town solicitor. (2) That the plaintiff cannot recover the sum of \$50 as charged for defending William H. Stone, a police officer of said Cranston, in a civil suit brought against him individually."

There was nothing for the court to do but refuse the first request, because no such claim was made by the plaintiff. A part of the plaintiff's claim was a balance of \$23 due for salary as judge of probate from April 1, 1909, to April 19, 1909. There is nothing in the record to show that the plaintiff ever made any claim for salary as town solicitor for said period between April 1, 1909, and April 23, 1909. Therefore the only question in this case that is before the court for its consideration is said request numbered 2.

The plaintiff testified without contradiction that he was directed by the town council when in session, and after he had explained the case to them, to defend William H. Stone, a police officer of the town, who had been sued in a civil suit for action taken by him in the discharge of his duty as a police officer; that a majority of the town council was present at the time when they directed him to defend the officer, and it does not appear that any objection was made, nor does it appear that any formal vote was made or recorded in the matter. The plaintiff did so defend the officer, and charged \$50 for the service, and testified that the charge was a reasonable one for the service rendered, and this was not disputed by the defense. There was no testimony to the contrary. Later on the plaintiff presented his bill, with this item, to the council for allowance, and the same was duly allowed and ordered paid;

but it has not been paid, for reasons which do not appear in evidence.

We find no error in the refusal of the court below to charge as requested. We think it was in the discretion of the town council to direct its town solicitor to defend its police officer in a suit for damages growing out of his acts as such officer, if they believed he was acting in good faith in the performance of his duty in the matter complained of in the suit against him. The general principle involved was carefully considered in the case of *Sherman v. Carr*, 8 R. I. 431. The court, after discussing the law applicable to cases of this nature, said: "It would seem, therefore, to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city, that, on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and, on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution. Under such a state of the law, every executive officer of the corporation would feel that he was acting as the servant and agent of that corporation, relying upon their good faith and good judgment toward him, so long as he acted in good faith and good judgment in the discharge of his duties. This distribution of power, which would be practically the wisest in the administration of municipal affairs, is the one which we understand to be in accordance with the existing law and long-continued practice in this state. * * * We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him."

As to the general power of towns to indemnify their officers against claims for damages, see *Cooley*, Const. Lim. (7th Ed.) pp. 306, 308; 1 *Abbott*, Mun. Corp. p. 694; *Hadsell v. Hancock*, 3 *Gray* (Mass.) 526; *Nelson v. Milford*, 7 *Pick.* (Mass.) 18; *Bancroft v. Lynnfield*, 18 *Pick.* (Mass.) 506, 29 *Am. Dec.* 623; *Fuller v. Groton*, 11 *Gray* (Mass.) 340; *Baker v. Windham*, 13 *Me.* 74; *Briggs v. Whipple*, 6 *Vt.* 95. In the case of *Pike v. Middleton*, 12 *N. H.* 278, it was held that selectmen, who under the law "shall have the ordering and managing of all the prudential affairs of the town," have the power to make a valid agreement to indemnify the tax collector from the costs and expenses of defending actions brought against him for acts done in the performance of his duties.

Some question was attempted to be raised in this case as to whether appropriations had been lawfully made under which money could be lawfully applied to pay the claims made by the plaintiff. It clearly appears

from the record that such appropriations were made, which fully cover all of the items in suit. The defendant's counsel also claims in his brief that the same questions involved in the suit of Patrick Trainor v. William M. Lee, City Treasurer, 34 R. I. —, 83 Atl. 847, are raised in this case, viz.: Regarding the contention that the town of Cranston had exceeded its debt limit, and so could not lawfully contract for the plaintiff's services. In this the defendant's counsel is in error. No such question was raised in this case, either by special plea or by the offer of evidence, and, if it had been, it is fully disposed of in Trainor v. Lee, supra.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment for the plaintiff upon the verdict directed by the court.

CARROLL v. SANFORD et al.

(Supreme Court of Rhode Island. June 29, 1912.)

ATTACHMENT (§ 50*)—REMEDIES OF CREDITORS OF TENANT BY THE CURTESY—STATUTES.

Under Gen. Laws 1909, c. 248, §§ 1, 8, 12, declaring that the real estate of any woman before marriage, or which may be acquired by her during marriage, shall be her sole and separate property, free from the control of her husband, and that his right in her real estate as tenant by the curtesy shall not be impaired, and that the wife or her property shall not be liable for the contracts or torts of the husband, an estate of tenancy by the curtesy initiate is not attachable; and a creditor who attaches such interest, and purchases it at execution sale after the interest has become consummate, acquires no title.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 129-136; Dec. Dig. § 50.*]

Case Certified from District Court, Second District.

Action by Timothy Carroll against Alfred A. Sanford and another. Cause certified to the Supreme Court on agreed statement of facts. Decision for defendants.

Dexter B. Potter and Edward A. Stockwell, for plaintiff. Frederick C. Olney, of Wakefield, and Harvey A. Baker, of Providence, for defendants.

JOHNSON, J. This case has been certified to this court by the district court of the Second judicial district under Gen. Laws 1909, c. 298, § 4, upon the following agreed statement of facts:

"This is an action of trespass and ejectment, brought by Timothy Carroll against Alfred A. Sanford and Nicholas Baker to recover possession of the following premises, situate in the village of Wakefield, in the town of South Kingstown, and bounded and described as follows: 'Northerly on Mechanic street, a highway, so called, one hundred and ten (110) feet; easterly on land

now or formerly of the estate of John Caswell, deceased, one hundred and eight (108) feet, more or less, to land of the Narragansett Pier Railroad Company; southerly on land of said railroad company, one hundred and ten (110) feet; and westerly on land now or formerly of the estate of John R. Clark, deceased, one hundred and eight (108) feet, more or less, in the line of the aforesaid street or highway'—which said premises the said plaintiff, Carroll, alleges he is entitled to possession of for the life of Alfred A. Sanford. He further alleges that said defendants are tenants at sufferance of the aforescribed premises. In this case it is agreed by and between the parties thereto that the facts are as follows:

"(1) The plaintiff, Timothy Carroll, prior to the beginning of this action, to wit, on the 19th day of May, A. D. 1910, began suit against one of the defendants, to wit, Alfred A. Sanford, and attached on his original writ therein all the estate, right, title, interest, and property of the said Alfred A. Sanford in the premises described in this declaration. On the 21st day of November, A. D. 1910, the said plaintiff, Carroll, obtained judgment against the said Alfred A. Sanford for \$4,122 and costs; on the 6th day of February, A. D. 1911, the said plaintiff, Carroll, levied on all the estate, right, title, interest, and property which said Alfred A. Sanford had at the time of the attachment on the original writ in the premises described in this declaration, by virtue of an execution issued in the case of Timothy Carroll v. Alfred A. Sanford, Washington No. 202, which said execution was returnable May 28, 1911; and on the 15th day of May, A. D. 1911, the said plaintiff, Carroll, caused to be sold on execution sale on said judgment all the estate, right, title, interest, and property of the said Sanford in the premises described in this declaration, and at said sheriff's sale the said plaintiff, Carroll, became the purchaser thereof and took a sheriff's deed therefor, which said deed was recorded on June 13, 1911, in the records of land evidence for the town of South Kingstown, in Book 38, at page 18.

"(2) At the time of the attachment of the premises described in this declaration on the original writ in the case of Timothy Carroll v. Alfred A. Sanford, Washington No. 202, said Alfred A. Sanford was not the owner in fee of said premises. They were purchased entirely with the money of Ethel B. Sanford, wife of said Alfred A. Sanford, in 1908, and stood of record in truth and in fact as her property. There were, however, issue born alive of the marriage between Alfred A. Sanford and Ethel B. Sanford, capable of inheriting the property in event of the death of said Ethel B. Sanford, which said children are now living. At the time of the aforesaid attachment Ethel B. Sanford was alive. She

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

died on the 8th day of September, 1910, intestate. Subsequent to the aforesaid attachment, and to the said demise of the said Ethel B. Sanford, but before the levy on the premises described in this declaration by the said plaintiff, Carroll, under his execution, and before the execution sale aforesaid, to wit, on the 20th day of September, A. D. 1910, the said Alfred A. Sanford conveyed by deed all his right, title, and interest in the premises described in this declaration to the other of these defendants, Nicholas Baker, which deed was recorded the 20th day of September, A. D. 1910, in the records of land evidence of the town of South Kingstown, in Book 37, at page 521.

"(3) At the time this action of trespass and ejectment was begun, and for some time prior to that time, said Alfred A. Sanford was in possession of said premises, living in the house on the tract in question, together with his said children. Due and legal notice to quit the said premises on or before July 1, 1911, was served on the said defendants by the said plaintiff, Timothy Carroll.

"Upon the aforesaid agreed statement of facts the parties pray the judgment of the court."

The question of law involved is: Did Timothy Carroll, by his attachment and subsequent purchase at execution sale of the interest of Alfred A. Sanford in the property of his wife in question, said interest at the time of said attachment being that of curtesy initiate, but before said sale becoming curtesy consummate, secure such title as will support this present action against the said Alfred A. Sanford and his grantee; said grant, however, having been made subsequent to the attachment and the death of his wife, but prior to the execution sale?

Section 1, c. 246, Gen. Laws 1909, provides that "the real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, including damages recovered in suits or proceedings for her benefit and compensation for her property taken for public use and the proceeds of all such property, shall be and remain her sole and separate property free from control of her husband." Under said chapter 246, Gen. Laws 1909, is an estate by curtesy initiate attachable? Section 1 provides that the property enumerated "shall be and remain her sole and separate property free from control of her husband." Section 8 provides: "The right of the husband in the real estate of the wife as tenant by the curtesy * * * shall not be impaired by the provisions of this chapter." Section 12 provides that "the wife or her property shall not be liable for the contracts or the torts of her husband."

The first married women's act in this

state appears in Pub. Laws 1844, at page 270, entitled: "An Act concerning the Property of Married Women." It is provided by the first section thereof as follows: "Section 1. The real estate, chattels real, household furniture, plate, jewels, stock or shares in the capital stock of any incorporated company of this state, or debts secured by mortgage on property within this state, which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be and are hereby so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property." The words "so far secured to her sole and separate use, that the same, and the rents, profits and income thereof, shall not be liable to be attached, or in any way taken for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property," were continued in the revision of 1857 in section 1 of chapter 136 of the Revised Statutes. This statute was considered in *Greenwich National Bank v. Hall*, 11 R. I. 124. The court held that the husband's tenancy by the curtesy initiate is not subject to attachment for the husband's debts. At page 127 the court, Durfee, C. J., says: "The statute expressly says that the real estate which is the property of any woman before marriage, or which may become her property after marriage, shall be so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death. The protection extends to the real estate which is the property of a woman before marriage, to the real estate which may become her property after marriage, and to all the rents, profits, and income of her real estate of either description. Let us consider the question submitted to us, first, with reference to the real estate which is her property before marriage. Certainly an exemption which covers the real estate which is the property of a woman before marriage, together with all the rents, profits, and income thereof, leaves nothing to be attached; for any interest which the husband acquires therein as the result of the marriage must necessarily be some portion of the real estate, or of the rents, profits, or income thereof, all of which is exempt. Does the real estate which becomes her property after marriage stand upon any different footing? We think not. The two descriptions of property are coupled in the same sentence, and

in a manner which shows that they were both intended to have the same immunity. That which is protected is not the real estate which the wife has at the time of the attachment, but the real estate which was her property before or which becomes her property after marriage. And this construction, based on the letter of the statute, is in keeping with its spirit. The design was to secure the estate during the life of the wife from molestation by the creditors of the husband, and this design is promoted by holding that during her life he simply as husband has no interest in her real estate which can be attached in any suit to which she is not a party."

The next change in the statute appears in the revision of 1872 (Gen. Stat. c. 152, § 1): "The real estate, chattels real, and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use; neither the same, nor the rents, profits, or income of the same, nor any part thereof, shall be liable to be attached, or in any way taken, for the debts of the husband, either before or after his death, and upon the death of the husband in the lifetime of the wife shall be and remain her sole and separate property." This section was considered in *Re Voting Laws*, 12 R. I. 586. The opinion stated that the law of 1844 did not in any way affect the right of the husband to vote under article 2, § 1, of the Constitution, upon the property of his wife, so long as she left him in the enjoyment of it. Then at page 592: "The law of 1844 remained without material change until the General Statutes went into effect, December 2, 1872. The General Statutes introduced an important modification by enacting that the real property of a married woman 'shall be *absolutely* secured to her sole and separate use,' instead of 'so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband.' It is true the old provision, that the husband may receive the rents and profits until the persons who are held for them are notified in writing by the wife not to pay them to him, remains unaltered. But this does not authorize us to conclude that the modification is of no effect. It is easy to construe that provision as being simply in the nature of a license or permission from his wife, which may be presumed until it is expressly repudiated or revoked. But there can be no estate by marital right in property which is absolutely secured to the sole and separate use of the wife. The estate is utterly incompatible with so exclusive an appropriation. See *Martin & Goff v. Pepall*, 6 R. I. 92, 94. Nothing remains for the hus-

band which he can really call his own. We think, therefore, that no husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, can be entitled to vote under article 2, § 1, simply as tenant by marital right." The opinion held that the new statute did not retroact, so as to destroy an estate by marital right previously acquired, and thus disfranchise the tenant, and that therefore any person who had acquired a right to vote previous to December 2, 1872, as tenant by marital right, and, a fortiori, as tenant by the curtesy initiate, was not affected in his right by the new statute which then went into effect. The opinion then proceeds: "One other question remains to be considered, namely: Can a husband who has married since December 2, 1872, or whose wife has acquired the property on which he claims the right to vote since December 2, 1872, be entitled to vote under article 2, § 1, if he has had issue by her capable of inheriting it? The new statute (Gen. Stat. R. I. c. 152, § 14) provides that the right of the husband in the real estate of the wife as tenant by the curtesy shall not be impaired. But this cannot mean that this right as tenant by the curtesy *initiate* shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right, as well as the mere marital title. It means, doubtless, that tenancy by the curtesy, in its stricter sense, as consummate by the death of the wife, shall not be impaired." The opinion then considers the question whether the right to vote is lost.

The statute remained unchanged in the Public Statutes of 1882, but appeared in its present form in Gen. Laws 1896. Under the provisions of the present statute (Gen. Laws 1909, c. 246, § 1) it is provided that the property of the wife enumerated "shall be and remain her sole and separate property free from the control of her husband." We think this secures the property to her separate use as effectively as the words of chapter 152, § 1, Gen. Statutes 1872, viz.: "Shall be absolutely secured to her sole and separate use." The express provision that the property "shall not be liable to be attached, or in any way taken, for the debts of the husband," is not in the present statute. Section 12 of said chapter, however, provides that "the wife or her property shall not be liable for the contracts, or the torts of her husband." The provision of section 8, that "the right of the husband in the real estate of the wife as tenant by the curtesy * * * shall not be impaired by the provision of this chapter," does not enlarge the right of tenancy by the curtesy beyond what it was under the statute under consideration in *Re Voting Laws*, supra, where at page 593, the opinion says: "The new statute (Gen. Stat. R. I. c. 152, § 14)

provides that the right of the husband in the real estate of the wife as tenant by the curtesy shall not be impaired. But this cannot mean that this right as tenancy by the curtesy *initiate* shall not be impaired; for the absolute appropriation to the use of the wife necessarily excludes that right, as well as the mere marital title. It means, doubtless, that tenancy by the curtesy, in its stricter sense as consummate by the death of the wife, shall not be impaired."

We are of the opinion that under chapter 246, Gen. Laws 1909, an estate of tenancy by the curtesy initiate is not attachable. As the defendant Alfred A. Sanford at the time of the attachment merely had an estate by the curtesy initiate, the plaintiff took nothing by his purchase at the execution sale of the right, title, interest, and property which said Alfred A. Sanford had at the time of the attachment in the premises described in the declaration, and therefore acquired no title to said premises which will support this action of trespass and ejectment.

Decision for the defendants for costs. The papers in the case will be sent back to the district court of the Second judicial district, with the decision of this court certified thereon, for further proceedings.

RHODE ISLAND HOSPITAL TRUST CO. v. DUNNELL et al.

(Supreme Court of Rhode Island. June 29, 1912. Motion for Reargument Denied July 31, 1912.)

1. POWERS (§ 33*)—EXECUTION—INTENTION OF DONEE OF POWER.

Where a donee of a power to dispose of property by will intends to execute the power, the intention, in the absence of any statute on the subject, must be so apparent that the instrument is not fairly susceptible of any other interpretation, and where, under the circumstances, the intention is doubtful, the doubt will prevent the instrument from being deemed an execution of the power.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

2. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION OF FOREIGN STATUTES.

Where a foreign statute judicially construed is adopted, the construction given to it in the foreign jurisdiction will be adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 256, 307; Dec. Dig. § 226.*]

3. POWERS (§ 33*)—EXECUTION OF POWER.

Under Gen. Laws 1896, c. 203, § 9, providing that a bequest of the personal estate of testator, or any bequest of personalty described in a general manner, shall operate as an execution of a power, unless a contrary intent appears by the will, a donee of a power, who bequeaths the rest, residue, and remainder of her estate of which she may die seised or possessed, or to which she may be entitled, executes the power, and her will passes personalty bequeathed to her with power to dispose of by will, unless a contrary intent appears in the will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

4. POWERS (§ 36*)—EXECUTION—WHAT LAW GOVERNS.

The law in force at the domicile of the donor of a power controls as to the execution of the power by the donee, in case of conflict with the law of the domicile of the donee.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

5. POWERS (§ 36*)—EXECUTION—WHAT LAW GOVERNS.

Where a will bequeathing property to a legatee for life, with power to appoint by will, did not specify that the power should be executed only by a special form of will, but by will generally, the law in force at the time of execution of the power governs.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. § 36.*]

6. POWERS (§ 33*)—CONSTRUCTION—"EXECUTION OF A POWER."

A donee of a power to dispose of personalty by will disposed of specified property, consisting of real estate and of specific tangible property, and then gave the rest, residue, and remainder of her estate of which she might die seised, or to which she might be entitled, to persons named. *Held*, that the donee exercised the power, within Gen. Laws 1896, c. 203, § 9, providing that a devise of real estate and a bequest of personal estate shall operate as an "execution of a power" unless a contrary intent appears.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 110-120; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2558-2561.]

Case Certified from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Suit by the Rhode Island Hospital Trust Company, trustee under the will of Jacob Dunnell, deceased, against Henry Dunnell and others, for instructions. Case certified to the Supreme Court. Decree ordered.

James Tillinghast, of Providence, for complainant. Livingston Ham, of Providence, for defendants Henry Dunnell and others. Tillinghast & Collins, of Providence (Coudert Bros., of New York City, of counsel), for defendants Denny.

JOHNSON, J. This is a bill in equity for instructions, brought by the Rhode Island Hospital Trust Company, as trustee under the will of Jacob Dunnell, late of Pawtucket, deceased, certified to this court under Gen. Laws 1909, c. 289, § 35. By the will of said Jacob Dunnell, who died in May, 1886, one-fourth of certain personalty was bequeathed to the complainant, in trust to pay the net income to Sophie B. D. Denny, a daughter of the testator, during her lifetime, and upon her decease to stand seised of the fund "to such uses and in such manner and for such persons as such deceased shall by her last will and testament declare and appoint concerning the same, and in default of such will then in trust for such persons as shall be the then heirs at law of such deceased, of my blood according to the statutes of descent then in force in said state of Rhode Island, such persons to take in the propor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tions prescribed by the same statutes." Sophie B. D. Denny died in May, 1910, a resident of New York City, leaving a will containing no reference to said power of appointment, or to the fund in the possession of the complainant, but containing the following residuary clauses:

"Fifth. I give, devise and bequeath to my said husband, John T. Denny, one-half of all the rest, residue and remainder of my estate and property, of which I may die seised or possessed, or to which I may be entitled, whether real or personal.

"Sixth. I give, devise and bequeath the other half of such rest, residue and remainder as follows: One-third to my son Thomas Denny, one-third to my daughter Maude D. Denny, and the remaining third as follows, to wit: One-half thereof to my son Thomas Denny, to be used as he may think for the best interests of such of his children as may survive me, but without imposing any trust in respect thereto, and the other half thereof to my grandson Francis C. Dale, if he shall survive me; but if he shall die before me, then such portion shall fall into and be distributed as a part of my residuary estate as hereinbefore provided."

The question presented is whether these residuary clauses of the will of Sophie B. D. Denny operated to exercise the power of appointment given her by the will of Jacob Dunnell. The further question has been argued whether, if the power was not exercised, the trust fund held by the complainant now belongs exclusively to the children and issue of Mrs. Denny, or to all the heirs of Jacob Dunnell.

[1] From the decisions of this court it is clear that under the law of this state as it stood prior to the passage of chapter 203, § 9, Gen. Laws R. I. 1896, the will of Mrs. Denny would not have exercised the power of appointment given her by said will of Jacob Dunnell. *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914; *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367; *Mason v. Wheeler*, 19 R. I. 21, 31 Atl. 426, 61 Am. St. Rep. 734. Thus in *Mason v. Wheeler*, 19 R. I. 21, at page 22, 31 Atl. 426, at page 427, 61 Am. St. Rep. 734, *Matteson*, C. J., says: "The rule in relation to the execution of powers, as stated by Mr. Justice Story, in *Blagg v. Miles*, 1 Story, 446, which may be regarded as a leading case in this country on the subject, is that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deemed an execution of the power. It is not necessary,

however, that the intention to execute should appear by express terms or recitals in the instrument. It is sufficient if it appears by words, acts, or deeds demonstrating the intention. In the case referred to three classes of cases are enumerated which have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument to the power; (2) a reference to the property which is the subject on which the power is to be executed; (3) where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity; in other words, would have no operation except as an execution of the power."

In the case at bar it is admitted that there was other property of Mrs. Denny which passed by the residuary clauses, and that a general residue was bequeathed by said residuary clauses, without description of property and containing no reference to the power. Chapter 203, § 9, Gen. Laws 1896, reads as follows:

"Sec. 9. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

This section is a literal copy of section 27 of the English Wills Act (St. 1 Vict. c. 26), and has remained in the statutes unchanged, being now section 9, c. 254, Gen. Laws 1909. The decisions of this court cited supra were in accord with the decisions of the English courts made prior to the passage of the Wills Act. *Denn Dem. Nowell v. Roake*, 6 Bing. 475, 478; *Andrews v. Emmot*, 2 Bro. 297; *Jones v. Curry*, 1 Swanst. 66. In the first of these cases, *Alexander, C. B.*, giving the unanimous opinion of the judges to the House of Lords, says: "There are many cases upon this subject, and there is hardly any subject upon which the principle appears to have been stated with more uniformity, or acted upon with more constancy. They begin with *Sir Edward Clere's Case*, in the reign of Queen Elizabeth, to be found in

the Sixth Report, and are continued down to the present time; and I may venture to say that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority." It seems to have been uniformly held that the English law upon the subject was changed by the section of the Wills Act above cited, and that a general residuary clause of either real or personal property will now execute the power, although such clause contains no reference to the power, and although the extrinsic facts before regarded as necessary are entirely absent. *Spooners Trust*, 2 Sim. (N. S.) 129 (1851); *Hutchins v. Osborne*, 4 K. & J. 252; *Thomas v. Jones*, 2 J. & Hem. 475; *Scriven v. Sandom*, 2 J. & Hem. 743 (1862); *In re Powell's Trusts*, 39 L. J. Ch. 188; *Boyes v. Cook*, L. R. 14 Ch. Div. 53; *In re Clarke's Estate*, L. R. 14 Ch. Div. 423; *Freem v. Clement*, L. R. 18 Ch. Div. 499; *Holyland v. Lewin*, L. R. 26 Ch. Div. 266. See, also, *Willday v. Barnett*, L. R. 6 Eq. 193.

[2] The English statute had thus received a definite construction long prior to its adoption in this state, and it is a general rule that, where a foreign statute has been so construed, the construction given to it in the jurisdiction of its origin will also be adopted when the statute itself is copied. Thus *Durfee, C. J.*, in *Sayles v. Bates*, 15 R. I. 342, at page 344, 5 Atl. 497, 498, citing Massachusetts decisions upon the statute there under consideration, said: "Our statute was borrowed from the Massachusetts statute, and should be construed the same way, unless there is some strong reason for construing it differently." *Stiness, J.*, in *Miller v. Coffin*, 19 R. I. 164, 168, 36 Atl. 6, 8: "When a statute is adopted which has already received a judicial construction, it is to be presumed that it was adopted in view of such construction." See, also, *In re O'Connor*, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814.

[3] But if the Wills Act had not been construed by the English cases, it would still be evident that the law has been changed by the statute. Before the enactment of the statute in question, the rule was "that if the donee of the power intends to execute, and the mode be in other respects unexceptionable, the intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative; but the intention must be so apparent and clear that the instrument is not fairly susceptible of any other interpretation. If, considering all the circumstances, the intention be doubtful, the doubt will prevent the instrument from being deem-

ed an execution of the power." *Mason v. Wheeler*, supra. By the statute, however, "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." The language of the bequest in *Mrs. Denny's will* being "all the rest, residue, and remainder of my estate and property, of which I may die seised and possessed, or to which I may be entitled, whether real or personal," such bequest will include any personal estate which she may have power to appoint in any manner she may think proper, and will operate as an execution of such power, unless a contrary intention shall appear by the will. If this is not so the statute is without effect.

In several of the cases cited, supra, considerable stress was laid upon the final words of the statute, "unless a contrary intention appear by the will." Thus *Cotton, L. J.*, in *Boyes v. Cook*, L. R. 14 Ch. Div., at page 57: "In my opinion that section applies unless a contrary intention appears by the will, whether the will is made before or after the creation of the power. We have to look only at the will for a contrary intention, and the distinctions made by the settlement cannot be said to be a contrary intention appearing by the will." *Wood, V. C.*, in *Scriven v. Sandom*: "There is no contrary intention within the meaning of the statute, unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power. It would not be a safe rule to proceed upon to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power. There ought to be shown something which can fairly be described as inconsistent with such an intention. The cases upon dower have some bearing on the point, where it is always held that dower attaches in the absence of some positive inconsistency between the gifts contained in the will and the claim of dower. Other analogies of the same kind may be suggested, and they all tend to the conclusion that the only safe rule for discriminating between mere conjecture and the contrary intent required by the statute is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power."

The statute of New York (Laws of 1897, vol. 1, c. 417) is in somewhat different terms from our statute, and is as follows:

"Sec. 6. Power to Bequeath Executed by General Provisions in Will.—Personal prop-

erty embraced in a power to bequeath, passes by a will purporting to pass all the personal property of the testator, unless the intent, that the will shall not operate as an execution of the power, appears therein either expressly or by necessary implication."

The substance of this statute is the same as that of the English and Rhode Island statutes. And long before the enactment of this statute expressly extending the principle to personal property, the statute applying in terms to real property had been extended to personal property by the decisions of the New York court. *N. Y. Life Ins. Co. v. Livingston*, 133 N. Y. 125, 30 N. E. 724; *Lockwood v. Mildeberger*, 159 N. Y. 181, 185, 53 N. E. 803, 804. In the latter case, the court, Parker, C. J., says: "It was the rule of the common law that whether a particular disposition should be treated as an execution of a power was a question of intention, and that the several provisions of a will should be carefully considered for the purpose of ascertaining whether the party really meant to execute the power or not. 4 Kent's Com. 335; *White v. Hicks*, 33 N. Y. 393. The common-law rule, however, has been changed by legislative enactment. By section 126 of the Statute of Powers, now section 156 of the Real Property Law (Laws 1896, c. 547), it is provided that 'lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication.' 1 R. S. p. 737. It was held by this court in *Hutton v. Benkard*, 92 N. Y. 295, that the rule laid down in section 126, supra, touching the execution by will of a power as to real estate, should be applied to personal estate also, and it follows, therefore, that it is the law of this state that by the residuary clause, by which Mrs. Mildeberger gave to her husband all the rest, residue, and remainder of her estate, she executed the power of appointment given to her by her grandmother's will, unless it appears expressly, or by necessary implication from the language of the will, that it was not her intent that the will should operate as an execution of the power. It is not pretended that she expressed an intent that the residuary clause should not operate as an execution of the power, nor do we think that it appears by necessary implication. Such an intent is not to be implied from the fact that no reference was made to her grandmother's will, or to the power of appointment therein conferred upon her, for the disposition of all her own property operated under the will as an exercise of such power of appointment. The omission of all reference to it, therefore, does not imply an intent not to execute the power. The basis for a necessary implication that it was not her intent to execute the power must, therefore, be found in some other provision than

that which under the will operates as an execution of the power. In examining the will in the light of the grandmother's will, and the circumstances surrounding Mrs. Mildeberger at the time of the execution of her will, it will not suffice to indulge in assumptions, for the law requires that the intent not to execute the power must appear either expressly or by necessary implication. Necessary implication results only where the will permits of no other interpretation. 'Necessary' is defined to mean: 'Such as must be;' 'Impossible to be otherwise;' 'not to be avoided;' 'inevitable.' The intent not to execute the power, therefore, must not be implied, unless it so clearly appears that it is not to be avoided."

[4, 5] Counsel for Henry Dunnell et al. contend that section 9 of chapter 254 of the General Laws of 1909 has no application, and argue as follows:

"The Dunnell will having been executed in 1883, and the testator having died in 1886, and the Denny will having been executed in 1908, and the testatrix having died in 1910, we have a case where the law in force at the time of the execution of the will of the donee of the power differs from the law in force at the time of the execution of the will of the donor. Where the law in force at the place where the donor has his domicile differs from the law in force at the place where the donee has his domicile, the law of the domicile of the donor controls as to the execution or nonexecution of the power. *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122; *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. 345; *Lawrence's Estate*, 136 Pa. 354, 363, 20 Atl. 521, 11 L. R. A. 85, 20 Am. St. Rep. 925; *Otting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, 16 L. R. A. 367.

"In *Sewall v. Wilmer* the court says, at 132 Mass. 136, 137: 'It is true that, as to personal property at least, the construction and effect of a will, and the distribution thereby made of the testator's estate, are to be governed by the law of his domicile. But the property of which Mrs. Wilmer has a power of appointment is not her property, but the property of her father; and the instrument executed by her takes effect, not as a disposition of her own property, but as an appointment of property of her father. The domicile of the testator whose property is in question is therefore the domicile of her father. * * * She must be presumed to have intended that her will should have the effect, by way of appointment, attributed to it by the law of the only place in which it could be made operative as such.' In *Bingham's Appeal* the court says: 'It is manifest that no possible judicial interpretation of the words "my personal estate" can make them mean the estate of another. It is simply a legal effect or operation of the law of statutory construction which can do

so. But where the situs both of the will containing the power and of the property subject to it lies beyond the domain of Parliament, it is evident that the statutory construction of the instrument of execution can have no operation upon it. That would be to subject Pennsylvania rights to English dominion. Whether a power contained in a Pennsylvania will over Pennsylvania property has been duly executed is evidently a question of Pennsylvania law, and not that of a foreign country having no jurisdiction.' In *Cotting v. De Sartiges* our own court says: 'It is not the fact of the donor's ownership of the property which points to the law of this state as the criterion, but the fact that her will is the controlling instrument in the disposition of the property.'

"Similarly the legality of the disposition made by the donee is governed, not by the law of his domicile, but by the law of the domicile of the donor of the power. In *re Bald*, 66 L. J. Ch. N. S. 524; *Pouey v. Hordern*, [1900] 1 Ch. 492; In *re Megret*, [1901] 1 Ch. 547. In *Pouey v. Hordern* the court says at page 494: 'The execution of such a power does not bring the appointed property into the will of the appointee at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment.' Even in the matter of determining whether the instrument executed by the donee is or is not a will, it is held that the instrument must be executed according to the formalities required by the law of the domicile of the donor. *Blount v. Walker*, 28 S. C. 545 [6 S. E. 558]; In *re Kirwan's Trusts*, 25 Ch. Div. 373; *Hummel v. Hummel*, [1898] 1 Ch. 642; In *re D'Este*, [1900] 1 Ch. 898; *Barretto v. Young*, [1900] 2 Ch. 339; In *re Scholefield*, [1905] 2 Ch. 408.

"All of the above cases are concerned with a difference in the place of the execution of the donor's will and the donee's, rather than with a difference in time. But the principle of all the cases (and it is nowhere more distinctly stated than in the Rhode Island case) is that since the will of the donor is the controlling instrument the law applicable to the will of the donor governs in determining whether the will of the donee executes the power. The Dunnell will controls the Denny will, and therefore the law governing the Dunnell will governs the Denny will. If this be the true principle, it applies equally well to a difference in time as to a difference in place, with this distinction: That if the law applicable to the donor's will has been changed before the will of the donee goes into effect, it is the later law which will prevail. It appears to be the contention of the Denny family that this is exactly what has occurred here by the enactment of section 9 of chapter 254 of the Laws of 1909, passed originally in 1896." (The italics are ours.)

Counsel proceeds: "The complete answer to this contention is that section 45 of the same chapter provides that 'this chapter and the provisions thereof shall not extend to any will made and executed prior to the first day of February, eighteen hundred ninety-six, * * * but the law in force at the time of the execution of such will made and executed prior to said date shall govern the same.' It is no doubt competent for the Legislature to pass an act affecting wills already made (*Langley v. Langley*, 18 R. I. 615 [30 Atl. 465]), and even affecting wills that have gone into effect (*Smith v. Hall*, 20 R. I. 170 [37 Atl. 698]); but it is expressly declared that section 9 of chapter 254 shall not have that effect."

The cases cited by counsel in the above argument as to the controlling power of the law of the domicile of the donor are in point. It is well settled that the law of the domicile of the donor controls as to the execution of the power by the donee. That the law of the domicile of the donor at the time of the execution of his will is to control as to the execution of a power of appointment given by said will, to the exclusion of the law of said domicile at the time of the execution of the power is an entirely different proposition. There would seem to be no doubt upon principle that the fact that Mr. Dunnell's will giving the power was made and took effect before the statute can make no difference. The statute deals, not with the creation of the power, but with its execution. Mr. Dunnell's will did not specify that the power should be executed only by a special form of will, but by will generally, and the Legislature can determine the construction of a later will, and give it the effect of executing a previously granted power. Section 34 of the Wills Act provides "that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty eight." This provision did not prevent the English courts from holding that powers created prior to the Wills Act could be executed according to its provisions. In the following cases the instrument granting the power preceded the statute by which the later will was construed: *Hutchins v. Osborne*, 4 K. & J. 252; *Turner v. Turner*, 21 L. J. Ch. 843; *Fremer v. Clement*, L. R. 18 Ch. Div. 499.

[8] Counsel also contend that the bequest is not within the terms of the statute, and argue that: "Even if section 9 of chapter 254 were applicable to the Denny will, it is submitted that the words of the will do not bring it within the terms of the statute. The power is executed only by a bequest 'of the personal estate of the testator,' or of property 'described in a general manner.' It is evident that there is no property here 'described in a general manner.' To refer to property as the residue 'of my estate and property, of which I may die possessed, or to which I may be entitled,' may serve to

identify it; but the words are not descriptive, and if those words were to be regarded as a description, they constitute a misdescription when applied to property over which the testatrix has only a power of appointment. As is later pointed out, she was not 'possessed of' or 'entitled to' the fund held by the complainant as trustee. But it is the phrase referring to bequests 'of the personal estate of the testator' that is the dangerous one. The statute is written in the third person, and wills are, perhaps invariably, written in the first person. In translating the statutory words 'the personal estate of the testator' into a will, they necessarily become 'my personal estate'; and it is very generally and properly held in England that a bequest of 'my property,' or of 'all my property,' or 'the residue of my property,' executes a power by virtue of the statute. But in the present case the testatrix's intentions were not described when she bequeathed the residue 'of my estate and property,' which, so far, would unquestionably, under the statute, execute a power. She went on and specified that it was her estate and property 'of which I may die possessed or to which I may be entitled.' She certainly was not possessed of this fund, nor could she be entitled to any part of it, except unpaid income and a proportionate part of income accrued, but not yet payable. Gen. Laws, c. 254, § 39. The statute does not alter the meaning of the words 'possessed of' or 'entitled to,' and they are just as inapplicable now as ever to property over which one has a power of disposition only. *Matteson v. Goddard*, 17 R. I. 299, 302 [21 Atl. 914]."

The argument does not avail to make the bequest anything but a bequest of the residue of the property of the testatrix, and by the statute such a bequest operates as an execution of the power. In the will of Mrs. Denny the bequest is of "all the rest, residue and remainder of my estate and property, of which I may die seised or possessed or to which I may be entitled, whether real or personal." In the case cited (*Matteson v. Goddard*) the court said: "When Mr. Goddard made his will, he evidently wished to give his wife the entire residue of his estate as it should exist at his death, and for that purpose, beyond question, added the words 'of which I may be possessed at the time of my death,' after the words, 'all the rest and residue of my property, real, personal, and mixed, wherever situated and of whatever kind.' The words 'or over which I at the time of my death may have the power of testamentary disposition' follow the words 'of which I may be possessed at the time of my death,' referring back to the same antecedent, and may be naturally read as a supplemental or completer expression of the same purpose. In each phrase the time to which it relates is a prominent feature. It may be that the later phrase is unnecessary

for such a purpose; and yet a man may own more than he possesses, if 'possess' is used in its primary signification, and hence the words 'or be then entitled to' are often added for greater surety, instead of which, in the residuary clause here, the phrase in question may be well regarded as having been used."

The bequest is clearly within the terms of the statute. No intent not to execute the power can be gathered from Mrs. Denny's will. By the first two clauses she disposes of specific property, consisting of real estate in New York City and certain of the contents of her homestead. By the third and fourth clauses she disposes of other specific tangible property, presumably also situated in New York City. It is only by the fifth and sixth clauses that she undertakes to dispose of any other property and she does so by general residuary bequests. There remain, therefore, only these residuary clauses from which such intent is to be gathered. Certainly no intention not to exercise the power of appointment given her by her father's will appears from these clauses.

Our decision is that the will of Sophie B. D. Denny operated to execute the power given to her by the will of Jacob Dunnell. It is therefore unnecessary to consider the question argued as to the ownership of the fund in the event that the power was not exercised.

A decree may be presented in accordance with this opinion, in order that the same may be approved by this court and ordered entered in the superior court.

DULINSKI et al. v. KLING et al.

(Supreme Court of New Jersey. July 1, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 108*)—LICENSES—REVOCATION—PARTIES TO PROCEEDING.

The statute providing for the forfeiture and revocation of a license (Comp. St. 1910, p. 2907, § 83) prescribes as a necessary consequence of a revocation that no license shall be granted for a period of a year thereafter to sell liquors in the premises for which the forfeited license was granted, and hence it follows that a judgment of forfeiture cannot stand, unless the owner of the premises is a party to the proceedings.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 116-118; Dec. Dig. § 108.*]

Certiorari prosecuted by Tofil Dulinski and another to review the revocation of a liquor license by Peter M. Kling, the Board of Excise Commissioners of the City of Elizabeth, and others. Order revoking license set aside.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

John J. Stamler, of Elizabeth, for prosecutors. James C. Connolly, of Elizabeth, for defendants.

VOORHEES, J. This is a certiorari to the board of excise of the city of Elizabeth. Under it a rule has been granted to take affidavits, and such testimony has been taken. Complaint under oath, signed by two citizens, was made to the board of excise, against the prosecutor, Dulinski, duly licensed by said board to sell liquors, for having sold or given away liquors on Sunday. It sets out that Dulinski, proprietor of a saloon at No. 216 Second street licensed to sell liquors, did on Sunday, October 8, 1911, violate the act regulating the sale of liquors, and on that day did sell and offer for sale, and give away, ale, wines, lager beer, and liquors, and that by reason of this violation his license became subject to revocation. The complaint further alleges that the premises whereon the violation took place were owned by Thomas Noonan. Upon this, the proper notice issued which was served on the saloon keeper and also on Noonan, the owner of the fee of the premises whereon the saloon was located. After a trial, a judgment was rendered against Dulinski, the proprietor, and Noonan, the owner.

In this conviction there is recited that on the day of the trial certain witnesses named therein were sworn in said matter, and one of them testified that "on Sunday, the 8th day of October, A. D. 1911, he went into the said saloon kept by said Dulinski, and in the presence of one O'Brien did drink beer that he found on the bar, and that he saw a number of other persons in said saloon who had beer before them on the said bar; that the said O'Brien testified that he accompanied the said Mulcahy on the said 8th day of October, 1911; that the other witnesses, naming them, did each testify that they were in said saloon on the said 8th day of October, 1911, at about 8 o'clock in the evening, at the time that the two officers came in, and that they had each asked the person tending bar to sell them a drink, and that he had given them a glass of beer, but refused to take money for it." Upon this testimony the following judgment was rendered by the board: "The said board, having considered the said testimony and evidence, do adjudge the said Tofti Dulinski to have been guilty of selling intoxicating liquors on Sunday, the 8th day of October, 1911, contrary to law, and do declare and adjudge that the said license heretofore granted to John Reilly and afterwards transferred to the said Tofti Dulinski be revoked and annulled, and that no license shall be granted to keep a saloon in said premises for a period of one year." It appeared from the affidavits taken that the Peter Breidt Brewing Company had a lease dated 1908, for 10 years, upon the premises, which company had sublet to Dulinski, but

was not made a party to these proceedings, and received no notice of them. This is one of the reasons asserted why the conviction should be set aside.

The tenth section of the liquor law of 1906 (P. L. 1906, p. 201) provides for the forfeiture of a license where a licensed dealer shall sell or offer for sale, or give, or suffer to be given within his saloon, any liquors on Sunday. Under the authority of *Marter v. Repp*, 80 N. J. Law, 530, 77 Atl. 1030 (s. c. affirmed 81 Atl. 1134), this conviction sets out the substance of the evidence upon which the forfeiture is rested, so that the reviewing court is able to judge of its sufficiency. It shows that the licensee had given away liquor on Sunday to persons in his saloon. The forfeiture is therefore good as to Dulinski and Noonan, the owner of the fee of the premises, unless for reasons to be hereafter spoken of it must be set aside for those reasons.

As to the Peter Breidt Brewing Company, the lessee of the premises, under a lease duly recorded with some years of its term yet to accrue, another question is presented. The prohibition of the statute, whereby by reason of the forfeiture of the seller's license, no license shall be granted for the premises for a year, extends automatically to such premises and amounts to a taking away of property rights, if it be done without notice to the owner. In *Tindall v. Monmouth Common Pleas*, 76 N. J. Law, 71, 68 Atl. 799, and in *Sawicki v. Keron*, 79 N. J. Law, 382, 75 Atl. 477, this court held that the revocation of the license, not only disqualified the person to whom it was granted from receiving a license for one year, but also prevented a license being granted to any one in the premises for which the forfeited license had been granted for the period of a year. It was held that notice to the owner of the premises was necessary to constitute due process of law, and for lack of such notice the order was set aside, forfeiting the license. The order of forfeiture of the license is inseparably connected with the ban against the premises. It is argued that the owner of the fee was notified. This is true, and makes the order good against him, as before stated. But a lessee is in a sense also an owner, and under the *Tindall Case* it is apparent such meaning should be given to the estate of a lessee of the premises, and a judgment working a forfeiture against him without notice to him would be taking his property without due process of law, thus coming within the reasoning of the cases last cited. The statute providing for the forfeiture and revocation of a license (C. S. p. 2007, § 83) prescribes as a necessary consequence of a revocation that no license shall be granted for a period of a year thereafter to sell liquors in the premises for which the forfeited license was granted, and hence it follows that a judgment of forfeiture cannot

stand unless the owner of the premises is a party to the proceedings. The order of revocation must be set aside.

This makes it unnecessary to consider the two motions which accompany this certiorari, viz.: The first to vacate an order made by the judge on the 7th of January, 1912, requiring the commissioners to send up the testimony taken on the trial and to strike out the return made in pursuance of said order because such return was signed only by the president of the commissioners, and not by all of the commissioners, and the second for an order striking out all of the testimony taken in pursuance of the rule granted because such testimony was merely hearsay, and because it contradicted the record.

SICILIANO v. NEPTUNE TP.

(Supreme Court of New Jersey. July 1, 1912.)

(Syllabus by the Court.)

LICENSES (§ 7*)—POLICE—VALIDITY OF ORDINANCES—DISCRIMINATION.

A municipal ordinance imposing license fees which provides for a fee of \$100 for express wagons or motor vehicles used in delivering express matter, and which exacts a fee of only \$12 for like vehicles used in the business of delivering goods not in the express business, is discriminatory and unreasonable as against a prosecutor who is engaged in the express business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15; Dec. Dig. § 7.*]

Certiorari prosecuted by Felice Siciliano to review ordinances of the Township of Neptune in the County of Monmouth. Conviction of prosecutor of violating the ordinances set aside.

The prosecutor has procured to be allowed two writs of certiorari, each removing an ordinance passed by the township committee of the township of Neptune entitled: "An ordinance requiring licenses for delivery automobiles, motor trucks, motor vehicles and express wagons, fixing fees therefor, and penalties for using the same without such licenses, in the township of Neptune in the county of Monmouth." The return to one of the writs sets forth the ordinance and the proceedings of the township committee in passing it. The return to the other writ shows a complaint made before a justice of the peace by the license collector of the township, charging the prosecutor with violating the provisions of the ordinance by engaging in the business of driving an express wagon and delivering express matter without a license from said express wagon, contrary to section 1, paragraph B, and section 6 of the ordinance aforesaid. The portions of the ordinance essential to the case read as follows: "1. No person or persons, corporation or company shall engage in or pursue the business of delivering goods, wares, merchandise, or

express matter into or within the township of Neptune unless he, they or it shall first obtain a license and pay therefor the fee hereinafter prescribed and provided, to wit: (a) For each and every automobile, motor truck, or motor vehicle used in the business of delivering goods, wares and merchandise not in the express business the sum of twelve dollars. (b) For each and every express wagon or motor vehicle used in delivering express matter the sum of one hundred dollars. * * * 4. The driver of each and every delivery automobile, motor truck, motor vehicle, or express wagon for the use or employment of which a license fee is hereinabove prescribed and provided, in the event that no license shall have been obtained therefor by the owner or owners thereof, shall be subject to the provisions of this ordinance and to the penalties for a violation thereof, whether he be the owner thereof or not. 5. All the above mentioned license fees are hereby imposed for the purpose of revenue. 6. Any person who shall violate any section or part of this ordinance shall on conviction thereof forfeit and pay to the township of Neptune in the county of Monmouth such sum not exceeding one hundred dollars, as may be fixed by the justice of the peace before whom the proceeding for such violation may be instituted, and in default of payment thereof said justice may commit such person to the county jail until the fine so fixed is paid with costs, or until otherwise discharged, according to law."

The return further shows a trial of the prosecutor before said justice of the peace, and a judgment finding him guilty of a violation of section 1, paragraph B, and section 6 of said ordinance, and adjudging that he forfeit and pay the sum of \$50 and costs to the township, and that, in default of such payment, he be committed to the county jail until payment be made.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Patterson & Rhome, of Asbury Park, for prosecutor. R. V. Lawrence, of Freehold, for defendant.

VOORHEES, J. (after stating the facts as above). The return to the writ which removes the proceedings of the township committee, relating to the passage of the ordinance, shows no conviction or proceedings to enforce the ordinance against the prosecutor. No irregularities in its passage have been pointed out. Under the authority of *Rosencrans v. Eatontown*, 80 N. J. Law, 227, 77 Atl. 88, the ordinance can be adjudged to be void before conviction and before action to enforce it has terminated in a judgment, only where it appears that it is void in toto. The reasons assigned do not present a case of that breadth. The ordinance must stand as against this writ, which will be dismissed. The other writ presents a different

problem, because the prosecutor has been convicted of a violation of the municipal by-law.

It is urged that the ordinance grossly discriminates between the two license fees, without reason or justification, in that it fixes \$12 for a license for "every automobile motor truck or motor vehicle used in the business of delivering goods, but not in the express business," while for every express wagon or motor vehicle used in delivering express matter a fee of \$100 is exacted. Wagons and motors employed in an express business are burdened with a high exaction, while the same class of vehicles, when not engaged in the express business, escape with a nominal charge. The name of the business in which they are employed seems to be the test, while the character of the use, namely, transportation and delivery of goods, may be the same.

The legislative warrant for imposing license fees found in chapter 285 of the Laws of 1908 (C. S. 3501, § 186) does not authorize the arbitrary and oppressive distinctions here made. The law is well settled that unwarranted discrimination in particular cases, or arbitrary charges, cannot be made by ordinances, but that such regulations should be, as far as possible, general and impartial in their operation, and not such as to restrain trade or contravene the common right. *Dillon*, Mun. Corp. § 322 et seq.; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240; *Kolb v. Boonton*, 64 N. J. Law, 163, 44 Atl. 873; other cases have been collected in 28 Cyc. at pages 370 and 750.

We are of opinion that the ordinance is not general, but in imposing a fee of \$100 upon the prosecutor, while subjecting others using like vehicles for a similar end to a small fraction of that sum, is discriminatory and unreasonable as against the prosecutor. This disposition of the case renders it unnecessary to examine the other reasons assigned for reversal.

The conviction of the prosecutor brought under review will be set aside, with costs.

WRAY v. MOTT, County Clerk, et al.

(Supreme Court of New Jersey. June 18, 1912.)

1. TELEGRAPHS AND TELEPHONES (§ 4*)—RIGHT TO OPERATE—STATUTORY PROVISIONS.
Under statutes the titles of which relate to telegraph companies alone and supplementary acts bringing in telephone companies as well, a telephone company is included, and may be organized to operate thereunder.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 2; Dec. Dig. § 4.*]

2. EMINENT DOMAIN (§ 191*)—PROCEEDINGS—PETITION.

Where the statutes require that a township committee consent to the erection of a telephone line or the designation of a route through the township, that fact must appear

on the face of a telephone company's petition to condemn.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

3. EMINENT DOMAIN (§ 191*)—ACTION TO ASSESS DAMAGES—PETITION—SUFFICIENCY.

A petition by a telephone company to acquire the right to put a telephone line in a public road in front of private property, and to determine the compensation to be paid to the abutter and owner of the fee in the road, which alleges that the township committee has no power of eminent domain as specified in Act April 27, 1888 (P. L. p. 546), and that the line was built in 1898, and has been maintained ever since, but which does not allege the consent to or designation of a route by the township committee, is sufficient.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

4. EMINENT DOMAIN (§ 318*)—COMPENSATION—ELEMENTS—TRIMMING TREES.

A telephone company on compensation therefor to an abutting owner may in building its line along a public highway trim the branches of trees where reasonably essential to the proper operation of its line, without unnecessarily interfering with, or destroying, the trees.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 841-846; Dec. Dig. § 318.*]

Certiorari by Emma Mann Wray against Elias Bertram Mott, Clerk of the County of Morris, and others, to review an order made by a Justice of the Supreme Court appointing commissioners in condemnation to appraise the amount to be paid prosecutrix for rights sought to be acquired by a telephone company. Order affirmed.

Argued February term, 1912, before PARKER, TRENCHARD, and MINTURN, JJ.

Charlton A. Reed, of Morristown, for prosecutrix. Edward A. & Wm. T. Day, of Newark, for defendants.

PARKER, J. The writ brings up an order made by a justice of this court appointing commissioners in condemnation to appraise the amount to be paid prosecutrix for the right to put telephone poles in front of her property in a road, and to trim trees as incidental to the proper operation of the telephone line. It appears without question that the telephone line has been installed and in operation for some years, having been originally built in 1898, and that consent was then obtained for that purpose from the then occupant of the premises, who was believed to be the owner. Some disagreement having arisen between the Telephone Company and the prosecutrix, who was the true owner at the time the order appointing the commissioners was made, and for some time prior thereto, the Telephone Company seeks, under the right of eminent domain, to acquire the above rights upon payment of proper compensation.

[1] Counsel for prosecutrix first calls attention to the fact that the defendant is un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

dertaking to operate under various acts which relate in their title to telegraph companies (see C. S. 1910, p. 5312 et seq.), and supplementary acts bringing in telephone companies as well, and claiming that these acts that confer any rights on telephone companies are all unconstitutional because they are supplements or amendments of the telegraph company act, and that telephone companies are not included in the titles of these acts. It is a sufficient answer to this to say that telephone companies have more than once been held to be included in the telegraph company acts, even though not specifically named therein (*Duke v. Telephone Co.*, 53 N. J. Law, 341, 345, 21 Atl. 460, 11 L. R. A. 664), and that consequently the title is adequate.

Next, assuming that defendant is relying upon the amendment of 1890 (P. L. p. 489; C. S. 1910, p. 5316) for the right to institute the present proceedings, it is said that that amendment is unconstitutional because of a double object in its title. To this the answer is that the defendant manifestly does not rely upon that act, because it contemplates proceedings in the circuit court, while the present proceedings are begun by application to a justice of the Supreme Court pursuant to the general Eminent Domain Act of 1900 (P. L. p. 79).

[2] It is further urged that it does not appear that the township committee of the township wherein the road in question and the property of prosecutrix are situated ever gave consent to the erection of this line or designated a route through the township. This, where required, must appear on the face of the petition. *Winter v. Telephone Co.*, 51 N. J. Law, 83, 16 Atl. 188. It is true that under the law as now existing there must always be an application to the municipal body. P. L. 1909, p. 288, § 8; C. S. 1910, p. 5314. But the situation was different in 1898 when the line was constructed and when the requirement was that whenever any * * * telephone company organized by virtue of the act to which this is a further supplement, shall apply to the * * * township committee * * * of any * * * township * * * in this state (the common council, township committee, or other legislative body of which is authorized by law to take and appropriate lands or real estate for the opening, laying out, or constructing streets therein, and to make awards for lands or real estate taken therefor, and to levy assessments for benefits or expenses of such improvements by a board of assessment or otherwise) through which it is intended to construct or extend any telegraph or telephone line for a designation of the streets or highways, etc., it shall be the duty of said body to give the company a writing designating such streets or highways; and by the next section it is made unlawful for any telephone company

"to construct any line or erect poles in any * * * township * * * having the power enumerated in the first section without first obtaining such designation." P. L. 1888, p. 546; G. S. 1895, p. 3459.

It is conceded that, by reason of this act, the defendant, at the time of constructing its line in 1898, was not required to obtain a designation from the township committee, because that body then had no power to take lands for streets and roads as specified in the act of 1888, but the claim is that it is now necessary to obtain such designation under the act of 1909, and that the proceedings must be regulated by the law as now existing. The point is fairly raised by the petition which sets up in substance that the line was built in 1888, and that the township committee at that time was not authorized to take lands by virtue of the right of eminent domain. If the defendant were now desiring to construct a telephone line along this road and to secure the right of way therefor, it would, of course, be necessary to go to the township committee, and obtain the designation required by the present law. But it should be remembered that that is not the situation, and that the present proceeding is instituted solely because of a previous misapprehension as to the ownership of abutting property. If the person claiming to own that property at the time the line was constructed had been the true owner, the consent given by him would bind the present owner, and the line would have been a lawful line without any designation or consent by the township authorities. It is now a lawful line in every respect but the absence of consent of the owner, and has been in actual operation for about 14 years.

[3] The question now is, not whether the telephone company can lawfully build a new line through this road, but what sum ought to be paid to the owner of abutting lands and of the fee in the road by way of compensation for the erection and maintenance of the line. The case is not unlike that of a railroad which has taken possession of private lands without compensation, and later on is made defendant in an action of ejectment by the landowner after substantial acquiescence in the occupation for some years. *Paterson, etc., Railroad Co. v. Kamlah*, 42 N. J. Eq. 93, 6 Atl. 444. We consider that the allegation of the petition that the township committee had no power of eminent domain as specified in the act of 1888, coupled with the allegation that the line was built in 1898 and has been maintained ever since, sufficiently meets the situation, and that no consent or designation of the township committee at this time need be set up in the petition.

[4] The last point made is that the petition asks that a sum be awarded as compensation for the right to do reasonable trimming of the trees in the road. Such

trimming, as appears by the testimony taken in this cause, is necessary for the proper operation of the line. The question in other jurisdictions appears to have been, not whether such right could be acquired by condemnation, but whether any damages ought to be paid for it, and the decisions appear to be uniform that such damages must be paid; the inference being that the right may be acquired upon payment thereof. See, also, *Green v. Irvington*, 76 N. J. Law, 5, 69 Atl. 485; affirmed 81 N. J. Law, 723, 73 Atl. 602. If such right did not exist, it might well be that in certain cases the character and number of trees might altogether prevent the construction of the telegraph or telephone line. We are of opinion that a telegraph or telephone company in building its line along the public highway may do such reasonable trimming of the branches of trees as is reasonably essential to the proper operation of its line without unnecessarily interfering with or destroying trees or parts thereof.

The order brought up will be affirmed, with costs.

ADAMS v. BOARD OF EDUCATION OF MONTVALE.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

1. JURY (§ 25*)—REFERENCE—WAIVER.

Where a cause is referred under section 155 of the practice act (3 Comp. St. 1910, p. 4101), and a party desires to reserve his right to trial by jury, a dissent filed after the reference has been suggested but a day in advance of the formal order of reference is not premature.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

2. JURY (§ 25*)—RIGHT TO JURY TRIAL.

It is the duty of the clerk to keep the minutes of the court, and, where a party files a dissent reserving his right to trial by jury under section 155 of the practice act (3 Comp. St. 1910, p. 4101), the clerk should make the proper entry in the minutes, and, upon his failure to do so, the court should order it entered *nunc pro tunc*.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

Parker and Kalisch, JJ., dissenting.

Error to Circuit Court, Bergen County.

Action by Lorenzo C. Adams against the Board of Education of Montvale. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff sued to recover for the erection of a schoolhouse. Although the bill of particulars disclosed that he sought to recover only the amount of two certificates by the architect and two small items of extras, the trial judge conceived that matters of account were in controversy and ordered a reference. To this both parties dissented and

filed dissents with the clerk, but no reservation was entered in the circuit minutes as required by section 155 of the Practice Act (C. S. 4101). The plaintiff's dissent was filed upon the opening day of the term, apparently when the trial judge had indicated that he would refer the case, but a day before he had made the formal order. Both parties participated in the trial before the referee. His report was adverse to the plaintiff, who filed exceptions, and demanded a trial by jury. Thereupon the court, without striking out the exceptions and without paying attention to the demand for a jury, confirmed the report and ordered judgment. The plaintiff noticed the case for trial, but the court struck it off the list.

Merritt Lane, of Jersey City, for plaintiff in error. Vreeland, King, Wilson & Lindabury, of Newark, for defendant in error.

SWAYZE, J. (after stating the facts as above). [1] That this case was not the proper subject of a reference, and that the plaintiff by going to trial before the referee waived the objection, is sufficiently shown by *New York Metal Ceiling Co. v. Klernan*, 73 N. J. Law, 763, 65 Atl. 444, and the cases there cited. The right of the trial court to ignore the exceptions to the referee's report and thereby to deprive the plaintiff of his right to a jury trial is the point now in question. This action can be vindicated only in case the party failed to reserve his right to trial by jury. The case already cited held that a dissent, such as the plaintiff filed in this case, is sufficient, and the only remaining objections are (1) that the dissent was filed in advance of the order of reference; (2) that it was not entered in the minutes. We think the first objection too technical. The statute requires that the reservation of the right to trial by jury be entered in the minutes at the time of ordering the reference, but we see no objection to a party filing his dissent as soon as it is suggested that the case be referred in order that the clerk may make the proper entry in the minutes as soon as the reference is in fact ordered. This suggests the answer to the second objection. It is the duty of the clerk to keep the minutes of the court. C. S. p. 1522, § 23. And, although it often happens where the clerk's office is readily accessible to attorneys that the actual writing is done by the attorneys or their clerks, the minutes are in the custody and keeping of the clerk, and the attorneys act as his agent just as they act in sealing and testing a summons. *Udlike v. Ten Broeck*, 32 N. J. Law, 105. Where the clerk's office is not readily accessible to the attorney as in the case of the clerk of the Supreme Court, or in cases where the attorney lives and does business in another county, we think the usual custom is for the attorney to draw up the rule and mail or de-

liver it to the clerk, who thereupon makes the entry in the minutes. This is the strictly correct method; the former is permissible by usage as a matter of convenience. An illustration is found in the case of an appeal from justice court to the Common Pleas in *Thompson v. Pippitt*, 18 N. J. Law, 176. There the attorney requested the clerk to enter the rule and he undertook but failed to do so. The court said: "The appellant was in no default. He had done all he was bound to do. He had moved for the rule in open court, and when granted he requested or directed the clerk to enter it, and handed him the papers for that purpose. True the counsel for the appellant might, if he had access to the minutes, have entered the rule himself, as is usually done. But he was not bound to do it." The case of *Wells v. Stackhouse*, 17 N. J. Law, 356, is explained on the ground of laches, and in the later case of *Ferguson v. Kays*, 21 N. J. Law, 431, the court said it entertained no doubt that the court would have allowed a mandamus in *Wells v. Stackhouse* if the counsel who applied for it had not suffered a delay of three terms before he made the application.

[2] In the present case counsel for the plaintiff was diligent. He dissented as soon as a reference was suggested. He filed a dissent stating that "the plaintiff's dissent to the above reference is hereby entered." The clerk should have made the entry in the minutes; his failure to do so should have been corrected by the court ordering it entered nunc pro tunc. The plaintiff filed his exceptions to the referee's report in time, and prayed for trial by jury, and gave notice of an application to the judge for a venire. The judge nevertheless confirmed the referee's report and judgment was entered. The plaintiff has thereby been deprived of the trial by jury secured to him by the Constitution and the statute merely through the failure of the clerk. This error requires a reversal of the judgment in order that a venire may issue and the case be tried before a jury.

In dealing with the meritorious question, we must not be considered as sanctioning the form in which the case is presented to this court.

PARKER and KALISCH, JJ., dissent.

LOW v. DAVY.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—"TRANSACTIONING BUSINESS IN THIS STATE."

The agent of a foreign corporation, which had not obtained from the Secretary of State a certificate that it was authorized to do business in this state, negotiated for it a sale of goods to the defendant. The negotiations were

carried on in this state, and resulted in a written agreement signed in this state by the defendant and the agent, which contained an express stipulation that it was subject to the approval of the home office of the vendor in another state. *Held*, that the writing did not become a contract, binding the parties thereto, until it was approved by the foreign corporation, and, such sale not being completed until such approval, it was not "transacting business in this state," requiring the obtaining of the aforesaid certificate of the Secretary of State before any action could be brought upon any contract made by it, as prescribed in section 98 of "An act concerning corporations," and the supplements thereto (P. L. 1896, c. 185, p. 277).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*

For other definitions, see Words and Phrases, vol. 8, pp. 7058-7060; vol. 8, p. 7818.]

Error to Supreme Court.

Action by Joseph Low against William E. Davy. Judgment for plaintiff, and defendant brings error. Affirmed.

Chandler & Robertson, of Atlantic City, for plaintiff in error. Wilson & Carr, of Camden, for defendant in error.

BERGEN, J. The plaintiff, as trustee for the James E. Pepper Distilling Company, brought a suit on certain notes given for whisky sold and delivered by the distilling company; it having assigned the notes after maturity to the plaintiff.

The principal defense is that the distilling company, a foreign corporation, was prohibited by statute from maintaining any action in this state upon any contract made by it in this state because it had not complied with section 97 of "an act concerning corporations," and the supplements thereto (Revision 1896, c. 185, P. L. 1896), which requires every foreign corporation, not expressly excepted, before transacting any business in this state, to file in the office of the Secretary of State a copy of its charter, a statement of the amount of its capital stock authorized, and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state, and an agent upon whom process against such corporation may be served, in default of which the corporation is forbidden, by section 98 of the act, an action in this state on any contract it may make.

The notes on which this action is founded were given as part consideration of a contract negotiated in this state by an agent of the foreign corporation. The contract was in writing, signed by the defendant and by the agent of the distilling company, and by its terms the defendant agreed to purchase from the distilling company a certain quantity of whisky and pay for it \$1,101.92 upon the following terms: One hundred and one dollars and ninety-two cents in cash, and 12 promissory notes for \$83.34 each. At the

same time the defendant signed a written order for the whisky, agreeing to pay \$83.34 each month until the whole consideration was paid in full. The cash was paid, and notes given which, together with the contract and order, were sent by the agent to the home office of the distilling company in Chicago, in the state of Illinois. The contract which was signed by the defendant and the agent contained this stipulation: "No agent has any authority to alter or change this contract, and this contract is subject to the approval of our home office, Chicago, Ill." The trial court directed a verdict in favor of the plaintiff, and it is the judgment entered thereon which this writ of error seeks to reverse. The argument of the plaintiff in error is that the contract was made in the state of New Jersey, and as the distilling company, being a foreign corporation, has not complied with our corporation act and obtained from the Secretary of State the proper certificate authorizing it to transact business in this state, no recovery can be had on any contract growing out of any business transacted in this state by such foreign corporation.

We are of opinion that the contract was not completed in the state of New Jersey, but, on the contrary, as the terms negotiated by the agent and the defendant were subject to the approval of the home office of the company, it did not become an efficient contract until such approval, and, as that took place in the city of Chicago, the contract was one made in the state of Illinois, and, as the business was there completed, the distilling company was not transacting business in the state of New Jersey in making this sale in the manner above indicated. This statute was under consideration in *Faxon Co. v. Lovett Co.*, 60 N. J. Law, 128, 36 Atl. 692, in which the court said: "We interpret the law to permit foreign corporations, without complying with its provisions, to maintain suits in this state on contracts made anywhere, before the passage of the act, and on contracts made outside of the state since the passage of the act." This case was cited with approval in *D. & H. Canal Co. v. Mahlenbrock*, 63 N. J. Law, 281, 43 Atl. 978, 45 L. R. A. 538. In this case Mr. Justice Depue, speaking for the court, said: "Until the guarantee came to, and was accepted by, the company, the contract between these parties was not concluded. It does not distinctly appear in the evidence in what manner the guarantee was sent to the plaintiffs. The fair inference is that it was mailed to Rondout with the order for the coal. If that be so, the statute does not apply to this transaction"—citing *Faxon Co. v. Lovett Co.*, supra, in support of his conclusion. In that case the guarantee was prepared in Jersey City, and mailed by the agent of the plaintiff to its principal office at Rondout, N. Y.

The contract in the present case having been made outside of this state, the action of the trial court is supported by the rule established in this state in the cases above cited.

Error is also assigned upon the refusal of the trial court to admit proof of a sale to one Collins upon a similar contract. This ruling was correct; for, if defendant's contract was made in Chicago, it was not a contract made in this state, and it was of no consequence that a similar contract was made with Collins, for in neither case was the company transacting business in this state within the terms of the statute invoked.

Another assignment of error relates to the refusal of the trial court to admit proof of modification of the contract by the agent. The terms of the contract forbade any agent to alter the contract.

Finding no error in this record, the judgment below will be affirmed.

BIERMAN et al. v. STIEFEL

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 233*)—ACTION FOR RENT—DIRECTION OF VERDICT.

Plaintiffs declare upon a lease for past-due rent. Defendant pleads nonperformance by plaintiffs of their covenant to restore premises after partial destruction by fire, and plaintiffs reply that they did comply. On the trial of the issue thus raised, it appeared that the dispute between the parties was based upon the question whether under the contract plaintiffs were bound to restore the buildings as they were at the time of the fire, or to the condition existing when demised. The plaintiffs, claiming the latter, refused to restore beyond that point and the defendant, being unable to use premises otherwise, completed the restoration as of the time of the injury by fire. The trial court held with defendant on the issue presented by the pleadings, but refused to direct verdict for defendant, upon the ground that when defendant completed restoration the suspension of rent, permitted by the lease during period of restoration, ceased, and that it was defendant's duty to exercise reasonable diligence in restoring, so that the rent might begin to run, and submitted the question of diligence to the jury. Held, that having construed the contract to be that plaintiffs were bound to restore as of the time of the fire, and as they had not done so, the only issue raised by the pleadings was determined, and it was error to submit to the jury the question of diligence on the part of the defendant in performing plaintiffs' covenant, as it was not an issue presented by the pleadings.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 49, 940-944; Dec. Dig. § 233.*]

Vroom and White, JJ., dissenting.

Error to Supreme Court.

Action by Charles Bierman and another against Edward Stiefel. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial awarded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Otto A. Stiefel, of Newark, for plaintiff in error. James R. Nugent, of Newark, for defendants in error.

BERGEN, J. This action is to recover rent reserved in a lease in which defendants in error, plaintiffs below, were lessors, and the plaintiff in error, defendant below, was lessee, who brings this writ to review the judgment recovered by the plaintiffs.

The declaration avers general performance by plaintiffs of all their covenants, and non-performance by defendant of his covenant to pay the rent reserved for the year commencing May 1, 1907. Oyer of the written lease being craved by the defendant, the following covenant by plaintiffs appeared: "That, in case of destruction or injury of the whole or any portion of the premises hereby demised by fire, he, the said lessor, will repair with all reasonable speed the destruction or injury done, and place the premises in the condition in which they were, and for this purpose and to this end will keep the said buildings properly insured; also, if the destruction or injury be total, or if the destruction or injury will deprive the lessee of the use of a substantial portion of the building or buildings on the premises, the rent above reserved and promised shall cease from the time of such destruction or injury until the premises are restored to the condition in which they were prior to the injury or destruction." Following this the plea avers that on April 11, 1907, a fire so injured the said buildings as to deprive the defendant of their substantial use, and that, the plaintiffs refusing to restore the premises to the condition in which they were prior to the fire, the defendant completed the restoration, which was not finished until October 11, 1907. To this plea the plaintiffs replied that they had, with all reasonable speed after the fire, restored the premises to the condition in which they were prior to the fire within 20 days thereafter. The only issue raised by these pleadings was whether the plaintiffs had restored the premises to the condition existing prior to the fire before May 1, 1908; that being the date to which rent was claimed. Under the lease the tenant was permitted to, and did, make substantial alterations to fit the building for restaurant purposes so that it was not, at the date of the fire, in the condition it was when demised, but much improved. It is not claimed by the plaintiffs that they restored the improvements made by defendant, for their contention at the trial was that they were only bound to restore the building to its condition at the date of demise, and the case was tried upon that theory; the plaintiffs offering testimony tending to show that they had by repairs restored the building to its condition at time of letting, claiming that this was all the contract required. It also appears in the record that, when the

plaintiffs refused to do more, the defendant gave them notice that, unless they fully restored the building to the condition it was in at the time of the fire, he would do so and charge the expense to them, and that, the plaintiffs giving no attention to the notice and neglecting to comply with its request, the defendant proceeded to complete the necessary repairs which were finished October 1, 1907.

At the close of the case the defendant moved for a direction of verdict in his favor upon the ground that the lease, properly construed, required the plaintiffs to restore the premises to the condition they were in at the time of the fire, and did not limit the obligation of the plaintiffs to the condition when demise was made. The trial court held, and properly, that the construction of the contract was a court question, and in construing the contract held that the plaintiffs, in order to comply with their covenant, were bound to restore the building to the condition it was in at the time of the fire, and the covenant was not satisfied by limiting restoration to conditions present when the demise was made. Whether this construction is correct it is not now necessary to determine, for it was the law of the case as applied by the court, and settled in favor of defendant the only issue raised by the pleadings, but the court refused the direction upon the ground that the tenant having undertaken to complete the restoration required of the plaintiffs was bound to do it in a reasonable time, and therefore two jury questions were presented: First. When did the tenant complete the restoration as required by the lease, at which time it was held the suspension of rent ceased? Second. Did the defendant use reasonable diligence in completing the work, for, if not, then the rent would revive from the period when, with reasonable diligence, it should have been finished? Without expressing any opinion on the correctness of this rule, which seems to charge the defendant with diligence in the performance of an obligation of the plaintiffs, it is enough to say that it imports into the case questions not raised by the pleadings, nor within the issues tried.

A careful examination of this record fails to show that either party had in mind during the trial the question of diligence on the part of the defendant in performing the covenant of the plaintiffs, for the claim of the plaintiffs was that they had done all their covenant demanded when they restored as of the time of the demise, while the defendant insisted that they had not done even what they admitted they were bound to do, and this raised a question of fact which became of no moment when the court decided that, admitting plaintiffs did all they claimed, it was not a compliance with their covenant which was a condition precedent to

their recovery. Therefore we have before us a record showing an action for rent on a written lease with averment of general performance by plaintiffs of all their covenants, to which defendant pleads nonperformance of a covenant by plaintiffs to restore partial destruction by fire, with replication by plaintiffs that they did restore to the extent they were bound, and a ruling by the court that on the issues raised by the pleadings the defendant would be entitled to judgment. This condition of the record did not warrant the trial court in submitting to the jury a question not within the issues presented by the pleadings, namely, whether when the defendant undertook to perform for his own benefit the covenant of the plaintiffs he had acted with reasonable diligence. In *Martinez v. Runkle*, 57 N. J. Law, 111-122, 30 Atl. 593, the plaintiff declared upon an express contract for payment, at a specified price, for services which he claimed he had performed, and it was there held to be error to submit to the jury the question of quantum meruit upon an implied promise; that not being the case made by the pleadings. "It is a cardinal rule for the control of a trial court that the questions submitted to the jury should be within the issues raised by the pleadings." *Excelsior Electric Co. v. Sweet*, 59 N. J. Law, 441, 31 Atl. 721. The trial court having in this case submitted to the jury questions not put in issue by the pleadings, or within the minds of the parties, and their character being material and injurious to the defendant, its action was contrary to the legal rule applicable to such cases as established in this state.

This case comes from the Supreme Court where the judgment was affirmed on error, but the conclusion we have reached requires a reversal of the judgment below, and the awarding of a new trial; and it is so ordered.

VROOM and WHITE, JJ., dissenting.

PETERSON v. AMERICAN ICE CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 203*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where the plaintiff, a carpenter of experience, was employed to repair a pitched roof upon defendant's shed, and, having worked thereon for two days, upon the third day slipped upon snow and ice, which collected while he was working, and fell from the roof, injuring himself, held, that the danger incident to the snow and ice upon the roof was as obvious to the plaintiff as to the master, and was a risk assumed by the plaintiff in the performance of his work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

Error to Circuit Court, Camden County.

Action by Anton Peterson against the American Ice Company. Judgment for plaintiff, and defendant brings error. Reversed.

Wescott & Wescott, of Camden, for plaintiff in error. Carrow & Kraft, of Camden, for defendant in error.

MINTURN, J. While working at his employment as a carpenter engaged in constructing a new roof upon defendant's coals shed in Camden, the plaintiff slipped and fell from the roof, sustaining the injuries which present the basis for this suit, and for which he recovered a verdict at the circuit. He had been engaged at his trade for 10 years, and had worked on the roof in question for two days prior to the accident.

On the morning of the accident it began to snow, and at noon, when the plaintiff was directed by the foreman to finish the work, there was about an inch of snow upon the roof. He worked there until between 3 and 4 o'clock, when he slipped and fell. He testified that he saw no ice there, that it was not freezing, and that the weather was inclined to be mild. The roof was pitched slightly, and there was nothing incident to the work at the time to indicate to the plaintiff a dangerous condition, and he admitted he was used to working under such conditions. A witness for the plaintiff, a fellow worker, testified that there was not enough snow upon the roof to trouble them, and that he saw no ice upon the roof until after the plaintiff fell. The defendant met this situation with proof that there was no ice upon the roof.

The legal question involved as to the master's liability, under these circumstances, was raised upon a motion to nonsuit, and a motion to direct a verdict, both of which motions were refused by the trial court, and the case is here upon exceptions to those rulings. The claim of the plaintiff is predicated upon the contention, as outlined in the brief, that, if the plaintiff did not know of the existence of the ice under the snow upon the roof, and could not by the exercise of reasonable care discern it, and that if the defendant by the exercise of reasonable care could have known of the ice so hidden and failed to possess himself of that knowledge, the defendant is liable for the damage. It is difficult to perceive how liability can be imposed upon the master for a failure to discover a condition which it is conceded was not within the power and trained experience of the plaintiff to observe and discover, and which in the legal postulate advanced to support the action could not be discovered by him in the exercise of reasonable care. The argument, in effect, superimposes upon the master the possession of a power of vision and a faculty of discernment and foresight to observe danger, which it denies to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the servant, and therein lies its fallacy as a legal contention. The negligence of the master, if it exist, must be predicated upon the neglect to observe some duty cast upon it by the law, and in this case it is difficult to perceive what the duty was. If it be said that the obligation was to give the employé a safe place wherein to work, that duty was discharged in legal contemplation when the plaintiff knowing from years of experience the nature of the work, and the dangers incident to it, and having the same opportunities of observation to say the least, as the master, undertook to perform the work in which the danger of slipping by accident in inclement weather naturally inhered in the discharge of the employment, and entered as a factor in the contract between the parties.

The risk the plaintiff took, therefore, in working upon the roof under such conditions, was necessarily an obvious risk, inherent in the nature of his employment and assumed by him as *quid pro quo* for the compensation he received. *McAndrews v. Burns*, 39 N. J. Law, 120; *Caffery v. Hedden & Sons*, 79 N. J. Law, 556, 76 Atl. 981. Underlying the doctrine of assumption of risk by an employé is the basic maxim *volenti non fit injuria*. Lord Herschell, upon the philosophy inherent in this maxim, applied it in *Smith v. Baker*, C. A. 360, where one agreed to take part in an operation necessitating the production of gaseous fumes injurious to health, and the court denied that a cause of action existed under the circumstances, and held that the employé assumed the risk of danger. It was also held to apply under the common-law relationship, but inapplicable under the English Employers' Liability Act of 1880 in *Thomas v. Quartermaine*, 18 Q. B. D. 685; and that case was followed and the same rule applied in *Baddely v. Granville*, 18 Q. B. D. 423. The learned editor of the English Ruling Cases states the modern application of the rule to be that: "If the danger is as well known or as manifest to the servant as to the master, the servant enters or continues in the employment at his own risk." 17 E. Ruling Cas. 239; citing *Ladd v. New Bedford R. Co.*, 119 Mass. 412, 20 Am. Rep. 331. The modern cases illustrative of the application of this principle are collected in valuable reference notes in 7 Ann. Cas. 430, and volume 12, p. 621, of the same work.

The most recent authoritative pronouncement upon this subject by this court is the case of *Mika v. Passaic Print Works*, 76 N. J. Law, 561, 70 Atl. 327, where the authorities in this state are collected by Judge Vroom in his opinion, and the doctrine enunciated that the rule of assumption of obvious risk by an employé persists in this state notwithstanding the dereliction of a statutory duty upon the part of the employer, which

duty was superimposed as a safeguard for employés under the provisions of the Employers' Liability Act of 1904 (P. L. p. 152). The line of divergence between the English courts and the law in this state, as settled in the *Mika* Case, arises, it will be perceived, entirely out of the effect to be given to the statutory duty imposed upon the master; but, as that question does not enter into this decision, it is sufficient to say that the common-law doctrine as herein outlined and illustrated by what may be said to be an uniformity of decision but at times a divergence of view in its application precludes a recovery in this case.

The judgment under review will be reversed.

RITTENHOFFER et al. v. CUTTER.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

ASSAULT AND BATTERY (§ 29*)—CIVIL ACTION—EVIDENCE—REPUTATION OF DEFENDANT.

In a civil action for damages for assault and battery committed by defendant in arresting the plaintiff, where the defendant pleads justification, the controverted issue on trial being the use of excessive force by the defendant, and where no moral element or element of malicious intent on the part of the defendant is involved, evidence of the reputation of the defendant as to peacefulness is not admissible in his behalf.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 42; Dec. Dig. § 29.*]

Error to Circuit Court, Middlesex County.

Action by Mary Rittenhoffer and Stephen Rittenhoffer against William Cutter. Judgment for plaintiffs, and defendant brings error. Affirmed.

Charles C. Hommann, of Perth Amboy, for plaintiff in error. Thomas Brown, of Perth Amboy, for defendants in error.

VREDENBURGH, J. This action was brought to recover damages for an assault and battery upon Mary Rittenhoffer, one of the plaintiffs (the wife), committed by the defendant in arresting her while she was trespassing upon his land engaged in collecting pieces of wood with intention, apparently, to appropriate them to her own use without his consent. To a declaration charging the defendant with assault and battery upon the said Mary Rittenhoffer, he pleaded (in addition to other pleas) specially justification, to the effect that the said Mary did steal, take, and carry away a quantity of firewood, the property of the defendant, wherefore he, who had view of the said offense, and his servant, at his request, gently laid their hands on the plaintiff, and did take her into their custody, so that they might carry and convey her be-

fore a justice of the peace of the county of Middlesex to answer the premises; that, the plaintiff vigorously resisting, they then and there bound her hands with a cord, and caused her to be carried and conveyed a distance of two miles to Perth Amboy. The declaration contains no averment that the defendant was actuated by malice or immoral purposes in the commission of the assault complained of.

The real issue presented by the pleadings, and actually tried before the court and jury, as the record shows, was whether the defendant and his servant in making the arrest had, as the plea avers, laid their hands on the plaintiff "gently," or had used excessive force and violence in so doing. We do not, after examination of the whole case, find that the trial court committed legal error in any judicial action embraced within the assignments of error. The only assigned error which seems to us in disposing of the case to present a question requiring consideration here is the refusal of the trial judge to charge the jury upon the request of the defendant that the jury might take into their consideration the reputation of the defendant as to peacefulness and law-abiding disposition. In civil actions for damages for assault and battery founded upon the arrest of the plaintiff by defendant, where justification is pleaded, and the question as to the use of unnecessary or excessive force in its making is the only issue, and where no moral element or element of malicious intent on the part of the defendant is involved, evidence of the reputation of the defendant for peacefulness is not admissible.

Prof. Wigmore in his late work on Evidence (vol. 1, § 64) states the general rule to be that the character of a party in a civil cause is not admissible, i. e., "that it cannot be used (as it is used for or against a defendant in a criminal case) to indicate the likelihood that the act in issue was or was not done." Among the decisions in support he refers to the case of *Thompson v. Church*, 1 Root (Conn.) 312, which was a *qui tam* action for an assault. The defendant's character as a malicious, quarrelsome man was rejected by the court, and it was said there that "the general character is not in issue. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause." So we may add a very good man may assert a clear, legal right in a very illegal and culpable manner. The case of *Markey v. Angell*, 22 R. I. 343, 47 Atl. 882, holding that in trespass for assault and battery evidence that defendants are men of peaceable character is inadmissible, sustains this general rule. The opinion there expressed by the court emphasizes the distinction to be observed where a bad motive or malice is involved, and draws attention to the case of *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec.

156. In this last-cited case the defendant was a schoolmaster, and the suit was brought for excessive punishment of the plaintiff, a pupil. Granting the right of a schoolmaster to punish scholars, the claim was made that the punishment in this case was excessive and malicious. The court held that the only question at issue in the case was whether the punishment inflicted by the master was excessive, not whether it was inflicted from malice; but added, *obiter dicta*, that in cases where the existence of malicious motive is the issue evidence of character might be admissible. The same author proceeds to say that certain reasons (given by him in the text) seem to justify the fixed policy of our law in excluding the character of the parties to a civil cause when offered to prove or disprove the doing of an act, and "that it is possible, however, to maintain that the reasons of policy should be yielded to in ordinary civil cases only, and that, where a moral intent is marked and prominent in the nature of the issue, the defendant's good moral character should be received as in criminal cases, that this view has in more modern opinions seemed to gain ground."

Among the pertinent decisions sustaining the general rule against the admissibility of such evidence are, *Attorney General v. Radloff*, 10 Exch. 97, where it is declared that "in criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime. But in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise in the very great proportion of such cases from the good character of the defendant that he did not commit the breach of contract or civil duty alleged against him." *Etting v. Bank*, 11 Wheat. 59, 6 L. Ed. 419; *Stow v. Converse*, 3 Conn. 345, 8 Am. Dec. 189; *Smets v. Plunket*, 1 Strob. (S. C.) 372; *Wright v. McKee*, 37 Vt. 163. In this last-cited case the court says: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors—especially if they are wealthy, influential, popular, or even only pleasant and obliging. The introduction of such evidence in civil causes wherever character is assailed would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that is easily manufactured, is liable to abuse, and, if in common use in the courts, is as likely to mislead as to guide aright." These views commend themselves to us. *Porter v. Seiler*, 23 Pa. 424, 429, 62 Am. Dec. 341; *Anthony*

v. Grand, 101 Cal. 235, 35 Pac. 859; Day v. Ross, 154 Mass. 14, 27 N. E. 676; Fahey v. Crotty, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305; Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508. This case holds that in an action for false imprisonment the plaintiff's character is inadmissible even though the offense set up in justification involves a crime.

In the case sub judice, there was neither allegation nor evidence tending to show that the defendant in arresting the plaintiff was actuated by either immoral or malicious motives, nor by any other than a lawful purpose, nor do such motives appear in the circumstances of the assault and battery which the jury have found he committed upon the plaintiff in arresting, detaining, and conveying her before a magistrate, but there was ample evidence to warrant the jury in finding that the defendant had in accomplishing the arrest used unnecessary and excessive violence.

The judgment below should be affirmed.

MULHOLLAND v. JONES.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

An answer to a question which required the plaintiff to testify as to his mental attitude respecting his willingness to finish a contract entered into by him with the general contractor of the defendant, upon the credit of such general contractor, where the plaintiff had previously testified that he refused to perform the work for the general contractor, was neither harmful nor prejudicial to the defendant, since it added nothing to the probative force of the resultant act from the mental operation to which the plaintiff had already testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. § 1050.*]

2. FRAUDS, STATUTE OF (§ 23*) — CONSTRUCTION OF CONTRACT.

Whether the form of expression, "I will see that you are paid," is or is not a collateral promise necessarily depends upon circumstances surrounding the making of such promise. The real test is to whom was credit given.

[Ed. Note.—For other cases, see Frauds, Statute of; Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

Error to Supreme Court.

Action by George J. Mulholland against Henry L. Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

R. V. Lawrence, of Freehold, for plaintiff in error. Johnston & Conover, of Asbury Park, for defendant in error.

KALISCH, J. The defendant, Jones, entered into a contract in writing with one Archibald for the building of a house. The contract was filed in the office of the clerk of the county where the building was to be

erected. The effect of such filing was to prevent anybody from obtaining a lien upon the building and curtilage, except Archibald. Archibald subcontracted the plumbing work to Mulholland, the plaintiff, for which work Mulholland was to receive \$390; \$150 when the rough plumbing was done, and the balance when the fixtures were installed. Mulholland finished the rough plumbing for which he was paid, according to the contract, the sum of \$150. But, before putting in the fixtures, the plaintiff learned that there was going to be trouble between the owner and the builder, and that the builder was probably going to default upon his contract. And he thereupon refused to go further under his subcontract with Archibald. The plaintiff testified that the defendant came to him and wanted him to finish the plumbing, but he refused, because he was afraid he would lose his money or have to wait a long time for it; and that he said to the defendant, "Understand, Mr. Jones, I don't want to complete that work now, because I would be out of my money all the time, and anyway I don't want to finish the job; I don't want anything more to do with the job; don't want to put the finish on"; that defendant replied, "You go ahead and get your men up here and do that job for me and I will see that you are paid." And the plaintiff further testified that the defendant said, "You go ahead and finish this work and I will see that you are paid for it when your work is completed. When you get your work completed, I will see that you are paid."

The trial judge charged the jury that it was immaterial whether the form of expression used was, "I will pay you," or "I will see that you are paid"; if it appeared, in fact, that the plaintiff did the work relying upon the strength of defendant's promise, he was entitled to a recovery against him. The jury found in favor of the plaintiff.

The case is under review before us on a writ of error, and several errors have been assigned for a reversal of the judgment. We shall proceed to consider them in the order in which they have been presented.

[1] 1. It is argued that the court erred in permitting the following question to be answered by the plaintiff, "Would you have done the work on that house if it had not been for this new arrangement with Mr. Jones?" The claim made is that this question was improper, because the defendant in error had entered into an entire contract with the contractor Archibald for this precise work, and was therefore obligated to perform it. The question obviously called for the plaintiff's mental attitude concerning his intention to do or not to do the work for the contractor. But, as the plaintiff had already testified that he had absolutely refused to do the work and complete his contract,

it was a superfluous task to elicit the plaintiff's mental operation or attitude that had materialized into the fact of his refusal to proceed with the work for the contractor. The answer thereto, by the witness, in the negative added nothing to the probative force of the resultant act from the mental operation, to which the witness had already testified, and therefore we are unable to perceive how it could have been either harmful or prejudicial to the defendant.

2. It appears that, at the close of the case, a motion was made by the counsel for the defendant below to direct a verdict in favor of the defendant, because the pleading of the plaintiff below based the liability of the defendant upon his assumption of the balance due upon the original contract between the contractor and the plaintiff. A reference to the declaration reveals that the plaintiff relied also upon the common counts contained therein, and on a particular statement therein for work done and performed and materials furnished by the said plaintiff, at the special request and promise of said Jones to pay the same. The objection is not well founded in fact.

[2] 3. The court charged the jury: "I do not see that it makes any difference whether he said, 'I will pay you,' or 'I will see that you are paid'; because you must take the language in connection with the surrounding circumstances." What those circumstances were have been already set out and need not be repeated here. The defendant attacks the correctness of the ruling of the trial judge. The argument advanced is that the second form of expression is a promise to pay the debt of another, and therefore not binding under the statute of frauds. Whether the form of expression, "I will see that you are paid," is or is not a collateral promise necessarily depends upon circumstances surrounding the making of such promise. The real test is to whom was credit given. The form of expression is not controlling, if it appears that the promisee acted upon the promise and gave credit to the promisor. In the case, sub judice, there was no debt due from Archibald to the plaintiff. The plaintiff had been paid for the work he had performed. He refused to furnish materials and complete the contract. He refused to give any credit to the contractor Archibald. It is true that as between the plaintiff and Archibald there was a breach of contract by the plaintiff, but surely this circumstance goes to strengthen the plaintiff's claim that he refused to give any further credit to Archibald. The court very properly left it to the jury to say whether, from what was said and the surrounding circumstances, credit was given to the defendant.

But considering that there was an obligation existing from the plaintiff to Archibald, the rule laid down by Chief Justice Green in

Kutzmeyer v. Ennis, 27 N. J. Law, at page 376, is the true legal rule that must control this case, and which is stated to be, by that learned jurist, as follows: "The rule is that, where the promise to pay the debt of another is founded upon a new consideration, and this consideration passed between the parties to the promise, and gives the promisor a benefit which he did not enjoy before, and would not have possessed but for the promise, then it will be regarded as an original promise, and therefore will be enforced, though not in writing. In that case the evidence tended to show, and if the jury believed the witness did show, that, though the work was originally undertaken by Ennis, at the instance of the contractor, yet he refused to proceed, and the work was stopped until Kutzmeyer promised payment. The work was not done for a third party, but for Kutzmeyer himself. He was interested in the completion of the work. He received the benefit of it, and he had it in his power to indemnify himself for the advances to Ennis by withholding the money from the contractors." The principle laid down in this case was approved in Cowenhoven v. Howell, 36 N. J. Law, 326, by an opinion of Beasley, C. J., and by this court in Hartley v. Sandford, 66 N. J. Law, 630, 50 Atl. 454, 55 L. R. A. 206, by an opinion of Dixon, J.

4. We find no merit in the fourth assignment which relates to what the trial judge said to the jury regarding a stop notice to the effect that it was absolutely valueless and of no effect. The judge was dealing with the defendant's claim that his (the defendant's) promise was conditioned on the giving of the stop notice then, and he pointed out to the jury, in connection therewith, the utter futility of the functions of a stop notice when there was no debt due from the contractor to the plaintiff, and left it to the jury to determine whether it was likely that a reasonable man would make such a bargain when they came to consider the credibility of the testimony. There was no error in this. The last assignment attempts to challenge the nature of the judge's charge, but, having no exception to support it, will not be considered.

The judgment under review should be affirmed.

WOOLEY v. CRESCENT AUTOMOBILE CO.

(Supreme Court of New Jersey. July 13, 1912.)

(Syllabus by the Court.)

FRAUDULENT CONVEYANCES (§ 308*)—CHANGE OF POSSESSION—QUESTION FOR JURY.

Where a vendor, having executed a bill of sale for an automobile, retained possession of it and operated and controlled it as his own, and the vendee failed to assert his title until levy upon the car under an execution at the suit of a creditor of the vendor, held, that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

inquiry whether the transaction was fraudulent or not, arising out of the absence of change of possession after the sale, presented a question of fact for the jury to determine.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 923-940; Dec. Dig. § 308.*]

Appeal from District Court of Jersey City.

Action by Lindsley E. Wooley against the Crescent Automobile Company. Verdict for plaintiff, and defendant appeals. Reversed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Frank W. Hastings, Jr., of Jersey City, for plaintiff. Fisk & Fisk, of Jersey City, for defendant.

MINTURN, J. The suit was in replevin to recover possession of an automobile, and was tried before the district court and a jury, resulting in the direction of a verdict in favor of the plaintiff, from which direction the defendant appeals. The plaintiff claimed title by virtue of a bill of sale, executed to him by Alfred H. Howe, who was indebted to him for sundry advances in the sum of \$395.98, which sum represented the consideration named in the bill of sale. The state of the case shows that Howe, being unable to settle this indebtedness, turned the automobile over to the plaintiff, who, being unable to use it at the time and being about to enter upon a business trip, arranged with Howe to retain possession of it, and use it until the plaintiff's return, upon consideration that Howe would assume and discharge the expenses incident to its maintenance and operation. Thereafter, and while the car was in the garage where Howe had previously housed it, the defendant brought suit against Howe, recovered a judgment, and, upon a levy made under execution, took the car into its possession, and, upon demand by the plaintiff, refused to surrender it, and hence this suit.

The plaintiff maintains his title to the car upon the ground that the bill of sale was executed to him in good faith for a valuable consideration. The defendant attacks the claim thus made upon the ground that the sale by Howe was void under the twelfth section of the statute of frauds, and upon the ground that the plaintiff was not a purchaser in good faith for value. If the validity of this contention were to be determined by the decisions defining good faith and value, according to the principles of the common law to many of which adjudications we are referred, we would have no difficulty in acceding to the proposition that those were questions of fact, the solution of which was for the jury. But this judicial rule has been superseded by the statutory rule contained in the Sales Act (P. L. 1907, p. 341, § 76), which defines value, *inter alia*, as "an antecedent or pre-existing claim whether for mon-

ey or not," and defines "good faith" as an act "done honestly whether it be done negligently or not."

Tested by these rules, we are unable to find in this case any positive proof of mala fides upon the part of the plaintiff when in settlement of a pre-existing claim he accepted title to the automobile, and, if those were the only circumstances in the case upon which the allegation of fraud could be predicated, we should be inclined to affirm the judgment. But we are met with the undisputed fact in the case that, while there was an executed sale within the meaning of the Sales Act, the vendor by retaining possession of the car after the sale has raised a presumption against the legality of the transaction, which, until rebutted and explained, *prima facie*, at least, estops the vendee from placing himself in the category of a bona fide purchaser. In 1861 Chief Justice Whelpley, speaking for this court, and after reviewing the authorities upon the subject, said: "The question in every case is whether the act done is a bona fide transaction, or a trick and a contrivance to defeat creditors. The possession by the vendor of personal chattels after the sale is not conclusive evidence of fraud. In all cases, whether fraudulent or not, it is a question of intent to be settled as a question of fact by a jury." *Pancoast v. Miller*, 29 N. J. Law, 254, and cases cited.

The defendant, under this rule, was entitled to have the testimony of the plaintiff and his witnesses, explaining the possession of the car by Howe and the circumstances attending such possession, submitted to the jury for the purpose of having their judgment upon the question whether the rebuttal thus established is sufficient in fact to overcome the presumption created by law. This course not having been followed in the case at bar, the judgment is reversed, and a venire *de novo* is awarded.

PERKINS-GOODWIN CO. v. HART.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

GUARANTY (§ 1*)—CONSTRUCTION OF CONTRACT—"GUARANTEE THE PAYMENT."

To "guarantee the payment" of a sum of money, in an appropriate context, imports a direct undertaking to pay the sum in a given event and not a mere promise to become answerable for the default of another.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3185-3186.]

Error to Supreme Court.

Action by the Perkins-Goodwin Company against John Hart. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon a demurrer to special pleas, the Supreme Court filed the following:

"Per Curiam. The declaration alleged in substance the execution of an agreement between the plaintiff company and the E. R. Ramsey Company for the sale of certain lands of the plaintiff situate in the state of New York whereby the Ramsey Company covenanted to make certain payments to the plaintiff representing the consideration stated in the agreement of sale. One of the payments, known as the 'second,' was to be the sum of \$7,000, and the payment of this sum the defendant guaranteed in writing over his signature in consideration of the execution of the agreement of sale by the plaintiff. The second payment was not made by the Ramsey Company, and this suit was instituted upon the defendant's said contract of guaranty.

"Defendant filed four pleas, one, the general issue, and three in bar. The pleas in bar are directed to the denial of the legal existence of the contract of sale, and to these pleas the demurrer was filed.

"For the purposes of this suit, it is immaterial whether the contract of the plaintiff with the Ramsey Company was valid or not. The effect of the plea is to admit the allegations of the declaration, wherein it is charged that the consideration of the guaranty was the execution by the plaintiff of the contract of sale with the Ramsey Company and the acceptance by plaintiff as quid pro quo of the written guaranty of the defendant.

"The legal effect of the guaranty was that the defendant would pay the sum of \$7,000 called for by the contract if the Ramsey Company failed so to do. It is immaterial, for the purpose of recovery of the guaranty, what were the causes of the Ramsey Company's failure to pay. The test of defendant's liability is the failure in any event of the Ramsey Company to pay. *Mann v. Eckford*, 15 Wend. (N. Y.) 502; *Reinsen v. Graves*, 41 N. Y. 471.

"The plaintiff is entitled to judgment on the demurrer."

Carrick & Wortendyke, of Jersey City, for plaintiff in error. Brinkerhoff & Fleider, of Jersey City, for defendant in error.

GARRISON, J. Judgment on demurrer to special pleas having been entered for the plaintiff, the case went to a trial on the general issue, upon which testimony offered by the defendant in support of the pleas that had been overruled was excluded. Final judgment having been entered for the plaintiff, the defendant brings this writ of error assigning as error the order sustaining the demurrer. This properly raises the questions the plaintiff in error has argued.

The judgment final is affirmed for the reasons stated in the opinion of the Supreme Court sustaining the demurrer to the pleas.

That opinion, it is true, speaks of the defendant's contract as one of "guaranty" which is the term used in the contract of the defendant which is in these words:

"In consideration of the execution of the within contract by Perkins Goodwin Company, I hereby guarantee the payment to them on October 20, 1909, of the sum of \$7,000, as provided for by the same. [Signed] John Hart."

This is a direct promise by the defendant to pay the plaintiff in a given event based upon a specified consideration moving from the plaintiff and is entirely independent of the enforceability of the "within contract" against the other party thereto. The term "guarantee" in such a context imports an undertaking to pay in the given event, which is one of its meanings (*Webster's New International Dictionary*), and not a promise to be answerable for the default of another, which is its technical meaning in an appropriate context. The former is evidently the sense in which the term is employed in the opinion, which, guarded by this note of explanation, properly disposes of the questions argued by the plaintiff in error who, having promised to pay the stipulated sum to the defendant in error if it would execute the "within contract" with the E. R. Ramsey Company, sought to avoid its promise, after the consideration had passed, upon the ground that the execution of such contract by the E. R. Ramsey Company did not bind that corporation. It was not pretended that the contract was illegal, or immoral, or against public policy, or otherwise unlawful, but only that its execution by the secretary and treasurer of the Ramsey Company was not duly authorized. It is admitted that the defendant in error lawfully executed the contract, which was the sole consideration and one of the events upon which the plaintiff in error predicated his promise to pay; the other being the failure of the Ramsey Company for any reason to pay the \$7,000.

For this reason, we do not consider the question of the legal obligation of the guarantor of a contract defectively executed by its primary obligor.

The judgment of the Supreme Court is affirmed.

LAUTER v. HEDDEN CONST. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—WARNING.

Where the danger which causes an injury to a workman is obvious and normally incidental to the work upon which he is engaged, and not of such an unusual or unexpected occurrence or character as to entitle him to receive warning before it happens, and no system of warning had in fact been instituted, the ab-

sence of warning in the particular instance complained of is not evidence of negligence on the part of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

Minturn, Kalisch, and Treacy, JJ., dissenting.

Error to Circuit Court, Essex County.

Action by Joseph Lauter against the Hedden Construction Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wilbur A. Helsley, of Newark, for plaintiff in error. Lindabury, Depue & Faulks, of Newark (Kinsley Twining, of Newark, on the brief), for defendant in error.

WHITE, J. The plaintiff, who had been a painter for 24 years, while in the employ of defendant (who had a contract to paint a 12-story office building which was occupied and in operation), and while painting the inside of the walls of the elevator cable shaft of said office building, was injured by having his arm caught between a two-inch wire elevator cable and the large revolving wheel over which the cable ran as the elevators, operated by the owner, in separate neighboring shafts moved upward and downward, transporting the tenants to and from their offices on the various stories of said building. The cable shaft contained a number of these wheels and cables running on two walls opposite each other, and was walled off separately from the shafts within which the elevators ascended and descended, so that the plaintiff at work in the cable shaft could not see the elevators start, nor could the persons operating the elevators see him at work in the cable shaft. He could, however, and did, see the cables moving upward and downward and the wheels, over which they ran, turning around, as they did so, in the shaft where he was working, and his testimony shows that he saw them doing this practically continually during a period of about six weeks while he was working on this job. He, with two other painters, had already given this shaft three coats of paint, each coat taking five or six days to put on, and were about half through putting on the fourth or enamel coat when the accident happened. During all of this time the cables had been moving and the wheels turning exactly as when the accident occurred, and no warning had ever been given by any one before such moving and turning took place. It is true that the plaintiff testified that he did not see this particular wheel turn during the hour he had been working the morning the accident happened, but he said that he saw other wheels turning in the shaft that morning, and he does not pretend that he thought, or had any reason to think, that the elevators were not running that day as usual, or that this particular wheel had been put out of commission with notice to

him that he might treat it as "dead," so that he would be entitled to receive a warning before it was again put into service. The uncontradicted evidence clearly indicates that the moving of the cable and the turning of the wheel which caused the injury were in no wise extraordinary, or "exceptional," but, on the contrary, that they were part of the normal conditions prevailing in that shaft while these painters were working there, and that these conditions were perfectly obvious to and thoroughly known by the plaintiff. Of course, there was danger that the plaintiff would be injured if he put his arm between the turning wheel and the moving cable on the intake side, or if he permitted the sleeve of the garment he was wearing to get caught in the same place and to pull his arm in, but this was a clearly obvious danger which he thoroughly understood and one easily avoided by proper care on his part. The wheels and cables were a foot or more away from the walls, and there was no difficulty in painting the walls behind them without getting caught.

The case is wholly lacking, therefore, in the element of a system of warnings having been established and upon which consequently the party injured had a right to rely, as in *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834, and in *Harmer v. Reed Apartment Co.*, 68 N. J. Law, 332, 53 Atl. 402, which, although not a master and servant case, is illustrative of this principle; and it is also equally lacking in the element of an "exceptional" or "extraordinary" condition requiring the establishment of a system of warnings, as in *Ondis v. Great Atl. & Pac. Tea Co.*, 81 Atl. 856. It does fall clearly, however, not only within, but far within, the doctrine laid down in *Caffery v. Hedden*, 79 N. J. Law, 556, 76 Atl. 981, in which this court said: "Where the risk is one ordinarily attending the service, or where the risk is known or by the reasonable exercise of ordinary observation and care would have been known and appreciated, the legal presumption is that the workman undertakes the employment on the terms of encountering the danger, though he may have no actual knowledge of it." This is not a case of an elevator plant being shut down in order that the painters might go into its cable shaft to paint it, in which case they would clearly have the right to be warned before the plant were started up again, because that would be an "extraordinary" or "exceptional" occurrence so far as they were concerned; nor is it the case of elevators being run occasionally only, and at unexpected intervals, with a system of warnings established to give notice of what the workmen were not expecting unless so warned. Instead of either of these, it was a case of the painting of the walls of an elevator cable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

shaft of an office building, with the elevators in regular and practically constant operation, which conditions were perfectly obvious to these painters in the cable shaft where they had been working and had constantly observed them for something like six weeks. Under such circumstances, the danger forms a part of the normal and expected conditions of the service, and the absence of a warning in the particular instance complained of is not evidence of negligence on the part of the employer.

The judgment of nonsuit must be affirmed.

MINTURN, KALISCH, and TREACY, JJ., dissenting.

HARRINGTON et ux. v. JAGMETTY et ux.
(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 102*)—TORTS OF WIFE
—LIABILITY OF HUSBAND.

Since the passage of the married women's acts [2 Gen. St. 1895, p. 2017, § 26], a husband is not liable for the torts of his wife growing out of the conduct by her of her own business, or arising from the management by her of her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 378-380; Dec. Dig. § 102.*]

Swayze, Trenchard, Parker, and Vroom, JJ., dissenting.

Error to Circuit Court, Atlantic County.

Action by Harry W. Harrington and Anna Harrington against Joshua Jagmetty and Susan A. Jagmetty. Judgment for defendants, and plaintiffs bring error. Affirmed.

Two suits were instituted in the circuit court of Atlantic county against Joshua Jagmetty and Susan A. Jagmetty, his wife, one by Anna Harrington to recover for personal injuries received by her in an elevator accident at the hotel known as Elmont Hall, wherein she was a guest, and the other by Harry W. Harrington, her husband, for loss occasioned to him thereby. The two suits were tried together. The trial judge directed a verdict in favor of the defendant Joshua Jagmetty, and the jury disagreed as to the liability of the defendant Susan A. Jagmetty.

The only assignment of error rests upon the exception taken to the action of the court in directing the jury to render a verdict in favor of the defendant Joshua Jagmetty. Mrs. Harrington, the female plaintiff, for the purpose of reaching her room on the top floor of the hotel, took the elevator. When the top floor had been reached, the car was brought to a full stop, and the operator opened the door and stepped out. The plaintiff attempted to leave the car also, and had placed one foot on the landing floor, when the elevator started downward, and, when the cage had descended about half its

height below the floor, the operator called to her to step back and then pushed her back into the car, and then he stopped the movement of the car. Mrs. Harrington meanwhile had fallen and fractured her leg in two places at the ankle, and sustained other injuries.

The declaration alleges that the two defendants conducted and carried on the business of hotel proprietors, and as such maintained and used the elevator for transporting the guests of the hotel, and were negligent in failing to provide a safe appliance for keeping the elevator at rest when stopped by the operator.

The plaintiffs offered a lease for the hotel premises for five months to both defendants; the demise covering the date of the accident.

Ohandler & Robertson, of Atlantic City, for plaintiffs in error. E. G. Schwinghammer, for defendants in error.

VOORHEES, J. (after stating the facts as above). Passing any technical objections to the entry of this judgment, and considering the case upon its merits, it seems clear that the direction of the verdict was proper.

Liability was rested upon the fact that the two defendants were together carrying on the business and conducting the hotel. To prove it, the lease was offered. The clerk of the hotel testified that he was employed by Mrs. Jagmetty, from whom he received most of his instructions, but that her husband had once in a while given him orders, and had paid him.

The defendants each testified that the husband had no connection with the business, which was entirely the wife's, as was the capital employed therein. There was no attempt to contradict this proof. The testimony conclusively showed that the hotel was run exclusively by the wife. The effect of the lease was not to the contrary.

Whatever may have been the consequence of the necessary joinder of husband and wife in an action for a tort committed by the wife before the passage of the statutes relating to married women, since the passage of those acts, the husband is not liable for the torts of his wife, growing out of the conduct by her of her own business, or arising from the management by her of her own separate property. It was so held by the Supreme Court in *Wolff & Co. v. Lozier*. 68 N. J. Law, 103, 52 Atl. 303, and we approve the reasoning of that case on that point.

The result is that the husband was not responsible for the injury received by the plaintiff, and the direction of the verdict in the defendants' favor was proper.

The judgment under review will be affirmed.

SWAYZE, TRENCHARD, PARKER, and VROOM, JJ., dissent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CAMPBELL v. AKARMAN.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

WITNESSES (§ 159*)—"TRANSACTION WITH DECEASED."

The test as to what is a "transaction with" the deceased so as to come within the statutory prohibition has been defined by this court in *Van Wagenen v. Bonnot et al.*, Administrators, 74 N. J. Eq. 843, 70 Atl. 143, 18 L. R. A. (N. S.) 400, and, measured by that test, certain testimony given by the plaintiff in this action was erroneously admitted.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.*]

For other definitions, see *Words and Phrases*, vol. 8, pp 7060-7062; vol. 8, pp. 7818-7819.]

Error to Circuit Court, Monmouth County.

Action by Frank Campbell against John Nelson Akarman. Judgment for plaintiff, and defendant brings error. Reversed.

R. V. Lawrence, of Freehold, for plaintiff.
Bourgeois & Oulomb, of Atlantic City, for defendant.

MINTURN, J. The suit was brought to recover a balance due upon a contract for services performed by the plaintiff for Mrs. Annoria Pall, the defendant's intestate. The trial resulted in a verdict for the plaintiff.

Ten assignments of error have been filed by defendant's counsel upon exceptions taken during the progress of the trial. For the determination of the review before us, it is necessary only to consider the validity of those exceptions that are directed to the trial court's ruling upon questions intended to elicit information concerning transactions between the plaintiff and the deceased. The executor had not testified or offered himself as a witness to testify to any such transactions so as to pave the way for any testimony upon the subject by the plaintiff within the exception prescribed by the general rule excluding such testimony by our statute. P. L. 1900, p. 363; C. S. p. 2218, § 4. In this posture of the proof, after detailing his relations with the deceased, the plaintiff, upon direct examination, was asked and allowed to answer over objection and exception by defendant's counsel to their legality under the statutory prohibition, the following, among other questions of similar import: "Q. Were you paid for your services? Q. Were you paid anywhere else any amount of money? Q. Go ahead and tell us how much you were paid?" The following receipt, signed by the plaintiff, was produced, and shown to the plaintiff: "Received from Mrs. A. A. Pall, from July 2nd to Nov. 14th, 1908, in full \$195." She was then asked: "Q. Did you ever receive any other moneys? Q. Did you receive any other moneys than the \$195 there in that receipt? Q. Did that pay in full?"

We entertain no doubt whatever as to the purpose of these and other inquiries of a like nature contained in the record. That the object in thus framing them was to evade the statutory provision prohibiting the giving of testimony by a party to the action "as to any transaction with or statement by any testator or intestate represented in said action" seems to us manifest. This statutory provision has been under consideration by this court upon several occasions, and its meaning and the declared purpose of the Legislature in enacting it have been defined and settled in several cases. In the comparatively recent adjudication of *Van Wagenen v. Bonnot et al.*, Administrators, 74 N. J. Eq. 843, 70 Atl. 143, 18 L. R. A. (N. S.) 400, this court, speaking by Mr. Justice Parker, said: "The test laid down in our decisions in ascertaining what is a 'transaction with' the deceased about which the other party to it cannot testify is to inquire whether in case the witness testify falsely the deceased if living could contradict it of his own knowledge."

That the questions here under consideration if subjected to that test would fall under the prohibition of the act to us seems indubitable, and the judgment below, for that reason, must be reversed.

STASSETT v. TAYLOR IRON & STEEL CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

1. MASTER AND SERVANT (§ 123*)—INJURIES TO SERVANT—APPLIANCES AND PLACES TO WORK—LATENT DEFECTS.

The general rule is that a master is not liable for injuries resulting to a servant by reason of latent defects of which he is ignorant, and which could not be discovered in the exercise of reasonable care and diligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 233, 234; Dec. Dig. § 123.*]

2. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—INSPECTION.

In the absence of evidence that an inspection would have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the master liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

3. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—INSPECTION.

Reasonable care in the matter of inspection, when inspection is required, requires a master to make such an examination and test as a reasonably prudent man would deem necessary, under the same circumstances, for the discovery of possible defects, and he is not required, unless put upon notice as to the possible existence of defects, to employ unusual or extraordinary tests.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

4. MASTER AND SERVANT (§ 106*)—INJURIES TO SERVANT—STATUTORY PROVISIONS.

Paragraph 1 of section 1 of the Employer's Liability Act of 1909 (P. L. p. 114) does not make a defendant company liable to its servant for an injury sustained by reason of a latent defect in a machine which the company by its servant was unloading from a railroad freight car for another company that was under contract to install the machine in the defendant company's plant, which machine, at the time of the accident, was neither connected with nor used in the business of the defendant company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.*]

Error to Circuit Court, Hunterdon County.

Action by Jacob Stasset against the Taylor Iron & Steel Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William O. Gebhardt, of Jersey City, for plaintiff in error. Vredenburg, Wall & Carey, of Jersey City, for defendant in error.

TRENCHARD, J. This writ of error brings up for review a judgment in favor of the defendant upon a verdict directed by the judge in a suit to recover for personal injuries brought in the Hunterdon circuit. The plaintiff below, Jacob Stasset, was in the employment of the defendant, an iron manufacturing company, and was hurt by the falling of a machine which he was engaged in removing from a railroad car to the ground. He was an experienced "craneman," being what is called the "hooker on" of the crew. The machine, which he was helping to move by the use of the crane, was a motor, with a ring bolt attached for the purpose of lifting. As the motor was being thus removed from the freight car of the Central Railroad Company by the use of the crane, and while the plaintiff stood beside it for the purpose of steadying it, the ring bolt broke, causing the plaintiff's injury.

The sole question raised by the assignments of error is the legal propriety of the direction of a verdict for the defendant. Our examination of the record, in the light of the argument of counsel, results in the conclusion that there was no error in such action of the trial judge. It is evident that, as claimed by the plaintiff, the cause of the accident was a latent defect in the eye-bolt. The gravamen of the action, as set forth in the declaration, is that the defendant negligently failed to inspect the machine or to warn the plaintiff of such latent defect, which was known, or ought to have been known, to the defendant, and was unknown to the plaintiff.

[1] Now the general rule is that a master is not liable for injuries resulting to a servant by reason of a latent defect of which he was ignorant, and which could not be discovered in the exercise of reasonable care

and diligence. 26 Cyc. 1145. The allegation that the latent defect in the bolt was known to the master has no proof to support it.

[2] Nor do we think there was any evidence that reasonable care in inspection would have disclosed the defect, and, in the absence of such evidence, the mere failure to inspect would not warrant holding the master liable. *Atz v. Newark Lime, etc. Co.*, 59 N. J. Law, 41, 34 Atl. 980; *Essex County Electric Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427.

[3] Reasonable care in the matter of inspection, when inspection is required, requires the master to make such an examination and test as a reasonably prudent man would deem necessary under the same circumstances for the discovery of possible defects, and he is not required, unless put upon notice as to possible existence of defects, to employ unusual or extraordinary tests. 26 Cyc. 1139. The defendant had no manner of notice of the possible existence of the latent defect in the bolt, and plainly it was of such a character that an examination, such as an ordinarily prudent man would deem necessary, would not have disclosed it. It was quite like that which gave rise to the accident in *Atz v. Newark Lime, etc. Co.*, 59 N. J. Law, 41, 34 Atl. 980. Moreover, the motor, with the ring-bolt attached for use in lifting, had been manufactured by, and was fresh from the hands of, the Darby Engineering Company, and that company was shown by the proofs to have been a reputable and experienced manufacturer, who was under contract to install the motor in the defendant's plant. At the time of the accident that contract was not complete. The motor was being moved by the defendant from a railroad freight car for the Darby Company, to be later installed by the Darby Company. Whether, under these circumstances, the defendant was under any obligation to inspect the bolt before putting it to the use for which it was admittedly supplied by a reputable and experienced manufacturer, is a question not now calling for decision. But clearly, to paraphrase the remarks of Mr. Justice Swayne in *Bauman v. Cowdin*, 75 N. J. Law, 193, 66 Atl. 914, respecting a quite similar situation, the latent defect in the bolt, which was the cause of the accident, if attributable to negligence, was due to the negligence of the Darby Engineering Company on whose experience and reputation the defendant had a right to rely.

[4] The contention of the plaintiff that his case is aided by paragraph 1 of section 1 of the Employer's Liability Act of 1909 (P. L. p. 114) is not well founded. That paragraph deals with cases where personal injury or death results to an employé "(1) by reason of any defect in the condition of the place, ways, works, machinery or plant connected

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

with or used in the business of the employer, which arose from, or had not been discovered or remedied, owing to the negligence of the employer or of any person in the service of the employer, and entrusted by him with the duty of seeing that the place, ways, works, machinery or plant were in proper condition." We have pointed out that at the time of the accident the defendant was unloading the motor from a railroad freight car for the Darby Company who was under contract to install it in the defendant's plant. It is plain that the paragraph quoted does not make the defendant responsible for a latent defect in the machine which was neither connected with nor used in the business of the employer. The contention that the case of the plaintiff is aided by paragraph 2 of section 1 of the Act of 1909 may be disposed of with the remark that there is no allegation in the declaration that the accident was caused by reason of the negligence of a superintendent, or any person acting as such.

Finding no error in the action of the trial judge in directing the verdict, the judgment of the court below will be affirmed.

RIVERS v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

2. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—"FORESIGHT."

By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

For other definitions, see Words and Phrases, vol. 1, p. 339.]

3. CARRIERS (§ 290*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A railroad company is under no legal obligation to provide vestibuled trains for its passengers, but, having done so, it is its duty to use reasonable care to maintain them in a safe condition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168, 1169, 1177, 1178, 1180, 1182-1184; Dec. Dig. § 290.*]

4. CARRIERS (§ 290*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

When a railroad company has assumed to safeguard passengers using the vestibule between cars, while the train is running between stations, by providing a trapdoor to cover the

space over the steps, it is bound to use reasonable care to maintain it in proper position.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1168, 1169, 1177, 1178, 1180, 1182-1184; Dec. Dig. § 290.*]

5. CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—QUESTION FOR JURY.

It was open to the jury to find that the plaintiff, a passenger on the defendant's vestibuled train from Newark to Jersey City, was not furnished a seat in the car which he boarded; that, when the train was four-fifths of a mile from the Jersey City terminal, he attempted to pass through the vestibule, which was not lighted, to the next car for the purpose of obtaining a seat; that in passing through the vestibule he was precipitated to the ground and injured because the trapdoor in the platform was open. *Held*, that the question of the negligence of the defendant was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

6. CARRIERS (§ 324*)—CARRIAGE OF PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE.

Section 39 of the General Railroad Law (P. L. 1903, p. 666) does not preclude recovery for an injury sustained by a passenger using the platform of a vestibuled train for the purpose of going to the next car to obtain a seat which the company had failed to furnish in the car which he originally entered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1347; Dec. Dig. § 324.*]

7. CARRIERS (§ 320*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—QUESTION FOR JURY.

The question whether, in the exercise of the high degree of care required of a common carrier of passengers, a railroad company should have anticipated that a passenger would, when within four-fifths of a mile from the end of his journey, attempt to pass from one car to another of a vestibuled train for the purpose of looking for a seat which the company had failed to furnish in the car which he originally entered, is for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1347; Dec. Dig. § 320.*]

Swayze, Parker, Vroom, and White, JJ., dissenting.

Error to Supreme Court.

Action by William J. Rivers against the Pennsylvania Railroad Company. From a judgment of the Supreme Court (80 N. J. Law, 217, 76 Atl. 455) reversing a judgment for plaintiff, he brings error. Reversed, and judgment of the circuit court affirmed.

Clarence Kelsey, of Jersey City, for plaintiff in error. Vredenburgh, Wall & Carey, of Jersey City, for defendant in error.

TRENCHARD, J. The plaintiff below, William J. Rivers, brought this suit to recover damages for personal injuries sustained while a passenger on the defendant's train. The evidence at the trial justified the jury in finding, if they saw fit, the following matters of fact: The plaintiff at about 11 o'clock at night boarded an express train of the defendant company at its Newark station, to be carried to Jersey City. The train

consisted of six cars, the four rear coaches being vestibuled. Rivers entered the car next to the last by the rear platform. He was unable to obtain a seat because they were all occupied, and so, with several other passengers, stood in the aisle. After the train had proceeded some distance from Newark, and was about four-fifths of a mile from the Jersey City terminal, its next and last stop, Rivers started to go into the next car for the purpose of obtaining a seat. As he stepped on the platform of the vestibule, which was not lighted, there was a sudden "jerk" of the train, and, as he endeavored to balance himself with his right foot, he stepped into space and plunged down the steps and fell upon the roadbed, because the trapdoor, which, when in place, covered the space over the steps, had been removed by an employé of the defendant company after the train left Newark. The suit was brought in the Hudson circuit, and resulted in a judgment for the plaintiff. The defendant took a writ of error to the Supreme Court, where such judgment was reversed (80 N. J. Law, 217, 76 Atl. 455), and this writ of error brings under review such judgment of the Supreme Court.

We are of opinion that the judgment in the circuit court should have been affirmed. The plaintiff's action was grounded upon the alleged negligence of the defendant company in leaving open the trapdoor at the time and place of the plaintiff's injury.

[1] Generally speaking, the legal duty of the defendant is well settled. A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.

[2] By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. *Hansen v. North Jersey, St. R. Co.*, 64 N. J. Law, 686, 46 Atl. 718. As we have pointed out, the plaintiff complains that the defendant did not use that high degree of care required of it by law in respect to the condition of the vestibule.

[3] Now a railroad company is under no legal obligation to provide vestibuled trains for its passengers, but, having done so, it is its duty to use reasonable care to maintain them in a safe condition.

[4] And when such company has assumed to safeguard passengers using such vestibule, while the train is running between stations, by providing a trapdoor to cover the space over the steps, it is bound to use reasonable care to maintain it in proper position.

[5] We have pointed out that, in the present case, the jury was at liberty to find from the evidence that the plaintiff was not furnished a seat in the car which he board-

ed; that, when the train was four-fifths of a mile from the Jersey City terminal in passing through the unlighted vestibule in quest of a seat, he was precipitated to the ground and injured because the trapdoor in the platform was open. Whether under these circumstances the defendant company had exercised that high degree of care which under the law it owed to the plaintiff was plainly a question upon which fair-minded men might honestly differ, and hence was properly submitted to the jury.

[6] The Supreme Court rested its opinion to the contrary largely upon a consideration of section 39 of the General Railroad Law (P. L. 1903, p. 666), as applied to the state of the proofs. That section is as follows: "In case any passenger on any railroad shall be injured by reason of his going or remaining on the platform of a car or any baggage, wood or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers." But this section does not preclude recovery by a passenger who uses the platform for the purpose of going to the next car to obtain a seat which the company has failed to furnish in the car which he originally entered. The Supreme Court properly adopted that construction of the statute. It also expressly recognized that the plaintiff and others were unable to obtain seats in the car which they boarded.

[7] The opinion then proceeds to declare that "it was not to be presumed that a passenger within four or five blocks of the end of his journey would pass from car to car for the purpose of looking for a seat," and concludes that the judge should have directed a verdict for the defendant.

We find ourselves unable to concur in that conclusion. We think the question whether in the exercise of the high degree of care required the defendant should have anticipated that a passenger would pass from one car to another for the purpose of looking for a seat when within four-fifths of a mile from the end of his journey was not for the court, but for the jury, and was properly submitted to them.

The judgment of the Supreme Court will be reversed, and the judgment of the Hudson circuit affirmed.

SWAYZE, J. (dissenting). It was necessary for the servants of the railroad company to open the vestibuled platform before the train arrived at the terminal or to discommode passengers by delaying them while the vestibule was opened after the train had come to a stop. It seems to me going too far to hold that the railroad company was guilty of negligence because they chose to open the

vestibule when the train was less than a mile from the terminal; that is to say, probably within a minute in time of reaching its destination. To me it seems one of those questions of good judgment which may fairly be left to the servants of the company in actual charge of the train.

I think, therefore, that the judgment of the Supreme Court was correct and should be affirmed.

PARKER, VROOM, and WHITE, JJ., concur in this dissent.

CORSON v. ATLANTIC CITY R. CO.
(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 356*) — OPERATION — CONDITION OF PREMISES.

Under normal conditions, the existence of a worn path across railroad tracks to a station, without more, cannot be relied on as an invitation to intending passengers to use that path so as to lay the railroad company under a duty of making such pathway reasonably safe, so long as a sufficient means of access has been elsewhere provided by the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.*]

2. RAILROADS (§ 356*) — OPERATION — CONDITION OF PREMISES.

But, where the passageway regularly provided by the company is habitually blocked just prior to train time by the very train that a passenger desires to take, and passengers are habitually forced by such practice to use the other pathway, it is open to a jury to infer that the railroad recognized the pathway across the tracks, and invited intending passengers to use it at such times.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1228-1234; Dec. Dig. § 356.*]

Error to Supreme Court.

Action by Amanda Corson against the Atlantic City Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo issued.

Bleakly & Stockwell, of Camden, for plaintiff in error. Lewis Starr, of Camden, for defendant in error.

PARKER, J. This writ of error brings up a direction of verdict for the defendant at the circuit. The plaintiff in attempting to reach the platform of defendant's station from a highway walked across some railroad tracks, and in so doing tripped on some signal wires near the ground, and was injured. The principal question now is whether the existence of a legal invitation to plaintiff to take the path that she took was a question for the jury or for the court.

A short description of the physical features (a map would be better) is essential to an understanding of the point involved. The place was Tuckahoe Junction, where the railroad of defendant running southerly from

Camden forks, one branch diverging toward the south to Cape May, the other southeasterly at an acute angle toward Ocean City. The station property is in the angle, and is bounded on the south by an east and west road over which ordinary access to the station is had, necessitating the crossing of a track for that purpose. From this road runs northerly close to the easterly track of the Ocean City fork, another road adjoining the defendant's premises for about 600 feet, and then bearing off to the northeast. This road leads to Marshallville as indicated by the map submitted in evidence. In the absence of any short cut across the tracks, an intending passenger from the direction of Marshallville must come down the last road southwestwardly until it strikes defendant's premises, thence southerly parallel with and bordering on the Ocean City branch for 600 feet to the crossroad, thence westerly along the same about 60 feet, crossing the Ocean City branch, and thence northerly by pathways provided, to the station, some 300 feet further and between the two sets of tracks. If this description be roughly jotted down on paper, it will at once be seen that a long detour is required of any one coming from Marshallville or its direction, and as all the tracks and platforms were substantially on a level with the road and entirely unfenced and open, and as the platform extended well up into the angle of the tracks at which point the Marshallville road met the Ocean City branch, the temptation would be strong to cut across the track, instead of going some hundreds of feet around by the road. Many had apparently yielded to this temptation, for there was, according to the evidence, a comparatively well-worn path across one track, then southerly between the tracks, and beside some rods or pipes used to operate the signals, and around their ends across another track to the platform. Plaintiff followed this path, and going around the south end of the rods, which she saw, tripped over the wires, which she did not see, and sustained the injury for which she claimed damages.

[1] Under normal conditions, the existence of a worn path across railroad tracks to a station cannot be relied on as an invitation to use that path so as to make the railroad company responsible for injuries due to mere negligence, so long as there is a safe pathway provided for such access; and the fact that the pathway provided is less convenient than the other will make no difference in the rule. *Dieckman v. D., L. & W. R. R.*, 81 N. J. Law, 460, 79 Atl. 310, 34 L. R. A. (N. S.) 693; *D., L. & W. R. R. v. Trautwein*, 52 N. J. Law, 175, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Garrett v. Atl. City, etc., R. R.*, 79 N. J. Law, 127, 74 Atl. 273, affirmed 81 N. J. Law, 570, 79 Atl. 1119. So that, if the access by the aforesaid east and west

road had been unobstructed at the time of plaintiff's approach, the existence of the trodden path without further evidence of its recognition and holding out by the defendant as a means of access would not have sufficed as an invitation, but she would have been bound to go around by the road; and on her taking the short cut the defendant would have owed her no duty except to abstain from willful injury, as she would be a trespasser or at best a mere licensee. *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478. See *Kubinak v. L. V. R. R.*, 79 N. J. Law, 438, 75 Atl. 443.

[2] But there was evidence from which the jury might have found that conditions were not normal; and plaintiff's claim as set up in the declaration is not predicated wholly on the existence of the worn pathway as an invitation. The declaration charges, and there is evidence to support the claim, that defendant, instead of providing a safe approach via the crossroad, blocked it with a train standing on one of the easterly or Ocean City tracks, and thereby made it impossible for plaintiff to gain the station by the road, and compelled her to take the beaten path for that purpose so that she tripped on the wires strung across that path. It appears that just to the south of the crossroad and west of the Ocean City track is defendant's water tank, and that at the time plaintiff approached to take her train that very train was lying across the track, the engine opposite the tank, taking water. There was also evidence of a custom that, if it was time for the train to leave, it would not back into the station for passengers, at least unless some were visible on the platform, but would start right out for Ocean City.

The defendant claimed, and produced evidence to show, that at the time in question it was at least 10 minutes after leaving time, and that the conductor had looked for passengers at the station, and seen that there were none. If so, we consider that the plaintiff was not justified in taking the short cut, which led back of the train across the wires. Her right to enter at all on the defendant's premises was for the purposes of buying a ticket and waiting for and boarding a train at the platform provided. But, so far as she was concerned, the train had (on the hypothesis that it was after leaving time) already left the station for Ocean City, and plaintiff's duty was to wait until the road was clear, and then cross by it and await the next train.

But there was one aspect, and in our view only one, in which the evidence presented a jury question. The plaintiff denied that she was late, and said that, on the contrary, she was in good time, and that the train left on schedule after she had been injured and had been put aboard. There was further testi-

mony that the train customarily took water prior to that trip, and therefore customarily blocked the road so that intending passengers were forced to take the other means of reaching the station. If the jury believed this testimony, they might well find that the defendant by cutting off the proper means of access at and before train time and habitually forcing its patrons to use another way to reach its trains had adopted that other way, and thereby invited its patrons to use it. In such case defendant would be under a duty to use proper care to make such means of access reasonably safe; and that a jury might infer negligence from the maintenance of wires placed so that pedestrians would trip over them is too plain for comment. In this aspect of the case the plaintiff was entitled to have her claim submitted to the jury. She would not have been justified in attempting to board the train on the near side where it was standing. *Kriwinski v. Penna. R. R. Co.*, 65 N. J. Law, 392, 47 Atl. 447, but it could not be said as a court question that with sufficient time remaining before the scheduled departure of the train she was required to stand helplessly by and watch it go out, when (as the jury might have found) the company had recognized and encouraged the use of the beaten path.

It is suggested that she was guilty of contributory negligence in not seeing and avoiding the wires, as it was broad daylight, and they were in plain sight. But this was essentially a jury question.

The judgment will be reversed to the end that a venire de novo issue.

**PATERSON & R. R. CO. et al. v. MAYOR
AND ALDERMEN OF CITY
OF PATERSON.**

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 47*)—STREETS—CROSSING RAILROAD PROPERTY.

Under the rule laid down in *New York, Susquehanna & Western Railroad v. Paterson*, 61 N. J. Law, 408, 39 Atl. 680, it is not so much the mere existence of a "freightyard" at the place of a proposed street crossing of railroad property as the deprivation of beneficial use by the railroad of such property that must furnish the test of the municipal right to make the crossing under general powers to open streets and take lands therefor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

Error to Supreme Court.

On certiorari by the Paterson & Ramapo Railroad Company and others against the Mayor and Aldermen of the City of Paterson to review an ordinance. Judgment was rendered affirming the ordinance (81 N. J. Law, 75, 80 Atl. 937), and prosecutors bring error. Affirmed.

Collins & Corbin, of Jersey City, for plaintiffs in error. Edward F. Merrey, of Paterson, for defendants in error.

PARKER, J. The general conditions which give rise to this litigation are stated in the opinion of the court below. The general authority of the city of Paterson to lay out a street over the right of way of a railroad may be considered as settled. *N. Y. Susq. & Western Railroad v. Paterson*, 61 N. J. Law, 408, 410, 39 Atl. 680. The claim of the plaintiff in error is, however, that the location of the proposed crossing in this case is at a point where the railroad has a freightyard, and that the opening of a street there would deprive the railroad company of the beneficial use of that freightyard. If so, on the authority of the case just cited, the ordinance for the opening of Sixth avenue brought up by the writ of certiorari herein should have been set aside. A similar ordinance relating to this same crossing was set aside by the Supreme Court in 1905 on the authority of the case in 61 N. J. Law, 39 Atl. Paterson, etc., *R. R. Co. v. Paterson*, 72 N. J. Law, 112, 60 Atl. 47. But the rule in the latter case seems to have been somewhat more broadly stated in the opinion, and to declare that, if a freightyard in fact exists, there is no power in the city to cross it, irrespective of the question whether the business carried on there would be destroyed or materially interfered with, which was an element in the *Susquehanna* Case. The case in 72 N. J. Law, 60 Atl., was brought to this court and the judgment there affirmed (74 N. J. Law, 738, 68 Atl. 76), but on a ground relating entirely to the municipal procedure in enacting the ordinance, the question whether of law or fact or both decided by the court below being expressly reserved.

In the present case the Supreme Court, as appears from its opinion, has found as facts that there is no freightyard at the point of crossing as distinct from the remainder of the tracks in the city, and also that the opening of Sixth avenue would not deprive the railroads concerned of the beneficial use of a freightyard. The first of these findings is attacked as wholly unsupported by the evidence, and we are asked to reverse the judgment on this ground. It is not necessary to go into this question, because, conceding that a "freightyard" exists at that point, it is of a very different character from the one under consideration in *N. Y. Sus. & Western Railroad v. Paterson*, supra, and, while the user of it by the railroad for such uses as they now make of it will be inconvenienced to some extent, the finding of the court below that such user will not be destroyed, or even seriously impaired, appears fully justified by the evidence.

The judgment will be affirmed.

OSTERLING v. CAPE MAY HOTEL CO.
(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. DAMAGES (§ 120*)—MEASURE OF DAMAGES—BREACH OF CONTRACT.

A contract to pay a stipulated percentage of the cost of a building in lots of land to be selected by the party entitled to payment, at "schedule prices and on the terms adopted by" the other party, from lots shown on a map annexed to the contract, is a contract to pay not money, but a specific thing, and, in case of performance and nonpayment, the measure of damages is the actual reasonable value of the lots.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

2. CONTRACTS (§ 349*)—ACTION FOR BREACH—EVIDENCE.

Such a contract is not admissible in evidence under the common counts to fix the price stipulated.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

3. CONTRACTS (§ 324*)—ACTION FOR BREACH.

The party enforcing such a contract and claiming his compensation cannot recover under the common counts for the reasonable value of the services rendered, but must sue on the special contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.*]

Error to Circuit Court, Cape May County.

Action by Frederick J. Osterling against the Cape May Hotel Company. Judgment for plaintiff, and defendant brings error. Reversed.

The suit was upon a mechanic's lien for architect's services. The declaration contained only the common counts for work, labor, and materials done and furnished, goods sold and delivered, money lent, account stated, and so on in the usual form, concluding with allegation of a promise to pay, and claiming damages for failure to make such payment. Then follows the statutory averment that the debt is a lien, etc., describing the land, bringing in a mortgage claim as subordinate to the lien. There is a bill of particulars "for services as architect" in preparing plans and supervising the erection of the building and other services connected therewith, "pursuant to a certain written contract" between plaintiff and defendant dated August 20, 1905; and that the "agreed price" was 5 per cent. on total cost of the work complete, which was \$828,000. There was no copy of the contract annexed to the declaration or forming part of the bill of particulars, but it was set up by defendant in, and annexed to, a special plea. There are two additional items, one for salary of a superintendent at the building, and another for a water color picture of the building; but these were abandoned on the trial. There was a verdict and judgment for plaintiff for the full amount of the claim, or near-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ly so, which was somewhat reduced on motion for new trial; the rule being discharged upon plaintiff waiving the excess found by the trial court.

The case is now presented upon assignments of alleged errors at the trial, and also of alleged errors in the order "reducing" the verdict and in refusing to quash a levy on personal property; the ground taken in the latter particular being that the judgment as actually entered was special against the land lien, and that it would not support an execution against personality.

Robert H. McCarter, of Newark (Arthur F. Egner and J. Spicer Leaming, on the brief), for plaintiff in error. Gaskill & Gaskill, of Camden, for defendant in error.

PARKER, J. (after stating the facts as above). Throughout the trial the insistence on the part of the plaintiff was that he was entitled to recover upon an implied assumpsit for the reasonable value of his services as claimed to have been rendered, and extending up to the completion of the hotel building upon which he was employed. There was a written contract prescribing his duties and the character and amount of compensation to be made for their performance, but plaintiff avoided the use of this contract as a basis of recovery, relying on the rendition and acceptance of the services as raising an implied promise to pay for them, and putting in expert proof as to the reasonable value of those services in terms of percentage of cost of the work, and also introducing the contract in evidence, over objection and exception, "as authority for doing the work, and as a basis of calculation." Throughout the trial defendant, on the other hand, maintained that implied assumpsit on a quantum meruit would not lie, and that the suit should have been brought as for performance of the written contract, and for the compensation therein stipulated or damages for failure to make it.

The importance of the issue thus made becomes manifest on an examination of the provisions of the contract relating to compensation. The second paragraph fixes it at 5 per cent. on total cost; the third provides that plaintiff may be discharged and in such case shall be paid as though the work had then been abandoned. The fourth is here copied in full: "Fourth. It is mutually agreed that the compensation to be paid to the party of the second part, in amount above specified, shall be paid in lots of the Cape May Real Estate Company, which lots are to be taken at schedule prices and upon the terms already adopted by the Cape May Real Estate Company; and such lots shall at once be selected by the party of the second part from Plan A of the Cape May Real Estate Company, and from lots that are not at this time sold or on option, and annexed hereto is a marked map of Plan A of the Cape May

Real Estate Company from which said selections shall be made by the party of the second part, and no lots shall be selected which are marked on said map. In the event of the employment of the party of the second part being terminated before the completion of said building, then the selections shall abate to the amount that is found to be due to the party of the second part at the time of the termination of his services. In case of delay in the selection of said lots, the lots sold by the Cape May Real Estate Company in the meantime shall be marked on said map before the selections are made."

[1] It is plain from a reading of these provisions that the agreement for payment was not to pay in money but to pay in a certain quantity of lots to be selected by plaintiff; the quantity or number to be determined not by the actual value of the lots as footing up the amount in dollars figured at 5 per cent. on total cost, but by the list price of such lots. Of that list price we know little or nothing from the evidence. It may be more or less than the real value of the lots or some of them. The question of actual value was not dealt with by the court, nor the question of payment in lots, but the jury were permitted to assess plaintiff's damages as upon an implied assumpsit to pay the reasonable value of his services in cash.

We consider that this entire theory of recovery was erroneous. The contract was binding on the plaintiff's part; it was expressed in its terms, and in writing, so that the terms were settled beyond dispute. The express promise was not the same as the law would imply, so that the declaration should have been on the special contract. *Princeton, etc., Turnpike Co. v. Gullick*, 16 N. J. Law, 161. An implied contract cannot exist when there is an express contract embracing the identical subject. *Voorhees v. Woodhull*, 33 N. J. Law, 494. Recovery might be had on a quantum valebat if the contract was unfulfilled and was rescinded by the parties (*Brewing Co. v. Donnelly*, 70 N. J. Law, 48, 35 Atl. 647), but such was not the case here, and indeed the contract expressly provided for the same character of compensation in case of discharge. Assuming the performance by plaintiff of the written contract and a failure by defendant to make compensation as specified therein, there arose a right of action for damages, and the measure of damages was not 5 per cent. of cost in cash, but the fair value of the lots that plaintiff was entitled to at list prices. *Hinchman v. Rutan*, 31 N. J. Law, 496, 497.

[2] The special agreement was not admissible in evidence under the common counts to fix the price stipulated, as it did not call for payment in money. *Weart v. Hoagland*, 20 N. J. Law, 517.

[3] There was an objection to the intro-

uction of the contract in evidence because the action was on the common counts, which was overruled and exception taken, and there was a motion to nonsuit on the ground, among others, that the special contract precluded recovery on the implied assumpsit under the conditions of the case. This was also overruled and exception taken, and these exceptions are assigned for error. The objection should have been sustained and the motion to nonsuit granted. These errors go to the root of the case and require a reversal of the judgment that a venire de novo may issue.

We have considered the other assignments of error, but the result reached above renders it unnecessary to discuss them. The reversal of the judgment carries with it the execution and levy and the rule discharging the rule to show cause, so that no special discussion of these proceedings is required.

JOYCE v. WEST JERSEY & S. R. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 327*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The plaintiff, seated in his wagon drawn by his horse, proceeded along the highway toward the defendant's railroad track where the highway and railroad crossed each other at grade; when his horse arrived at a point 25 feet distant from the track (between which point and the track evidence, not open to serious dispute, showed there were no obstacles to his sight of any train approaching on his left side, for a distance of more than half a mile), he continued to drive his horse on a walk toward and upon the railroad track without looking in the direction of such train until it was too late to escape collision with it, and it was held he had been guilty of such contributory negligence as was fatal to his right of recovery of damages from the defendant company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. RAILROADS (§ 327*)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The rule of legal caution, as established in this court by the case of the Pennsylvania R. R. Co. v. Righter, 42 N. J. Law, 180, and adjudications following it, requiring a person about to drive across a railroad track at grade to look each way before crossing in order to guard against the approach of trains, held to control the decision of the case under review.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

Error to Supreme Court.

Action by Joshua S. Joyce against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David O. Watkins, of Woodbury, and John W. Wescott, of Camden, for plaintiff in error. Gaskill & Gaskill, of Camden, for defendant in error.

VREDENBURGH, J. This is an action for damages resulting to the plaintiff from a collision with defendant's cars at a road crossing. The trial judge at the close of the evidence in this case, upon the motion of defendant for the direction of a verdict in its favor (urged upon the ground that the proofs had shown the plaintiff to have been guilty of contributory negligence), directed such verdict, and to this ruling error has been assigned.

In deciding the motion, the learned judge said he was unable to distinguish the case from the Righter Case (Pennsylvania R. R. Co. v. Righter, 42 N. J. Law, 180); that, while there was some difference in the facts, he could see no difference in the legal principles; adding that, "under the proofs, giving the plaintiff the most favorable view of it, he could have seen a train coming from his left when he was at a point at least 25 feet from the track, and that the undisputed proof is that he made no observation from that time." With the correctness of these conclusions of the trial court, summarizing the pivotal facts of the evidence, and applying to them the long-established principles of law settled in the cited case, we entirely agree.

The Righter Case was decided by this court in the year 1880, and the law of negligence applicable to what are called railroad-crossing accidents, then announced, has been ever since followed in cases, almost without number by our courts, and without dissent. Our Legislatures, sitting annually for the past 32 years, and having before them for that long period of time this pronouncement of the law relating to this important subject, have been content to leave that judicially-made law unaltered and untouched.

If the doctrine of "stare decisis" is to be applied to the case in hand, presenting, as it does, substantially the same facts as the Righter Case, it must be now regarded as controlling. This doctrine, says a recent authority (Black on Judicial Precedents, 1912), "is one of surpassing importance." It is that, "when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, * * * and it is upon this basis that the whole elaborate structure of our case law has been built up."

In the Righter Case this court, sitting in review of a judgment upon verdict in favor of the plaintiffs below, held that the trial court erred and should have taken the case from the jury, and proceeded to define and declare rules of law applicable to that class of negligence—cases where accidents happen to the highway traveler from collisions with railroad trains upon road crossings at grade, as follows: First. If it clearly appears that the plaintiff's negligent conduct contributed

to his injury so that there remains no fairly debatable question that it did so contribute, the decision of the question is for the court and not for the jury. Second. It is a primary rule of requisite legal caution that a person about to drive across a railroad is bound to use his eyes and ears to watch for signboards and signals, to listen for bell and whistle, and to guard against the approach of trains by looking *each* way before crossing; and that the failure of the railroad company to provide or give a statutory signal will not relieve a person from making this dual observation, if he has an opportunity, by a view of the road to avoid danger.

[1] The plaintiff here admits that he disregarded this legal rule of caution, and that he did not look each way for a train before crossing the railroad track. He admittedly continued driving his horse toward the track after it had reached a point distant about 25 feet from the track, without looking in the direction from which the train was approaching him. His horse was actually upon the railroad track before he looked and saw the train, and the collision quickly followed. He thus neglected his opportunity to avoid danger by a view of the road from a place of safety. From that position and onward toward the crossing, it is not substantially disputed that there were no obstacles of a permanent or other nature to his view of the railroad track on his left for more than half a mile.

[2] Such place of safety was held in the *Righter Case* to exist where the driver of the carriage was 30 feet distant from the railroad track. In the case of *Dotty, Adm'x, v. Atlantic City R. R. Co.*, 64 N. J. Law, 710, '48 Atl. 772, this court, unanimously reaffirming the principles of the *Righter Case*, held such place of safety existed where the driver was about 30 feet distant from the railroad track and his horse's head had come within about 17 feet of the track.

In the case under review the evidence of the plaintiff himself justifies the conclusion that his horse's head must have been at least 25 feet distant from the track, and the driver (the plaintiff) about 35 feet distant therefrom. He had but to check his walking horse at this point, and he would have been secure from collision with the train. The line of judicial precedents, of which the cited cases are illustrations, compel us to the conclusion that the plaintiff, in failing to look in the direction of the colliding train after his horse reached the place above described, and while a sufficient opportunity was afforded him to look, was guilty of negligence which contributed to his injury.

A reference to some of the other circumstances of this case of more or less materiality may be of use in distinguishing future suits of a like character. The plaintiff's horse was not afraid of the cars, and had,

while attached to a milk wagon, been accustomed every morning for more than two years next preceding to be driven by the plaintiff, and to meet this particular train at this crossing; the plaintiff admits he was thoroughly familiar with the running of that train, and that he would very frequently have to hold his horse up at this crossing until the train would go by. Sometimes the plaintiff would cross the track ahead of the train, and sometimes behind it. The track was a single one located over a right of way which was 66 feet wide at about its center, leaving 33 feet on each side of the center line. The highway road (Salem avenue) over which the plaintiff was driving was there at least 50 feet wide, and crossed the track upon the plaintiff's left hand side at an angle less than a right angle. Its precise angle is not expressly given in the testimony, but the defendant's blue print plan (Exhibit) in evidence shows approximately the angle of the crossing, and that the railroad line to the left of the plaintiff (toward Paulsboro) ran straight for at least the distance of a mile after leaving the crossing. The train which struck the plaintiff's wagon was running at a speed of about 25 or 30 miles an hour. The plaintiff's claim that he was mistaken as to the fact that the train had previously passed the crossing that morning can, of course, have no materiality. It was his own mistake and can furnish no lawful excuse for his failure to look before crossing.

It was testified by the plaintiff that before his horse reached the point, 25 feet from the railroad track, he looked for a train on his left, and that, until he reached that place, there were permanent obstructions to his view of the railroad track in that direction consisting of a telegraph pole and a one story chicken house. The defendant's witnesses denied the correctness of the plaintiff's statements that such obstructions prevented his view before his horse arrived at that point. This was the main subject of dispute at the trial. In the construction we place upon the plaintiff's case, this dispute as to his view before he arrived at this point becomes of no legal consequence.

The judgment below should be affirmed.

CHAMBERS v. PHILADELPHIA PICKLING CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

JUDGMENT (§ 958*)—COVENANTS (§ 121*)—CONCLUSIVENESS—PARTIES CONCLUDED—COVENANTOR AND COVENANTEE—QUESTION FOR JURY.

In a suit upon a covenant by the party for whose benefit it was made, whereby the defendant promised the covenantee "to pay any and all claims for damages * * * arising

from the operation of the business" of the covenant, "including any claim now existing or hereafter to be made" by the plaintiff "suit for which has already been brought in the state of New Jersey," it appeared that the suit so brought was against the business name only of the covenantee, and that, in that name, a plea had been filed, verified by the covenantee's husband, as the defendant's agent, and who, there was evidence to show, had sometimes taken part in the conduct of such business; that the aforesaid suit came to trial, at which the said husband of the covenantee, together with her son, were sworn as witnesses for the defendant, and a verdict was rendered against her. *Held*, that whether the covenantee had authorized the appearance and defense to such suit were jury questions, and, if she had, that the judgment so rendered was conclusive in the suit against the covenantor for the amount of it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1827-1829; Dec. Dig. § 953; Covenants, Cent. Dig. §§ 221-223; Dec. Dig. § 121.*]

Swayze, Parker, and Vroom, JJ., dissenting.

Error to Supreme Court.

Action by Walter Chambers against the Philadelphia Pickling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 81 Atl. 573.

Wilson & Carr, of Camden, for plaintiff in error. Westcott & Westcott, of Camden, for defendant in error.

VOORHEES, J. In 1908 one Sally Whittenberg individually conducted a business for which she adopted the name of Philadelphia Pickling Company, and while so carrying on the business the plaintiff, an employé, sustained personal injuries. In April, 1908, he brought suit against the Philadelphia Pickling Company eo nomine, wherein the summons was returned: "Service made on the Philadelphia Pickling Company through their agent, Walter Henry." A plea of general issue in behalf of the Philadelphia Pickling Company was filed, verified on the 18th day of April, 1908, by Louis Whittenberg, in which he deposed that he was manager, and, for that purpose, agent, of the defendant company.

This case came on for trial, witnesses on each side were sworn, and, being submitted to the jury, judgment upon their verdict was entered January 5, 1909, in favor of the plaintiff, Walter Chambers, for \$4,000. On November 7, 1908, the Philadelphia Pickling Company, the defendant in the case sub judice, was incorporated by certificate filed in Pennsylvania, and on the same day Mrs. Sally Whittenberg, whom it appears was the wife of Louis Whittenberg, made a transfer to the corporation in consideration of \$50,000, which recited that she was the owner of the stock, good will, and fixtures of the business now carried on by her in Philadelphia under the name of the Philadelphia Pickling Company, "and has agreed to sell

all the stock, good will, and fixtures of the said business, including all the factories in New Jersey, or elsewhere, * * * assigned, transferred, and set over to the Philadelphia Pickling Company, the incorporated company, all the stock, good will, fixtures, book accounts due or to become due as set forth in a schedule annexed thereto, of the business carried on by her under the name of the Philadelphia Pickling Company," etc. This instrument contained a covenant that "the company further agrees to pay any and all debts due by the said Sally Whittenberg, trading as Philadelphia Pickling Company, as shown by the books of the company on the first day of November, 1908, * * * together with any and all claims for damages or otherwise, arising from the operation of the business by the said Sally Whittenberg, including any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the state of New Jersey." This transfer was executed by Sally Whittenberg personally under her seal, and also by the "Philadelphia Pickling Co., S. Whittenberg, President," under its corporate seal.

The present suit is brought against the corporation. The declaration contains a special count which sets up the agreement, to which the common counts are added, and for a bill of particulars there is attached and referred to a copy of the foregoing agreement and a statement of the judgment rendered January 5, 1909. The plea at that time was the general issue, filed only to the common counts, but by stipulation at the trial it was agreed that the defendant might show "that Sally Whittenberg was never served with process in the cause, that she never filed an appearance, and that she was never subject to the jurisdiction of the court in the case of Walter Chambers against the Philadelphia Pickling Company," referring to the case in which the judgment had been entered for \$4,000. The entire record of that case was then offered in evidence, together with the agreement above mentioned. There was also testimony given showing that witnesses had been sworn on each side at the trial. The defendant then offered the return indorsed upon the summons in the former suit, the plea, its verification, and an exemplified copy of the certificate of incorporation of the Philadelphia Pickling Company, dated November 7, 1908. Thereupon a motion to direct a verdict for the defendant was made, on the ground that proper service of the process in the former case had not been shown, nor that the defendant, Sally Whittenberg, appeared thereto, nor that Louis Whittenberg, her husband, who swore to the plea, had authority to do so in her behalf. The court then allowed the case to be opened for the purpose of showing the relations existing between Sally Whittenberg

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and Louis. It was proved by this supplementary evidence that Louis Whittenberg and Sally were husband and wife, that Louis took charge of the plant at times, and that he and their son were present and sworn as witnesses at the first trial, but it did not appear that Sally had knowledge of the former suit while it was pending, save as that fact was shown by the instrument of transfer heretofore referred to. The motion to direct a verdict for the defendant was then renewed, but refused. The court charged that: "If she was sued, or if she defended the suit or authorized it to be defended, your verdict will be for amount I have named. If she was not sued, if she did not defend the suit, your verdict will be for the defendant." And further instructed the jury: "If you find she did not know anything about it (the suit), was altogether ignorant of it, you will find for the defendant. But if you find she did know and sent her husband here to defend it, or if she had the summons served on her and did not defend it, then this defendant is bound to pay this judgment as is agreed."

This case came before the Supreme Court on a demurrer to the declaration (*Chambers v. Philadelphia Pickling Co.*, 79 N. J. Law, 1, 75 Atl. 159), and it was held good to support an action to enforce the covenant of the defendant to pay to the plaintiff his claim for damages against Sally Whittenberg. With this conclusion we agree. The question involved in this suit is a broader one. It is not the validity of the promise to pay the claim, but is the recovery of the judgment rendered upon the claim binding upon the defendant corporation in view of the circumstances surrounding its recovery? In other words, have the damages in the first suit been assessed by the jury and merged into a judgment so as to conclude the assignor and the defendant corporation?

The proofs demonstrated that Sally Whittenberg assigned all the assets of her personal business and in consideration received the total capital stock of the corporation of which she at once became president; that is to say, she obtained \$45,000 in the stock of the company and \$5,000 in cash. It also appears that all the shares of the company were in her name, except two, and one of them was in her husband's name. The defendant's promise is to pay any and all claims for damages or otherwise arising from the operation of her business, including the Chambers' claim. It was her personal debt which the promise referred to. She stated in the instrument which was accepted by the defendant company that a suit was pending for the recovery of it in New Jersey. Prima facie this meant a suit which had been legally brought, and duly instituted against her, for her personal obligation which it concerned. The instrument of transfer

which contains the statement and covenant was executed two months before the recovery of the judgment in the first suit, and more than six months after her husband had verified the plea in that action. If either the assignor or the defendant corporation defended or permitted the defense, the recovery became as between the plaintiff and them conclusive, for the appearance at the trial and participating in it without objection will be a waiver of improper service of process. Whether the appearance was with the knowledge and consent of Mrs. Whittenberg, and whether the trial proceeded with her approbation and authority, were under the circumstances properly left to the jury to decide from the evidence adduced. What would bind her in the premises would become obligatory upon the corporation of which she was the head and substance. She has not denied her knowledge of the first trial, nor has she offered to prove that she did not authorize the defense made to it. Her knowledge and acquiescence in the conduct, whether before or after the making of the covenant and the formation of the corporation would conclude the defendant as to the amount of recovery. There was evidence to sustain the finding of the jury.

The judgment will be affirmed.

SWAYZE, J. (dissenting). My dissent in this case is upon the ground that the covenant of the defendant to pay the debts of Sally Whittenberg and the claim of the plaintiff for damages then in suit was not an agreement for the benefit of the plaintiff upon which he could sue, but an agreement to indemnify Sally Whittenberg in case he recovered a judgment. I am at a loss to understand why Sally Whittenberg should have exacted such a covenant for the benefit of the plaintiff, whose claim she was then contesting.

VROOM, J., concurs in this dissent. PARKER, J., dissents.

GERISCH v. HEROLD.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§§ 282, 287, 322*)—PERFORMANCE—DECISION OF ARCHITECT—BURDEN OF PROOF.

A building contract provided that the builder should erect and finish a house in a good workmanlike and substantial manner to be testified by a writing or certificate under the hand of the architect, and should provide good, proper, and sufficient materials for completing and finishing all the work; that the last payment should be made when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative; that, should any dispute arise respecting the true construction or meaning of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the drawings or specifications, it should be decided by the architect, and his decision should be final and conclusive.

Held, (1) that it was incumbent upon the builder in an action upon the contract to prove that the building was completed to the satisfaction of the owner or his representative; (2) that, under the terms of the contract, the architect was not the representative of the owner; (3) that the duty of the architect was limited to certifying (a) whether the house was finished in a good workmanlike and substantial manner and did not extend to the goodness, propriety, and sufficiency of the materials, and (b) to deciding upon the true construction or meaning of the drawings and specifications; and that his certificate that the plaintiff was entitled to the final payment was not conclusive upon the owner.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1284–1289, 1308, 1309, 1312–1316, 1318–1338, 1340–1342, 1344–1346, 1348, 1350, 1351; Dec. Dig. §§ 282, 287, 322.*]

(Additional Syllabus by Editorial Staff.)

2. CONTRACTS (§ 282*)—VALIDITY—SATISFACTION OF EMPLOYER.

Contracts requiring work to be satisfactory to the employer are valid.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1284–1289; Dec. Dig. § 282.*]

Error to Supreme Court.

Action by John C. Gerisch against Rudolph Herold. Judgment for plaintiff (81 N. J. Law, 171, 79 Atl. 1028), and defendant brings error. Reversed, and venire de novo awarded.

The plaintiff agreed to erect and finish a house in a good workmanlike and substantial manner under the direction of Joseph Turck, architect, to be testified by a writing or certificate under the hand of Turck, and also to find and provide good, proper, and sufficient materials for completing and finishing all the work. The defendant agreed to pay for the same in four payments, the last of which, \$3,000, was to be made when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative. The contract also provided in the ordinary form that, should any dispute arise respecting the true construction or meaning of the drawings or specifications, it should be decided by Joseph Turck, and his decision should be final and conclusive. This suit is for the last payment. One plea averred that the plaintiff did not complete all the work to the satisfaction of the owner or his representative. The replication to the plea averred that the owner fraudulently withheld his satisfaction, and on this issue was joined. This issue was not submitted to the jury, and the defendant did not request its submission. He relied upon a motion to nonsuit for failure of the plaintiff to prove that the work was done to the satisfaction of the owner or his representative. The architect had certified that the plaintiff was entitled to the payment of \$3,000 by the terms of the contract.

Weller & Lichtenstein, of Hoboken, for plaintiff in error. J. Emil Walscheid, of Town of Union, for defendant in error.

SWAYZE, J. (after stating the facts as above). [2] Contracts requiring the work to be satisfactory to the employer are valid. *Gwynne v. Hitchner*, 66 N. J. Law, 97, 48 Atl. 571. This decision has been approved in this court in a suit involving the same contract. *Gwynne v. Hitchner*, 66 N. J. Law, 97, 48 Atl. 571. A distinction is sometimes made between cases where the fancy, taste, sensibility, or judgment of the promisor are involved, and cases where only operative fitness or mechanical utility is involved. 9 Cyc. 618, ff. *Gwynne v. Hitchner* was a case of the former class, and, although the case of a building contract is somewhat different, we see no reason to doubt that the mere taste or fancy of the owner may be an important element in a dwelling house at least. The Supreme Court has applied the rule to that situation, and we do not question the soundness of its decision. *Welch v. Hubschmitt Co.*, 61 N. J. Law, 57, 38 Atl. 824. In the present case the parties made a clear distinction between the workmanship and the materials. The character of the former was to be testified to by Turck's certificate. The only provision as to the latter is that they should be good, proper, and sufficient for completing the work. The workmanship might well be left to the judgment of another while the owner to gratify his own taste might well desire to retain control of the latter himself.

[1] No doubt it is true, as Justice Holmes said in *Hawkins v. Graham*, 149 Mass. 271, 21 N. E. 312: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff either wholly or in great part unless paid for, a just hesitation must be felt, and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies of the interested party." The court in that case seized upon the words, "or the work demonstrated," as offering an alternative to the owner's acknowledgment. In a later case the same court drew a distinction between cases in which the decision of a particular person is referred to, and a case where machinery was guaranteed to work in a satisfactory manner, and held that the latter case involved a "result to be passed upon in a reasonable way in accordance with a standard stated in words." *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N. E. 420. The present case is one where the decision of a particular person (the owner or his representative) is referred to, a class of cases in which the Massachusetts courts recognize that the dissatisfaction of the promisor need not be a reasonable dissatisfaction to bar recovery by the prom-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

isee. The decision of the New York Court of Appeals seems to be to the contrary. *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398. The case is entitled to less weight for the reason that the learned judge failed to distinguish between a case where the owner withheld satisfaction unreasonably and one where he withheld it in bad faith. All the cases recognize that the owner must act in good faith. The reasoning of Chief Justice Beasley in *Chism v. Schipper*, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668, applies with greater force to such a case as the present, where it is the owner himself who is to be satisfied. Of course, he cannot avail himself of his own fraud to escape liability on his contract. The motion to nonsuit would have been properly denied if there was evidence of bad faith on the part of the owner. We are not called upon to decide whether the jury in a proper case might be permitted to infer fraud from the fact that the owner was not satisfied with the architect's certificate. The case was not tried on that theory. If it had been, the defendants should have been allowed to ask the question of the plaintiff that was excluded—whether Turck did not tell him at the time he received the certificate that he (Turck) had been discharged as architect. Not only was the case not tried on the theory that the owner acted in bad faith, but no inference of bad faith could be drawn from his refusal to be satisfied by the architect's certificate, since by the terms of the contract that certificate covered only the execution of the contract in a good workmanlike and substantial manner, and the plaintiff specifically contracted to furnish good, proper, and sufficient materials to complete the work, with no provision authorizing or requiring the architect to certify whether he had in fact done so or not. The distinction is pointed out by Justice Fort in *Newark v. New Jersey Asphalt Co.*, 68 N. J. Law, 458, 463, 53 Atl. 294. The contract, it is true, made the architect's decision final as to some things, but it was only as to the true construction or meaning of the drawings or specifications. The learned trial judge fell into error in thinking that the architect's certificate covered, not only these points, but also the question whether the payment was due. His charge as to the finality of the architect's certificate would have been correct if he had limited it to the points to which the parties limited it by their contract. They contracted that the final payment should be due when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative provided that in case of each payment a certificate should be obtained and signed by Turck. Thus they made for the final payment a double condition (1) a certificate by the architect; (2) sat-

isfaction of the owner or his representative.

The case differs from *Welch v. Hubschmitt Co.* because in that case satisfaction of the owner and architect was required; here only that of the owner or his representative. The question remains whether Turck was the representative of the owner. Our reason for thinking he was not is threefold. (1) It was unnecessary to require his certificate for the final payment if the payment was to be made upon his being satisfied. By requiring satisfaction of the owner or his representative in one clause and a certificate from Turck in a proviso immediately following, the parties seem to have had two different persons in view. (2) Turck had already been designated as the architect, and the word "architect" would have been more natural in this clause than the word "representative" if he had been meant. (3) He was made by the contract the judge between the parties as to most important portions of the contract, which were likely to lead to controversy between builder and owner. To have made him the representative of the owner would have deprived him of the judicial position in which the parties meant him to stand, and thereby have deprived his certificate of that conclusive character against the builder which was given to it by the express terms of the contract.

We think for these reasons that there was error, and that the judgment must be reversed that a *venire de novo* may be awarded.

VAN HORN v. BOARD OF FREEHOLDERS OF MERCER COUNTY.

(Supreme Court of New Jersey. July 13, 1912.)

(*Syllabus by the Court.*)

OFFICERS (§ 4*)—ABOLITION OF OFFICE.

Where a resolution of the board of freeholders abolishing a position is adopted in the exercise of a bona fide effort to economize in the interest of the public weal, and not as a subterfuge to make place for another, the passage of the resolution is within the discretion of the board, and the incumbent of the place is not protected from incidental removal by the provisions of the Civil Service Act [3 Comp. St. 1910, p. 3795].

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 5; Dec. Dig. § 4.*]

Certiorari by William B. Van Horn to review resolution of the Board of Freeholders of Mercer County. Affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Linton Satherwaite, for prosecutor. Samuel C. Kulp, for defendant.

MINTURN, J. The board of freeholders of Mercer county of January 2, 1912, passed a resolution intended to abolish the office of custodian of the county courthouse, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indices

the prosecutor, who was the incumbent, contests the legality of the resolution on this writ.

It is not denied that the board possesses this power, provided the Civil Service Act (3 Comp. St. 1910, p. 3795) does not intervene, to protect the incumbent, and provided the abolition of the place be accomplished in good faith, and not as a subterfuge for the employment of another. The prosecutor was appointed as jailer of the courthouse on May 10, 1908, and continued thereafter to act as warden of the jail and custodian of the courthouse during the intervening years by resolution of the board of freeholders duly passed for that purpose. But, after 1907, he performed the duties of warden under his appointment as custodian of the courthouse. In pursuance of a resolution of the freeholders, the prosecutor surrendered the keys and property of the jail, which he held as warden, to John D'Arcy, who was appointed warden of the jail by the sheriff. Thereafter, at a meeting of the freeholders on January 2, 1912, a resolution was passed abolishing the office of custodian of the courthouse, the preamble of which resolution recited the appointment of D'Arcy as warden, and the resulting fact that such appointment left the custodian of the courthouse without any duties to perform.

If we were convinced that this resolution was inspired by a desire to expel the prosecutor and place another in his stead, rather than as contended by the defendant, the recorded desire of the freeholders to economize in the public interest, we would have no difficulty under our adjudications in reaching the conclusion that the resolution was invalid. *McCheesney v. Trenton*, 50 N. J. Law, 338, 14 Atl. 578. But our reading of the record here has not satisfied us that such is the purpose of the freeholders, and consequently the resolution in question must be viewed as an exercise of the legitimate power and discretion of the board, exercised in a bona fide manner, for the public weal, and as such is clearly not assailable or subject to judicial review. 1 *Abbott*, Mun. Corp. 802; *Ryan v. Paterson*, 66 N. J. Law, 533, 49 Atl. 587.

It remains only to consider the effect of the adoption of the Civil Service Act upon the prosecutor's position. His contention is that he is protected by that act from removal, even if the removal be a bona fide attempt upon the part of the freeholders to reduce the public burdens by abolishing the office. But the contrary is the law, as settled by the adjudications of this court. *Sutherland v. Jersey City*, 61 N. J. Law, 436, 39 Atl. 710; *Evans v. Freeholders*, 53 N. J. Law, 585, 22 Atl. 56.

In the recent case of *Paddock v. Hudson County Board of Taxation*, 83 Atl. 185, this court held that, even though the relator was

in the paid service of the state and within the protection of the Civil Service Act, "it did not preclude the board of taxation from abolishing the clerkship and dismissing the relator when done in good faith and for the purpose of economy."

The resolution in question will therefore be affirmed.

WIKANDER v. UVALDE ASPHALT PAVING CO.

(Supreme Court of New Jersey. July 12, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 706*)—STREETS—NEGLIGENT USE—FRIGHTENING HORSES IN STREET.

A horse and wagon being driven through a public street, and while near to and passing a steam roller a dense cloud of black smoke was discharged from the roller's stack, frightening the horse and causing him to back the wagon into a child 4½ years old, the plaintiff below, who was playing in the street near the curb, knocking her down and seriously injuring her. *Held*, that the questions whether the act of the defendant in discharging the dense cloud of smoke was calculated to frighten a gentle horse, and was an unnecessary act or a necessary act but negligently performed, were for a jury to determine, and were properly submitted to it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

Error to Circuit Court, Hudson County.

Action by Alice E. Wikander, by her next friend, against the Uvalde Asphalt Paving Company Judgment for plaintiff. Defendant brings error. Affirmed.

Argued February term, 1912, before BERGEN and KALISCH, JJ.

Lindabury, Depue & Faulks, of Newark, for plaintiff in error. Alexander Simpson, of Jersey City, for defendant in error.

KALISCH, J. The plaintiff recovered a judgment against the defendant company upon the ground that the defendant, by its servants, negligently managed and operated a steam roller in a public street. The alleged negligence complained of is that the steam roller emitted dense volumes of black smoke at a time when a horse, drawing a wagon, under the care of a driver, was approaching and near to the roller, thereby causing the horse to back the wagon into a child 4½ years old, who was playing in the street near the curb, and seriously injuring her. The defendant moved for a nonsuit and for a direction of a verdict for the defendant, both of which motions were based upon the ground that the plaintiff had failed to show that there was any negligence on part of the defendant company that was the proximate cause of the plaintiff's injury. The trial judge refused to grant either motion, to which refusals the defendant duly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

excepted, and the correctness of the court's rulings is now here, under review, on a writ of error.

The defendant's main contention is that the court erred in refusing to take the case from the consideration of the jury. An examination of the testimony convinces us that the case was a proper one for the determination of a jury. There was testimony from which a jury might reasonably have found that the "hooking up of the fire," which sent out the dense volumes of smoke at the time the horse was approaching and passing the roller, frightened the horse, and caused the plaintiff's injury, was either an unnecessary act, or, if a necessary act, was negligently performed. There was testimony which, if believed, warranted a jury in finding that it was the sight of the dense volumes of black smoke issuing from the roller's smokestack that frightened the horse. There was evidence that the horse was old and very gentle. A steam roller is a formidable enough looking engine, in its necessary operation in the public street, to frighten horses. From the testimony, however, it appeared that it was at the time when the steam roller emitted a thick volume of black smoke that the horse became frightened. It further appeared that the defendant's servant, before he "hooked up the fire," took no precaution whatever to ascertain whether any vehicle drawn by a horse was near or approaching. Under such circumstances, it seems to us the question of the defendant's negligence was one for the jury to determine. The facts of this case are controlled by the legal principles enunciated by Mr. Justice Trenchard, who delivered the opinion of the Court of Errors and Appeals in *Butler v. Easton & Amboy R. R. Co.*, 76 N. J. Law, 703, 71 Atl. 276.

The defendant's further contention is that the injury to the plaintiff was the result of an independent negligent act of the driver of the wagon, because, when the latter saw the roller, he failed to take all precautions to prevent an accident, but continued to drive on and past the roller, and therefore the injury to the plaintiff was the proximate result of the driver's negligence, and not of the defendant's. The driver was lawfully in the street. He had a right to pass the roller. He was under no duty to anticipate that there would be an extra quantity of black smoke discharged from the roller as he was near to and passing it. *Butler v. Easton & Amboy R. R. Co.*, supra, 76 N. J. Law, 707, 71 Atl. 276. But, suppose he was chargeable with all this and was also negligent, it is far from sound reasoning and principle that thereby the defendant's act became divested of negligence or became merged in the driver's negligence so as to exonerate the defendant from liability for the result that followed. The fallacy of the defendant's contention lies in assuming that

it was an independent act of the driver of the wagon that was the sole cause of the injury to the plaintiff, whereas, if the driver was negligent, it was the co-operating negligence of the driver with that of the defendant that resulted in an injury to the plaintiff. And under such circumstances the defendant would be liable. "The initial force that set in motion the train of circumstances by which the plaintiff was injured" was the emitting of the dense volumes of black smoke by the roller when the horse was near to and passing it that frightened the horse, and therefore the defendant cannot escape liability for the consequences that ensued. *Collins v. West Jersey Exp. Co.*, 72 N. J. Law, 232, 62 Atl. 675, 5 L. R. A. (N. S.) 373; *Walling v. Cent. R. R. Co.*, 81 Atl. 987.

The judgment of the circuit court should be affirmed.

FIRTH v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

The place of work of a servant was a pit under a locomotive tender which was a reasonably safe place unless the tender was moved without warning. There was a custom of giving such a warning, but whether it was given as an incident of the work of the master or as the duty of the master to warn the servant was a disputed question. Held that, where the testimony was conflicting and variant inferences could be drawn from it, this question was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1002, 1003, 1007, 1006, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—WARNING OF DANGER—DUTY OF MASTER.

A warning is incidental to the work of the master when the act that constitutes such warning is done as part of the work for the master in the performance of which his servants were at the time engaged, and not as the performance of the master's duty to warn his servants, although it may incidentally have that effect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 297, 299-302, 303-307; Dec. Dig. § 150.*]

Error to Supreme Court.

Action by Walter S. Firth against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alan H. Strong, of New Brunswick, for plaintiff in error. John H. Backes, of Trenton, for defendant in error.

GARRISON, J. The defendant in error, Walter S. Firth, recovered a judgment for injuries received while working in the repair shop of the plaintiff in error.

The denial by the trial court of a motion

for a nonsuit and of a motion for a direction of a verdict are assigned as errors.

Upon this writ of error, therefore, the case consists of the testimony resolved most favorably to the defendant in error. Thus constituted, the case to be dealt with is: Walter S. Firth, who had been employed in the repair shop of the plaintiff in error for about two months, was set to work in a pit beneath a locomotive tender in order to remove a cylinder head, in doing which his body at times rested upon one or the other of the rails on which the tender stood, which on one of these occasions was moved without warning to him passing over and crushing his thigh. The movement of the tender was preliminary to the work of removing its tank, which required that the tender be directly under an overhead crane that by perpendicular traction lifted the tank clear of the trucks of the tender. The crane was operated by a man in a cage some 50 feet above the floor who started and stopped the motors that controlled the crane upon hand signals given him from below. At the time of the accident, the preparation for moving the tender into position had progressed as far as the disconnection of its brakes, the hooking of chains to various parts of the trucks, and the connection of these by their center ring with the vertical traction chain lowered from the crane. The hooks by which the chains were attached to the trucks were prevented from falling out of place by the taking up of the slack which was done by the operator of the crane preparatory to the moving of the tender into its intended position. It was at this stage that the tender moved over the rails inflicting the injury for which damages were recovered.

Young Firth had been put in charge of a Mr. Burr, by whom he was instructed as to working in the pit, and to whom, on several occasions, he had said that he was "afraid to work under there"; to which, on at least one occasion, Burr replied, "Walter, never be afraid, because you will be notified before the tender is moved." As a matter of fact and custom, when the tender was about to be moved, some one would come around and say, "Get out, we are going to move it." On the occasion of the plaintiff's injury, no such warning was given. Such being the facts that a jury might find, the argument relied upon to take the question of the defendant's liability from the jury is that the only permissible inference from these facts is that the customary warning "was incidental both in its object and performance to the work of the master," i. e., that the warning was incidental to the moving of the tender and not for the safety of the man who was working underneath it. In legal effect, the proposition in question, therefore, is that no other conclusion could be reached from the testimony than that the warning was given to

the man under the trucks in order that the work of moving the tender might not be impeded by the presence of his body on the rails. The bald statement of this contention is its own refutation, for the legal proposition is not merely that the jury might so find, which is, to say the least, questionable, but that the jury could not find otherwise, which is manifestly untenable. In support of this proposition, stress is laid upon the circumstances that the warning was customarily given by a fellow workman as if that were in some way conclusive. The fact is in dispute, but, if it were not, it is only a relevant, not a conclusive, circumstance.

The cases of *Miller v. Central R. R. Co.*, 69 N. J. Law, 413, 55 Atl. 245, and *Koneski v. D., L. & W. R. R. Co.*, 77 N. J. Law, 645, 74 Atl. 516, 26 L. R. A. (N. S.) 644, on which the plaintiff in error relies, do not support his proposition. In each of these cases the act of omission had reference to a duty owed by the servant to the master, and was at once inseparable from the proper performance of the work of the master, and at the same time incidentally constituted a warning upon which the master's other servants customarily relied. Such reliance was therefore clearly none other than that a fellow servant would, without negligence, perform the duty thus owing by him to the common master; and it is plain that the failure of a servant to perform a duty thus owing to the master does not transform the duty into one owing by the master to his servants.

[2] These cases therefore aptly illustrate what is meant by a warning that is incidental to the work of the master, showing it to be an act done as part of the work for the master in the performance of which the servant was at the time engaged, and not a performance of the master's duty to warn his servants, although incidentally it may have that effect.

Thus in the *Miller Case* the neglected duty was that of a rear-end brakeman to go back and flag a train that might be coming, a duty that he owed to the master in the line of his employment. Incidentally the performance of this duty served as a warning to the servants on the on-coming train.

In the *Koneski Case* the neglected duty was the ringing of the engine bell, a duty that appertained to the proper performance of that duty, and hence was owed by the servant to the master.

Directly opposed to the facts of these cases is the case in hand, in which the work of moving the tender had no tendency to give rise to any incident that would act as a signal or warning, which, consequently, if given, by word of mouth, by the servants engaged in such work, might well be found by the jury to have been done by them, not in the performance of their work for the master, but in the performance of the duty of the

master to warn his servant that the place in which he had been set to work was about to be rendered unsafe.

This distinction renders it plain that the controlling feature of the cases relied upon by the plaintiff in error was not that the negligent servant and the injured servant were in the employ of the common master, but that the duty that was neglected was one that was owing to such master by his servants, and not one that was owing by him to them.

"The test," as we said in *Laragay v. East Jersey Pipe Co.*, 77 N. J. Law, 516, 72 Atl. 57, "is not what agents did the master employ in the performance of a given duty, but whether the duty itself was one that he owed to his servants or one that they owed to him." Of the latter, the cases first cited are examples; of the former, those cited by the defendant in error are illustrations, viz.: *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834; *Albanese v. Central R. R. Co.*, 70 N. J. Law, 241, 57 Atl. 447; *D'Agostino v. Penna. R. Co.*, 72 N. J. Law, 358, 60 Atl. 1113; *Germanus v. Lehigh Valley R. R. Co.*, 74 N. J. Law, 662, 67 Atl. 79; *Ondis, Adm'x, v. Great Atlantic, etc., Co.*, 81 Atl. 856.

[1] We care to add nothing to the legal expositions contained in these decisions, the correctness of which is not at all challenged in the case before us which turns solely upon the relative functions of court and jury with respect to the rules of law established by the cases cited. In its simplest form, the contention of the plaintiff in error is that, while the jury was justified in finding that the warning of the intended movement of the tender was customarily given, it was not open to the jury to find that such warning had for its object the safety of the servant who was working underneath such tender. The trial court refused to adopt this view, and was entirely right in so doing. There was therefore no error committed under any assignment that has been argued.

The judgment of the Supreme Court is affirmed.

FIRTH v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

Error to Supreme Court.

Action by Walter Firth against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alan H. Strong, of New Brunswick, for plaintiff in error. John H. Backes, of Trenton, for defendant in error.

PER CURIAM. The decision of this case is dependent upon that of *Walter S. Firth v. Pennsylvania R. R. Co.*, 83 Atl. 896, decided at this term, and, for the reasons stated in the opinion in that case, the judgment brought up by this writ of error is affirmed.

LOUDENSLAGER v. ATLANTIC CITY.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 951*)—SINKING FUND—ESTABLISHMENT.

The common council of Atlantic City on May 25, 1896, by the passage of the resolution required by the act of March 14, 1879, p. 270, established a sinking fund under the provisions of that act. On March 25, 1912, city council passed a resolution rescinding the said resolution of May 25, 1896, and providing for the handing over of the fund to a committee of common council. *Held*, that the power conferred by the act of 1879 in this respect was exhausted by its exercise, and that the attempted rescission of the resolution by which a sinking fund was established was nugatory and ultra vires, and that the handing over of the fund to common council was without legislative or legal warrant.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1996-1998; Dec. Dig. § 951.*]

Certiorari by William B. Loudenslager against the City of Atlantic City to review a resolution of the common council. Set aside in part.

Argued before GARRISON, J., under the statute.

Grey & Archer, for prosecutor. Harry Wootton, for defendant.

GARRISON, J. In 1879 the Legislature passed an act entitled "An act to enable cities to create and maintain a sinking fund for the redemption of their bonded indebtedness" (P. L. 1879, p. 270). Section 1 of this act provides that any city of less than 100,000 population may, by resolution of the common council thereof, establish a sinking fund. This Atlantic City did by a resolution of its council adopted May 25, 1896.

The act of 1879 also provides for a "commissioner of sinking fund" to be appointed for a term of five years by the Supreme Court or a justice thereof upon the application of any city council who shall have created a sinking fund under its provisions. This was also done, and the prosecutor, as the incumbent of said office and also as a taxpayer, now attacks a resolution of city council adopted on March 25, 1912, that purports, among other things, to rescind the resolution of 1896 establishing the said sinking fund.

The establishment of a sinking fund for Atlantic City became an accomplished fact when the resolution of 1896 was adopted by the common council which thereupon, so far as this statutory grant was concerned, became functus. For the grant was of the right to exercise a specific statutory power and not a delegation of legislative power over a specific subject. The present case is thereupon the antithesis of *Stemmler v. Madison* (Err. & App.) 83 Atl. 85. Such statutory grant having thus been exhausted by its ex-

ercise, the rescission of such exercise was not only nugatory but ultra vires. The resolution of March 25, 1912, therefore, so far as it purports to disestablish the sinking fund, is set aside.

It is argued that Atlantic City may avail itself of "An act authorizing the establishment of sinking funds in cities of this state," approved March 23, 1881 (P. L. p. 189). This may be so if the object thus expressed be held to apply to cities in which a sinking fund is already established, a question to be decided when it is raised, which it certainly is not by the mere direction to the city solicitor to prepare an ordinance under said act of 1881, which is a further provision of the resolution under review.

Non constat that such an ordinance will be passed. A mere direction to draft an ordinance is, of course, not reviewable, but neither, on the other hand, does it justify municipal action based upon the passage of such ordinance. It is the existence of the sinking fund, not the title to the office of commissioner, that is involved. Hence the remaining provision of the resolution, viz., that the cash, bonds, and securities accumulated in the sinking fund be handed over to a committee of common council, is premature to say the least.

In view of the impotence of city council to disestablish the sinking fund by the rescission of the resolution of 1896, this provision, which treats the sinking fund as already disestablished, is clearly without legislative or legal warrant.

So much of the resolution under review as directs the city solicitor to prepare an ordinance is unassailable by the prosecutor, but so much of it as rescinds the resolution establishing the sinking fund and directs the handing over of the fund itself to a committee of council is set aside, with costs.

ELLIOTT v. PHILADELPHIA & CAMDEN FERRY CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

FALSE IMPRISONMENT (§ 15*)—ARREST OF PASSENGER—CARRIER'S LIABILITY—ACT OF EMPLOYÉ.

Where plaintiff was on defendant's ferryboat as a passenger, and had paid his fare when he was wrongfully arrested by one of defendant's employés, defendant, in an action for false imprisonment, was liable, though the employé effecting the arrest was not acting in the course of his employment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-67; Dec. Dig. § 15.*]

Error to Circuit Court, Camden County.

Action by Reuben J. Elliott against the Philadelphia & Camden Ferry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gaskill & Gaskill, of Camden, for plaintiff in error. Wescott & Wescott, of Camden, for defendant in error.

PER CURIAM. The defense claims exemption from liability because the arrest for which plaintiff sues was the act of the employé when engaged in a matter of his own, and not in the course of his duty as servant of the defendant. It appears that the plaintiff was on the ferryboat as a passenger and had paid his fare. The case is therefore governed by *Haver v. Central R. R.*, 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647, and it was proper to refuse to consult and to direct a verdict for defendant.

We think the trial judge was right, also, in excluding evidence that the plaintiff had made a good many claims and brought other suits against corporations before the present one.

The judgment is affirmed, with costs.

NEGY v. KWALICK.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

APPEAL AND ERROR (§ 78*)—ORDERS APPEALABLE—STRIKING PLEADING AS FRIVOLOUS.

An order striking out as frivolous a plea or demurrer is not final, and is not reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

Error to Supreme Court.

Action by Charles Negy against Harry Kwalick. There was an order striking out a demurrer as frivolous, and defendant brings error. Writ of error dismissed.

John J. Stamler, of Elizabeth, for plaintiff in error. John J. Fallon, of Hoboken, for defendant in error.

PER CURIAM. The plaintiff in this case sued to recover for the pecuniary loss sustained by the next of kin of his intestate by reason of the latter's death, which was charged to be due to the wrongful act of the defendant Kwalick. The defendant demurred to the declaration, and, a motion having been made to strike out the demurrer as frivolous, it was ordered that, "it having been determined that said demurrer is frivolous, it is thereupon, on the 6th day of June, 1911, ordered that it be stricken out, and that the defendant plead to the declaration within 20 days after service of a true copy upon the defendant or his attorney, and that, in default of pleading as aforesaid, judgment may be entered against the defendant by default." Two days after the entry of this rule the present writ of error was sued out, and under it the defendant challenges the validity of the rule.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

An order of the Supreme Court striking out as frivolous or sham a plea or demurrer, being merely incidental, and discretionary in character, is not final, in the sense of the common-law rule applicable to writs of error, and consequently is not reviewable before us. It was so decided by this court in the case of *Brown v. Warden*, 44 N. J. Law, 177, and again in *State Mutual B. & L. Association v. Williams*, 78 N. J. Law, 720, 75 Atl. 927.

The writ of error must be dismissed as improvidently sued out.

**MONMOUTH COUNTY ELECTRIC CO. v.
CONSOLIDATED GAS CO. OF NEW
JERSEY.**

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

**CONTRACTS (§ 217*)—CONSTRUCTION—RIGHT
TO RENEWAL.**

A contract for the furnishing of electric current at a stipulated rental for a fixed period of three years provided that the party furnishing the current "agrees to renew this contract at its expiration for an additional three years should the party of the first part desire such a renewal." *Held*, that the party furnishing the current was not bound to renew unless the desire of the other party for such renewal was communicated on or before the last day of the original term.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1006-1009; Dec. Dig. § 217.*]

Error to Supreme Court.

Action by the Monmouth County Electric Company against the Consolidated Gas Company of New Jersey. Judgment for defendant, and plaintiff brings error. Affirmed.

McDermott & Enright, of Jersey City, for plaintiff in error. Frederick W. Hope, of Red Bank, and Edmund Wilson, Atty. Gen., for defendant in error.

PARKER, J. The sole question raised by this writ of error is the propriety of the nonsuit entered in the court below. The solution of this question depends on the effect to be given to the written contract between the parties. The Electric Company, operating a trolley railroad line and needing electric current for that purpose, contracted with the Gas Company, which had facilities for furnishing such current, for the necessary supply. The contract is dated February 1, 1905, and by it the Electric Company agreed to buy from the Gas Company all electric current it might use "within the period of three years from date (that is, from February 1, 1905, to February 1, 1908)" and to pay therefor three cents per kilowatt; the Electric Company, the purchaser, also agreeing to furnish and keep in repair all electric apparatus necessary for the generation and supply of said current. The Gas

Company faithfully performed this contract for the term specified, but thereafter refused to continue the supply except at a higher rate, and the present suit was to recover damages for such refusal, basing the alleged right to a continuance of the supply at the same rate after February 1, 1908, upon a "renewal clause" contained in the contract, and which reads as follows: "Twelfth. The party of the second part (the Gas Company) agrees to renew this contract at its expiration for an additional three years, should the party of the first part desire such a renewal, and it is further agreed by the party of the second part to allow the party of the first part at the expiration of this contract to remove all of its electrical apparatus from the plant of said party of the second part if desired by the party of the first part."

The ground taken by the trial court was that this clause conferred an option which must be exercised not later than February 1, 1908, and had not been so exercised; or, in any case, that such option must be exercised within a reasonable time after February 1, 1908, and that a reasonable time had elapsed before any attempted exercise of the option.

We consider that the judgment of nonsuit should be affirmed, and are content to rest our decision on the first ground taken in the trial court, viz., that the desire of the plaintiff for a renewal should have been communicated to defendant on or before February 1, 1908. The renewal clause above quoted is similar to that found in many instruments of demise, and, as to such, its effect is not in doubt. Where a lessee is entitled to a renewal of his lease, he must give notice promptly at or before the expiration of the first term or according to the agreement. *Jones on Landlord and Tenant*, § 339; *Thibaud v. First National Bank*, 42 Ind. 212, 219. In *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545, the option of renewal lay with the landlord and was exercised on the day the lease expired; the questions in dispute relating to authority of agents and sufficiency of notice. The clause of renewal reads, "In case said first party shall elect at the termination of said five years to renew this lease," etc., and the court viewed the rule as settled that such election must take place on or before the last day of the term.

Renoud v. Daskam, 34 Conn. 512, is precisely in point. The landlord's covenant was that, "after the expiration of said term of five years, he will, if thereto desired by said Renoud, make and execute to said Renoud a lease of said premises for the further term of five years, upon the terms and conditions in this lease contained." No notice of a desire to renew was given until the day after the expiration of the lease, and it was held that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the lessee was bound to express his desire of renewal, and do so on or before the expiration of the original term.

We see no difference in the character of the contract under consideration or in the relations of the parties that calls for the application of any different rule than the above. The contract was for a definite term which required renewal if the service of electric current was to continue after the date of expiration. As was said in the Connecticut case, the phrase "at its expiration" refers to the renewal and not to the exercise of the option, and it was as important to defendant as to a landlord to know in due season whether a renewal was desired in order to adapt its other business to the conditions arising from renewal or lapse of the contract, as the case might be. The defendant seems to have acted fairly in calling attention on January 31st to the expiration of the contract and to the absence of any notice of renewal up to that time.

The authorities cited with respect to options of purchase of land or personality are not in point. Apart from differences in language, there is an essential difference between the renewal of an existing status at the end of a fixed term and the right to make a purchase or a conversion on serving notice. If the option in the case at bar had been for the plaintiff to purchase defendant's plant at a fixed price on the expiration of the term, a different rule might perhaps apply. But that point is not before us, and no decision on it is intimated.

It is not pretended that any communication, either in writing or orally, was made to defendant of plaintiff's desire to renew, on or before February 1, 1908.

The nonsuit was right, and the judgment will be affirmed.

BROAME v. NEW JERSEY CONFERENCE CAMP MEETING ASS'N (two cases).

(Court of Errors and Appeals of New Jersey.
June 21, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—QUESTIONS OF FACT.

In reviewing a refusal to nonsuit or direct a verdict, the testimony will be considered in the aspect which is favorable to defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. TRIAL (§ 143*)—DIRECTION OF VERDICT—DISPUTED FACTS.

Where there is a substantial dispute as to the facts, a motion for direction of a verdict is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

3. LANDLORD AND TENANT (§ 165*)—USE OF PREMISES—LIABILITY OF LANDLORD.

In cases where a landlord may not be held responsible for injuries caused by the defective

condition of the demised premises in the absence of an agreement to repair, he is nevertheless liable where he undertakes to do work on or about a part of the premises either for compensation or gratuitously, and by reason of the negligent doing of such work a person in the employ of his lessee is injured.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631, 633-637, 640, 641; Dec. Dig. § 165.*]

Error to Circuit Court, Camden County.

Action by William Broame against the New Jersey Conference Camp Meeting Association, and action by Mary Broame against the same defendant. Judgments for plaintiffs, and defendant brings error. Affirmed.

John Boyd Avis, of Woodbury, for plaintiff in error. Wescott & Wescott, of Camden, for defendants in error.

TREACY, J. These cases were tried together. One was a suit by a wife for damages for injuries claimed to have been sustained by her by reason of the defendant's negligence. The other was a suit by her husband for the damage resulting to him on account of the injuries to his wife.

[1] The errors assigned are the denial by the trial court of a motion for a nonsuit and a motion for a direction of a verdict. On such assignments of error the defendants in error are entitled to have the testimony considered by us in the aspect which is favorable to them. Looked at from that viewpoint, the case presents the following facts: The defendants in error, plaintiffs below, worked as cooks for one Walton, who conducted a hotel owned by the plaintiff in error, known as the Grove House, and which had been sublet to him by the lessee of plaintiff in error. In the performance of her duties, Mary Broame had to hang clothes in the hotel yard. There was a cesspool in the yard over and around which she had to walk while doing this work. At the time of the accident, while so engaged, she stepped on the cover of the cesspool, which was improperly fastened, fell into the pool, and was injured. The cesspool was a receptacle for slops from the hotel kitchen, and was cleaned out from time to time, as it filled up, by the employes of the plaintiff in error. They had cleaned it out the night before Mrs. Broame was hurt or the same day. It was Walton's custom to notify the plaintiff in error whenever the pool needed cleaning out. Although by the terms of the lease under which Walton held he was to be responsible for the removal of all slops, the plaintiff in error compelled him to pay half of the expense of this work, and bore the other half itself. No other persons than the employes of plaintiff in error ever cleaned out the cesspool.

The jury might have found these facts. It might have inferred therefrom that the improper fastening of the cover of the cesspool was done by defendant's servants. If

the plaintiff in error undertook to do the work of cleaning out the cesspool under the arrangement testified to by Walton, it would be chargeable with the negligence of its servants. It cannot be said on the testimony in this case that there was not sufficient evidence to support the verdict of the jury. Although the testimony for the plaintiffs was contradicted, all disputed facts must be resolved in their favor on a motion for the direction of a verdict. *McGrath v. North Jersey St. Ry. Co.*, 66 N. J. Law, 312, 49 Atl. 523.

[2] A trial court cannot direct a verdict where there is a substantial dispute as to the facts or the inferences to be drawn therefrom. *Carroll v. Central R. R. Co.*, 81 N. J. Law, 567, 79 Atl. 293.

[3] The plaintiff in error attempts to bring the case sub judice within the rule that a landlord is not liable for injuries sustained by a tenant by reason of the defective condition of the demised premises; no obligation to repair being implied by the contract of letting. In the case at bar there was evidence indicating that the landlord retained control of the cesspool for the purpose of cleaning it out. Even if the landlord is not under any obligation to make repairs, but undertakes to do them gratuitously, he is liable for injuries resulting from the negligence of himself or his servants in making the repairs. *La Brasca v. Hinchman*, 81 N. J. Law, 367, 79 Atl. 885. In the present case there was evidence indicating that the defendant's servants had committed a positive act of negligence, namely, the improper replacement of the cover of the cesspool.

The judgment should be affirmed.

JACOBSON v. HAYDAY.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(*Syllabus by the Court.*)

1. EJECTMENT (§ 81*)—TITLE OF PLAINTIFF—ISSUES AND PROOF.

The defendant by pleading the general issue in an ejectment suit admits a possession by him amounting to an ouster of the plaintiff, and, if the latter shows at the trial a title against which an exclusive possession or claim of the defendant would be wrongful, he will be entitled to judgment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 220, 221; Dec. Dig. § 81.*]

2. EJECTMENT (§ 23*)—DEFENSES—TITLE OF DEFENDANT—EASEMENT.

An easement of a right of way is no defense to an action of ejectment brought by the owner of the fee to recover possession, where the defendant admits by his plea that he has ousted the plaintiff and claims exclusive possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 81-93; Dec. Dig. § 23.*]

3. EJECTMENT (§ 9*)—TITLE OF PLAINTIFF—EASEMENT.

Ejectment cannot be maintained to recover a right of way which is limited to an

easement over lands, the fee of which is in another. The appropriate remedy is an action for damages resulting from an unlawful interference, or by injunction if a case for equitable jurisdiction is presented. Nor can such an easement be established in favor of the tenant of the easement in an ejectment suit brought by the owner of the fee to recover possession, for it would amount to the recovery of a right of way in a suit not adapted to the adjudication of that question.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

Error to Supreme Court.

Action by Louis Jacobson against William Hayday. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

Chandler & Robertson, of Atlantic City, for plaintiff in error. Thompson & Smathers, of Atlantic City, for defendant in error.

BERGEN, J. The plaintiff in error brought an action in ejectment to recover possession of a strip of land four feet in width along Atlantic avenue in Atlantic City, and 75 feet, six inches in depth, as described in his declaration. To this action the defendant interposed a plea of general issue, and the trial court, at the close of the case, directed a verdict for the defendant upon which judgment in his favor was entered. The plaintiff seeks to reverse this judgment and assigns as error the direction of the verdict for the defendant.

[1] The defendant, by pleading the general issue, admits a possession by him amounting to an ouster of the plaintiff, and, if the latter shows at the trial a title against which an exclusive possession or claim of the defendant would be wrongful, he will be entitled to judgment, otherwise not. *Combs v. Brown*, 29 N. J. Law, 36; *French v. Robb*, 67 N. J. Law, 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433.

[2] Therefore, if this judgment be sustained, it would vest in the defendant the exclusive possession of the land in question. The plaintiff's right to possession rests entirely upon a paper title traced from George Hayday, Sr., who had title to, and possession of, a considerable tract of land which included the locus in quo. He devised the tract to his children in different parcels, after having erected buildings thereon, leaving an alley (the land in dispute here) four feet wide between two of them, one of which he devised to an ancestor in title of the plaintiff and the other to the defendant. There is testimony in the case showing that the plaintiff's paper title includes the alley, and this is not disputed by the defendant, who sets up as a defense that he is entitled to a right of way over the alley, which he says is recognized by the grantor of the plaintiff in his deed to him. According to this deed, plaintiff's grant is made "subject

to the right of way, if any, over that part of the premises lying between the buildings 1706 Atlantic avenue, and the buildings on the premises adjoining on the east so far as the same may now be used by owners, tenants, or occupants of the adjacent properties, and rights, if any, of the maintenance of the present windows or other openings on the westerly side of the building on adjoining premises on the east."

Assuming, but not conceding, that, as defendant claims, this deed subjects plaintiff's land to an easement of way in favor of defendant, the situation, when the trial court directed the verdict, was that the plaintiff in ejectment had a paper title to the fee of the land, derived from an ancestor in title who had possession as well as title, while the defendant relied for justification of his plea to the right of exclusive possession upon an alleged right of way or easement to pass and repossess over the land. If the defendant had clearly established the easement he claims, it would be no defense to this action, for a fee and an easement in an estate are independent rights when vested in different persons, and each may vindicate their respective rights by an action at law, the one to enforce his fee, and the other to protect an interference with his easement, but a right of way over lands, held by another in fee, will not support a defense in an action in ejectment which rests upon a mere right of way, for the plaintiff has a right to assert his title to the fee, and the adjudication of that question in his favor will not destroy the right of the holder to such an easement. The judgment in such case, if in his favor, settles the plaintiff's right to possession, subject to the easement if it exists. *Burnet v. Crane*, 56 N. J. Law, 285, 28 Atl. 591, 44 Am. St. Rep. 395.

[3] Ejectment cannot be maintained to recover a right of way which is limited to an easement over lands, the fee of which is in another. The appropriate remedy is an action for damages resulting from an unlawful interference with the easement, or by injunction if a case for equitable jurisdiction is presented. Nor can such an easement be established in favor of the tenant of the easement in an ejectment suit brought by the owner of the fee to recover possession, where the plea admits ouster of the owner, and exclusive possession by such tenant is claimed, for it would amount to the recovery of a right of way in a suit not adapted to the adjudication of that question, for under such pleadings a judgment for plaintiff would not impair any right of way that the defendant may have as an easement over the land in question; the rights involved are separate and independent.

As the plaintiff is entitled to establish his right to the possession of the land subject to defendant's user as tenant of the

easement of way, it was error to direct a verdict for the defendant in this case, and the judgment below will be reversed and a new trial ordered.

PUBLIC SERVICE RY. CO. v. BOARD OF PUBLIC UTILITY COM'RS et al.

(Court of Errors and Appeals of New Jersey. June 20, 1912.)

CARRIERS (§ 269*)—CARRIAGE OF PASSENGERS—TRANSFERS.

The Public Service Railway Company is not required under the ordinances of the city of Newark to give retransfers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1060-1063; Dec. Dig. § 269.*]

Error to Supreme Court.

Action between the Board of Public Utility Commissioners and others and the Public Service Railway Company. From a judgment of the Supreme Court (81 Atl. 1117) affirming an order of the Board of Public Utility Commissioners, the Public Service Railway Company brings error. Affirmed.

Frank Bergen, of Newark, for plaintiff in error. Frank H. Sommer and Joseph G. Wolber, of Newark, for defendants in error.

PER CURIAM. The writ in this case brings up for review a judgment of the Supreme Court affirming an order made by the Board of Public Utility Commissioners in August of last year, directing the Public Service Railway Company to issue transfers at specified connecting points, where theretofore they had not been issued by the company. The Supreme Court affirmed the order of the board, and in our opinion that affirmance was proper, and for the reasons set forth in the opinion delivered by the Supreme Court.

In order to avoid misapprehension we deem it proper to add that we do not understand the Supreme Court, by its decision, to have affirmed the findings recited in the order of the board, but merely the mandatory part of that order. The findings to which we refer are that "the Public Service Railway Company is legally bound to give a transfer to any passenger paying the fare of five cents upon any of its cars, such transfers entitling the passenger to a continuous ride in either direction on any street railway line intersecting with, or connecting with, the line upon which said transfer was given; and, further, that the requirement to give such transfers may not be restricted or limited to a line that may take the passenger without further change to his ultimate destination, but that transfers must be given on any intersecting or connecting line that advances the passenger continuously towards his ultimate destination, even though a re-transfer is required to bring him to his ultimate destination." The various ordinances of the city of Newark upon which these find-

ings are based, and which are specifically referred to in the opinion of the Supreme Court, do not in our judgment support the conclusion that by force thereof the Public Service Railway Company is required to furnish transfers on any intersecting or connecting line that advances the passenger continuously toward his ultimate destination, even though a retransfer is required to bring him to it.

The judgment under review will be affirmed.

**BOHLES v. PRUDENTIAL INS. CO.
OF AMERICA.**

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

1. TIME (§ 5*)—"MONTH."

The term "month" in a policy of life insurance construed to mean a calendar month.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4574, 4575; vol. 8, p. 7724.]

2. TIME (§ 10*)—DAYS.

Where a premium was due on a life insurance policy on June 30th, and by the terms of the policy a period of grace of one month was allowed for its payment, and the last day of grace fell on July 31st, which was a Sunday, the insured had the first day thereafter upon which lawful business could be transacted, which was Monday, August 1st, on which to pay the same.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 84-82; Dec. Dig. § 10.*]

3. INSURANCE (§ 388*)—FORFEITURE OF POLICY—NONPAYMENT OF PREMIUMS—WAIVER.

The refusal of the insurer to accept the premium on that day, and its claim that the policy had lapsed because the insured had not paid the premium within 30 days, and that the policy would not be continued and no premium received unless the insured first underwent a medical examination, was a waiver, by the company, of any further tender of subsequent premiums, without notice to the insured that they would be received.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1026-1040, 1057; Dec. Dig. § 388.*]

4. INSURANCE (§ 559*)—PROOF OF DEATH OF INSURED—WAIVER.

The insurer having denied liability on the policy upon the specific ground that it had lapsed, and therefore ceased to continue in force, made it unnecessary to furnish proofs of the death of the insured in order that the policy may become payable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.*]

5. INSURANCE (§ 543*)—PROOF OF DEATH OF INSURED—SUFFICIENCY.

Where a life insurance company issues several policies on the life of the insured and there is nothing contained in any of them which requires a separate proof of the death of the insured to be made, such proof of death made under one of them suffices to make the policy under which no such proof had been made actionable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1347; Dec. Dig. § 543.*]

Error to Circuit Court, Essex County.

Action by Anna Bohles against the Prudential Insurance Company of America. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo awarded.

Argued February term, 1912, before BERGEN and KALISCH, JJ.

Samuel Kalisch, Jr., and Samuel Press, both of Newark, for plaintiff in error. Edward D. Duffield, of Newark, for defendant in error.

KALISCH, J. A policy of insurance was issued by the defendant company on the life of George B. Bohles under date of December 30, 1902, by the terms of which the defendant company agreed to pay to Anna Bohles, the beneficiary and wife of George B. Bohles, the sum of \$1,000 "immediately upon acceptance of satisfactory proof of the death of the insured during the continuance of this policy." The premium was payable "quarter annually" on the delivery of the policy, and on or before the 30th day of March, June, September, and December, in every year during its continuance. The policy further provided: "In the payment of any premiums under this policy, except the first, a grace of one month will be allowed, during which time the policy will remain in force." The insured died on the 18th day of April, 1895. On April 26, 1905, the beneficiary, Anna Bohles, filed with the defendant company proofs of the death of the insured on two other policies of insurance issued by the defendant company on her husband's life. An action was brought by the plaintiff against the defendant company on March 9, 1910, to recover the amount due on the policy under date of December 30, 1902; the other two policies having been paid by the company.

At the trial in response to a notice given by the plaintiff to the defendant company to produce the proofs of death of George Bohles, the insured, the defendant, by its attorney, produced the proofs of death filed with the company by the plaintiff under the two other policies, and at the same time admitted that they were the proofs of death of the same George Bohles who was insured under the policy in litigation, but not admitting that they were proofs of death furnished in connection with that policy.

From the plaintiff's testimony it appeared that the defendant company, after having received the premium of \$7.84 from her for the month of June, on August 1st discovered that the plaintiff's husband was ill, and therefore it insisted upon her surrendering the receipt given her for such premium, and induced her against her most emphatic protests to accept a return of the money represented by the receipt, on the claim that the policy on the life of her husband had lapsed on July 30th, and therefore, when she paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the June premium on August 1st, it came too late for acceptance by the company, and that her husband must undergo a medical examination before the premium would be accepted and the policy continued.

[1] At the close of the plaintiff's case, the only ground upon which the defendant moved for a nonsuit was that the payment of the premium had not been tendered to the company until after the premium had been due over 30 days. The trial judge granted this motion on the theory that the word "month" in the insurance contract should be construed to mean 30 days. Upon the argument before this court the defendant urged as an additional reason why the nonsuit should be sustained that the plaintiff had not presented proofs of the death of the insured under this particular policy.

[2] It is clear that the trial court erred in computing the period of grace in which the insured was entitled to pay the premium due on the policy. The premium became payable on June 30th. The month of July was the period of grace to which the insured was entitled under the policy. Therefore the period of grace expired on July 31st. This was a Sunday. As the company provided no means by which the premium could be paid on Sunday, and as the insured was entitled to the entire month of July in which to do so and as the last day happened to be Sunday, he was entitled to pay the same on the first day thereafter upon which lawful business could be transacted, which was on Monday, August 1st. This view is in accord with the weight of authority on the subject. See 38 Cyc. tit. "Months," p. 311, and cases cited; *Campbell v. Internat'l Life Ass'n Soc.*, 4 Bosw. (N. Y.) 299; *Hammond v. Am. Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Stryker v. Vanderbilt*, 27 N. J. Law, 68; *Von de Place v. Weller*, 64 N. J. Law, 155, 44 Atl. 874.

[3] It is important to bear in mind, in this connection, that when the defendant company claimed that the policy had lapsed because the premium was paid on August 1st, instead of July 30th, and flatly refused to retain it, and insisted upon returning it to the plaintiff, it thereby waived any further tender of premiums, and that, by such conduct on its part, it relieved the plaintiff from making another tender of subsequent premiums, without notice that they would be received. *Agnes McMahon v. U. S. Life Ins. Co.*, 128 Fed. 388, 63 C. C. A. 130, 68 L. R. A. 87.

[4] Under this posture of affairs, we think the other ground advanced by the defendant in support of the judgment of nonsuit and now for the first time urged before us, that the failure of the plaintiff to present to the company proofs of death of the insured under this particular policy precluded her from a recovery thereon, is wholly without any merit. The company denied the legal vitality of the policy. It claimed that the policy

had lapsed. It refused to receive any premiums. From the time it refused to receive the June premium it treated the policy as without any binding force. Having repudiated all liability on the policy, it follows, as a logical sequence, that a proof of death thereunder would be of no avail. The reasoning of Mr. Justice Bradley in *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866, is applicable to the situation of the present case. On page 710 of 112 U. S., on page 320 of 5 Sup. Ct., 28 L. Ed. 866, this learned jurist says: "The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground without reference to the want or defect of the preliminary proof, the occasion for it ceases, and it will be deemed to be waived. And this can work no prejudice to the insurers, for, in an action on the policy, the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proofs were exhibited or not."

[5] There is an element in this case that conclusively answers the defendant's contention regarding the absence of any proof of loss being presented to the defendant under this policy, and that is that the insured held two other policies issued by the defendant company, under which proofs of the death of the insured were made, and therefore there does not appear to have been any substantial reason for a separate proof of death under this particular policy. A reference to the clause in the policy under the caption, "When Payable," which reads, "Immediately upon acceptance of satisfactory proof of the death of the insured during the continuance of this policy," makes the aim of this requirement too palpable to be misunderstood. The object sought for is satisfactory proof of the death of the insured. But that it would be necessary, in the first instance, where a company had issued 10 policies on the life of the insured, unless the insurer demanded it, to provide 10 separate proofs of death, does not seem reasonable. In the present case it was admitted by the defendant that it had notice of the death of the insured, and that he was the same person of whose death proofs were furnished by the plaintiff under two other policies issued by the defendant on his life. In the case of *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 97 Pa. 15-24, the question received careful and able consideration, and it was there decided that, while it was competent for a company to contract with the assured that, in case they issue more than one policy on his life, separate proofs shall be furnished, under each policy, in case of his death, there being no such contract in the policy, the provision of which was for the payment of the sum in-

sured 60 days after due notice and proof of the death of the insured, no separate proof of death was necessary.

These views lead to a reversal of the judgment of nonsuit and awarding a venire de novo.

BRADEN v. ROSENSTONE et al.
(Supreme Court of New Jersey. July 12, 1912.)

(Syllabus by the Court.)

INSOLVENCY (§ 33*)—BOND OF INSOLVENT—CONSTRUCTION — “IMMEDIATELY THEREAFTER.”

The words “immediately thereafter” contained in the provision of the statutory bond required to be given under section 2 of the Insolvent Debtors Act (2 Comp. St. 1910, p. 2825) by an insolvent debtor petitioning for the benefit of the Insolvent Laws, that he, the debtor, will, if refused a discharge, surrender himself immediately thereafter to the sheriff or keeper of the jail of said county, construed to have the meaning of “directly” or “at once,” after the debtor’s discharge has been refused.

[Ed. Note.—For other cases, see Insolvency, Cent. Dig. § 40; Dec. Dig. § 33.*

For other definitions, see Words and Phrases, vol. 4, pp. 3403-3410.]

Action by Edward A. Braden, surviving partner, against Abraham Rosenstone and others. Heard on rule to show cause. Rule discharged.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Melosh & Morten, of Jersey City, for plaintiff. Bildler & Bildler, of Newark, for defendants.

KALISCH, J. In an action brought upon an insolvent bond by the plaintiff against Abraham Rosenstone, principal debtor, and Hirsch Hertzberg and Benjamin S. Rosenstone, sureties, defendants, the trial judge at the close of the testimony directed a verdict in favor of the plaintiff and against the defendants for \$3,220.40. Upon application of the defendants’ attorney, a rule to show cause was allowed why the verdict should not be set aside and a new trial granted.

The condition of the bond upon which the plaintiff’s declaration is founded is as follows: “Now, therefore, if the said Abraham Rosenstone shall appear before the next court of common pleas to be holden in the county aforesaid and petition the said court for the benefit of the insolvent laws of this state, and shall in all things comply with the requirements of the said insolvent laws, and shall appear in person at every subsequent court until he shall be duly discharged as an insolvent debtor, and if refused a discharge surrender himself immediately thereafter to the sheriff or keeper of the jail of the said county, there so to remain until discharged by due course of law, then this obligation to be void, otherwise to remain in force.” The plaintiff introduced in evidence the record of the court of common pleas,

which recited, among other things, that the said Abraham Rosenstone, having appeared on said day and the taking of evidence in said matter, having been duly adjourned from time to time, until it was duly concluded, etc., the court ordered that he be refused his discharge, and that he be remanded, etc. The order was made on July 28, 1911. It was conceded at the trial, and the fact established is that the insolvent debtor did not surrender himself to the sheriff or keeper of the jail immediately after said order was made by the court, but that on the 1st day of August, 1911, he did surrender himself to the sheriff. It was further an established fact in the case that the plaintiff commenced an action upon the bond for breaches thereof on the 31st day of July, 1912. One of the breaches of the bond set out in the plaintiff’s declaration, and which was made the basis of the direction of a verdict for the plaintiff, was the failure of the insolvent debtor, immediately after the order of the court was made refusing to discharge him, to surrender himself to the sheriff or keeper of the jail of Hudson county.

The defendants attempted to set up as a defense to the plaintiff’s right of recovery that after the conclusion of the examination under the debtor’s petition, on July 14, 1911, the court, upon application of the debtor’s counsel, set July 21, 1911, on which it would hear arguments of counsel, and that, after such arguments were heard, the court announced that it would determine the application of the debtor during the following week without fixing any day for that purpose, and would notify the attorneys of the respective parties when it would be ready to render such determination, and that thereupon, without any notice to the debtor or his attorney, rendered a decision refusing his discharge which was then entered in the minutes of the court, and that the debtor had no notice of such decision or rule being entered until the evening of July 31, 1911, and that immediately thereafter, on August 1, 1911, he surrendered himself to the sheriff or keeper of the jail of Hudson county, etc., which defense the court overruled, and we think properly so. It is elementary law that a judicial record bespeaks absolute verity and may not be impugned collaterally. If the proceedings before the court of common pleas were irregular, they were open to an attack upon a direct review.

But it is insisted by counsel for defendants that whether there was a breach of the condition of the bond became under all the existing circumstances a question of fact for the jury to determine, and not for the court. The substance of the defendants’ argument to support this contention is that the words “immediately thereafter” must be construed to mean within a reasonable time, and what is a reasonable time must depend upon sur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep’t Indexes

rounding circumstances, and presents a jury question. The construction contended for is palpably unsound. The word "thereafter" refers to the time of the making of the order, and not to the time when the debtor may claim to have been first apprised of such order. The Legislature has not seen fit to leave it uncertain when such surrender shall take place, but, on the contrary, it has declared, in most emphatic terms, that the surrender shall be made "immediately" after the order refusing the discharge. The use of the word immediately in the statute is equivalent to that of "directly" or "at once." To adopt the defendants' construction would require us to give a meaning to plain words different from the sense in which they are generally used and understood. No good reason has been advanced why the general and accepted meaning of these words should be disregarded and a meaning given to them which they do not bear and which was not within the contemplation of the Legislature when it adopted them. It was never intended that it should lie within the discretion of the debtor when refused a discharge to choose the time of his surrender. Furthermore, it has been generally understood by the bar and it has been the common practice from time immemorial for the debtor, to be present when the order either granting or refusing a discharge was made, and, if refused a discharge, to surrender himself immediately to the sheriff or keeper of the jail. The presumption arising from the record is that the debtor was present when the order was made. We find that there was no legal excuse presented for the failure of the debtor to surrender himself to the sheriff or keeper of the jail immediately after the order was made refusing his discharge, and that, therefore, the direction of a verdict for the plaintiff against the defendants was fully warranted by the evidence.

The rule to show cause will be discharged.

SNYDER PASTEURIZED MILK CO. v. BURTON.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. GOOD WILL (§ 6*)—SALE—CONSTRUCTION.

A person who has sold the good will of his business may, unless he has otherwise covenanted, set up a rival business, but he may not solicit the custom of those who have previously dealt with him.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6.*]

2. ESTOPPEL (§ 52*)—EQUITABLE ESTOPPEL—EFFECT.

A person by his inequitable conduct may deprive himself of a right he might otherwise lawfully claim.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

Appeal from Court of Chancery.

Bill in equity by the Snyder Pasteurized Milk Company against John W. Burton. From an order directing the issuance of an injunction, defendant appeals. Affirmed.

John A. Hartpence, of Trenton, and Vredenburgh, Wall & Carey, of Jersey City, for appellants. William J. Backes, of Trenton, for respondent.

GARRISON, J. This is an appeal from an order of the Court of Chancery directing the issuance of an injunction to restrain "the defendant from soliciting any of the customers of the complainant, who had prior to the sale of the property and good will of the milk business of the said defendant to the complainant been his customers, to deal with or to purchase milk and cream from him and not to purchase their milk and cream from the complainant; also from selling or delivering milk and cream to any of the customers of the said complainant who had, prior to the sale of the property and good will of the milk business of the defendant to the complainant, been his customers and who had been (i. e., prior to the filing of this bill) solicited by him to purchase their milk and cream of him."

This order indicates the scope of the litigation and the nature of the transaction out of which it arose. In brief the defendant, John W. Burton, having sold to the complainant the personal property used by him in carrying on his milk business, together with the good will, engaged in a competing business, owned either by himself or by his wife, and solicited his former customers to deal with him, and at the time of the filing of the bill the defendant was serving a large number of his former customers whose custom he had secured by such solicitation.

[1] The defendant having made no express covenant may engage in a competing business. This, which is the recognized rule, is admitted by the complainant.

The controverted question is whether the defendant, having sold the good will of his business and engaged in a competing business, may be enjoined from soliciting his former customers to deal with him.

Upon this question judicial opinion in this country is not in entire unanimity, and in England, after a period of vacillation, the question was set at rest by the House of Lords only as recently as 1896.

In this state the trend of decision in the Court of Chancery and of dictum in this court favors the rule that was applied in the present case.

Thus in *Althen v. Vreeland* (N. J. Ch.) 38 Atl. 479 (not yet officially reported), in which there was a covenant that was unreasonable because of its territorial extent, the Court of Chancery enjoined the vendor from soliciting his old customers not by force of his

covenant, but on general principles deemed applicable to the circumstances of the case.

In *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 982, which was not a soliciting case, but one in which the defendant had advertised his former connection with the business he had sold, Vice Chancellor Emery rehearses the English decisions on the subject of soliciting as part of the argument of his opinion, without adverse comment as to the rule finally adopted.

In *Scudder v. Kilfoil*, 57 N. J. Eq. 171, 40 Atl. 602, in which there was a restrictive covenant, Vice Chancellor Reed said obiter: "The sale of the good will would have only precluded the vendor from soliciting trade from old customers."

In *Richardson v. Peacock*, 33 N. J. Eq. 597, which was in this court and in which there was a restrictive covenant, Mr. Justice Dixon said: "The case is not one of a mere implied contract growing out of a sale of the good will of a business. Such a sale, without more, while it does not prevent the vendor from carrying on a similar business, and, perhaps, dealing with the old customers, will prevent his soliciting the old customers by any means other than the general advertisement of his business"—citing *Labouchere v. Dawson*, L. R. 13 Eq. 322.

Although this was dictum, and although at the time, viz., 1881, the law of England was not settled by the case cited, we think that the rule stated was the one we should adopt upon the reasoning and authority of the later case of *Trego v. Hunt*, 65 L. J. Ch. 1. This case came before the House of Lords in 1895, and was decided upon the opinion of Lord Herschell in which the state of the law upon the subject was exhaustively considered with the result that the case of *Labouchere v. Dawson* which had been questioned in some quarters and finally overruled by the Court of Appeal in *Pearson v. Pearson*, 27 Ch. Div. 145, was declared to have been correctly decided. The rule of the English courts thus established is that a person who has sold the good will of his business may set up a river business, but is not entitled to solicit the custom of those who have previously dealt with him.

We can add nothing to the exposition contained in the opinion in *Trego v. Hunt*, which may be conveniently consulted with the annotation of American decisions in 12 English Rul. Cas. 442.

[2] The Court of Chancery in the present case, having properly enjoined the defendant from soliciting his old customers, properly enjoined him also from serving those he had obtained by such solicitation. This is within the principle of decision and essential to the remedy based thereon. The argument that such customers might without solicitation have returned of their own accord is answered by what we said as to a similar ar-

gument in *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756-762, 55 Atl. 796, 63 L. R. A. 344, 103 Am. St. Rep. 794, the principle being that one by his own inequitable conduct may practically deprive himself of what otherwise he might rightly claim.

The conflict of testimony as to whether the owner of the rival business is the defendant or his wife is not significant upon this appeal. The injunction is against John W. Burton. Whether its effect will be to deprive him of an inequitable advantage as owner or as an agent is an immaterial consideration. If he be an agent, his chief asset as such, so to speak, is his influence with his old customers, which he is not entitled to trade upon either as enhancing the value of his services as agent or as something that he can swing to an employer.

The order of the Court of Chancery is affirmed.

McCLOUD et al. v. ILLINOIS SURETY CO.
(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 159*)—ACTION ON BOND—COMPLIANCE WITH CONDITIONS—PRESUMPTIONS.

In a suit upon a bond for the faithful performance of a contract, where a provision of a bond required that within a stipulated time notice should be sent by registered letter to the obligor of any default upon the part of the principal, and it appeared in evidence that such a letter was sent, and was received by the surety company, held that, in the absence of proof to the contrary, it would be presumed that the transmission of the letter was by the method prescribed in the contract.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 428-435; Dec. Dig. § 159.*]

2. APPEAL AND ERROR (§§ 170, 274*)—REVIEW—OBJECTIONS NOT RAISED BELOW.

A question of law not specifically presented to the trial court, and not fairly within the scope of an exception taken, does not present a ground for reversal in this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1035-1052, 1631-1645; Dec. Dig. §§ 170, 274.*]

Error to Circuit Court, Union County.

Action by William J. McCloud and others against the Illinois Surety Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Edwards & Smith, of Jersey City, for plaintiff in error. Lindabury, Depue & Faulks, of Newark, for defendants in error.

MINTURN, J. Having secured a contract from the city of Newark for the construction of a municipal sewer in the city, the plaintiffs subcontracted with Ellis & Co. for the furnishing and installation of a pumping apparatus required under the specifications accompanying the original contract. As se-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

curity for the fulfillment of the subcontract, Ellis & Co. furnished a bond to the plaintiffs with the defendant as surety. The bond contained this provision: "(1) That the said surety shall be notified in writing of any act, omission or default on the part of said principal, or its agents, or employes, which may involve a claim or loss, for which the said surety is or may be responsible hereunder, within ten days after the occurrence of such act, omission or default shall have come to the knowledge of the owner or his, its or their agents, officers or representatives, said notification must be given by a *United States post office registered letter mailed to the said surety at its principal office in Chicago, Illinois.*" Ellis & Co., having failed to perform their contract, the plaintiffs instituted this suit to recover damages by reason of the default, and obtained judgment.

[1] It is proved and is unquestioned that Ellis & Co. defaulted; and that the notice in writing required by the above condition contained in the bond was given within time by plaintiffs to defendant by mailing a letter directed to defendant's principal office in Chicago, as prescribed in the bond, and that the letter in due course was received by defendant. The defense on this point, however, is based upon the insistence that, since the condition of the bond required the mailing of a registered letter to the defendant, the information required to be transmitted by said provision could not be sent by any other method. It is sufficient answer to this contention to say that the record is silent as to the method of transmission, while the fact is indubitable that the notice was received by defendant through the mail. No objection was made at the trial to the admission of the letter in evidence upon that or any other ground, and we in this forum are thus free to assume that the requirements of the bond in that respect were complied with. *West Shore R. R. v. Wenner*, 70 N. J. Law, 233, 57 Atl. 408, 103 Am. St. Rep. 801, 1 Ann. Cas. 790. This disposition of the defendant's contention renders it unnecessary to discuss the questions argued in the briefs as to the legal effect of a failure by the obligee to comply with this requirement of a bond. The question was not mooted on the motion to nonsuit, or in any manner by motion or exception called to the trial court's attention until both sides had rested, and the case was ripe for submission to the jury.

[2] The request for a direction was "that the required notice had not been given to the surety company," and the trial court in refusing the direction properly left it to the jury to determine whether the registered notice had been given. If there were a defect in the notice, or in the manner of its transmission, and this defect was uppermost in counsel's mind as the basis for the motion, he in no wise specifically called the trial

court's attention to his insistence, and, unless that be done in the court of first instance, the question cannot be debated and considered here under the well-settled practice of this court. *Maguth v. Freeholders*, 72 N. J. Law, 226, 62 Atl. 679; *Van Alstyne v. Franklin Council*, 69 N. J. Law, 672, 58 Atl. 818.

The final objection to this judgment is directed to the admission in evidence of a resolution adopted by the street and water commissioners of the city of Newark, which was transmitted to the plaintiffs and received by them. The resolution was objected to by defendant as immaterial. It may well be said, in view of the requirement of our practice, already referred to, that such an objection is of too generic a character to direct the attention of the trial court to the specific point in the mind of the counsel as the basis for this action. The resolution unquestionably concerned the very matter in controversy between all the contracting parties. Its materiality consisted in the fact that it was indicative of a complaint entertained by the city with the manner in which Ellis & Co. were doing and had failed to do the work which they had contracted with the plaintiffs to perform. It recited this complaint in its preamble, and its resolution contained a direction to the clerk of the board substantially to notify the plaintiffs of the default of Ellis & Co., and of the intention of the city to complete the work, and hold the contractor for all loss or damage incident to its completion.

In another aspect the introduction of the resolution was entirely harmless to defendant, in view of the fact that the city engineer later in the case was allowed to read verbatim, without objection, the same resolution from the official minute books of the board of street and water commissioners. The objection to the original resolution itself was thus rendered immaterial, and its existence on the record therefore could in no wise prejudice the defendant's case. *Whitaker v. Miller*, 63 N. J. Law, 587, 44 Atl. 643.

Finding no error in the record, the judgment will be affirmed.

MAHER v. FERRACUTE MACH. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

TRIAL (§ 139*)—DIRECTING VERDICT—QUESTIONS FOR JURY.

The plaintiff and his witnesses, being mechanics of experience, having testified that in the exercise of reasonable care in the ordinary use of a tool by the plaintiff, an employe in defendant's business, a defect which caused injury to the plaintiff could not be observed, it was error upon the part of the trial court to direct a verdict for the defendant, since the

contradiction of that proof by defendant presented an issue of fact for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Gummere, C. J., and Parker, Voorhees, White, and Treacy, JJ., dissenting.

Error to Supreme Court.

Action by Charles E. Maher against the Ferracute Machine Company. Judgment for defendant, and plaintiff brings error. Reversed.

Martin V. Bergen, Jr., of Camden, and William I. Stanton, of Philadelphia, Pa., for plaintiff in error. Gaskill & Gaskill, of Camden, for defendant in error.

MINTURN, J. At the trial in the circuit the court directed a verdict for the defendant, and the only question presented to us is whether upon the following state of facts a question of fact, and not a question of law, was presented.

The plaintiff, a machinist of experience, was employed by defendant company at his trade in defendant's shop at Bridgeton, where it conducted the business of manufacturing presses and sheet metal tools. While thus engaged, the plaintiff was injured by the center hole of a reamer abruptly leaving the center point of the machine, catching his hand, and causing the permanent loss of the first and second fingers of his left hand. At the time of the injury plaintiff was engaged in reaming a hole already cut in an iron piece. The reamer which he was using was about 3 feet long, and weighed between 16 and 18 pounds. It was used as a finishing tool, upon a lathe, to smooth out holes previously bored in steel by coarser instruments. Its head consisted of cutting blades about three inches in length, set on what is called the shank of the reamer, which is about $1\frac{1}{4}$ inches in diameter. In its center, at the end, is bored a hole, called the "back center," having an apex angle of 60 degrees, and which in this instance was $\frac{3}{16}$ of an inch in depth. The lathe upon which it rested was about 10 feet long and stationary. It rested upon two uprights, to which upon the inside the object to be reamed is fastened, in a fixture which revolves during the reaming process. A moveable pin projects through the other upright, and this pin tapers to a point of 60 degrees, and is moved in and out by a wheel at the back of the upright, but does not revolve. When the object is ready to be reamed, the machinist places the head of the reamer into the bored hole, and turns the wheel in the upright, which results in moving forward the pin until it is inserted in the reamer, each being 60 degrees, and the complement of the other. Fastened to the center of the reamer is what is called a "dog," the object of which is to prevent the reamer from suddenly losing its place by the roughness of the metal in the bored hole, and also to prevent it from re-

volving with the metal being bored. When the reamer is put on the lathe for use, its back center and its size are hidden from view. The machinist in performing his work rests his right hand upon the center of the wheel and his left upon the dog, the object being to keep pushing on the wheel at the center point and thus push the reamer forward, to enable it to do its work. While this plaintiff was so engaged, the reamer sprang from its place in the metal it was intended to finish, and injured the plaintiff in the manner stated.

For the purpose of properly operating the establishment, the defendant maintained a separate toolroom, and men whose specific duty it was to keep the tools, including the reamers, in proper condition. The men using the tools secure them at this room upon application, and the plaintiff upon the day preceding the accident secured his reamer in that manner. It was in evidence that the plaintiff used this reamer the day before, and the day of the accident, without perceiving any defect in it, that the foreman and other employes had used the reamer upon many occasions without observing its defect, and two expert machinists testified that the defect in the reamer could not have been observed in the ordinary use of the tool. After the accident, one of the witnesses, an experienced machinist, measured the center hole and testified that he found it $\frac{3}{16}$ of an inch deep, and that in his judgment to be reasonably safe for the use of the reamer, it should have been from $\frac{1}{4}$ to $\frac{5}{16}$ in diameter across the face and 60 degrees countersunk, which would make it from $\frac{3}{8}$ to $\frac{7}{16}$ deep. He was then asked: "Q. Therefore, in your opinion, if this reamer had a hole, if this center hole in this reamer was $\frac{3}{16}$ of an inch deep, would that reamer be safe or not? A. I should think not; no, sir." Other qualified witnesses testified to the same effect. There was ample testimony of this character in support of the plaintiff's claim that the reamer was unsafe, and that the plaintiff did not, and could not, in the exercise of ordinary care and observation in the manipulation of the tool discover its defect. A contradiction of these contentions by the defendant and its witnesses presented a question of fact for the jury, for concededly the duty imposed by law upon the servant, under his contract of service, is to assume such risks only as are obvious, or such as could be obvious to him in the exercise of reasonable care. *Carroll v. Tidewater Oil Co.*, 67 N. J. Law, 679. 52 Atl. 275.

The case in this aspect presents a situation not unlike that presented in *Pankow v. Swift & Co.*, 78 N. J. Law, 532, 74 Atl. 689, where a machine without any apparent reason tore loose from the floor to which it seemed to be secured, and shortly after it had been repaired upon the complaint of the

plaintiff, and this court held that the question whether or not the risk was obvious was a fact question for the consideration of the jury. See, also, *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 403, 31 Atl. 619, where the relative duties of the parties in a situation like the present are declared in an opinion by Mr. Justice Dixon, speaking for this court. *Laragay v. East Jersey Pipe Co.*, 77 N. J. Law, 516, 72 Atl. 57, furnishes a practical illustration of the application of this rule. Mr. Justice Garrison, speaking for this court, there says: "In determining whether or not a risk is obvious in a legal sense, the question as to the impression that would be made on the mind of a reasonably prudent man by the congeries of concurrent circumstances is normally one for the jury, and always so when from such circumstances opposite inferences might in reason be drawn by different minds."

Tested by this rule, it cannot be said as matter of law, in view of the testimony in this case in behalf of the plaintiff, that the defect in the reamer could be discovered in its ordinary use by the servant, and that the defect and incident danger were of such a palpable nature as necessarily to be obvious to the plaintiff. The contention of the plaintiff, a mechanic of experience, supported by capable witnesses, was that the defect in the reamer was not obvious, and hence that he therefore did not assume it. The fact that this contention is offset by the defendant's denial, and competent testimony to support the denial, evolved not a question of law upon the decision of which the court may determine the obviousness of the risk, but presented essentially a jury question.

The judgment under review will be reversed.

GUMMERE, C. J., and PARKER, VOORHEES, WHITE, and TREACY, JJ., dissenting.

DIERKES v. HAUXHURST LAND CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

TRIAL (§ 143*)—QUESTIONS FOR JURY.

A matter fairly in dispute under the evidence in an action at law is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Error to Circuit Court, Hudson County.

Action by Bernadine Dierkes against the Hauxhurst Land Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 80 N. J. Law, 369, 79 Atl. 361, 34 L. R. A. (N. S.) 693.

E. J. Luce, of Rutherford, and Gilbert Collins, of Jersey City, for plaintiff in error. Charles E. S. Simpson, of Jersey City, for defendant in error.

PER CURIAM. This is the second time this case has been before us for consideration. The original trial in the court below resulted in the nonsuit of the plaintiff. The ground of the nonsuit was that one Wallace, whose wrongful act produced the injury to the plaintiff for which she sued, was not the servant or agent of the defendant in doing the act, and that, therefore, the defendant was not responsible for the results thereof. On review in this court, we held that the question of the responsibility of the defendant company for Wallace's acts was one for the determination of the jury rather than the court, and reversed the judgment of nonsuit. Upon a retrial of the cause this question was left to the jury, and was resolved in favor of the plaintiff; a verdict being rendered in her favor. From the judgment entered upon that verdict the present writ of error is sued out.

The principal contention now made before us is that on this second trial the court should have directed a verdict in favor of the defendant, upon the ground that there was nothing in the evidence from which it could be determined that authority had been conferred upon Wallace, either expressly or by implication, to perform the acts complained of. We think the motion to direct a verdict was properly denied. It may be conceded that the proof at this second trial more strongly supported the contention of the defendant that Wallace was without authority in the matter complained of than the evidence adduced at the earlier trial. It was, nevertheless, a matter fairly in dispute, and, therefore, necessarily one to be settled by the jury.

The other assignments of error are not pressed by counsel with any vigor, and do not any of them, we think, justify a reversal of the judgment under review.

The judgment will be affirmed.

ZIMMERMAN v. HAUXHURST LAND CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

Error to Circuit Court, Hudson County.

Action by William Zimmerman against the Hauxhurst Land Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Luce, of Rutherford, and Gilbert Collins, of Jersey City, for plaintiff in error. Charles E. S. Simpson, of Jersey City, for defendant in error.

PER CURIAM. This case was consolidated for the purpose of trial with that of *Dierkes v. Hauxhurst Land Co.*, supra, decided at the present term. For the reasons stated in the per curiam opinion filed in that case, the judgment now under review will be affirmed.

H. J. McGRATH CO. v. MARCHANT.

(Court of Appeals of Maryland. Feb. 28, 1912.)

1. EXCEPTIONS, BILL OF (§ 40*)—TIME TO FILE—MOTION FOR NEW TRIAL—DETERMINATION—WHAT CONSTITUTES.

Where the time for filing a bill of exceptions was extended until 30 days after the motion for the new trial was heard and determined by the court, an entry reciting "new trial to be granted unless plaintiff agree to a reduction of the verdict" was not a complete determination, and the 30 days did not begin to run until the motion for new trial was actually overruled.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57-64; Dec. Dig. § 40.*]

2. MASTER AND SERVANT (§ 43*)—COMPENSATION—ACTIONS—EVIDENCE.

In an action for breach of contract of service, evidence held sufficient to go to the jury on the question of the existence of a contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 72½; Dec. Dig. § 43.*]

3. FRAUDS, STATUTE OF (§ 50*)—CONTRACTS TO BE PERFORMED WITHIN A YEAR.

An oral contract for personal service for more than a year provided defendant should remain in business for that length of time is not within the statute of frauds; there being a possibility that it may be performed in less than a year.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 75-77; Dec. Dig. § 50.*]

4. MASTER AND SERVANT (§ 41*)—COMPENSATION—DAMAGES.

In an action for breach of contract of service, the servant is entitled to recover the contract price less such sums as may have been paid, and such sums as he has earned or by due diligence might have earned in the line of his business during the period covered by the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 65-71; Dec. Dig. § 41.*]

5. TRIAL (§ 252*)—DISCHARGE—GROUNDS.

A master is not justified in discharging a servant who has a contract because the servant's creditors request him to assist in collecting their bills, and so, in an action by such servant, who was discharged for no other reason, instructions submitting the servant's performance of his duties were not objectionable for want of evidence to show that he exercised ordinary skill and diligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

6. MASTER AND SERVANT (§ 41*)—COMPENSATION—DAMAGES—BURDEN OF PROOF.

In an action for a master's breach of a contract for services, the servant is entitled to the contract price for his services in the absence of evidence showing the sums he earned or might have earned during the life of the contract in his line of business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 65-71; Dec. Dig. § 41.*]

Appeal from Baltimore City Court; John J. Dobler, Judge.

Action by Otis V. Marchant against the H. J. McGrath Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

William A. Wheatley, for appellant. Beverly W. Mister, for appellee.

THOMAS, J. This suit was brought to recover damages for the breach of an alleged oral contract by which the defendant employed the plaintiff for one year from May 1, 1909, to April 30, 1910, provided the defendant continued in business that long, and agreed to pay him a salary of \$25 per week for the first six months, and \$20 per week for the remaining six months of the year.

The declaration contains six of the common counts and two special counts. The seventh count alleges that in the early part of the year 1909 the plaintiff and defendant "agreed that the plaintiff should serve the defendant as a buyer of fruits, etc., including all duties usually assumed by buyers in the canned goods business, and that the defendant should employ the plaintiff as such for one year from May 1, 1909, and pay him for his services the sum of \$25 per week for the first six months of his contract, and \$20 per week for the remaining six months of the year, provided the business should be continued during the term of said contract"; that the plaintiff entered upon the service of the defendant, and has ever since been ready and willing to continue in such service; "that on the 12th day of February, 1910, the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid, although the said business of the defendant was continued until after May 1, 1910, and has never paid him the balance due on the said contract although requested to do so by the plaintiff." The eighth count charges that on the 2d of May, 1908, the plaintiff and defendant agreed in writing that the plaintiff should serve the defendant as buyer of fruits, etc., and that the defendant should employ the plaintiff as such for one year from said date and to pay him for his services the sum of \$25 per week for the first six months, and \$20 per week for the remaining six months of the year; that the plaintiff entered into the service of the defendant under said contract, and that, shortly before the end of said year, the plaintiff and defendant agreed that the contract should be continued for another year, beginning on the 1st day of May, 1909, and ending on the 30th day of April, 1910, "under the same terms and for the same services as set out in their original contract, provided that the business of the defendant should be continued for that length of time"; that the plaintiff accordingly remained in the service of the defendant until February 12, 1910, when the defendant wrongfully discharged him; that the plaintiff has always been ready and willing to perform such services,

but the defendant refused to permit him to do so, and has refused to pay the balance due him under said contract, notwithstanding the business of the defendant was continued beyond the 1st day of May, 1910. Issue was joined on the general issue plea, and the trial of the case before a jury resulted in a verdict and judgment in favor of the plaintiff for \$201.50, from which judgment the defendant the H. J. McGrath Company, a corporation, has appealed.

[1] The defendant filed a motion for a new trial, and while that motion was pending, on the 26th of May, 1911, the court extended the time for filing the bill of exceptions in the case "until thirty days after the motion for a new trial is heard and determined by this court." The record contains the following docket entry: "10th June, 1911—New trial to be granted, unless the plaintiff shall within ten days from this date, agree to a reduction of the verdict from \$201.50 to \$150.00," etc. The docket entries further show that the motion for a new trial was overruled on June 21, 1911, and on June 28th the time for filing the bill of exceptions was again extended, and thereafter regularly extended until the exceptions were filed. The appellee has made a motion to dismiss the appeal on the ground that the time for filing the bill of exceptions was by the terms of the first order extended to 30 days after June 10, 1911, the contention of the appellee being that the motion for a new trial was heard by the court on June 10th, that the court on that day ruled that the new trial be granted unless the plaintiff agreed to a reduction of the verdict, etc., and that that was a complete "determination by the court" of the motion. The answer to this contention is that the order extended the time until 30 days after the motion for a new trial "is heard and determined by the court," and that, while it does not appear when the motion was heard, the docket entries show that the motion for a new trial was not "determined" or disposed of until June 21, 1911, when it was overruled, and on the same day a judgment was entered on the verdict in favor of the plaintiff. The motion to dismiss the appeal must therefore be overruled.

But one exception was reserved during the trial, and that is to the ruling of the court on the prayers. It appears from the evidence that the defendant was engaged in the business of canning fruits, vegetables, and oysters, and that the plaintiff had been employed by the defendant for a number of years, and was paid a salary of \$25 per week for the first six months, and \$20 per week for the remaining six months of the year; that for the year commencing May 2, 1908, the contract was in writing; that Mr. McGrath died in February, 1909, and, after his death, it was for a while uncertain whether the business of the defendant "would go on." The plaintiff states that about 10 days before the expiration of the year ending May 1, 1909,

Mr. Hamberger, the manager of the appellant company, said to him: "Mr. Marchant, I understand you, and you understand me. You do not need no written contract with me. You are dealing with me now, and, if this business continues, your position is assured with the terms the same;" and that he, the plaintiff, said in reply: "Mr. Hamberger, I am perfectly satisfied. If that contract suits you, it certainly suits me, and your word is sufficient, and I am dealing with you now, and not with Mr. McGrath." It further appears from the evidence that the plaintiff continued in the service of the defendant until February 12, 1910, and that he received during the first six months of the year commencing May 1, 1909, \$25 per week. The plaintiff says that the defendant continued to pay him \$25 per week for some time after the expiration of the first six months of the year, and that Mr. Hamberger said to him that they had him down on his pay roll for \$20 per week, but that he had told the bookkeeper to pay him \$25 per week, that he appreciated that the extra \$5 was more to the plaintiff than it was to the defendant, and that they would continue to pay it as long as they could; that he received \$25 per week until the 1st of January, when Mr. Hamberger said to him that he would have to put him back on \$20 per week; that he was discharged on the 12th of February, 1910, and that he tried to secure other employment, but failed to realize more than \$30 or \$35 between the time he was discharged by the defendant and the end of the year for which he claims to have been employed. Mr. Hamberger denied that he had employed the plaintiff for one year, or for any definite time, and says that he told the plaintiff that he could not make him any definite promise, but that he would continue him in the service of the defendant as long as he felt that he was justified in doing so; "that things went along to" his "satisfaction until the fall of 1909," when he was annoyed by persons calling him up by telephone and coming to see him at his office, and requesting him to assist them in collecting debts due by the plaintiff; "that those things did not get any better, but got worse; that it got so bad I concluded he was not the proper man for me to continue in the employ of the house, * * * and that he was finally discharged."

The plaintiff's first prayer instructed the jury that if they found that the plaintiff and the defendant agreed prior to May 1, 1909, that the plaintiff would serve the defendant as buyer of fruits, etc., and that the defendant would employ the plaintiff as buyer, etc., for one year from May 1, 1909, if the business of the appellant should be continued that long, and pay him \$25 per week for the first six months and \$20 per week for the remaining six months of the year, and further found that said business of the appellant continued for the whole of said year, and that the plaintiff entered upon the dis-

charge of his duties under said contract and continued in the employ of the defendant until February 12, 1910, that he exercised ordinary skill and diligence in the performance of his duties, and that on the 12th of February, 1910, the defendant dismissed him from its service and refused to permit him to perform such services, that the plaintiff was ready and willing to perform such services and offered to continue in the service of the defendant until the expiration of the term of his employment, the plaintiff was entitled to recover.

By the plaintiff's second prayer the jury were told that, if they found for the plaintiff, he was entitled to recover \$20 per week from the time he was discharged by the defendant to the expiration of the contract of employment, less such sum as he earned during that period, or by the exercise of due diligence might have earned in the line of his business, with interest on such balance from May 1, 1910, in the discretion of the jury.

The defendant specially excepted to these prayers on the ground that there was no evidence to show that the plaintiff and the defendant entered into a "conditional contract" for the time mentioned in the first prayer, and because there was no evidence to show that the plaintiff exercised ordinary care and diligence in the performance of his duties, and, further, because there was no evidence from which the jury could ascertain what sum was earned by the plaintiff between the time he was discharged and the end of the year for which he claimed to be employed, and no evidence to show what he might have earned in his line of business by the exercise of due diligence.

Defendant's first and second prayers sought to take the case from the jury on the ground that under the pleadings in the case there was no evidence legally sufficient to entitle the plaintiff to recover. By its third prayer the court was asked to instruct the jury that if they found that prior to the 1st day of May, 1909, the plaintiff and defendant entered into an "unwritten contract," whereby the defendant agreed to employ the plaintiff and the plaintiff agreed to accept the employment by the defendant for the period of one year, beginning May 1, 1909, the plaintiff was not entitled to recover, and by its fourth prayer the defendant asserted that the plaintiff was not entitled to recover unless the contract sued on was in writing. The court below overruled the defendant's exceptions to and granted plaintiff's prayers, rejected defendant's first, second, and fourth prayers, and granted defendant's third prayer, after modifying it so as to require the jury to find that the defendant employed the plaintiff for one year "unconditionally."

[2] As we have said, evidence was adduced by the plaintiff tending to show that he and the defendant entered into an oral agree-

ment by which the defendant employed the plaintiff for one year, commencing on the 1st day of May, 1909, and ending on the 30th day of April, 1910, provided the defendant remained in business for that period, and agreed to pay him \$25 per week for the first six months and \$20 per week for the balance of the year. This evidence tends to establish the contract declared on in the seventh and eighth counts of the declaration, and which might or might not have been performed in the year, depending upon the defendant remaining in business during the entire year.

[3] If the business of the defendant continued for only six months of the time covered by the contract, the contract would have been fully performed in the year. The decisions in this state are uniform, and it is clear that such a contract does not come within the statute of frauds. In the case of *Ellicott v. Turner*, 4 Md. 476, the court makes the statement followed in the later decisions in this state, that "it has been held both in England and in these states the statute will not apply where the contract can, by any possibility, be fulfilled or completed in the space of the year, although the parties may have intended its operation to extend through a much longer period." *Cole v. Singerly*, 60 Md. 348; *Balto. Breweries Co. v. Callahan*, 82 Md. 106, 33 Atl. 460; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 450, 47 L. R. A. 385.

[4] The plaintiff's second prayer follows the prayer granted by the lower court and approved by this court in the case of *Balto. Baseball Club v. Pickett*, 78 Md. 378, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304, and which instructed the jury in that case that, if they found for the plaintiff, "then he is entitled to recover the contract price, less such sums as may have been paid him, and also less such sums as he earned or by the exercise of due diligence might have earned, in the line of his business, during the remainder of the period covered by the contract." See, also, *Olmstead v. Bach*, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273, and *Cumb. & Penn. R. R. Co. v. Slack*, 45 Md. 161.

[5] The case was not defended on the ground that the plaintiff did not properly perform the services rendered the defendant, and there is no evidence in the case to show that he was not diligent and faithful; on the contrary, the evidence produced by the defendant tends to show that he discharged his duties in a satisfactory manner. Mr. Hamberger states that everything was entirely satisfactory until the fall of 1909, when he was annoyed by inquiries from creditors of the plaintiff, and that the plaintiff was discharged for that reason. It is not contended by counsel for the defendant that the reason assigned by Mr. Hamberger would be sufficient ground for discharging

the plaintiff during the continuance of the contract. The claim of the defendant in that connection is that the plaintiff was not employed for any definite time, and that the defendant had the right to terminate their relations of employer and employé at any time. There is no force, therefore, in defendant's exceptions to plaintiff's prayers on the ground that there is no evidence to show that "the plaintiff exercised ordinary skill and diligence in the performance of his duties."

[6] Nor was there any evidence to show that the plaintiff earned, between the time he was discharged and the end of the year for which he claims he was employed, more than the amount stated by him, or that he could, by the exercise of due diligence, have found other employment. It is said by Chief Judge Bartol in *Cumb. & Penn. R. R. Co. v. Slack*, supra: "The measure of damages to be recovered is fixed by the contract, and as decided in *Jaffray v. King*, 34 Md. 217, it is the stipulated salary for the year, less the amount which had been paid him, and less the amount of the money of the company he may have actually received and not accounted for; there being no evidence in the case that he actually earned or might by due and reasonable diligence have earned wages in some other employment after his dismissal. Such evidence it would be competent to offer and would diminish to that extent the claim of the appellee, but, in the absence of all evidence of that kind, the sum to which he is entitled is, as before stated, fixed by the contract, and is under the Code a legal set-off."

What we have said disposes of all the contentions of the appellant, and, finding no error in the ruling of the court below, the judgment must be affirmed.

Judgment affirmed, with costs.

EVANS v. WATKINS.

(Supreme Court of New Hampshire. Rockingham. June 4, 1912.)

1. TRESPASS (§ 20*)—RIGHT TO MAINTAIN—POSSESSION—SUFFICIENCY.

Where plaintiff bought land with his own money, and at his wife's request took title in her name, and subsequently his wife left him and sold to defendant the grass upon the land, though plaintiff yet remained in possession and had sowed a crop on a portion of the premises, plaintiff's possession, being at least that of a tenant at will and not that of a servant or agent, was sufficient to support trespass *quare clausum* against the defendant for entering upon the land and cutting and removing the grass.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

2. LANDLORD AND TENANT (§ 277*)—RIGHT OF RE-ENTRY—CROPS.

The owner of land cannot lawfully enter and take crops against a tenant at will until the tenancy is legally determined.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1169-1178; Dec. Dig. § 277.*]

Transferred from Superior Court, Rockingham County; Pike, Judge.

Trespass by Arthur W. Evans against Frank Watkins. Transferred from the superior court. Judgment for plaintiff on the verdict.

The plaintiff bought the premises in question in 1907 and paid the purchase price from his own money. His wife having refused to live there unless the title was taken in her name, the deed was made to her, and they lived on the premises until 1910. Some months prior to the alleged trespass, the plaintiff's wife left him, and subsequently gave the defendant a bill of sale of the standing grass, for which he paid her \$50. The trespass complained of is the entry and the cutting and removal of the grass by the defendant. At that time the plaintiff had sowed oats upon a portion of the premises, and before the defendant's entry forbade him to enter or cut. If upon the foregoing facts the plaintiff can maintain this action, a verdict for \$50 is found for him; otherwise, there is to be a verdict for the defendant.

Eastman, Scammon & Gardner, of Exeter, for plaintiff. Shute & Shute and Arthur O. Fuller, both of Exeter, for defendant.

PARSONS, C. J. The action is trespass *quare clausum*. The court found a verdict for the plaintiff, if the plaintiff could maintain the action upon the facts stated. This, as the finding is expressed, is understood to mean a verdict for the plaintiff, if one could be found from the facts reported.

[1] The plaintiff was in possession. His possession was a sufficient foundation for the action against the defendant, who had no title, unless the plaintiff's wife, by the sale of the grass, could give the defendant a right to enter upon the land. This she could not give, unless she might herself rightfully enter and take the grass. The facts are briefly reported, but they are sufficient to authorize the verdict. Assuming upon the facts stated that the wife was the legal owner of the title, free from the control and interference of her husband, she as owner could not rightfully enter, if her husband was rightfully in possession of the premises, unless he occupied as her servant or agent.

In 1907 the plaintiff bought the premises and paid for them, intending to take the deed in his own name; but, his wife protesting that she would not go there to live unless the title was taken in her name, the conveyance was made to her; and it is inferred that the family went "there to live," and occupied the premises (which appear to have been a farm) until some months before the alleged trespass, when the husband and wife separated, the husband continuing in the possession, having "sowed oats upon a portion of the premises." From these facts

it could be inferred that, although the deed was taken in the wife's name, the husband had the control and management of the farm upon which the family lived.

Where the wife has the legal title to a farm, managed and controlled by her husband as if he were the owner, it is held in *Albin v. Lord*, 39 N. H. 196, 204, 205, that, in the absence of evidence to the contrary, it is to be presumed that he holds and occupies as her tenant, under some agreement by which the crops are to be appropriated for the benefit of the family, rather than that he carries it on for her in the capacity of a servant or hired man. But in *State v. Hayes*, 59 N. H. 450, this conclusion was considered to be erroneous, and it was there held that whether the husband occupied as the tenant or servant of his wife was a question of fact. There is no evidence that the husband was the servant or agent of his wife in the management of the farm, or that he went into the occupation of it against or without her consent. Upon these facts the only conclusion that can be reached is that he occupied as her tenant; and, no other contract being shown, it must be held that he occupied as tenant at will (P. S. c. 246, § 1), presumably, from the nature of the property, as such tenant from year to year.

[2] But the wife, as owner, could not lawfully enter and take the crops against him as tenant at will until the tenancy was legally determined. P. S. c. 246, § 2; *Plummer v. Currier*, 52 N. H. 287, 295, 296; *Dickinson v. Goodspeed*, 8 Cush. (Mass.) 119; *Hilbourn v. Fogg*, 99 Mass. 11. There was no evidence that the plaintiff's tenancy had been determined prior to the defendant's entry. As the plaintiff was rightfully in possession, he could maintain this action against the defendant, claiming under the owner of the premises. It is therefore unnecessary to consider the question of resulting trust, and that of the husband's right in the wife's land under the statute (P. S. c. 176, § 1), which have been argued.

Judgment for the plaintiff on the verdict. All concurred.

GLOVER v. BAKER et al.

(Supreme Court of New Hampshire. Merrimack. May 7, 1912.)

1. TRIAL (§ 3*)—ORDER OF TRIAL OF ISSUES.

Whether all or a part of the issues in an action tried by the court shall be tried together, and if tried separately, the order in which they shall be tried, are questions of convenience, to be settled by the superior court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 6, 7; Dec. Dig. § 3.*]

2. APPEAL AND ERROR (§ 308*)—TRANSFER OF QUESTIONS OF LAW—POWER OF LOWER COURT.

Upon an heir's petition for the construction of a will, and for advice as to the validity

of certain of its provisions, and his right to receive any of the property which the will attempted to dispose of by the provisions attacked, where the executor and legatees as defendants demurred, and pleaded in bar a denial of plaintiff's right to sue, but not supporting the validity of the bequest, and where the state intervened and claimed an escheat, and plaintiff, without joining in the pleadings, moved for a hearing on the demurrer, the superior court was empowered to transfer the questions raised by the demurrer, without ruling, and also to transfer the question whether the bill could be maintained, and, if so, upon what grounds, in case such question was not properly presented by the demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1768-1770; Dec. Dig. § 308.*]

3. WILLS (§ 697*)—BILL FOR CONSTRUCTION—RIGHT OF ACTION—PARTY NOT IN FIDUCIARY RELATION.

The only parties who can call on the court for advice in the construction of a will are those in a fiduciary position, since such questions are prospectively determined by a court of equity only in behalf of trustees who in the execution of a trust are entitled to its protection; and hence a plaintiff, who is not a trustee under a will, nor a beneficiary of the trust attempted to be created by it, and who does not in terms ask that a trust be declared for his benefit, is not entitled to the advice of the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1671-1675; Dec. Dig. § 697.*]

4. WILLS (§ 697*)—BILL FOR CONSTRUCTION—PARTIES ENTITLED.

When questions as to the meaning or validity of the clauses of a will come before a court in the exercise of its ordinary jurisdiction, the will is construed as a part of the determination of the cause; but this does not require the court to advise every one who may think he has an interest under or adverse to the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1671-1675; Dec. Dig. § 697.*]

5. WILLS (§ 697*)—BILL FOR CONSTRUCTION—PARTIES ENTITLED—PARTY CLAIMING IN HOSTILITY TO THE WILL.

An heir claiming in hostility to a will has no such interest in its interpretation as that he can require the advice of the court as to his rights in the estate by bill in equity for the construction of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1671-1675; Dec. Dig. § 697.*]

6. WILLS (§ 697*)—BILL FOR CONSTRUCTION—PARTIES ENTITLED—PARTY INTERESTED IN DISTRIBUTION.

Under some circumstances a party may bring a bill in equity to have his beneficial interest declared under his claim as heir to a distributive share in funds in an executor's hands; but such bill cannot be maintained against an executor merely upon the ground of the trust implied by law, but a special case must be shown calling for equitable relief.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1671-1675; Dec. Dig. § 697.*]

7. COURTS (§ 472*)—COURTS OF PROBATE JURISDICTION—EXCLUSIVE JURISDICTION.

Under Const. pt. 2, art. 79 (80), and Pub. St. 1901, c. 182, § 2, the probate court has exclusive original jurisdiction of the probate of wills and the settlement and distribution of the estates of deceased persons.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1199-1224; Dec. Dig. § 472.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. COURTS (§ 472*)—COURTS OF PROBATE JURISDICTION—EXCLUSIVE JURISDICTION.

Until the settlement of an executor's account the probate court has entire jurisdiction of the necessary procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1199-1224; Dec. Dig. § 472.*]

9. COURTS (§ 200*)—COURTS OF PROBATE JURISDICTION—SUPERIOR COURT.

The superior court has no power to require an executor to account for his administration upon a bill in equity or to revise proceedings in the probate court, except on appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 441, 442, 454, 469-471; Dec. Dig. § 200.*]

10. EXECUTORS AND ADMINISTRATORS (§ 532*)—ACCOUNTING—REMEDY ON BOND.

Where an executor, on settlement of his account, refuses to pay to any person sums to which he may be legally entitled, such person has a complete remedy upon the administration bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2431-2451; Dec. Dig. § 532.*]

11. WILLS (§ 706*)—BILL FOR CONSTRUCTION—TRANSFER TO APPELLATE COURT—AUTHORITY TO EXPRESS OPINION ON REQUEST OF PARTIES.

A bill by an heir for advice of the court as to the construction and effect of a will, and his right to receive any of the property attempted to be disposed of by the provisions attacked, was transferred from the superior court upon demurrer, without ruling, and also upon the question whether the bill could be maintained, and, if so, upon what grounds, in case the question was not properly presented by demurrer. Other adverse claimants under the will fully presented their views, and all persons interested were either represented before the court or had had notice of the suit, and the rights of the parties were not so clear that it would not be the executor's duty to obtain at some time a judicial determination of the conflicting claims. *Held*, that the executor's concession that the proceeding was maintainable in some form might be treated as a request for advice, which authorized the court to express for his benefit its opinion on the material questions argued, notwithstanding the bill was dismissed so far as the plaintiff's right to maintain it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1683; Dec. Dig. § 706.*]

12. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A demurrer admits all facts well pleaded, which cannot be varied or answered by allegations of fact, but it does not admit the conclusions of law attempted to be drawn therefrom.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

13. WILLS (§ 423*)—PROBATE—CONCLUSIVENESS OF DECREE.

The decree of the probate court allowing a will is a judgment establishing the instrument to be the will of the alleged testator, and so long as it stands it is conclusive of the genuineness and validity of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 911-913; Dec. Dig. § 423.*]

14. WILLS (§ 421*)—PROBATE—COLLATERAL ATTACK.

The judgment of the probate court allowing a will is not open to collateral attack on the ground of fraud and undue influence in securing the execution of the will; and, except in a direct proceeding to set the probate aside,

evidence of facts inconsistent with the judgment is incompetent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 904-910; Dec. Dig. § 421.*]

15. WILLS (§ 225*)—PROBATE—CONTEST ON GROUND OF FRAUD.

Whether a paper presented for probate was the will of the testator, or the product of other minds operating upon hers through fraud or undue influence, is a question which could have been raised in opposition to its probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 547; Dec. Dig. § 225.*]

16. WILLS (§ 216*)—PROBATE—PARTIAL PROBATE.

Where objection to the probate of a will on the ground of fraud or undue influence goes only to a portion of the will, it defeats the will only to the extent of the proof, and probate thereof may be limited to the portions, if any, not found to have been so induced.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 524; Dec. Dig. § 216.*]

17. WILLS (§ 439*)—CONSTRUCTION—INTENT OF TESTATOR.

Where the testator's purpose can be ascertained and is legal, it is the duty of the court to give it effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

18. CHARITIES (§ 36*)—CREATION—PURPOSES.

A gift in trust to a charitable or religious organization, without more, is in trust for the purposes of the organization.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 65; Dec. Dig. § 36.*]

19. WILLS (§ 15*)—GIFT FOR RELIGIOUS PURPOSES—LIMITATION ON AMOUNT—STATUTES—"GIFT FOR USE OF CHURCH."

A gift of all the property of an estate not otherwise disposed of to a church, in trust for the repair of the church and church buildings, and for promoting and extending the religion of Christian Science, is a gift for religious purposes, and not a gift to a church, or "gift for the use of a church," within Pub. St. 1901, c. 152, § 10, providing that the income of any grant or donation made to or for the use of a church shall not exceed \$5,000 a year, nor R. L. Mass. c. 37, § 9, which limits the income of gifts for the use of any one church to \$2,000 a year.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36; Dec. Dig. § 15.*]

20. STATUTES (§ 205*)—CONSTRUCTION—CONSTRUING ALL PARTS TOGETHER.

It is a rule in the construction of statutes that all parts of the act must be construed together.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

21. STATUTES (§ 182*)—CONSTRUCTION—INTENT OF LEGISLATURE.

In the construction of statutes, such construction must be given as will best answer the intention of the makers; and to accomplish this the letter of the statute may be restrained or enlarged by an equitable construction, or it may be construed contrary to the letter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 260; Dec. Dig. § 182.*]

22. CHARITIES (§ 20*)—GIFT TO UNINCORPORATED ASSOCIATION—VALIDITY.

Gifts in trust to an unincorporated association are sustained in equity.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

23. CHARITIES (§ 20*)—CAPACITY TO ACT AS TRUSTEE.

Towns, like other corporations, may act as trustees for purposes not incompatible with the objects of their organization.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

24. CHARITIES (§ 20*)—CAPACITY OF RELIGIOUS SOCIETY TO ACT AS TRUSTEE.

Under legislation relating to religious societies, and especially under Pub. St. 1901, c. 152, § 2, which authorizes such societies to raise money by taxation of their members, they have the same parochial powers as towns existing prior to the legislation, and may act as trustees for purposes not incompatible with the object of their organization.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

25. CHARITIES (§ 24*)—TRUSTEE—REFUSAL TO ACT.

On the creation of a valid testamentary trust, the refusal of the trustee named to act, because of incapacity, will not avoid the trust, since equity never allows a valid trust to fail for want of a trustee, except when it appears that the testator reposed a personal confidence in the trustee named.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 8; Dec. Dig. § 24.*]

26. CHARITIES (§ 33*)—CONSTRUCTION—TRUSTEES—PERSONAL TRUST.

A gift in trust to a religious association, to use the income for the repair of a church and other church buildings, and the balance of the income and such part of the principal as might be deemed wise for the promotion of Christian Science, was intended as a trust to be executed by the persons who from time to time might constitute the association, and was not intended to limit the discretion conferred to any particular person.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 68-74; Dec. Dig. § 33.*]

27. CHARITIES (§ 47*)—JUDICIAL APPOINTMENT OF TRUSTEE.

Where testatrix intended a gift in trust to a religious association to be administered by persons professing the belief she desired to promote, it would be the duty of the court, in appointing a trustee, not to appoint any one hostile to such purpose.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 85; Dec. Dig. § 47.*]

28. CHARITIES (§ 49*)—VALIDITY—ADMINISTRATION—RIGHTS OF HEIR.

Where a valid charitable trust is created, an heir of the creator has no concern as to the manner in which or the persons by whom the trust is carried into effect.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 82; Dec. Dig. § 49.*]

29. CHARITIES (§ 20*)—CAPACITY TO TAKE AND HOLD PROPERTY—STATUTES.

Pub. St. 1901, c. 152, entitled "Religious Societies," was intended to regulate the property holding capacity of the quasi corporations created by the act, and to make provision whereby defects in a church organization were supplied, so that property donated for pious purposes might not fail of reaching the objects intended by the donor; the purpose of the chapter not being to limit or destroy gifts to pious uses, but to promote and effectuate them.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18-33; Dec. Dig. § 20.*]

30. STATUTES (§ 226*)—CONSTRUCTION—DECISIONS OF JURISDICTION WHENCE DERIVED.

Pub. St. 1901, c. 152, entitled "Religious Societies," section 10 of which limits the in-

come of any gift for the use of a church to \$5,000 a year, was not derived from the mortmain act (9 Geo. II, c. 36), and hence the English decisions interpreting that statute have no bearing on its construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 256, 307; Dec. Dig. § 226.*]

31. STATUTES (§ 217*)—CONSTRUCTION—HISTORY OF LEGISLATION.

In the construction of a statute, the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it, are competent evidence.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

32. STATUTES (§ 181*)—CONSTRUCTION—AVOIDANCE OF ABSURD OR UNREASONABLE CONSTRUCTION.

If one view which may be taken of legislative language produces an absurd and unreasonable result, that fact is evidence that no such purpose was within the legislative purpose, if the language used is capable of a different construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

33. WILLS (§ 15*)—TESTAMENTARY CAPACITY—GIFT TO RELIGIOUS USES—STATUTES.

Under Pub. St. 1901, c. 186, section 1 of which provides that every sane person of the age of 21 years may dispose of his property, real and personal, and of any right or interest therein, by his last will in writing, and which places no limitation on the amount that may be given to educational, charitable, or pious uses, or to any one corporation or individual, and Pub. St. 1901, c. 152, entitled "Religious Societies," which provides by section 2 that the income of any gift to or for the use of a church shall not exceed \$5,000 a year, a gift in excess of \$5,000, made by a resident testatrix to a religious association in Massachusetts, was not prohibited, since chapter 152, § 2, was not intended to limit the testamentary capacity of residents of this state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 36; Dec. Dig. § 15.*]

34. WILLS (§ 671*)—CONSTRUCTION—TRUSTS—REQUISITES TO CREATION.

The words of a will to create a trust must be imperative, must make the subject certain, and the object as certain as the subject.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1577, 1578, 1586; Dec. Dig. § 671.*]

35. WILLS (§ 671*)—TRUSTS—REQUISITES TO CREATION—CERTAINTY AS TO SUBJECT OF TRUST.

A gift of all of an estate not otherwise disposed of by the will is sufficiently certain as to the subject of the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1577, 1578, 1586; Dec. Dig. § 671.*]

36. CHARITIES (§ 13*)—PUBLIC CHARITY—REPAIR AND BENEFIT OF CHURCH.

A gift in trust for the repair of a church is valid as a public charity; and a gift for the repair of a definitely described building belonging to the church, and of any building or buildings that may be substituted therefor, in the absence of a showing that they are not for the benefit of the church, is also valid.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 37; Dec. Dig. § 13.*]

37. CHARITIES (§ 4*)—VALIDITY—ADMINISTERING SEVERAL PARTS TOGETHER.

It is no objection to the validity of a charitable gift that it is made up of several parts, which are to be administered together, the in-

come to be divided according to the discretion of the trustee.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 9, 10; Dec. Dig. § 4.*]

38. WILLS (§ 488*)—AMBIGUITY—EVIDENCE TO AID CONSTRUCTION.

A court may not declare an instrument ambiguous, because of ignorance of any particular fact, art, or science, familiar to the person who used the words, and a knowledge of which is necessary to a right understanding of such words, nor pronounce an instrument ambiguous, until it has brought to its aid in its interpretation all the aid afforded by the collateral facts and circumstances.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.*]

39. CHARITIES (§ 22*)—CERTAINTY OF OBJECT —“CHURCH.”

A gift in trust to “the First Church of Christ, Scientist,” for the promotion of the “religion of Christian Science as taught by me,” when construed in connection with the term “church,” which imports an organization for religious purposes, and the allegations of a bill, admitted by demurrer, that the church existed as a religious society, with a large membership, and that it was organized by the testatrix for the promotion of the doctrines of Christian Science, which doctrines were ascertainable from books published by the testatrix, was not indefinite as to its object.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 51-56; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1152-1155, vol. 8, p. 7602.]

40. CHARITIES (§ 22*)—GIFT TO TRUSTEES—DISCRETION—CERTAINTY OF OBJECT.

The fact that a charitable gift is to trustees, whose discretion the donor intended should determine the manner in which the gift should be applied to effect their charitable purpose, relieves the gift of uncertainty, which might otherwise defeat it.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 51-56; Dec. Dig. § 22.*]

41. CHARITIES (§ 10*)—GIFT FOR BENEFIT OF PUBLIC GENERALLY.

A gift for the benefit of the public generally is valid.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 34; Dec. Dig. § 10.*]

42. CHARITIES (§ 29*)—VALIDITY—APPLICATION TO PURPOSE NOT CHARITABLE.

Where the will of the donor of a charitable trust permits the trustees in their discretion to apply the whole or a part of the fund to objects not charitable, the gift is void; but in case of a trust for the repair of a church and church buildings, the purchase of material therefor in open market would not be an application of the fund to a purpose not charitable, so as to avoid the gift, even if the transaction was beneficial to those dealing in such material, since it is the purpose of the expenditure, its promotion of the object of the trust, which alone limits the power of the trustees.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 59, 60; Dec. Dig. § 29.*]

43. CHARITIES (§ 13*)—VALIDITY —“PIETY” —“RELIGION.”

In determining the validity of a charity, there is no distinction between the promotion of “piety” and of “religion”; the two words being synonymous.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 37; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6063, 6064.]

44. CHARITIES (§ 13*)—VALIDITY—PROMOTION OF CHRISTIAN SCIENCE—PECUNIARY PROFIT OF DONEE.

A gift to trustees of a Christian Science church, a voluntary religious organization, for the promotion of the doctrines of Christian Science as taught by the donor, who had organized the church, held by the church for its charitable purposes, and not for the private profit of any persons as owners or stockholders, is not invalid as a charity because the promotion of Christian Science is in some sense a business owned and carried on by the church.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 37; Dec. Dig. § 13.*]

45. CHARITIES (§ 13*)—VALIDITY—PROMOTION OF CHRISTIAN SCIENCE—ENRICHMENT OF PRIVATE OWNERS.

Where the necessary effect of a gift in trust of a Christian Science church for the promotion of Christian Science would be to enrich any private owners thereof, the gift could not be sustained as a charity.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 37; Dec. Dig. § 13.*]

46. CHARITIES (§ 10*)—VALIDITY—GENERAL PUBLIC BENEFIT.

A gift of all of an estate not otherwise disposed of by will to a Christian Science church, a voluntary religious organization, in trust for the promotion of Christian Science, is not invalid, though Christian Science be admitted to be a faith cure, and not a religion, since whether the promotion intended is of a religion or a system of therapeutics, or a combination of the two, whether it aims to benefit mankind by insuring their happiness in a future state, or by rendering their existence more tolerable in this world, it is a gift for a general public use.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 34; Dec. Dig. § 10.*]

47. CHARITIES (§ 12*)—VALIDITY—EDUCATIONAL PURPOSES.

Where one is interested in an educational scheme which he might legally publish and promote in his lifetime, there is no legal objection to gifts by himself or others to extend and promote it by publishing his writings, or by any other lawful means, after his death.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 36; Dec. Dig. § 12.*]

48. WORDS AND PHRASES—“PUBLIC POLICY.”

By “public policy” is intended the policy of the state, as evidenced by its Constitution and statutes, and the provisions of the common law as evidenced by the decisions of its courts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5813, 5814; vol. 8, p. 7773.]

49. CHARITIES (§ 29*)—VALIDITY—CONSTRUCTION.

Where the object of a gift to trustees for charitable purposes, leaving to their discretion the means to be employed, is itself lawful, it will not be inferred that unlawful means were intended to be employed, and it is no objection that unlawful methods might be employed for such purpose.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 59, 60; Dec. Dig. § 29.*]

50. CONSTITUTIONAL LAW (§ 84*)—CIVIL AND PERSONAL RIGHTS—RELIGIOUS LIBERTY.

Under Bill of Rights, art. 5, which declares that every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason, and shall not be restrained or molested for his religious profession or sentiments, provided he does not disturb the public peace, or disturb others in their religious worship, one has the

right to entertain such opinions as he chooses, and to make a religion of it, and to teach them to all others, since their rights of belief are as extensive as his, and this legal right to teach is not ended with his death.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152-154; Dec. Dig. § 84.*]

51. CONSTITUTIONAL LAW (§ 50*)—DEPARTMENTS OF GOVERNMENT—LEGISLATIVE POWERS—PUBLIC POLICY.

The lawmaking power of the state is alone invested with the authority to determine its public policy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

52. CONSTITUTIONAL LAW (§ 70*)—DEPARTMENTS OF GOVERNMENT—JUDICIAL POWERS.

Courts have no power to inaugurate or determine the public policy of the state. It is for them to ascertain and apply the legislative policy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

53. CHARITIES (§ 4*)—PURPOSES OF GIFT—PROMOTION OF CHRISTIAN SCIENCE—LEGALITY.

The teaching and practice of Christian Science as a system of faith cure or mental therapeutics, treating disease without the use of drugs or instruments, or extirpating it by belief in its nonexistence, not requiring its disciples to violate Laws 1901, c. 16, § 2, requiring any person knowing or having reason to believe that a person in any of certain relations to him has any malignant communicable disease to give notice to a health officer, is not against the policy of the state as shown by its general course of legislation, or by any specific enactments; Laws 1897, c. 63, regulating the licensing and registration of physicians and surgeons, by section 11 expressly excluding from its restrictions persons practicing "Christian Science so called," and hence a gift to trustees for the promotion of the doctrines of Christian Science is not illegal.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 9, 10; Dec. Dig. § 4.*]

Transferred from Superior Court, Merrimack County; Wallace, Chief Judge.

Bill by George W. Glover against Henry M. Baker, executor, and others. The bill was demurred to, and the case transferred without a ruling. Bill ordered dismissed, and case discharged.

Bill in equity, brought by George W. Glover, for the construction of the will of his mother, Mary G. B. Eddy, and for advice as to the validity of certain provisions thereof. The defendants are the executor, Henry M. Baker, and five residents of Massachusetts, who constitute the board of directors of the First Church of Christ, Scientist, in Boston. The Attorney General, claiming for the state by escheat, George W. Baker, a nephew of the testatrix, John B. Baker, her grand-nephew, and George W. Glover, Jr., a son of the plaintiff, were given leave to intervene. Transferred from the April term, 1911, of the superior court upon demurrer, without a ruling, by Wallace, C. J., who also of his own motion transferred the question whether the bill can be maintained, and, if so, upon

what grounds, in case such question is not properly presented by the demurrer.

For disposition of plaintiff's motion to remand, see 76 N. H. 261, 81 Atl. 1081.

Hannis Taylor and William L. Chambers, both of Washington, D. C., Herbert Parker and John D. Long, both of Boston, Mass., William E. Chandler and De Witt C. Howe, both of Concord, and John W. Kelley, of Portsmouth, for plaintiff. Taggart, Tuttle, Burroughs & Wyman, of Manchester, for intervenor George W. Baker. William A. J. Giles, of Concord, for intervenor John B. Baker. Remick & Jackson, of Concord, for intervenor George W. Glover, Jr. Edwin G. Eastman, Atty. Gen., Robert L. Manning, Special Counsel, of Manchester, and Joseph S. Matthews, of Concord, for the State. Elder, Whitman & Barnum, William A. Morse, and Leon M. Abbott, all of Boston, Mass., and Streeter, Demond & Woodworth, of Concord, for defendants.

PARSONS, C. J. Mary Baker Eddy died December 3, 1910. On the 14th of that month her will was duly probated in this county. The defendant Baker has been appointed executor and has qualified by giving bond. January 12, 1911, the plaintiff, a son of the deceased, commenced this proceeding against the executor and five persons alleged to be the directors of the First Church of Christ, Scientist, in Boston, Mass. The plaintiff in his bill (or petition, as he names it) alleged the above facts, argumentatively stated that the property of the deceased exceeds \$2,000,000 in value, and alleged that the will attempts to dispose of the great bulk of the estate by gifts to said church, or its directors, directly and in trust, and attacked the validity of the clauses of the will making such gifts. The prayer of the bill is for the advice of the court as to the true construction, meaning, and effect of the will, and the right of the plaintiff to receive any of the property which the will attempts to dispose of by the clauses attacked. The defendants demurred, pleaded in bar, and answered. It does not appear from the record which has been sent to this court that there has been any joinder on, or answer to, the various pleadings. There is no replication to the answer. The case has not been set for hearing upon the bill and answer, or for argument upon the plea. The only progress in the superior court appears to have been a motion by the plaintiff for a hearing upon the demurrer.

[1, 2] Whether all or a part of the issues in an action shall be tried at one time, and the order in which they shall be tried if determined separately, is a question of justice and convenience, usually settled by the superior court. *Owen v. Weston*, 63 N. H. 599, 4 Atl. 801, 56 Am. Rep. 547; *Glover v. Baker*, 76 N. H. 261, 81 Atl. 1081. Although

the defendants' plea presented matter claimed to bar the plaintiff from making any claim to his mother's estate, in the situation of the case the superior court was of the opinion that the progress of the cause would be advanced by first securing a final determination of the questions of law raised by the demurrer, and transferred those questions to this court, with the suggestion that if the defendants' demurrer does not raise the question whether the bill can be maintained, and, if maintainable at all, upon what grounds it may be maintained, those questions were specially reserved by the presiding justice of his own motion. The power of the court to make such a transfer has already been determined. *Glover v. Baker*, 76 N. H. 261, 81 Atl. 1081.

No ground appears upon which to question the ruling as a finding of fact of proper procedure, even if upon portions of the pleadings other questions were presented to the trial court for decision. The defendants' plea went merely to the maintenance of this action by the plaintiff. It did not support the validity of the bequests. The plaintiff concedes that, if the bequests are lawful, he has barred himself from questioning the will. If the bequests are unlawful, such as the law will not permit to be carried into effect, whether in that case the plaintiff is or is not entitled to share in the estate thereby left undisposed of by the will is a question between him and the other parties who have been permitted to join in the litigation—the more remote heirs of Mrs. Eddy and the state. Especially in view of the claim of escheat now made by the state, is it clear that the validity of the bequests must at some time be determined. If they are valid, the litigation is ended. If they are invalid, the legatees have no further interest in the cause.

[3] The question transferred is the right of the plaintiff to maintain the bill, and that is the only question transferred. The prayer of the bill is for advice as to the plaintiff's rights. The defendants demur, for the reason that it appears on the face of the bill that the plaintiff does not occupy any fiduciary position entitling him to the advice and direction of a court of equity. The only parties who can call on the court for advice are those in a fiduciary position. Questions are prospectively determined by a court of equity only in behalf of trustees who in the execution of a trust are entitled to its protection. *Greeley v. Nashua*, 62 N. H. 166, 167; *Ellis v. Aldrich*, 70 N. H. 219, 222, 47 Atl. 95; *Bailey v. McIntire*, 71 N. H. 329, 52 Atl. 446; *Drake v. True*, 72 N. H. 322, 56 Atl. 749; *Harvey v. Harvey*, 73 N. H. 106, 59 Atl. 621.

The plaintiff is not a trustee, nor is he a beneficiary of the trusts attempted to be created by the will, nor does he ask in terms that a trust be declared for his benefit in the property in question. He is not entitled

to the advice of the court. The defendants did not insist upon this objection in argument, but appear to concede in the brief, and in fact did concede in oral argument, that if the plaintiff might have an interest in the estate he could require a construction of the will. The plaintiff claims in his brief that "there can be no possible question either as to the jurisdiction of the superior court or as to the form of the bill in the present case." But while, in view of the attitude of the parties to the cause, the court may perhaps properly proceed to the consideration of the validity of the questioned clauses of this will, an examination of the cases cited by the plaintiff does not so clearly sustain the proposition above quoted that the question can properly be passed without some consideration. The procedure in this case ought not to be permitted to stand as authority for the proposition that immediately upon his appointment an executor can be dragged into court and compelled to litigate against his will questions which certainly cannot arise until the estate is ready for distribution, unless it is clear such is the law.

[4] When questions as to the meaning or validity of the clauses of a will come before a court in the exercise of its ordinary jurisdiction, such an instrument is construed as part of the determination of the cause. But this does not require the court to advise every one who may think he has an interest under or adverse to a will or other instrument. The only case of similar procedure found in this state is *Haynes v. Carr*, 70 N. H. 463, 484, 49 Atl. 638. In that case the executors filed an answer, which they asked to have considered as a cross-bill, asking the advice of the court, and the case was disposed of by ordering the dismissal of the plaintiffs' bill, with a decree advising the executors.

[5] In *Bowers v. Smith*, 10 Paige (N. Y.) 193, it is said, in substance as quoted in the plaintiff's brief: "An executor takes the legal estate in the personal property of the testator as trustee for the legatees or next of kin; and the court of chancery having general jurisdiction in cases of trusts, any person having an interest in such property, either as a legatee or distributee of the decedent, may file a bill in that court against the executor, to have the construction of the will settled, or to have the question as to the validity of any of its provisions determined, so far as concerns the interest of the complainant in the property, and to have a decree against such executor for such parts or portions of the property as he is legally and equitably entitled to receive." This statement was not involved in the decision of the case, but was merely "asserted by the chancellor." *Read v. Williams*, 125 N. Y. 560, 566, 26 N. E. 730, 21 Am. St. Rep. 748. The New York cases are in conflict, and the jurisdiction appears finally to be rested up-

on the provisions of the Code. Read v. Williams, *supra*. See Wager v. Wager, 89 N. Y. 161; Horton v. Cantwell, 108 N. Y. 255, 267, 15 N. E. 546.

The correct rule, in the absence of statute, which is followed here, is set forth in Chipman v. Montgomery, 63 N. Y. 221, 230: "The plaintiffs, as heirs at law and next of kin claiming in hostility to the will, have no interest in the interpretation of that instrument, and have no standing in court in an action for that purpose, but must assert their rights directly by proper action at their peril, taking the chances of being subjected to costs in case of failure, as in other controversies. * * * A court of equity has an incidental jurisdiction in respect to wills, and does not take jurisdiction of an action brought merely for the construction of a will or other instrument at the instance of every person who claims to be directly or indirectly interested in the subject-matter of the instrument. The rule is that to put a court of equity in motion there must be an actual litigation in respect to matters which are proper subjects of the jurisdiction of that court, as distinguished from a court of law. * * * Hence one who claims real property must bring his action of ejectment or other proper action for its recovery, and he who has a right to personalty, or to any debt or duty which is the subject of an action at common law, must resort to the appropriate remedy by action for the specific property, debt, or duty, or damages for the infringement of his right. It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy." "It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." Folger, J., in Bailey v. Briggs, 56 N. Y. 407, 413.

[6-8] In no case that has been cited is it held that an heir claiming in hostility to a will can require the advice of the court as to his right in the estate. The only principle that has been laid down is that he may under some circumstances bring a bill to declare his beneficial interest, under his claim as heir to a distributive share in funds in the executor's hands. In Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362, it is held: "An administrator is a trustee for heirs and creditors; and this court, sitting as a court of chancery, has power over trusts of that description, upon a proper case for enforcing the rights of those interested in the trusts." But a bill in equity cannot be

maintained against an executor merely upon the ground of the trust implied by law. A special case must be shown calling for equitable relief. Walker v. Cheever, 35 N. H. 339; Joslin v. Wheeler, 62 N. H. 169. By the Constitution and the statute, the probate court has exclusive, original jurisdiction of the probate of wills and the settlement and distribution of the estates of deceased persons. Knight v. Hollings, 73 N. H. 495, 497, 63 Atl. 38; Const. pt. 2, art. 79 (80); P. S. c. 182, § 2. 'Until the settlement of the executor's account, the probate court has entire jurisdiction of the necessary procedure. Hayes v. Hayes, 48 N. H. 219, 224, 225.

[9, 10] The superior court has no power to require the executor to account for his administration upon a bill in equity, or to revise proceedings in the probate court, except upon appeal. Reed v. Prescott, 70 N. H. 88, 46 Atl. 457; Ayer v. Messer, 59 N. H. 279. If, upon settlement of the executor's account, the executor refuses to pay the plaintiff any sums to which he may be legally entitled, the plaintiff has a complete remedy upon the administration bond. If in such case the executor withholds from an heir property to which the heir lays claim, it may not be very material under New Hampshire practice whether the heir at its inception denominates his proceeding a bill in equity or some action at common law; but an attempt to bring the executor to account in equity traverses jurisdictional provisions established by the Constitution.

[11] But the plaintiff does not ask for an accounting by the executor, or for a decree requiring payment to him. His sole request is for advice as to his rights. As the plaintiff is not entitled to such advice, the petition should be dismissed so far as any proceeding thereunder is based upon the plaintiff's right to maintain it. But when the question of construction has been fully argued by all parties interested, and both desire the opinion of the court, a court may express its opinion although dismissing the petition. Austin v. Bailey, 163 Mass. 270, 39 N. E. 1022. And where the parties in conflict have brought in the administrator and fully tried their case, for the protection of the administrator the opinion of the court, as advice to him, has been given to dispose of the controversy. Day v. Washburn, 76 N. H. 203, 81 Atl. 474. Upon this ground alone, in the final argument for the plaintiff, is it claimed the proceeding is maintainable.

In this case the executor is a party represented by counsel. The plaintiff and the claimants under the will have fully presented the opposing views in argument. All persons understood to be interested are represented before the court or have had notice of the proceeding. The executor has not insisted in argument upon the technical objection to the maintenance of the proceeding by the plaintiff. The rights of the parties are not so clear that it would not be his duty to

them, as well as to himself, to obtain at the proper time a judicial determination of their conflicting claims. *Tilton v. Society*, 60 N. H. 377, 49 Am. Rep. 321. In this view, the concession in argument by counsel for the executor that the proceeding is maintainable in some form may be treated as a request for advice, which authorizes the court to express for his benefit the opinions formed upon the material points argued.

The plaintiff attacks the fourth, sixth, and eighth (or residuary) clauses of the will. It is conceded that the fourth and sixth clauses of the will are valid, if the residuary clause can be sustained. It will be unnecessary, therefore, to discuss them until the residuary clause is found invalid. The residuary clause contained a provision as to Pleasant View, the testatrix's residence in Concord, which was revoked by the second codicil. Omitting this provision, the residuary clause reads: "I give, bequeath, and devise all the rest, residue, and remainder of my estate, of every kind and description, to the Mother Church—the First Church of Christ, Scientist, in Boston, Massachusetts—in trust for the following general purposes: I desire that such portion of my residuary estate as may be necessary shall be used for the purpose of keeping in repair the church building and my former house at No. 385 Commonwealth avenue, in said Boston, which has been transferred to said Mother Church, and any building or buildings which may be, by necessity or convenience, substituted therefor; * * * and I desire that the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by me."

[12] The legatees stand upon the will. The plaintiff in his bill has stated the facts upon which he claims that the bequests attempted to be made by the will are invalid. The demurrer admits all facts well pleaded, but does not admit the conclusions of law attempted to be drawn therefrom. Although the bill admits that in the lifetime of his mother, in consideration of payments made to him, the plaintiff agreed that she might, if she saw fit, dispose of her property in any lawful way, no agreement in writing is set forth in the bill, nor does the plaintiff admit any agreement, debarring him from prosecuting the claim he makes upon the ground upon which he seeks to place it. The validity and effect of the agreements set forth in the plea are questions not raised by the demurrer, and not now before the court. It is elementary that upon demurrer the facts must be taken as alleged by the opposing party and cannot be varied or answered by allegations of fact. *Tappan v. Evans*, 11 N. H. 311, 322, 323; *Sto. Eq. Pl.* § 448; 1 *Dan. Ch. Pr.* *598.

[13, 14] One ground upon which the plain-

tiff attacks the residuary bequest is that it was obtained by fraud, concealment of what are alleged to be material facts, and undue influence. These issues of fraud and undue influence in securing the execution of the will are not open in this proceeding. The decree of the probate court allowing the will is a judgment establishing the document to be the will of Mrs. Eddy. That judgment is not open to collateral attack. *Spofford v. Smith*, 59 N. H. 366; *Poplin v. Hawke*, 8 N. H. 124. As long as the decree stands, "it is conclusive of the genuineness and validity of the will." *Knight v. Hollings*, 73 N. H. 495, 500, 63 Atl. 38. Except in a direct proceeding to set the probate aside, evidence of facts inconsistent with the validity of the decree is incompetent. *Kent v. Hunt*, 74 N. H. 74, 65 Atl. 386; *Simmons v. Goodell*, 63 N. H. 458, 2 Atl. 897.

[15, 16] Whether the paper presented for probate was Mrs. Eddy's will, or the product through fraud or undue influence of other minds operating upon hers, is a question which could have been raised in opposition to its probate as her will, and which, whether raised or not, is conclusively determined by the judgment. If the objection went only to a portion of the will—to the bequests to the legatees who are defendants—it would have defeated the will only to the extent of the proof, and the probate of the will could have been limited to the portions, if any, not found to have been so induced. *Owen v. Weston*, 63 N. H. 599, 603, 4 Atl. 801, 56 Am. Rep. 547; *Marston v. Marston*, 17 N. H. 503, 508, 43 Am. Dec. 611; *Sumner v. Crane*, 155 Mass. 483, 484, 29 N. E. 1151, 15 L. R. A. 447; *Post v. Mason*, 91 N. Y. 539, 550, 43 Am. Rep. 689; *Allen v. McPherson*, 1 H. L. C. 191. The only matters open here are the construction of the disputed clause, ascertaining upon competent evidence what the testatrix meant by the words she used, and the inquiry, when the testatrix's purpose is ascertained, if it can be, whether that purpose is one that can be carried into effect.

[17] If the donor's purpose can be ascertained, and is legal, it is the duty of the court to give it effect. *Adams v. Page*, 76 N. H. 96, 79 Atl. 837. The testatrix gave the bulk of her property in trust to be devoted and used for the purpose of promoting and extending the religion of Christian Science as taught by her. Her understanding that she was not making in the residuary clause a direct gift to the legatee is made certain, if anything beyond the language of the clause itself were needed, by the direct gift of \$50,000 to the legatee in the sixth clause. It is argued that the object of the legatee, the First Church of Christ, is the extension and promotion of the religion of Christian Science, and that the subject of the gift to it in trust for the purpose named must be used for the same purpose as if given to it directly. This may be so.

[18] A gift to a charitable or religious organization, without more, is in trust for the purposes of the organization. *Hale v. Everett*, 53 N. H. 9, 77, 16 Am. Rep. 82; 2 Per. Tr. (2d Ed.) § 733. But for some reason the testatrix saw fit to make more certain the purpose of her residuary gift by declaring the trust upon which it was given. The language she used cannot be disregarded. Uncertainty as to the corporate capacity of the legatee to hold directly and administer for the purposes of its organization so large a fund may have inspired the express definition of the trust.

The allegations of fact of the bill and amendments are reduced by counsel for the plaintiff in argument to two fundamental propositions, which, however, are in direct conflict with each other: (1) The legatee, the First Church of Christ, Scientist, is an unincorporated religious society for the promotion of Christian Science as taught by Mrs. Eddy. (2) The legatee is not a charitable organization, but a business organization for the purpose of practicing and vending a system of faith cure invented by Mrs. Eddy, the religious feature of which is only for the commercial purpose of giving vogue and salability to the cure. The first proposition is that of the original bill; the second is deduced from the facts alleged in the numerous amendments. No objection has been made to this double aspect of the facts claimed to be presented by the bill.

[19] Under the first view, that the legatee is a church, from which it follows that the scheme it is organized to promote is a religion, alleged to be that taught by Mrs. Eddy, the plaintiff claims the gifts are void, because prohibited by statute law. The Massachusetts statute relied upon is: "The income of the gifts, grants, bequests, and devises made to or for the use of any one church shall not exceed two thousand dollars a year." R. L. Mass. c. 37, § 9. The New Hampshire provision is: "The income of any grant or donation made to or for the use of a church shall not exceed five thousand dollars a year." P. S. c. 152, § 10. The facts alleged do not bring the case within the terms of the statutes. The residuary clause in its principal feature is not a gift to a church, or for the use of a church. It is on its face a gift for religious purposes. Whether a church may or may not act as trustee of such a trust, or whether the language of the will creates a valid trust or not, neither question is expressly concluded by the words of the statutes.

[20, 21] But "it is a very familiar rule in the interpretation of statutes, that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction, in others enlarged,

and sometimes the construction may be even contrary to the letter. * * * What is within the legally proved intention of the Legislature is within the statute, though not within the letter; and what is within the letter, but not within the intention, is not within the statute." *State v. Banks*, 75 N. H. 27, 31, 70 Atl. 542, 544 (21 Ann. Cas. 1204). The claim is that the sections cited are not merely regulations of or limitations upon the corporate holding power conferred upon the deacons and other similar officers of churches by the statutes of which they are a part; but, construed according to the purpose of the Legislature as evidenced by their history and source, they also are intended to be and are limitations upon testamentary power. In this view the New Hampshire statute only is material, for Massachusetts cannot determine the extent to which New Hampshire permits or authorizes its citizens to dispose of property by will. Consequently the Massachusetts statute is material only as a limitation of the power of the testamentary trustee.

[22] The history of these sections, later more fully considered, shows them to be part of legislation enacted because of doubt of the validity of gifts in trust to unincorporated associations—a doubt no longer entertained, since grants or gifts to an unincorporated association are sustained in equity. *Bartlett v. Nye*, 4 Metc. (Mass.) 378; 1 Per. Tr. § 46. In *Sohler v. St. Paul's Church*, 12 Metc. (Mass.) 250, it is held that, under the Massachusetts statute declaring that the deacons "be deemed bodies corporate," a church is authorized to execute a trust for a purpose not foreign to those of its organization.

[23, 24] The same result appears to follow from the conclusion of the historical argument of the plaintiff's counsel, that the purpose and effect of the legislation upon the subject has been to transfer to these religious societies the parochial functions of towns—a conclusion which was pointedly enforced by the citation of the existing statute (P. S. c. 152, § 2) authorizing such societies to raise money by taxation of their members. This means that such societies are towns so far as such powers existing in towns prior to the legislation may extend. From this it would seem to follow, as towns, like other corporations, may act as trustees for purposes not incompatible with the objects of their organization (*Sargent v. Cornish*, 54 N. H. 18; *Dublin Case*, 38 N. H. 459, 577; 1 Per. Tr. §§ 42, 43), that the religious societies having their parochial powers might so act.

In view of the suggestion that the precise question as to the competency of this church is now pending before the Massachusetts court between the same parties, this court would not attempt to pass upon it in advance of that court, unless it were essential to the rights of the parties that it

should do so without delay. *Moore v. Casualty Co.*, 74 N. H. 47, 64 Atl. 1099. But it is unnecessary to decide at this time whether under Massachusetts law an unincorporated religious society may not act as trustee for a purpose not foreign to the objects of its association, but alleged to be identical therewith.

[25] The gift is not to the church, but in trust, and unless it is sustainable as a charitable trust it is invalid, and whether the church could act as trustee if the trust were valid is immaterial; while, if the will creates a valid trust, the refusal of the trustee named in the will to act because of incapacity under Massachusetts law, or otherwise, will not avoid the trust, which cannot fail merely because of disability of the trustee. "It is a rule without exception that equity never allows a legal and valid trust to fail for want of a trustee." *Campbell v. Clough*, 71 N. H. 181, 184, 51 Atl. 668, 669; *Chapin v. School District*, 35 N. H. 445; *Hubbard v. Art Museum*, 194 Mass. 280, 290, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025; *Vidal v. Girard*, 2 How. 127, 180, 11 L. Ed. 205. The only limitation of the rule is when it appears that the testator intended a personal trust in the trustee named in the will (*Fountain v. Ravenel*, 17 How. 369, 382, 15 L. Ed. 80), a conclusion which cannot be reached here because no person has been named as trustee.

[26] The trustee named is an association, and the testatrix must have intended the trust to be executed by the persons (whoever they might be) who from time to time might constitute the association or be its managers. The trust may be permanent, because the use may be restricted to the income; and the testatrix had in mind, consequently, succession in the individuals in control, and did not intend to limit the discretion conferred to any particular person. *Lorings v. Marsh*, 6 Wall. 337, 354, 18 L. Ed. 802; 2 Per. Tr. §§ 721, 722.

[27] The testatrix intended the trust to be administered by persons professing the belief she desired to promote. Such persons it would be the duty of the court to appoint should occasion arise, or at least none in hostility thereto should be permitted to undertake the execution of the trust. *Smith v. Nelson*, 18 Vt. 511, 569. As the case stands, the incapacity of the church to act as trustee may be taken as sufficiently alleged as a fact by the bill and admitted by the demurrer.

[28] If a valid trust is created, the plaintiff is not concerned as to the manner in which or the persons by whom the trust is carried into effect. *Burnham's Petition*, 74 N. H. 492, 494, 69 Atl. 720. The question of trustee will be settled at the proper time, upon the facts as they may then appear. As the gift is not to the church for its own use, it is unnecessary to consider the question,

argued at length, whether the state alone may take advantage of a limitation upon the corporate holding power of a corporation.

[29] Does the law of this state limit the amounts that may be given to pious uses? "Every person of the age of twenty-one years, of sane mind, may devise and dispose of his property, real and personal, and of any right or interest he may have in any property, by his last will in writing." P. S. c. 186, § 1. This chapter, under the title "Wills," does not restrict this general disposing power by limitations of the amount that may be given to educational, charitable, pious, or superstitious uses, or to any one corporation or individual. There is no such statutory limitation, unless contained in the section above quoted from chapter 152, Public Statutes, entitled "Religious Societies," whose purpose is, it has been said, to make provision "whereby defects in a church organization are supplied, so that property donated for pious purposes may not fail of reaching the objects intended by the donors." *Hennessey v. Walsh*, 55 N. H. 515, 521. In other words, the purpose of the chapter is not to limit or destroy gifts to pious uses, but to promote and effectuate them.

The section upon which the plaintiffs rely was enacted here in 1842, and was doubtless taken from the Revised Statutes of Massachusetts of 1836. The argument that the income-limiting provision of the section is intended to make void gifts to any church which might produce an income in excess of the limit is based upon the claim that its provisions originated in section 1 of the English statute (9 Geo. II, c. 36) commonly called the Georgian mortmain act. The evil at which this act was aimed, as set forth in the preamble, was the alleged fact that many large and improvident dispositions of their property were made by languishing and dying persons to uses called charitable uses, to the disherison of their lawful heirs; and the remedy enacted was to declare void all conveyances of land, or of money to be laid out in land, to any person or persons, corporate or otherwise, in trust for the benefit of any charitable use whatever, unless made by deed executed and delivered 12 months before the death of each donor or grantee and enrolled within 6 months after its execution. This section of the English statute does not treat in any form of the income corporations may hold. The New Hampshire statute does not declare any gifts in trust void. The only possible connection between them comes through the Massachusetts provincial statute of 1754-55. Ancient Charters and Laws Mass. Bay, p. 605; 2 Mass. Laws (Ed. 1807) p. 1037. This act is defined in the title as "An act for the better securing and rendering more effectual grants and donations to pious and charitable uses." Section 1 declares that the deacons

of Protestant churches shall be deemed so far bodies corporate as to take in succession all grants and donations "made either to their several churches, the poor of their churches, or to them and their successors," thereby resolving the doubt expressed in the preamble of the act whether such gifts would go in succession, although so intended. Section 2 provides that the annual income of the grants made or to be made to any one such body politic for pious and charitable uses shall not exceed the sum of three hundred pounds, and also "that all such donations hereafter made by deed, which shall not be recorded in the register's office, in the county where the lands lie, three calendar months before the death of the donor, and all such bequests or devises which shall not be made * * * at least three months before the death of the testator, shall be utterly void and of no effect; anything in this act contained to the contrary notwithstanding."

[30] It seems very probable that this latter clause was inspired by the section of the English act before quoted; and if this clause had remained in the Massachusetts law, or had ever been enacted in New Hampshire, the English decisions interpreting the English statute would be of value. But in 1786 the Massachusetts statute was revised and re-enacted in a new statute, which omitted the clause which declared deeds and wills void unless made three months before the death of the donor or testator. 1 Mass. Laws (Ed. 1807) p. 282. This provision was never adopted here, and there is no foundation for the claim that the New Hampshire "church statute" is derived from the Georgian mortmain act.

It was said in *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99 (1815), that the provisions and restrictions of the act of 1754-55 (28 Geo. II) related only to gifts and devises to the bodies politic created by that act; that donations or bequests to others could not reasonably be brought within the act; from which it would follow that gifts to charitable uses generally were not understood to be within the act. The point was not decided, because it was held that the act of 1786 repealed the provisions of the act of 1754-55 contended to render void a bequest to the American Board of Commissioners, "to promote the pious objects thereof." In *Goling v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645 (1834), the purpose of the statute was said to be to remove doubts concerning the legal estate and to declare and confirm the same to these quasi corporations created out of the church officers; that the statute "implies that such gifts were good in principle and in substance, but might be defeated by the ignorance or unskillfulness of the grantors, in not creating proper trustees, in whom the legal estate might vest, in order to support and carry out the charitable in-

tent." The careful student of the Massachusetts law was therefore informed, at the time the Massachusetts provisions were adopted here in 1842, that their purpose was to promote and preserve certain gifts to pious uses, and that the provisions restricting generally the power of testators to bequeath or devise to charitable uses, if any had such effect, had been stricken from the act. This is the conclusion of the Massachusetts court. *Hubbard v. Art Museum*, 194 Mass. 280, 284, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 10 Ann. Cas. 1025.

The plaintiff's answer is that the Massachusetts court made a plain mistake. If so, they have been consistent therein since 1815. If the legislation is approached from the viewpoint of its declared purpose—the promotion and preservation of gifts to or for churches—the income limitation is easily understood as a limitation upon the corporate power created by the act. If the act is viewed, as the plaintiff attempts to consider it, as an intended restraint upon such gifts, an intent to defeat absolutely gifts in excess might be extracted from the act, even after the express removal of the words declaring the gifts void, which cannot be found in the act since 1786. But as the purpose is plainly declared in the preamble, the plaintiff's construction cannot be read into it.

[31] But the question for this court is not what the language meant in Massachusetts in 1754-55, 1786, or 1836, or now means, but what did it mean to the Legislature which made it New Hampshire law in 1842? Upon this question the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it are competent evidence. *Stanyan v. Peterborough*, 69 N. H. 372, 373, 46 Atl. 191; *Weed v. Woods*, 71 N. H. 581, 583, 53 Atl. 1024. "The public worship of God and public instruction in morality and religion were recognized in the Bill of Rights in the Constitution as 'giving the best and greatest security to government'; and to promote these the Legislature is empowered 'to authorize, from time to time, the several towns, parishes, bodies corporate, or religious societies within this state to make adequate provision, at their own expense, for the support of public Protestant teachers of piety, religion, and morality.' Bill of Rights, art. 6. Prior to and at the time of the adoption of the Constitutions of 1784 and 1792, public religious worship was very generally supported by a tax laid by the several towns. The town was the parish or religious society, which, by authority of legislative acts, furnished the meeting house and contracted with and paid the minister. The provincial statute of 1714 (Acts and Laws of the Province 1696-1725, p. 51) empowered towns to choose ministers and raise money by tax for their support, subject to the right and liberty of conscience. The same power.

of enabling towns to support public worship by means of a tax, was fully set forth in section 10 of the act of February 8, 1791 (Laws 1792, p. 167) entitled 'An act for regulating towns and the choice of town officers,' and which provided that the legal voters, at any regular meeting of the town, might, agreeably to the Constitution, 'grant and vote such sum or sums of money as they should judge necessary for the settlement, maintenance, and support of the ministry, schools, meeting houses, the maintenance of the poor, for laying out and repairing highways, for building and repairing bridges, and for all the necessary charges arising within the said town, to be assessed on the polls and estates in the same town as the law directs.' The support of the ministry and of houses of public worship was then on the same footing as that of schools, highways, and the support of the poor. With a gradual change arising from the multiplying of religious sects and the larger exercise of freedom of opinion, the system of supporting religious worship through the parochial functions of towns was by degrees abandoned, though authorized by law, until the act of 1819 repealed section 10 of the act of 1791, and empowered religious societies of every Christian sect 'to raise money by taxes upon the polls and ratable estate of the members' for maintaining houses of public worship and supporting the ministry." *Franklin Street Society v. Manchester*, 60 N. H. 342, 347, 348; *Holt v. Downs*, 58 N. H. 170, 175; *Hale v. Everett*, 53 N. H. 9, 64-68, 16 Am. Rep. 82; *Dublin Case*, 38 N. H. 459, 475.

The exemption from taxation for the support of teachers of another sect, persuasion, or denomination, guaranteed to the individual of any one particular sect or denomination by article 6 of the Constitution and recognized in the early statute (Prov. Laws [Ed. 1771] pp. 55, 138; Act 1770 [Supp. Same] p. 49), was not always in practice effected under the act of 1791, authorizing taxation by towns for the support of the ministry. The question of fact remained for the decision of a jury, whether the objecting individual was of a different persuasion from the minister of the town. *Sanborn*, Hist. N. H. 287, 289; *Barstow*, Hist. N. H. 422-427. The first attempt at relief was a legislative declaration recognizing persons of particular religious belief as distinct religious sects or denominations entitled to the protection of the Constitution and the laws. *Free Will Antipedo Baptists*, December 7, 1804; *Universalists*, June 13, 1805; *Methodists*, June 15, 1807; *Laws* (Ed. 1815) p. 46. Another remedy was the incorporation of various religious societies, with authority to tax their members for the support of religious instruction of the particular kind favored by them. These incorporations at first gave little beyond the power to assess and collect taxes for the purpose named; but in time the powers con-

ferred were enumerated with greater detail, and in nearly every instance the charters conferred in various terms authority upon the incorporations to receive and hold for their own use subscriptions, grants, or donations of real and personal property not exceeding a fixed amount, or of a limited annual income. In 1819 and the years immediately preceding, these incorporations are very numerous. *Index Laws N. H.* 468-472; *Mss. Laws N. H.* vols. 20, 21. These acts being simply acts of incorporation, the limitations contained therein were purely limitations upon corporate power.

The toleration act of 1819 (chapter 76) was urged, not only upon the ground of religious freedom, guaranteed by the Constitution, but denied in practice, but as a remedy for the abuse of special religious incorporations which was beginning to be felt. Section 3 of the act provided for the incorporation without special act of societies of each religious sect or denomination of Christians in the state. The act was a general incorporation act, as well as an act of religious toleration. This act, like the earlier special incorporations, gave merely the power to raise money by taxation of the members of the societies so incorporated, "and to collect and appropriate the same for the purpose of building and repairing houses of public worship, and for the support of the ministry." The legislation transferred the power conferred upon towns by the act of 1791 to the societies to be formed under it. But the act was seen to be incomplete, and in 1823 (chapter 60, § 1) such societies were authorized "to collect and receive by voluntary contribution or by devise, and hold for the uses of such society, a permanent fund not exceeding the sum of ten thousand dollars, the annual income of which shall be appropriated towards erecting or repairing a place of public worship for such society and for the support of the ministry in such society."

The act of July 3, 1827, repealed the acts of July 1, 1819, and July 3, 1823, authorizing the creation of religious societies and defining their corporate powers (*Laws* 1827, c. 36, § 4; *Laws* [Ed. 1830] tit. 99, § 4), but re-enacted with some modifications and extensions the provisions as to their organization and powers. Section 1 provided that societies organized as provided in the act should be bodies corporate, with power "to take, hold, and possess, to them and their successors, for the use and benefit of such society, by purchase, gift, grant, devise, or otherwise, any real or personal estate, for the purpose of erecting and repairing a house of public worship, and a parsonage house, and other buildings necessarily connected therewith, and for supporting the ministry in such society; and shall have power to improve, sell, and convey and dispose of the same for the sole use and benefit of such society: Provided always, that the annual value or in-

come of the estate of any one society shall not at any one time exceed one thousand dollars."

The commissioners who made the revision of 1842 reported with some rearrangement the provisions of the act of 1827, which was entitled "An act empowering religious associations to assume corporate powers," as chapter 147 of title 17 ("Of Corporations"), and it was enacted with some verbal changes as the first five sections of chapter 144 of the Revised Statutes. Section 2 provides that the corporations organized under it "may take, hold, and possess by purchase, gift, grant, devise, or otherwise, any real or personal estate" for purposes stated, "provided that the annual value or income of all the estate of such society shall not exceed two thousand dollars." Up to this point it is clear that the only subject receiving legislative consideration is the property-holding capacity of this class of corporations. In the Legislature title 17 ("Of Corporations") was referred to a special committee of ten, who reported a large number of amendments. House Jour. Nov. Sess. 1842, pp. 122, 213, 334. In the passage of the act through the Legislature, sections 6 to 15 were added to the chapter. These sections are shown, by comparison with chapter 20 of the Revised Statutes of Massachusetts of 1836, to have been taken bodily from that act. In case of a gift or grant to an unincorporated religious society, section 7 makes such society a corporation for the purpose of managing, using, and employing the same, or to prosecute and sue for the same, and was taken from section 25 of the Massachusetts statute, but contains a provision not found in that section, as follows: "Provided that the income of the donations, gifts, or grants to any one of such unincorporated religious societies shall not exceed the sum of two thousand dollars a year"—identical in effect with the like provision as to the holdings of incorporated religious societies under section 2 of the chapter. Section 8 declares that "the trustees, deacons, church wardens, or other similar officers of all churches or religious societies, if citizens of the United States, shall be deemed bodies corporate for the purpose of taking and holding, in succession, all grants and donations, whether of real or personal estate, made either to them and their successors, or to their respective churches, or to the poor of their churches." This section, except for the insertion of the word "trustees" as an additional term descriptive of church officers, is identical with section 39, c. 20, Revised Statutes of Massachusetts. The remaining sections correspond, respectively, with this addition when appropriate, with the remaining sections of the Massachusetts statute. Section 14, upon which the plaintiff relies, is: "The income of any such grant or donation, made to or for the use of any church, shall not exceed the sum of two thousand dollars a year, exclusive of the income of any par-

sonage lands granted to or for the use of the ministry"—and is identical with section 43, c. 20, Revised Laws of Massachusetts.

Title 19 of the Commissioners' Report on the Revised Statutes of New Hampshire ("Of Probate and the Estates of Deceased Persons"), which includes chapter 159 ("Wills"), was referred to and reported from the committee on the judiciary. House Jour. Nov. Sess. 1842, p. 126. It would seem to be clear that the Legislature of 1842, in dealing with through a separate committee, and amending the title "Corporations," which included the chapter "Of Religious Societies," must have understood they had corporate power, rather than testamentary capacity, under consideration. That chapter, as completed, provided for the voluntary incorporation of religious societies, with a limitation upon their property-holding power; second, that in case of a gift to an unincorporated religious society, such unincorporated society should have the same power as an incorporated society to hold and control the same, with the same limitation upon the income upon the property authorized to be held, though somewhat differently expressed; and, third, recognizing the well-understood distinct entity of church and society (*Holt v. Downs*, 58 N. H. 170), and the possibility that a gift might be made to the officers of the church or society, or both, provided (sections 8, 9) that such officers, as the case might be, should be deemed bodies corporate "for the purpose of taking and holding in succession" all such grants and donations, with the same proviso that the income of such grant or donation should not exceed \$2,000 a year. The difference in expression arising from copying the Massachusetts language in the latter section does not authorize the conclusion that any different purpose was understood to be attached to the limitation of the income of grants or donations to any church than that intended to be expressed in the proviso of section 2, "that the annual value or income of all the estate of such society shall not exceed two thousand dollars," whose history shows it is nothing more than a limitation of corporate power. The statute appears to have been intended to provide for all possible cases of gifts to religious societies or churches, whether incorporated or unincorporated, and whether the gift be made to the society or church, or to the officers of either or both. The act is comprehensive and complete, and justifies the conclusion of Judge Smith in *Hennessey v. Walsh*, 55 N. H. 515, 531, before quoted. "that provision is made, whereby defects in a church organization are supplied, so that property donated for pious purposes may not fail of reaching the objects intended by the donors."

In the chapter of the Public Statutes entitled "Religious Societies" (chapter 152), the first three sections of chapter 144 of the Revised Statutes, providing for voluntary incorporation of such societies, are omitted.

though their substance is found in the General Statutes and the General Laws; but in chapter 147 of the Public Statutes the purpose for which voluntary corporations might be formed is extended to include any charitable or religious cause. Such a corporation may hold property, without special authority from the Legislature, to the value of \$500,000. The present situation of the legislation upon the subject, therefore, is that a religious society or church which incorporates itself under the general law may hold property to the amount of \$500,000; and unincorporated religious societies, or the quasi corporations created by gifts to the officers of a society or church, may hold property whose annual income does not exceed \$5,000, the limit having been increased since 1842.

[32] Considering these provisions as limitations of corporate power, there is reasonable ground for permitting greater power to a formally incorporated body than to one whose incorporation results merely from the fact that a gift is made to it or its officers. But a statute intended as a limitation upon testamentary power, with the purpose of preserving an estate for the heirs, which should define the limits of such power, not by the character of the gift or the relation of its amount to the whole property of the decedent, but solely by the amount which could be given to a single corporate entity, varying that by the degree of corporate organization, leaving the testator free to dispose of all his property for pious or superstitious uses by the simple expedient of extending his charity to a sufficiently large number of corporate entities of the same class, or by selecting some other as trustee, would be so poorly adapted to execute such a purpose that it cannot be reasonably interpreted as enacted with such end in view. If one view which may be taken of legislative language produces an absurd and unreasonable result, that fact is evidence no such purpose was within the legislative purpose, if the language used is capable of a construction neither absurd nor unreasonable. Opinion of the Justices, 75 N. H. 613, 616, 72 Atl. 754.

[33] Considering all the competent evidence furnished by the language used, the prior history of legislation, the circumstances under which the law was passed, other provisions of apparently similar purpose adopted at the same time, and assigning a reasonable meaning to the language, it is more probable that in 1842, and the subsequent re-enactments of the section relied upon by the plaintiffs, the legislative intent was to regulate the property-holding capacity of the quasi corporations created by the act, and not to limit the testamentary capacity of the inhabitants of the state. If the New Hampshire statute, by limiting the corporate holding power of a church, indirectly restrains the power of individuals to give directly to such an organization, the restraint relates only to gifts to New Hampshire churches, and can-

not in any way be construed to limit the testamentary capacity of a New Hampshire citizen to give to other churches. As the gift is not to a New Hampshire church, and as no statute limiting general testamentary power as to gifts for charitable or religious uses is found, the gift is not invalid because of the statute.

[34-38] This disposes of the grounds urged against the validity of the gift in the original bill and, it may be inferred, of the principal objections to the bequest. In the amendments to the original bill, and in argument, the validity of the bequest as a gift to charitable or religious uses is questioned. "The rule for determining whether the words of a will create a trust or not is: First, the words must be imperative; second, the subject must be certain; and, thirdly, the object must be as certain as the subject." *Goodale v. Mooney*, 60 N. H. 528, 533, 49 Am. Rep. 334. In this case the subject is certain—all of the testatrix's estate not otherwise disposed of by the will; and that the gift is in trust is distinctly declared. The objects are twofold: The repair of the church building and another definitely described building of the First Church of Christ, Scientist, in Boston, Mass., and of any building or buildings that may be substituted therefor; and "promoting and extending the religion of Christian Science as taught by me."

The first objection taken to the validity of the gift as a public charity is to the indefiniteness of the language used. It is said that the gift for the repair of the church buildings is invalid, and, as it is impossible to ascertain how much will be required for this purpose, the sum given for the promotion of religion is uncertain. "St. 43 Eliz. c. 4 (A. D. 1601), contains an enumeration of charitable objects, all of which have since been considered charitable; also many other uses, not named within the strict letter of the statute, but which come within its spirit." *Goodale v. Mooney*, 60 N. H. 528, 533, 49 Am. Rep. 334. "Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity." *Carter v. Whitcomb*, 74 N. H. 482, 486, 69 Atl. 779, 782 (17 L. R. A. [N. S.] 733). The repair of churches is one of the charitable objects and purposes specially enumerated in the statute of Elizabeth. 2 Per. Tr. § 692. "The only reference that the statute makes to religious uses as charitable is to the 'repair of churches.' * * * But in a Christian community, of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spreading, and teaching of Christianity, or for the convenience and support of worship or of the ministry, have been held charitable." *Id.* § 701. The inapplicability of the Massachusetts cases

cited, which hold that certain conveyances did not constitute public trusts under the control of the Attorney General, is shown by one case cited, *McAlister v. Burgess*, 161 Mass. 269, 271-273, 37 N. E. 173, 174 (24 L. R. A. 158), in which it is said: "In none of these cases, however, was it contended that the gifts or devises were void"—and that the cases are not "authority for the position that a gift for the benefit of a church, simpliciter, is not a public charity," while the case itself explicitly holds that a gift for the benefit of a church is a public charity. The relation of the building, No. 385 Commonwealth avenue, Boston (the building which is to be kept in repair as well as the church), to church purposes is not disclosed; but being the property of the church, in the absence of allegation to the contrary, maintaining it in a state of repair must be assumed to be a benefit to the church.

[37] The trust for repair being valid, both trusts created by the residuary clause are to be administered together. "It is no objection to the validity of a charitable gift that it is made up of several parts which are to be administered together, the income to be divided according to the discretion of the trustee." *Haynes v. Carr*, 70 N. H. 463, 479, 49 Atl. 638, 640; *Webster v. Sughrow*, 69 N. H. 380, 383, 45 Atl. 139, 43 L. R. A. 100; *Gaffney v. Kenison*, 64 N. H. 354, 357, 10 Atl. 706.

[38, 39] The claim that the expression "the religion of Christian Science as taught by me" constitutes a patent ambiguity is without merit. It may be that, without study, the term does not present as clear an image to the minds of the court as would either of the terms Congregational, Episcopal, or Unitarian. But the image, if hazy, is probably more clearly defined than would be that of the recipient of a gift to John Jones, to a mind which had never heard of Jones. But Jones does not lose his legacy because the court does not know him. Neither can the religion of Christian Science be deprived of the gift to promote it because of the court's lack of knowledge, if its identity can be ascertained. "Words cannot be said to be ambiguous because they are unintelligible to a man who cannot read; nor is a written instrument ambiguous or uncertain merely because an ignorant or uninformed person may be unable to interpret it. It is ambiguous only when found to be of uncertain meaning by persons of competent skill and information. Neither is a judge at liberty to declare an instrument ambiguous because he is ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."

* * * No judge is at liberty to pronounce an instrument ambiguous until he has brought to his aid, in its interpretation, all the lights afforded by the collateral facts

and circumstances." 1 Gr. Ev. § 298. A gift having been made for the benefit of needy members of churches forming upon the apostolical doctrines brought forward by the late Edward Irving, a reference was directed to inquire what those doctrines were, and to ascertain other facts necessary to the interpretation of the will and the establishment of the trust. *Attorney General v. Lawes*, 8 Hare, 32.

The bill concedes the existence of the First Church of Christ, Scientist, as a religious society "based upon Christian Science which originated in the year 1866," and that the church embraces about 50,000 members, widely distributed, and sets out a portion of the Church Manual, from which it appears that in April, 1879, Mrs. Eddy and her followers voted "to organize a church * * * which should reinstate primitive Christianity and its lost element of healing," that the church itself was organized December 23, 1892, and that the doctrines of Christian Science are to be ascertained from a book published by Mrs. Eddy, called "Science and Health with Key to the Scriptures," the Church Manual, and other publications. The Church Manual, which is thus by reference made a part of the bill, has been furnished the court, and contains the tenets or creed of the church, to be signed by those uniting therewith. This declares the inspired word of the Bible as a sufficient guide to eternal life, acknowledges the existence of God, his son, Christ, and the Holy Ghost, God's forgiveness of sin, the atonement of Jesus, and his crucifixion and resurrection. It is also alleged in the bill that this church was organized for the promotion of the doctrines of Christian Science—the purpose of the bequest under consideration. "The very term 'church' imports an organization for religious purposes." *Baker v. Fales*, 16 Mass. 488, 495. In the light of the admissions of the bill, it is unnecessary to consider whether as the case is presented the court should or could take judicial notice of the believers in Christian Science as a sect or denomination of Christians, because the bill admits the existence of a body of at least 50,000 members organized for religious purposes and united in a belief claimed to be founded upon the truth of the Bible and the revelations of the New Testament. As it is conceded the religion of Christian Science founded by Mrs. Eddy exists, there is no want of definiteness as to what she meant by "the religion of Christian Science as taught by me."

While courts may not often be called upon to investigate the doctrines of a particular religion, if it becomes necessary to do so to see that a trust is administered according to the intention of its creator, they do not hesitate to undertake the task. If necessary, no reason occurs why the "tenets" of Christian Science may not be as readily passed upon as the creed of Congregationalism or the faith of Unitarianism. Dub-

In Case, 38 N. H. 459; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82. Its briefer history would probably render much less extensive the necessary investigation. But, as already suggested, the administration of the trust does not concern the plaintiff.

[40] The ingenious and extended argument of the counsel for the plaintiff in support of the claim that this trust is invalid, because too indefinite, loses sight of the fact that the gift here is to trustees, whose discretion the testatrix intended should determine the manner in which the gift should be applied to effect her charitable purpose, and thereby the gift is relieved of the uncertainty which otherwise might defeat it. 2 Per. Tr. §§ 720, 732. If there are authorities to the contrary, they are not followed here. *French v. Lawrence*, 76 N. H. 234, 81 Atl. 705; *Haynes v. Carr*, 70 N. H. 463, 49 Atl. 638; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334.

[41] The argument also omits to consider that a gift for the benefit of the public generally is valid. 2 Per. Tr. § 704; Bisp. Eq. §§ 59, 123. Where the benefit intended is one in which all mankind may share, it is not necessary that some smaller class of humanity be selected. "An establishment for the increase of knowledge among men" (*President of United States v. Drummond*, cited in 7 H. L. C. 155), "for the benefit, advancement and propagation of education and learning in every part of the world" (*Whicker v. Hume*, 7 H. L. C. 123; *Russell v. Allen*, 107 U. S. 163, 172, 2 Sup. Ct. 327, 27 L. Ed. 397), "the furtherance and promotion of the cause of piety and good morals" (*Saltonstall v. Sanders*, 11 Allen [Mass.] 446), "for the preaching of the gospel of the blessed Son of God, as taught by the people known now as Disciples of Christ" (*Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418), "for the advancement and benefit of the Christian religion" (*Miller v. Teachout*, 24 Ohio St. 525), are examples of valid trusts whose benefits were not limited to a particular class. The beneficiaries of the trusts for printing and publishing the works of Joanna Southcote (*Thornton v. Howe*, 31 Beav. 14), or of Henry George (*George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754), could only be those who might read the published volumes, or the general public, because of the common advantage resulting from the dissemination of the doctrines therein advocated.

[42] It may be conceded that if the will permits the trustees, in their discretion, to apply the whole or a portion of the fund to objects which are not charitable, the gift is void. *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334. The application of the numerous cases cited by counsel to this proposition is not perceived. No objects are within the purview of the bequests except

the repair of the church buildings and the extension of the religion of Christian Science. If the trustees attempt to apply the fund to other objects, they will violate the trust committed to them. The argument seems to be that it will be possible to promote and extend Christian Science by means that are not charitable. This means (if it means anything) that in the administration of the trust the money may be paid out to persons who are not and who could not be beneficiaries. This is true in all cases where the trust is not performed by delivery of the money directly to the beneficiaries. The latter is rarely the case. To execute the trust for the advancement of Christianity among infidels (*Attorney General v. London*, 1 Ves. Jr. 243), it could not have been required that the money should be paid to the infidels. Conversion by purchase was not the purpose. In keeping the church in repair the purchase of the necessary materials in the open market would not be an application of the fund to a purpose not charitable, even if the transaction were beneficial to those dealing in such articles. It is the purpose of the expenditure—whether the act has any reasonable prospect of promoting the object of the trust—which must be the test which limits the power of the trustees.

[43] The claim that there is a distinction between the promotion of piety and of religion is not sustained by any authorities. The two words are used as synonymous. *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Bisp. Eq. § 122. If there is a distinction from the derivation of the words in some uses between duty to man and duty to God as well as our fellows (*Soule*, Eng. Syn. 311, 349), there is no distinction in the meaning in common use by which to test the validity of a charity.

[44] The next contention is that the purpose of the gift is the pecuniary profit of the donee. This is not a fact admitted by the demurrer, but a legal conclusion to be drawn from the will under the circumstances competent for consideration. Assuming that it is sufficiently alleged that the promotion of Christian Science is in some sense a business owned and carried on by the First Church of Christ, Scientist, that fact does not destroy its charitable character. Dartmouth College is in a sense a business. It receives between \$100,000 and \$200,000 annually for tuition. It may be said to be in the business of selling education to that extent yearly. But that fact does not destroy its character as a public charity. The reason is the absence of private ownership. It is not alleged that any persons, as stockholders or private owners of the First Church of Christ, Scientist, are entitled to personal profit from its alleged business. The allegations all point in the opposite direction: That as a voluntary religious organization

its property is all held for the charitable purposes of the association.

[46] If the necessary effect of promoting Christian Science were to enrich its private owners, the gift could not be sustained as a charity. *Haynes v. Carr*, 70 N. H. 463, 483, 49 Atl. 638. The facts essential to such conclusion are not alleged. The case is here on demurrer, and, if material facts have been omitted, the plaintiff will be permitted to amend.

[48] The allegation that Christian Science is not a religion, but a system of faith cure for disease, does not help the plaintiff. Whether the extension and promotion intended is of a religion or a system of therapeutics, or a combination of the two, whether its aims to benefit mankind by insuring their happiness in a future state, or by rendering their existence more tolerable in this world, it is equally a gift for a general public use, and within the definition of Judge Gray in *Jackson v. Phillips*, 14 Allen (Mass.) 539, 556: A gift "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, [or] by relieving their bodies from disease, suffering, or constraint."

[47] Even if Mrs. Eddy's scheme were merely educational, if it were such that she might legally publish and promote it in her lifetime, there would be no legal objection to gifts by herself or others to extend and promote it by publishing her writings, or by other lawful means after her death. *Thornton v. Howe*, 31 Beav. 14.

[48] "By 'public policy' is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect to any question, the only matters which can be considered are its Constitution and statutes and the provisions of the common law as evidenced by the decisions of its courts; for the common law, as modified by the statutes of the state, is the law of the state." *Spread v. Tomlinson*, 73 N. H. 46, 58, 59 Atl. 376, 379 (68 L. R. A. 432), and authorities cited. "The question what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ." *Vidal v. Girard*, 2 How. 127, 197, 11 L. Ed. 205. When, therefore, it is said that "the residuary bequest is void because it is contrary to the public policy of this state," the meaning must be either that the promotion and extension of the religion of Christian Science as taught by Mrs. Eddy is forbidden by the law of the state, or that it is impossible to promote or extend it except by unlawful methods.

[49] If the object itself is lawful, and may

be accomplished by lawful methods, it is no objection that unlawful methods might be employed for such purpose; for it will not be inferred, unless expressly declared, that unlawful means were intended to be employed. *Jackson v. Phillips*, 14 Allen (Mass.) 539. Here the means to be employed are left to the discretion of the trustees. The use of unlawful methods by them would be a violation of their trust.

[50] With the truth of the religious theories inculcated the court has no concern. Even if, upon examination of Mrs. Eddy's writings, the members of the court should entertain the opinion expressed by Sir John Romilly of Joanna Southcote in *Thornton v. Howe*, and believe her to be "a foolish, ignorant woman," and her teachings absurd and illogical delusions, the personal opinions of the members of the court would not affect the question. Mrs. Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers. Her legal right to teach was not ended with her death. She might dispose of her property by a gift in public charity "for any use that is not illegal." Whether her opinions are theologically true "the courts are not competent to decide." *Dublin Case*, 38 N. H. 459, 509. "To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty. * * *

It is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order." 12 Henning's Stat. Va. 84, quoted in *Reynolds v. United States*, 98 U. S. 145, 163, 25 L. Ed. 244. "Whilst legislation for the establishment of a religion is forbidden and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not less odious because sanctioned by what any particular sect may designate as a religion." *Davis v. Beason*, 133 U. S. 333, 345, 10 Sup. Ct. 299, 301 (33 L. Ed. 637); *State v. White*, 64 N. H. 48, 50, 5 Atl. 828, 829. "Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason, * * * provided he doth not disturb the public peace, or disturb others in their religious worship." Bill of Rights, art. 5; *Hale v. Everett*, 53 N. H. 9, 61, 16 Am. Rep. 82. With the worship of God according to the belief of Christian Science no fault is found.

*[51-53] It is not suggested that Mrs. Eddy's teachings lead to immorality or irreligion, or tend to a breach of the peace or to disturb the religious worship of others. As mere belief cannot constitutionally be made

a crime, the only possibility of offense must be looked for in some overt act necessarily resulting from, or peremptorily inculcated as part of, her system. That act is claimed to be found in the cure of disease without drugs or instruments, which may be said to be an essential element of a belief founded on the rediscovery of the lost art of healing exhibited in the miraculous cures of Jesus Christ recounted in the New Testament. The allegations upon this point are found in paragraphs numbered 5 and 25 in the bill, with the further reference to the contents of the book "Science and Health" before referred to. In this connection it seems necessary again to remark that it is only facts duly alleged that are admitted by the demurrer. Allegations as to what the plaintiff is advised by his counsel, or as to the conflict of Mrs. Eddy's teachings with "the great body of common, statute, and municipal law designed to improve and preserve the health and save and lengthen the lives of the people," are merely arguments. The material facts are: What overt acts are committed under and in pursuance of Mrs. Eddy's teachings? These being presented, whether they are in violation of law is for the court.

Paragraph 5 sets out the existence of a band of about 5,000 Christian Science practitioners, who claim to heal all manner of diseases, practicing upon the following principles: "(1) That no medicines whatever shall be given, and (2) no physical act performed; (3) that the treatment can be carried on as well when the practitioner is absent from the patient as when he is present; and (4) that the healing is effected solely by the exercise of Christ's divine power of working miracles, which disappeared after two or three centuries, but was rediscovered by the testatrix and by her taught to her disciples." The mode of procedure is more fully elaborated in paragraph 25, the short of which is that the cures claimed to be effected are produced by mental effort through some mysterious action of the book "Science and Health." In short, as counsel describe it, Mrs. Eddy teaches, and her disciples have practiced, a system of faith cure for disease—a system of mental therapeutics. It is also alleged that the system taught by this book denies and reprobates all scientific, preventive, and remedial medicine. In paragraph 27 it is again alleged that the treatment prescribed must be purely mental.

If the court have legislative power to make the law, the natural inquiry would be: What are the results of the system? Five thousand practitioners, collecting \$5,000,000 yearly, must have done some business—treated some cases. Have the public been helped or harmed thereby? The only allegations (paragraph 16) are that the system "has been tried upon a large scale, and in many cases has prevented sick persons and young

children from being properly treated by regular physicians," reiterated in substance in other paragraphs. In argument, counsel has given a history of two cases where the system was applied with disastrous results. It does not seem necessary to undertake an extensive discussion of Mrs. Eddy's theories as set forth in her writings, because the system may be reduced to the simple principle of treatment of disease without the use of drugs or instruments, or its extirpation by belief in its nonexistence. Is the system against the policy of the state? Is it a crime to attempt to cure physical ills without drugs or surgery? The close association between mental health and physical ills in many cases is common knowledge. The plaintiff does not attempt to say no good has been effected by the system. His distinguished counsel candidly admitted in argument that Mrs. Eddy had done great good; that there were many cases of at least apparent or supposed disease which her system had relieved; but his objection was that she went too far when she professed to be able to cure or extirpate all disease.

Bulletin 30, a Report on National Vitality by Prof. Irving Fisher (a government publication cited by the plaintiff), has been furnished the court. In it (pages 67, 68) the author comments upon the public demand for "drugless treatment" and criticises physicians who fail to see and meet that demand as far as it is rational. He says: "The public will go and should go to those who will render the most effective help. . . . There is a quackery that is villainous and injurious. This should be suppressed. But there is another quackery which is well-intentioned and which in spite of ignorance manages to do some good. The good in it should be appropriated by the profession. By always promptly absorbing the best, the profession will be in a position to cast out the worst in 'irregular' systems of therapeutics. It may then recover the ground which it has too often lost. There was no reason why it should have lost hundreds of thousands of patients to Christian Science, except that these patients were for the most part benefited, and greatly benefited, by Christian Science, after having received no benefit, often injury, from the profession. 'Easily, physicians, without knowing it, can produce sickness by pessimistic prophecies, by anxious looks or words.' Had the profession made use of mental therapeutics, not only could they have saved themselves the enmity of these hundreds of thousands, but they could have nipped in the bud the crude metaphysics which teaches the nonexistence of disease and death and the uselessness of any therapeutic agent except those employed by the promulgator."

The beneficial effects to some extent in some diseases appearing by the absence of denial in the bill, the admissions of counsel

In argument, and the authorities furnished the court by them, the case would seem to be one for regulation, either as to the cases in which the system might be used, or the intelligence and education of its practitioners, rather than one requiring absolute prohibition, if law were needed upon the subject. But "It must be remembered that the lawmaking power of the state * * * is alone invested with the authority and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it." *Carroll v. East St. Louis*, 67 Ill. 568, 571, 16 Am. Rep. 632. "It is not within the power of any court, state or federal, to prescribe what rules and regulations are needful to the welfare, peace, health, safety, and morals of the state." *State v. Coal Co.* (C. C.) 96 Fed. 353, 368; *People v. Hawkins*, 157 N. Y. 1, 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736.

What is the law of the state, as shown by specific enactments or the general course of legislation, as to the prohibition or regulation of the practice of Christian Science? March 16, 1897, the Legislature passed an act to regulate the licensing and registration of physicians and surgeons, with stringent provisions for the examination and regulation of persons proposing to practice medicine or surgery. Laws 1897, c. 63. By section 11 of the act, persons practicing "Christian Science, so called," were expressly excluded from its restrictions. It thus appears that the practice of Christian Science was brought to the attention of the Legislature 15 years ago, and that neither at that time nor at any time since has the Legislature considered the public good required its practice should be prohibited or regulated. No inference can be drawn, except that in the opinion of the Legislature restrictive legislation is not required. This conclusion of the Legislature binds the court.

No person could be convicted of crime upon an indictment charging the practice of Christian Science healing, because there is no law which forbids it. Whether a Christian Science practitioner may be found guilty of negligence for unsuccessfully attempting to treat disease, in a suit by the state (*Spעד v. Tomlinson*, 73 N. H. 46, 59, 60, 59 Atl. 376, 68 L. R. A. 432), is a different question. The law permits and regulates the practice of medicine and surgery by express provisions. Laws 1897, c. 63. The possession by the respondent of a license to practice medicine and surgery, duly issued under that act, would not be an answer to an indictment for manslaughter through culpable negligence, under section 8, c. 278, Public Statutes. That a Christian Science practitioner might be liable under the same statute does not establish that the practice of Chris-

tian Science is forbidden by law. Nor does Mrs. Eddy teach that all persons believing in the principles of Christian Science are competent to heal all diseases by drugless treatment. Science and Health, 459, 460. If she believed all disease was a mere erroneous mental conception, curable by correcting the mental error, she did not teach that all Christian Science practitioners could cure all diseases in all persons. "If patients fail to experience the healing power of Christian Science, and think they can be benefited by certain ordinary physical methods of medical treatment, then the mind physician should give up the case." Science and Health, 443; Church Manual, 47.

The plaintiff has not called attention to any statute which the practice of Christian Science contravenes. The defendants cite section 2, c. 16, Laws 1901, requiring any person, knowing or having reason to believe that a person in any of certain relations to him has any malignant communicable disease, to give notice to a health officer. Nothing in Mrs. Eddy's teachings has been pointed out requiring her disciples to violate this law, and it is unnecessary to recite the passages set out in the defendants' brief advising obedience to the laws of the land.

The truth of Mrs. Eddy's science or religion is not to be determined by the court. As a religion, she had the right to believe and teach it. If the scientific principles she believed in run counter to the general belief of the time, she had equal right to believe and teach them. In the absence of legislative reprobation, found in express enactment or in the general course of the legislation of the state, action in accordance with her teachings is not illegal. As neither her belief nor the acts under it are necessarily illegal, the trust to promote the principles she attempted to inculcate is not illegal.

Upon the facts before the court, the residuary clause creates a valid trust. Unless the plaintiff amends his bill, the executor should be advised to pay over the balance of the estate to trustees found duly qualified and appointed by the probate court. With this decree the plaintiff's petition should be dismissed.

Case discharged.

WALKER, J., did not sit. The others concurred.

MORRIS v. MORRIS.

(Superior Court of Delaware. Sussex. April 3, 1912.)

DIVORCE (§ 76*)—JURISDICTION—SERVICE OF PROCESS.

Act Gen. Assem. March 29, 1907 (24 Del. Laws, c. 221), providing for personal service of summons in actions for divorce, or for substituted service by publication, and declaring that, when defendant cannot be served per-

sonally within the state, an alias summons shall issue, which the sheriff shall publish, must be strictly construed; and where service of the original writ was insufficient, and the case was continued for an alias, personal service of the alias, instead of by publication, was defective, and the court did not acquire jurisdiction.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 247-250; Dec. Dig. § 76.*]

Action by Noble B. Morris against Lula M. Morris for divorce. Leave to withdraw petition without prejudice.

Argued before WOOLLEY and RICE, JJ.

Charles S. Richards, of Georgetown, for plaintiff. John M. Richardson, of Georgetown, for defendant.

The sheriff made return of non est on the summons—alias summons issued and return thereon of personal service, and publication was not made as required by the statute.

WOOLLEY, J. (delivering the opinion of the court). Jurisdiction of actions for divorce is conferred upon the Superior Court by the Act of Assembly of March 29, 1907 (Laws of Del. vol. 24, c. 221), and jurisdiction over the parties to such actions is acquired in the manner prescribed by the act, namely:

"The proceedings for divorce, * * * shall be by petition filed with the prothonotary of the Superior Court in the county of the petitioner's residence, * * * whereupon a summons shall issue for the defendant's appearance and upon proof of the service of such summons more than twenty days before the time of its return or upon proof of substituted service by publication as hereinafter provided, the cause shall proceed to trial," etc.

"When the defendant cannot be served personally within the state, * * * an alias summons shall issue to the second term next after issuing the original writ, which the sheriff shall publish," etc. Sections 7, 9, 10, 11, Act of Assembly, supra.

Service upon the original writ issued in this case was found to be insufficient and the case was continued for an alias. Upon the return of the alias summons it appeared that the process was executed not by substituted service as required by the statute, but by personal service made twenty days before the return in the manner prescribed for service of an original writ. The question is therefore presented, whether the Superior Court can acquire jurisdiction of the defendant in an action for divorce, by personal service of an alias writ of summons, when the statute prescribes for that writ another method of service.

When the history of the law of divorce is considered in connection with the known origin and avowed purpose of the existing statute upon the subject, it is apparent that the provisions of the statute should be strictly construed and rigidly enforced. Among

other things the statute contemplates certainty of notice and the avoidance of collusion, and to that end it has prescribed the character of the process and the methods of its service. It has further provided that "upon proof" of the execution of the process in conformity with its requirements, the Superior Court may then have jurisdiction to proceed to trial and judgment. Service of one kind or the other has therefore been held essential to jurisdiction, and it has likewise been held that the service prescribed by the statute can neither be waived nor its defects cured by the appearance of the defendant either upon the record or in person. *Wood v. Wood*, 1 Boyce, 71, 74 Atl. 376.

As it is against the policy of the divorce act to allow a defendant to substitute his appearance for the service required, it is also against the policy of the act to allow service of any kind to be substituted for service of the one kind prescribed by the act, even though the service attempted be in truth superior to the one required. For a proceeding to be legal, service of the process upon which it is founded must likewise be legal, and the legality of such a service is dependent upon its conformity to the law that prescribes it. *Odessa Loan Ass'n v. Dyer*, 2 Boyce, —, 81 Atl. 469.

Leave to withdraw petition without prejudice.

GREEN v. WILMINGTON TRUST CO.

(Superior Court of Delaware. New Castle.
May 21, 1912.)

JUDGMENT (§ 101*)—DEFAULT—SUPPORT IN PLEADING—WRITTEN INSTRUMENT—SUFFICIENCY.

Under Rev. Code 1852, amended to 1893, p. 789, c. 106, § 4, in order to have a judgment at the first term by default, the instrument sued on must contain an unconditional promise to pay money, so that, where a writing merely contained an admission by the defendant's intestate that the defendant had received from the plaintiff a sum of money for a certain purpose, it is not such an instrument as is contemplated by the statute, and judgment thereon at the first term must be refused.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 168-170; Dec. Dig. § 101.*]

Action by Harry E. Green against the Wilmington Trust Company, administrator of Samuel D. Forbes. Motion that judgment be refused notwithstanding affidavit of demand. Granted.

Argued before WOOLLEY and RICE, JJ.

Lilburne Chandler, of Wilmington, for plaintiff. Herbert H. Ward, of Wilmington, for defendant.

The body of the affidavit was as follows:

"That annexed hereto is a true and correct copy of the moneys had and received by defendant in his lifetime and defendant's acknowledgment of same under hand of

Samuel D. Forbes, defendant, deceased, sued upon in this action; that the sum demanded of the said defendant is the sum of \$1,000, principal and interest thereon from December 1, 1903, and said deponent further says that he verily believes that the same is justly and truly due from the said defendant to the said plaintiff."

The paper referred to and annexed to the affidavit was as follows:

"December 1, 1903. Received of Harry E. Green at different times up to this date, one thousand dollars, to be used in developing of the paint and clay business near Fleetwood, Penn. S. D. Forbes. \$1,000."

Mr. Ward moved that judgment be refused notwithstanding the above affidavit of demand, for the following reasons:

First. Because the affidavit does not conform to the requirements of the statute, which provides that the plaintiff, in order to get his judgment at the first term by default, must file in the office of the prothonotary a copy of the instrument, book account or claim, and in case of a scire facias, a certified abstract of the docket entries, of the judgment, mortgage or recognizance, etc., together with the affidavit that he verily believes the same is justly and truly due. This may be an instrument of writing, book entry or claim. The affidavit does not say that it is either, but that it is a true and correct copy of the money had and received, and is not in conformity with the statute.

Second. This is not an instrument of writing, book entry or claim within the meaning of the law. It is simply a receipt for moneys. There is nothing in this receipt to show for what this money is supposed to have been due from Samuel D. Forbes. It is simply an acknowledgment on the part of Samuel D. Forbes that he received from Harry E. Green, at different times, \$1,000 to be used in developing the paint and clay business near Fleetwood, Pennsylvania. The instrument does not show any promise to pay, or any obligation to repay, but simply an acknowledgment that Samuel D. Forbes received a certain amount of money from Green. Whether it was furnished on an agreement between them that Forbes was to furnish money for Green's own business does not appear. It is not a promise to pay and not a claim.

Third. Inasmuch as this is a suit by an individual against an estate, the plaintiff cannot get judgment until he produces in court, in which he asks for judgment, a probate of his claim. He must prove to the court that there has been a probate of his claim and this affidavit shows nothing of that sort.

Mr. Chandler, for the plaintiff, contended that the affidavit was sufficient under the statute and under the practice and rulings of the court. Woolley on Del. Prac. as to

Probate of Claim; *Emory v. Glens Falls Insurance Co.*, 7 Pennewill, 101, 76 Atl. 230.

WOOLLEY, J., delivering the opinion of the court:

Taking up the grounds for the motion in reverse order, it is apparent that the instrument sued upon is not such a one as is contemplated by the statute and therefore the matter of its probate does not require decision. In order to obtain judgment at the first term upon an affidavit of demand, the instrument of writing or claim sued upon must be for the unconditional payment of money and must contain a promise to pay that is unconditional in its nature. The instrument sued upon in this case is neither an unconditional promise nor a promise at all. It is a paper showing that Samuel D. Forbes admits that he has received from Harry E. Green the sum of \$1,000 to be used and employed in developing a certain business. The character of that business does not appear, the relation of these two parties in the business is not by the instrument disclosed, nor is the agreement with each other discoverable. There being no promise—certainly no unconditional promise—the court think that it is not such an instrument as is contemplated by the statute (section 4, c. 106, Revised Code), and the motion is therefore allowed and judgment is refused, notwithstanding the affidavit of demand.

STATE v. ADAMS.

(Court of General Sessions of Delaware. New Castle. May 14, 1912.)

1. WITNESSES (§ 57*)—COMPETENCY.

While, in a prosecution for wife beating, outsiders could testify that the prosecutrix and defendant are reputed and looked upon by their neighbors and people who know them as man and wife, the prosecutrix was not a proper witness for that purpose.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 157-159; Dec. Dig. § 57.*]

2. ASSAULT AND BATTERY (§ 92*)—CRIMINAL RESPONSIBILITY — WIFE BEATING — EVIDENCE—MARRIAGE.

In a prosecution for wife beating, though the only evidence of the marriage was that of the prosecutrix, who testified that she and the defendant were married in a certain month, year, and place, but did not know the exact date, or the name of the minister who performed the ceremony, and had no certificate, the question of the defendant's guilt was properly submitted to the jury.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 137-139; Dec. Dig. § 92.*]

Daniel H. Adams was indicted for wife beating. Guilty.

Argued before WOOLLEY and RICE, JJ.

Josiah O. Wolcott, Deputy Atty. Gen., for the State. Philip L. Garrett, of Wilmington for defendant.

Indictment for wife beating (No. 13, March term, 1912). One of the issues was whether the accused was the husband of the prosecutrix, who was unable to make formal proof of their marriage. They had lived together as husband and wife, and seven children had resulted from the relation. The question of marriage was submitted to the jury, to be determined by them from the evidence and instruction of the court upon the law.

At the trial, the state proved that the assault was made upon the prosecutrix by the accused, as alleged in the indictment. The proof as to marriage was substantially as follows:

That the parties lived together as husband and wife, the prosecuting witness stating that, while this was a fact, he (the defendant) did not want to own that they were married. The prosecuting witness stated that she and the defendant were married in November, 12 years ago, in Philadelphia, at the home of an uncle of the defendant, but she could not give the exact date and had never received a certificate; that she did not know the name of the minister who performed the ceremony, but was informed that he was a minister of the gospel; that she had seven children by the defendant.

The witness was asked by the Attorney General the following question: "Were you reputed and looked upon by your neighbors and the people who knew you as a man and wife?"

(Objected to by Mr. Garrett, counsel for defendant, who claimed that proof of marriage in a case of wife beating must be strict proof and not proof by general reputation.)

WOOLLEY, J. [1] We sustain the objection, not upon the point made in the argument, but rather upon the point that the witness is not the proper kind of witness to testify to the reputation in which she is held by others. Others can testify as to such a reputation, but she cannot.

When the state rested, Mr. Garrett, counsel for defendant, moved that the jury be instructed to bring in a verdict of not guilty, on the ground that no marriage had been proved except the bare statement of the prosecuting witness concerning her marriage, and contended that in a criminal charge of as high a grade as wife beating, strict proof of marriage was necessary, that being the only thing that distinguished such a charge from assault and battery; that the fact of marriage must be clearly proved because the charge was based upon the relation of husband and wife existing. If that relation did not exist, then the charge fell, and not having been proved strictly, no crime has been proved against the defendant and the jury should be instructed to acquit him.

The Deputy Attorney General contended, first, that he had proved by the prosecuting

witness all the necessary facts required to establish the marriage; second, that under the wife beating statute, the same strictness was not required as in divorce or bigamy, that the object of the wife beating statute is to prevent men living with women supposed to be their wives, beating and abusing them, the same as if the actual relation of man and wife existed.

WOOLLEY, J., delivering the opinion of the Court:

[2] The court declines to grant the motion of the attorney for the prisoner that the jury be instructed to return a verdict of not guilty.

There are certain proceedings, both civil and criminal, in which proof of marriage must be made strictly; notably in those cases in civil actions out of which result property rights, and in criminal actions where the marriage is necessarily and primarily the foundation of the procedure, as perhaps in bigamy. While this is a novel question in a criminal proceeding, we nevertheless have had rulings upon a question akin to it in a quasi criminal proceeding, viz., under our statute providing for the support of married women, or rather a proceeding against her husband for the nonsupport of his wife.

The case of *State v. Miller*, 8 Pennewill, 518, 52 Atl. 262, which was a case where the husband, sued for nonsupport of his wife, was defended by the defendant upon the ground that the woman on whose behalf the state brought the action was not in fact his wife. There it was proved that they had lived together for a number of years and in that relation there had been born to them children who bore his name with his permission, and that they had lived together as husband and wife in all respects except the initial act of marriage. The court held in that case that in proceedings under that act, the fact of marriage, in either this or a sister state, may properly be proved by competent and satisfactory circumstantial evidence, such as cohabitation, holding themselves out to the public as husband and wife, the admission of the parties, etc.

In the case of *State v. Oaks*, heard in this court in 1910, and reported in 76 Atl. at page 480, which likewise was a quasi criminal proceeding for nonsupport, the husband or alleged husband, after living with his wife for several years, having begotten of her body children, who, after their birth, bore his name, endeavored to avoid his duty in supporting his wife upon the ground that she was not in fact his wife; and the court in that case said, Judge Conrad delivering the opinion:

"It is a well-established principle of law that when persons have represented themselves to be married or have assumed the relation of husband and wife, cohabiting and holding themselves out to the public as such; though not in fact married, they will, when

it is sought to charge them with any of the civil liabilities growing out of that relation, be conclusively presumed to sustain such relation to each other, and will not be permitted to disprove or deny the marriage."

We think this case should be submitted to the jury, in order that the jury may determine, as one of the issues, whether or not this defendant is the husband of the prosecuting witness, and if they find that he is, they will be instructed to make their finding accordingly; and if they find that he is not, they will be instructed to acquit him. We therefore refuse the motion of defendant's counsel for binding instructions.

The court charged the jury upon the law as indicated in the above opinion, and the jury found the defendant guilty.

STATE v. BUCKMAN.

(Court of General Sessions of Delaware. Sussess. Oct. 16, 1911.)

INTOXICATING LIQUORS (§ 176*)—ILLEGAL SALE—DEFENSE.

It is no defense, in a prosecution for unlawfully selling spirituous liquor, that the liquor was sold as a medicine, where accused was not authorized to sell medicine.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 176.*]

Andrew J. Buckman was indicted for unlawfully selling spirituous liquor. Verdict guilty.

Argued before WOOLLEY and RICE, JJ.

Frank M. Jones, Deputy Atty. Gen., for the State. Robert C. White, of Georgetown, for defendant.

Indictment for selling spirituous liquor, to wit, whisky, the same not being sold for medicinal or sacramental purposes (No. 80, October term, 1911).

At the trial of the case, the prosecuting witness, John R. Reed, was asked by Mr. Jones, on direct examination, the following question: "Did you want that whisky for medicinal or sacramental purposes? A. I was feeling bad; I wanted it to drink."

The same witness on cross-examination was examined by Mr. White, as follows: "X. You told him (meaning the defendant) you were feeling bad? A. Yes, sir; I had been away for a week, and I was pretty near sick, and I asked him if he knew where I could get a half pint of whisky, and he said he didn't know for sure, but he would go look, and he fetched me a half pint of whisky. X. But you say you were feeling bad? A. Yes, sir. X. And you told him you were feeling bad? A. Yes, sir. X. And you wanted this whisky for medicinal purposes? A. Yes, sir."

Mr. Jones, on redirect examination, asked the following question: "RQ. You know what

medicine is?" (This question was objected to by Mr. White, as already gone into in the examination in chief. Question withdrawn and the witness recalled.)

By Mr. Jones:

"Q. You know what medicine is? A. I never taken much of it. Q. The whisky which you got of Buckman on this occasion, did you get it for medicinal purposes or a drink as a beverage? A. I got it for to make me feel better; I had been away for a week. Q. Is that the purpose for which you usually use whisky? A. Yes, sir. Q. It was not on a physician's prescription, was it? A. No, sir. Q. Buckman is not a physician? A. Not that I know of. Q. Did you or not tell Buckman at the time you got this whisky that you wanted it for a medicine? A. No; I don't think I did."

On cross-examination Mr. White asked the following questions: "X. What did you tell him you wanted it for? A. I told him I was feeling bad. X. You were ill? A. I thought it would make me feel better. X. You took it, therefore, as a medicine? A. I did; yes, sir."

At the completion of the state's testimony, Mr. White asked that the jury be instructed to return a verdict of not guilty, on the ground that the prosecuting witness stated he took and bought the whisky as a medicine.

Mr. White's motion was refused, and, no defense being offered, the Deputy Attorney General requested the court to give binding instructions to the jury to find a verdict of "guilty."

RICE, J., charged the jury as follows:

Gentlemen of the Jury: Andrew J. Buckman has been indicted, charged with the sale of spirituous liquor, to wit, whisky, to one John R. Reed, in Seaford, this county, on the 24th day of September, A. D. 1911, said whisky not being then and there sold for medicinal or sacramental purposes.

The defense, not introducing any testimony, the state has requested us to give you binding instructions to find a verdict of guilty.

It seems to the court that it was not intended that this law should be evaded by permitting a person who was not authorized to sell medicine, to sell vinous, malt or spirituous liquor as a medicine; in other words to protect himself from indictment, a person must be authorized or qualified to sell medicine before he can lawfully sell vinous, malt or spirituous liquor as a medicine, therefore, while the court is always reluctant to do so, yet we think this is a proper case in which we should give instructions to you to find a verdict of guilty, if you believe the testimony of the state's witness.

Verdict, guilty.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ANDERS et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. Feb. 19, 1912).

1. MUNICIPAL CORPORATIONS (§ 990*)—PUBLIC IMPROVEMENTS—CONTRACTS—ACTIONS TO ANNULL.

A bill in equity by taxpayers against a city, certain officers, and a municipal contractor to declare void a contract because of an unlawful combination entered into to prevent competitive bidding, and for an accounting from the contractor, cannot be maintained, where there was no improper understanding among the bidders, and a close approximation in the bids showed that there was competitive bidding in fact, though the contractor failed to comply strictly or fully with the requirements of the contract, and this failure was known to the officers of the city, and it was not expected by the officers when the contract was awarded that there would be a strict and literal compliance by the successful bidder, whoever he might be, with all the requirements of the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2151-2156; Dec. Dig. § 990.*]

2. MUNICIPAL CORPORATIONS (§ 987*)—PUBLIC IMPROVEMENTS—CONTRACTS—ACTIONS TO ANNULL.

The city alone has any standing to demand an accounting of a contractor of moneys received by him for work called for which he has not done, and taxpayers cannot demand such an accounting.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2147, 2150; Dec. Dig. § 987.*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Howard S. Anders and others against the City of Philadelphia and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Willson, P. J., filed an opinion in which he found the facts and law as follows:

"Findings of Fact.

"(a) The contract was entered into between the defendant Vare and the city on the 18th day of February, 1910. After due advertisement, it had been awarded to him on the 7th day of December, 1909. It called for work to be done from the 1st of January, 1910, until the end of the same year, and work was done under the contract from the date of its execution. Work was also done between January 1st and February 18th, which the defendants have treated as covered by the contract.

"(b) In competition for the contract four bids were presented to the city in response to the advertisement asking for such bids. The bidders were Peoples Bros., Mack Paving & Construction Company, David McMahon, and the defendant E. H. Vare. Vare, to whom the contract was awarded, was the lowest bidder. We are not able to find anything in the proofs which would warrant us in reaching a conclusion that these bids, or

any of them, were collusive as between the bidders and Vare.

"(c) The contract and specifications called for the doing of work which has been substantially detailed in the second section of the previous recital of the plaintiffs' bill. It does not seem to us that there would be any advantage in a repetition of what is therein set forth. We are satisfied by the proofs, and we find that in numerous respects, which we need not now detail, but which will be set forth more fully in our answers to the plaintiffs' requests for findings of fact, the contractor, Vare, failed to comply strictly or fully with the requirements of the contract. And we further find that his failure fully to comply with the provisions of the contract must have been known, and in point of fact was known, to the officers of the city who had supervision over the work which the contractor had agreed to do.

"(d) We further find as a fair deduction from the proofs, and particularly from the previous experience of the city officers with the carrying out of contracts relative to the same subject-matter, that at the time when bids for the work in question were asked for, and also at the time when the contract was awarded to Vare, it was not expected or contemplated by those officers that there would be a strict and literal compliance by the successful bidder, whoever he might be, with all the requirements of the contract.

"(e) At the same time we are not able to find in the proofs sufficient reason for holding and finding that there was any real combination or conspiracy or collusion between the officers of the city and Vare, either in the awarding of the contract to him, or in the manner in which he carried out or was allowed to carry out the provisions of the contract. Upon this particular point, a crucial one in the case, we may be permitted to enlarge somewhat and to express our views with some elaboration.

"The whole subject of contracts for the cleaning of streets is attended with many inherent difficulties. This has been demonstrated in the history of this and other municipalities. There may be no impropriety in its being said that when, many years ago, the writer of this adjudication was connected with the Law Department of the city, questions arose and were brought before the courts involving the practical possibility and propriety of a strict interpretation and enforcement of various provisions in contracts for the cleaning of streets. The difficulties connected with such a severe standard of requirement then necessitated some laxity of construction, and any practical method of dealing with the subject-matter is likely to make it necessary that a certain amount of flexibility and the exercise of a good honest judgment shall be permitted in the enforcement of contracts of the nature referred to. The object to be attained in the making of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such contracts is, of course, the cleaning of the streets, and the doing of such other work as is incidentally connected therewith. That is the main end to be had in view, and officers of the city who supervise such work would naturally keep it in mind. Whether or not a form of contract for the work of cleaning streets could be devised which would enable the desired object to be attained without holding the contractor to the furnishing of any particular number of implements or of men or of day's work is a question that we need not now discuss. When the contract contains specific provisions such as are embraced in the contract now in question, there can be no doubt that it is the duty of the city officers to require a substantial performance of those provisions. We are far from holding that the contract obligations can be ignored or disregarded. The pertinence of what we have referred to, however, is this: That it is not unnatural that municipal officers intrusted with the supervision of the cleaning of streets should look mainly to the ends to be accomplished, rather than to the particular means employed for the purpose of reaching those ends. It may and must be said also that unless proofs before the court compel a conclusion that municipal officers intrusted with the supervision of the cleaning of the streets were influenced not by the general purpose of obtaining clean streets, but by a desire to, favor a contractor and relieve him of work which he was bound to do under his contract, then a court ought not to find such officers guilty of an improper and illegal confederation in the nature of a conspiracy. We find nothing in the circumstances connected with the awarding of the contract to Vare which would justify the thought that there was any collusion between the city's officers and him in regard thereto. It was doubtless the fact that Vare had a plant or appliances whereby the work of street cleaning could be done, and that other bidders probably were not so well situated, and therefore could not bid to the same advantage. It is also true that this disparity might have been overcome if the bids had been asked for at an earlier date than that at which, in point of fact, they were requested. At the same time, it should be said, not only that other bids were made for the contract in question, notwithstanding the disadvantage of position, but that the time of the asking for bids had been for many years customary with the city authorities. Unless we should be disposed to put an unfavorable construction on such a state of affairs merely for the sake of reaching a conclusion derogatory to the city's officers we would not be justified in adopting that construction. At the same time it is proper for us to say that there seems to be no reason why in all such cases, and in cases of a similar character, bids could not be asked for at a period of time when, to the advantage of the city as well as for

the convenience of the bidders, all bidders would have an opportunity to bid intelligently and to equip themselves with the necessary appliances to carry out any contract which might be awarded to them.

"As to the performance of the contract by Vare after it was awarded to him, notwithstanding we have already found, as our conclusions from the proofs, that he failed substantially to comply with the provisions of his contract, in its details and particular obligations, yet we are unable to find sufficient ground to sustain the plaintiffs' contention that this failure on his part was either the result of a previous understanding or collusion with the officers of the city, or was permitted by reason of any such understanding or collusion. We by no means question the accuracy of the proposition that a conspiracy or combination of the nature referred to may properly be inferred from a series of significant acts or omissions which naturally and necessarily lead to the conclusion that the acts or omissions constituting or evidencing the violation of a contract were the result of an actual understanding and agreement between the contractor and those intrusted with the supervision of his work that such acts or omissions should be allowed without objection and without abatement of compensation by reason of his failure to do work that ought to have been done. In every case where such a question arises it becomes necessary for the tribunal hearing the case to exercise a candid and intelligent judgment as to whether the facts developed in the case warrant a conclusion that the alleged collusion existed. We have endeavored to apply such a judgment to the proofs in this case. Notwithstanding we are of the opinion that there were serious departures on the part of the contractor from a strict and full compliance with the specific provisions of his contract, and that these must have been known, and should have been the subject of proper treatment, by the city's officers, we still are unable to find that these officers were in a guilty combination or conspiracy with the contractor. In this connection it must be borne in mind that the question before us is not to be settled by any views which we may have as to the sufficiency of the work done by the contractor to keep the streets clean, or as to the full fidelity and efficiency of the officers of the city in supervising the work of the contractor, or as to the manner in which the contractor performed his work, or even as to whether or not, if he had strictly complied with the terms of his contract, he would have made or lost large sums of money. The simple and single question now under consideration is whether or not the proofs in the case ought to lead us to the conclusion that there was an agreement or combination between the contractor and the supervising officers of the city whereby he should be favored and allowed to draw money under the con-

tract without doing the work which would justify the payment to him of the money received by him. The affirmative of this question was assumed by the plaintiffs when they filed their bill, and it was incumbent upon them to establish it by sufficient proofs before we can properly be asked to sustain their position.

"(f) We find it to be true, although the contract in question was awarded to Vare on the 7th of December, 1909, that he did not, in point of fact, receive or enter into the formal contract until the 18th day of February, 1910, and therefore that whatever work he did between January 1st and February 18th of that year was done without any formal or written contract having been entered into for the doing of such work.

"Findings of Law.

"(a) In view of our findings of fact as they have been hereinbefore set forth, it requires but few words to state our conclusions as to what is the legal position of the parties with reference to that portion of the plaintiffs' case which claims that the contract in question was null and void because it was either entered into or carried out under collusion and fraudulent combination with the city's officers. It having been our conclusion that no such collusion or combination existed, no legal question of that nature arises, and we therefore find that the plaintiffs' bill cannot be sustained upon any such ground.

"(b) So far as the plaintiffs' case is based upon a claim that the contractor, Vare, failed to comply with his contract to do the work called for by the specifications, and therefore that he is bound to account for and repay to the city the moneys which were received by him from the city for the work which he ought to have done under the contract, we deem it sufficient to say that in our judgment the plaintiffs have no standing to require the contractor to render any such account. If it were within the power of taxpayers in all cases wherein it might be claimed that a contractor had failed to comply with the provisions of his contract to come into court and cause the matter to be investigated, and, in case of default of performance, to require the contractor to render such an account as is called for in this case, the affairs of the city would be thrown into endless confusion, and the proper functions of the municipal officers would, to a large degree, be devolved upon and assumed by the courts. We regard the municipal authorities as the repository of all the power that is needed to deal with such questions as a general rule. A gross violation of duty might be sufficient ground for impeachment or prosecution. However that may be, the supervision of work done under municipal contracts and the making of payments for work done under them, in the absence of fraud of a character which would justify the interference of a

court of equity, must be left to those who by law are intrusted with the responsibility over those matters.

"(c) In determining whether the contractor had a right to demand payment for work done from January 1 to February 18, 1910, we must follow the views which have been expressed by this court in cases recently decided, and particularly in the case of *Bullitt v. Philadelphia*, 19 Pa. Dist. R. 1091. We have held that it is essential to the making of a valid contract between the city and a contractor that not only must a previous appropriation of the moneys necessary to pay the contractor for the work to be done by him have been made, but, also, that the contract itself must have been executed according to the requirements of the act of June 1, 1885 (P. L. 37). In the case in hand, the second of these necessary elements was entirely wanting until the 18th day of February, 1910. Therefore all the work done by Vare before that date must be regarded as having been done in the absence of a contract. For that reason he had no right to demand payment for such work from the city as a matter of legal obligation. It appears from the proofs that the contractor has received from the city a payment which was intended by the officers through whom the payment was made to cover the work done by him during the period in which no formal contract existed. That payment, however, was unauthorized by law, and must be accounted for by the contractor in the final settlement for the work of the year under the terms of the contract. It does not seem to us that in that regard it makes any difference whether the obligation to pay the contractor was entire or severable. So far as the payment for work done between January 1st and February 18th is concerned, the contract finally executed has no relation to the payment, for that contract was not in existence during that period. There is, therefore, no force in the argument that the plaintiffs are estopped from objecting to that payment, on the ground that it was made upon the basis of a certificate from the director of public works that the work was done and the money due. Any such certificate was given without authority and had no effect, under the provisions of the contract as it was executed. We must regard all payments made as applicable only to work done after the contract was entered into, viz., after February 18, 1910. The defendants contend that we should not adopt this view because of laches or delay on the part of the plaintiffs in objecting to the payment made, but we do not regard the point as well taken. There is nothing in the proofs to show that the plaintiffs had any knowledge that Vare was doing work in the absence of a contract, and therefore no duty or obligation rested upon them to move promptly, if they desired to move at all. We do not regard the present case as

ruled by our decision in the case of Sheppard v. Philadelphia, 17 Pa. Dist. R. 636.

"It follows, therefore, that in the decree which shall be made in the present case it must be ordered that the amount paid to Vare for work done in the year 1910 prior to February 18th shall be treated as having been paid for work lawfully done under the contract; that is, for work done after the date last mentioned."

Complainants filed the following exceptions:

"(1) The learned court erred in finding as follows: 'E. At the same time we are not able to find in the proofs sufficient reason for holding and finding that there was any real combination or conspiracy or collusion between the officers of the city and Vare, either in the awarding of the contract to him, or in the manner in which he carried out or was allowed to carry out the provisions of the contract.'"

"(10) The learned court erred in its answer to the fifty-seventh request for findings of fact by the plaintiffs, which request and answer were as follows: '(57) The contract in suit was the result of an unlawful combination between the contractor and the officers of the city to defeat the provisions of law relative to competitive bidding. Answer: We decline to affirm this request.'"

"(17) The learned court erred in its answer to the fourteenth request for findings of law by the plaintiffs, which request and answer were as follows: '(14) The contract in suit is void because it was the result of an unlawful combination between the contractor and officers of the city, to defeat the statutes relative to competitive bidding. Answer: Declined.'"

"(19) The learned court erred in not restraining defendant city from making further payments to the defendant Vare, as prayed for in the second prayer of the bill. Answer: Declined.

"(20) The learned court erred in not requiring defendant Vare to account for the sums of money illegally received by him and to pay the same into the city treasury, as prayed for in the third prayer of the bill. Answer: Declined."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

Thomas Raeburn White, for appellants. Francis Shunk Brown, John C. Bell, and James Alcorn, City Sol., for appellees.

STEWART, J. The plaintiffs, residents and taxpayers of the city of Philadelphia, sought by bill in equity to restrain further payments under a contract between the city of Philadelphia and Edwin H. Vare, one of the defendants, by which Vare for the consideration of \$1,299,000 undertook to clean the streets of the city during the year 1910 in accordance with the specifications recited

in the contract, on the ground that the contract had been let as the result of a collusive understanding that Vare was not to be required to do all the work specified in the contract; that he was to be permitted to disregard the specifications without incurring the stipulated penalties, and was to be allowed to receive the entire amount of his bid regardless of the amount of work by him performed; that the purpose of such collusive understanding was to prevent competitive bidding, and that such had been its effect. It was charged that Vare had performed less than one-half the work required under the contract and specifications; that notwithstanding, he had been paid ratable monthly installments, excepting for the month of December, on the full amount of his bid; that the stipulated penalties had not been enforced against him, and, generally, that the contract was null and void because let pursuant to a conspiracy entered into to cheat and defraud the city. In the separate answers filed by the city and by Vare the material averments of the bill were specifically denied, and issue was accordingly joined therein. The record before us is voluminous, but we are spared the labor and examination of the evidence by the admission on part of the appellants that the findings of the learned chancellor who heard the case correctly exhibit it on its facts. The case has been submitted on these findings, and the only contention made is that it results from the findings as an inevitable inference that the contract with Vare was the product of an unlawful combination entered into with a view to prevent competitive bidding, and that the chancellor erred in his conclusions therefrom that the proofs were not sufficient to warrant him in finding that there was no real combination or conspiracy to this end. We deem it unnecessary in this connection to do more than indicate in a brief way the special findings on which the appellants rely, since, however important the facts established might be in an action by the city against the defendant Vare, as we view the case, they are without controlling significance in connection with the one governing question which is squarely raised in the assignments of error.

[1] The special findings may be thus briefly summarized: There was failure on Vare's part to comply strictly or fully with the requirements of the contract. The officers of the city had knowledge of such failure as the work progressed through reports made to them by the inspector. There was like failure by Vare and like knowledge by the officers of the city with respect to similar contract for the year 1909. Strict compliance with the specifications in the contract of 1910 would have resulted in the loss of a very large sum of money to the contractor, amounting in all probability to more than \$1,000,000 and possibly to over \$2,000,000

Seven thousand dollars was exacted of Vare in the way of fines for violation of specifications during 1910. When Vare submitted his bid, he knew that to perform the work in accordance with the specifications at the price bid by him would necessarily result in serious loss to himself. When the contract was awarded, the main object the officers of the city had in view was the proper and sufficient cleaning of the streets during the year, and they did not expect the specifications of the contract to be strictly and in all details carried out by the contractor. The daily reports of the contractor of men and machines employed by him were largely in excess of the actual number of men and machines actually employed. The contention on part of appellants is twofold: First, that, applying to these facts "the interpretation consistent with ordinary human action and common sense, there is an inevitable inference that there was an understanding between the officers of the city and the contractor, when the contract was awarded, that the contractor would not be required literally to obey the specifications and would not be fined for disobedience of them"; and, second, "if there was such understanding, it would amount to an unlawful combination to defeat the statutes requiring competitive bidding." The first proposition is too plain for discussion, and is conceded; but that the second results as a conclusion from the first is clearly a non sequitur, as the facts in the case abundantly show. Notwithstanding the above facts relied upon by appellants, we have this distinct and unchallenged finding by the chancellor: "In competition for the contract four bids were presented to the city in response to the advertisement asking for such bids. The bidders were Peoples Bros., Mack Paving & Construction Company, David McMahon, and the defendant E. H. Vare. Vare, to whom the contract was awarded, was the lowest bidder. We are not able to find anything in the proofs which would warrant us in reaching a conclusion that these bids, or any of them, were collusive as between the bidders and Vare." If we refer to the testimony, we find nothing to impeach the correctness of this finding, but, on the contrary, much to support it. Conceding, as we must in the absence of evidence to the contrary, that these unsuccessful bidders were responsible parties, the burden rested upon appellants to show that they all participated in the alleged fraudulent collusion, and submitted their bids, not in good faith, but upon a fraudulent understanding that in any event the contract was to be let to this defendant. The fact that Vare had an understanding with the city officials that compliance with the specifications would not be required by him, however much this would be a departure from plain business principles, and expose the officials to suspicion and censure, would

not show conspiracy to defeat competitive bidding in any such conclusive way as the law requires, except as it further appeared that in this respect Vare was advantaged over the others. If all alike bid on the same terms and with the same understanding, irregular and unbusinesslike as the transaction would be, it would lack the essential element of fraudulent conspiracy to defeat competition between bidders. Not only is there an absence of any finding that Vare bid with any understanding that the others did not have, but the close approximation in the bids would seem to indicate that each had been governed in making his bids by the same considerations which influenced the others. The defendant's bid was \$1,299,000, another was \$1,350,000, another \$1,403,000, while the fourth and highest exceeded the lowest by \$200,000, which, as explained, included the cost of assembling a plant with which to do the work. Can it be possible that these bids were made in any different terms than those given to Vare? If they were—and here we exclude collusion because the finding of the court acquits these bidders of that—then it follows that each was willing to undertake, just as Vare, to do work for the city which each knew would cost upwards of \$1,000,000 in excess of what they were to receive therefor. To our mind this, to say the least, is most unlikely. It would be far more reasonable to infer that all alike understood that strict compliance with the specifications was not to be required. We have dwelt on this feature of the case because of its controlling significance. The third assignment of error, which includes the second as well, fairly and squarely raises the question we have been considering. What is there assigned for error is the refusal of the chancellor to hold that "the contract in suit is void because it was the result of an unlawful combination between the contractor and officers of the city, to defeat the statutes relative to competitive bidding." In the proposition here expressed we have the whole of appellants' contention concentrated.

[2] If, as there stated, the contract resulted from any such combination, it follows necessarily that the contract was corrupt and should have been declared void; but, if this be not established, according to the measure of proof which the law requires in such cases, the contention must fail, for in that event the failure to perform the work required under the contract in the manner therein provided becomes a matter between the municipality and the delinquent contractor, as to which the former alone can be heard to complain; for, as well said by the learned chancellor, "so far as the plaintiffs' case is based upon a claim that the contractor, Vare, failed to comply with his contract to do the work called for by the specifications, and therefore that he is bound

to account for and repay to the city the moneys which were received by him from the city for the work which he ought to have done under the contract, we deem it sufficient to say that in our judgment the plaintiffs have no standing to require the contractor to render any such account. If it were within the power of taxpayers in all cases wherein it might be claimed that a contractor had failed to comply with the provisions of his contract to come into court and cause the matter to be investigated, and, in case of default of performance, to require the contractor to render such an account as is called for in this case, the affairs of the city would be thrown into endless confusion, and the proper functions of the municipal officers would, to a large degree, be devolved upon and assumed by the courts. We regard the municipal authorities as the repository of all the power that is needed to deal with such questions as a general rule. A gross violation of duty might be sufficient ground for impeachment or prosecution. However that may be, the supervision of work done under municipal contracts and the making of payments for work done under them, in the absence of fraud of a character which would justify the interference of a court of equity, must be left to those who by law are intrusted with the responsibility over these matters. If there was competitive bidding without collusion on part of the bidders—and this we have seen is an established fact in the case—it follows that the letting of the contract to Vare, no matter what may have been the intention of Vare and the city officials in this regard, could not have resulted from such intention; in other words, if the purpose of the parties to the contract was to avoid competitive bidding, and that purpose failed in execution, the fraud contemplated could not have entered into the contract subsequently made. While the findings on which appellees rely are most pertinent to the inquiry before us, and while they are convincing that the ordinary safeguards against fraud were utterly disregarded in the letting of this contract, yet, remembering that the one ground of challenge is conspiracy to prevent competitive bidding, it cannot be said that they are sufficient in themselves to establish the guilt of the parties so accused. In this connection we can do no better than repeat here what was said by the learned chancellor in his opinion: "It must be borne in mind that the question before us is not to be settled by

any views which we may have as to the sufficiency of the work done by the contractor to keep the streets clean, or as to the full fidelity and efficiency of the officers of the city in supervising the work of the contractor, or as to the manner in which the contractor performed his work, or even as to whether or not, if he had strictly complied with the terms of his contract, he would have made or lost large sums of money. The simple and single question now under consideration is whether or not the proofs in the case ought to lead us to the conclusion that there was an agreement or combination between the contractor and the supervising officers of the city whereby he should be favored and allowed to draw money under the contract without doing the work which would justify the payment to him of the money received by him. The affirmative of this question was assumed by the plaintiffs when they filed their bill, and it was incumbent upon them to establish it by sufficient proofs before we can properly be asked to sustain their position." It is to this feature of the case that we have confined the discussion. Our conclusion has already been indicated, and it only remains to state formally our concurrence in the findings and conclusions of the learned chancellor.

The appeal is dismissed at cost of appellants, and the decree is affirmed.

ANDERS et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. Feb. 19, 1912.)

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Howard S. Anders and others against the City of Philadelphia and others. From the decree, defendant Edwin H. Vare appeals. Dismissed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Francis Shunk Brown and John C. Bell, for appellant. Thos. Raeburn White, for appellees.

PER CURIAM. To a suggestion by the appellants, duly filed, to the effect that the question sought to be raised by this appeal has become moot, the appellees make answer admitting the facts set out in the suggestion and consenting that the appeal be dismissed at the cost of appellant Edwin H. Vare. It is accordingly so ordered.

PENNSYLVANIA R. CO. et al. v. BOARD OF PUBLIC UTILITY COM'RS.
(Supreme Court of New Jersey. July 15, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 10*)—REGULATION—PUBLICATION OF RATES.

The Board of Public Utility Commissioners made an order requiring (1) each railroad company affording intrastate commutation service from points in New Jersey to Jersey City, N. J., or to Hoboken, N. J., when request is made upon it and proper payment is tendered therefor, to sell tickets for said commutation service specifically designating in every case both termini of the journey, and to publish rates for such commutation service designating both termini specifically, and to file schedules of said rates with the commission; and (2) requiring each railroad company carrying in intrastate journeys passengers to or from Jersey City, N. J., or to or from Hoboken, N. J., at special rates to follow the same course with respect to the sale of special rate tickets, publication of rates, and filing of schedules. The order was based upon a determination of (a) the existence of "regulations" and "practices" that are unjust and unreasonable and arbitrarily or unjustly discriminatory; and (b) the subjection of persons and localities to prejudice and disadvantage. *Held*, (1) that such order is within the jurisdiction of the board, as conferred by the Public Utility Law (P. L. 1911, c. 195, p. 374), if such determination is justified by proof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. § 10.*]

2. CARRIERS (§ 10*)—REGULATION—PUBLICATION OF RATES.

Held, (2) that such order is within the jurisdiction of the board, it appearing that such railroad companies refuse to sell, or quote rates for, such commutation or special rate tickets (except "school" tickets) to intrastate passengers to and from their Hudson river terminals (Jersey City and Hoboken) specifically designating both termini of the journey (though they afford such commutation and special rate service to intrastate passengers requiring it), and insist that such passengers shall take, as evidence of their right to such transportation, tickets reading to and from New York City, and at New York City rates, and though they quote and sell commutation and special rate tickets for all other intrastate journeys where such service is afforded specifically designating the termini of such journeys upon such tickets.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. § 10.*]

3. CARRIERS (§ 10*)—REGULATION—TICKETS.

Held, (3) that the order does not require the establishment of a commutation service from and to other New Jersey points to and from Jersey City and Hoboken. It merely requires that tickets shall be sold for an existing service designating specifically the termini of the journey within this state in accordance with the fact; and that commutation and other special rates for such service be quoted and filed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. § 10.*]

4. CARRIERS (§ 10*)—REGULATION—POWER OF STATE.

Held, (4) that the order does not involve the exercise of power by the state, through the Public Utility Board, to compel the railroad companies, independent of any action on their part, to issue commutation or other special forms of tickets. It involves merely the exercise by the state, through the board, of the power to end unjust discrimination growing out of the

refusal of the companies to quote and sell tickets designating specifically both termini of the intrastate journey.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. § 10.*]

5. CARRIERS (§ 13*)—REGULATION—STATUTORY PROVISION.

Held, (5) that the Public Utility Law (P. L. 1911, c. 195, p. 374) is not merely declaratory of the common law. It forbids the giving to any locality any undue or unreasonable preference or advantage, or the subjection of any locality to any prejudice or disadvantage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21-24; Dec. Dig. § 13.*]

6. COMMERCE (§ 58*)—SUBJECTS OF REGULATION—TRANSPORTATION CHARGES.

Held, (6) that the order under review does not involve any interference with, nor impose any burden upon, interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86, 100; Dec. Dig. § 58.*]

Certiorari prosecuted by the Pennsylvania Railroad Company and another, by the Lehigh Valley Railroad Company of New Jersey, by the Erie Railroad Company, by the New York, Susquehanna & Western Railroad Company, by the New Jersey & New York Railroad Company, and by the Delaware, Lackawanna & Western Railroad Company, respectively, against the Board of Public Utility Commissioners. Orders of the Public Utility Commissioners affirmed.

Argued February term, 1912, before TRENCHARD, PARKER, and MINTURN, JJ.

Vredenburg, Wall & Carey and Herbert A. Taylor, for prosecutors Pennsylvania R. Co. and West Jersey & S. R. Co. Collins & Corbin and Herbert A. Taylor, for prosecutors Lehigh Valley R. Co. of New Jersey, Erie R. Co., New York S. & W. R. Co., and New Jersey & N. Y. R. Co. M. M. Stallman and Herbert A. Taylor, for prosecutor Delaware, L. & W. R. Co. Frank H. Sommer, of Newark, for defendant.

TRENCHARD, J. The order brought up for review by these writs was made by the Board of Public Utility Commissioners on October 3, 1911, after hearing, upon notice. The six cases have been here argued and will be considered together.

The order requires (1) each railroad company affording intrastate commutation service from points in New Jersey to Jersey City, N. J., or to Hoboken, N. J., when request is made upon it and proper payment is tendered therefor, to sell tickets for said commutation service, specifically designating in every case both termini of the journey, and to publish rates for such commutation service designating both termini specifically, and to file schedules of said rates with the commission; and (2) requiring each railroad company carrying in intrastate journeys passengers to or from Jersey City, N. J., or to or from Hoboken, N. J., at special rates to

follow the same course with respect to the sale of special rate tickets, publication of rates, and filing of schedules.

[1] We now proceed to consider, in convenient order, the reasons assigned and argued by the railroad companies prosecuting these writs why the order should be set aside. We see no merit in the contention that the order is not within the jurisdiction of the board. The Public Utility Law (P. L. 1911, c. 195) vests in the board the following, among other, powers: Section 17 (a): "The board shall have power, after hearing, upon notice, by order in writing to require every public utility * * * to comply with the laws of this state * * * and to conform to the duties imposed upon it thereby. * * *" Section 16 (e): "The board shall have power * * * after hearing, by order in writing, to fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed thereafter by any public utility, as herein defined." It imposes upon the prosecutors the following, among other, duties: Section 18 (c): "No public utility * * * shall * * * adopt, maintain or enforce any regulation, practice * * * which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory. * * *" Section 18 (d): "No public utility * * * shall make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever." Section 18 (a): "No public utility * * * shall make, impose or exact any * * * unjustly discriminatory * * * commutation rate * * * and other special rate. * * *" The order under review was based upon a determination of (a) the existence of "regulations" and "practices" that are unjust and unreasonable and arbitrarily or unjustly discriminatory, and (b) the subjection of persons and localities to prejudice and disadvantage. If, therefore, the order was justified by the proofs, it was within the jurisdiction of the board. We are of opinion that the order was justified by the proofs.

[2] At the close of the hearing, held upon notice to the prosecutors, and at which they were represented and produced testimony, the board found the following matters of fact applicable to the prosecutors: (1) That the carriers transporting passengers from Jersey points to certain Hudson river boundary terminals, notably Jersey City and Hoboken, do not, as a general rule, sell commutation of special rate tickets specifically good to and from said river boundary terminals. (2) That to this general rule there is a nota-

ble exception, in that 46-trip monthly school commutation tickets are sold specifically between Jersey points to and from Hoboken and Jersey City. (3) That commutation and other special rate tickets are sold specifically good to and from Camden. (4) That, except for the Hudson river boundary terminals, Hoboken, and Jersey City, the carriers quote and sell commutation and special rate tickets for intrastate journeys between points in New Jersey where they afford such commutation and special rate service, specifically designating the termini of such journeys upon such tickets. (5) That the carriers (except as to the 46-trip commutation school tickets) transporting passengers from Jersey points to Hoboken and Jersey City refuse to carry said passengers in intrastate commerce at commutation or special rates, and insist that said passengers be carried in interstate commerce or under a contract purporting on its face to be a contract in interstate commerce. (6) That the carriers afford commutation service to Jersey City and Hoboken, though they quote no rates therefor specifically. (7) That there are no other points to which intrastate commutation service is afforded where the rates for such service designating the termini of the intrastate journey are not quoted.

Such facts, if properly found, establish (a) the existence of "regulations" and "practices" that are unjust and unreasonable and arbitrarily or unjustly discriminatory, and (b) the subjection of persons and localities to prejudice and disadvantage. We think such finding was justified by the evidence and admissions of counsel before the board. The only fact now seriously questioned by the prosecutors is that the carriers afford commutation service to Jersey City or Hoboken. Now, it appeared that the prosecutors are railroad companies operating lines across the state of New Jersey, some having a terminal in Jersey City and some in Hoboken, where the intrastate journey ends. All carry among others passengers bound to one or the other of such cities, and no farther. Many of these passengers are commuters from other New Jersey points, and, of course, require service. The insistence of the carriers at the hearing before the Utility Board was that they furnished such commutation service, and it was frequently reiterated, and was coupled with the argument that it was at reasonable rates. The proofs also show that such service was held out to commuters, and was in fact furnished. It appeared that, when the persons desiring it applied to the ticket offices for it, they were compelled to take tickets reading to New York City, by which the service was then furnished to Jersey City or Hoboken, as the case might be. The carriers' contention now is that this commutation service which they held out and furnished to and from Jersey City or Hoboken was not commutation service.

solely because the prosecutors insisted upon selling only tickets reading to New York City. We see no merit in the contention, and we think the finding was justified by the evidence and admissions of counsel.

The fact is, then, that the prosecutors refuse to sell, or to quote rates for, commutation or special rate tickets (except "school" tickets) to intrastate passengers to and from their Hudson river terminals (Jersey City and Hoboken), specifically designating both termini of the journey (though they afford such commutation and special rate service to intrastate passengers requiring it), and insist that such passengers shall take, as evidence of their right to such transportation, tickets reading to and from New York City, and at New York City rates, and though they quote and sell commutation and special rate tickets for all other intrastate journeys where such service is afforded specifically designating the termini of such journeys upon such tickets.

The issue is thus narrowed down to the question whether such difference in practice is to be construed as a "regulation" or "practice" which is unjust, unreasonable, unduly preferential, or unjustly discriminatory, or otherwise in violation of law.

We agree with the Utility Board that it is, for the reasons we will now state. This refusal to sell commutation or other special rate tickets to and from Hoboken or Jersey City specifically designating both termini deprives the passenger who would commute on the carrier's line to either named point, and no farther, of the right he enjoys in common with every other passenger in intrastate journeys in the state of New Jersey to the protection which the law of the state throws around him as regards the justice and reasonableness of the rates, and of regulations and practices involved in intrastate travel. It seems to us that the character of an intrastate journey is not changed by the circumstance that the carrier requires the passenger to buy transportation on its face in excess of his requirements over the carrier's line, and to a point in a neighboring state. The Public Utility Law, as we have seen, makes certain prohibitions upon the acts of public utilities in this respect. They shall not "adopt, maintain or enforce any regulation, practice which shall be unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory" (section 18c); nor "subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever" (section 18d). If in ordinary commutation intrastate travel the passenger may appeal to the Commission in the matter of the justice and reasonableness of rates, and the justice and reasonableness of any of the carrier's regulations, it cannot be denied that the commuter to or from Hoboken or Jersey City who, as the

sine qua non of buying his transportation, must resign the remedies and appeals accorded him by law, is subjected to prejudice or disadvantage.

The question here involved is not the reasonableness or unreasonableness of particular rates, nor whether the rates involved are or are not just and reasonable. The question here is whether all New Jersey commuters in intrastate journeys are to be accorded their rights under the law, or whether such rights are to remain inviolate only for those commuters who do not travel to or from certain Hudson river terminals.

The prosecutors point out that section 16 (c) of the Public Utility Act confers on the board the power "after hearing, upon notice, by order in writing, to fix just and reasonable rates * * * whenever the board shall determine any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage, or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential," and contend that "only where such commutation rates have been in existence" is the board given the power to "consider and determine whether they are reasonable." Counsel urge that the language of the statute contemplates "the possible existence and nonexistence, aside by side, of commutation rates as a condition not in violation of public policy." In reply, it may be said that the carriers aver that they already afford commutation service to Jersey City and to Hoboken. They contend, however, that they have not established commutation rates to Jersey City and Hoboken, but only through these places (where a stop-off is allowed) to New York. As the commutation service already exists, it obviously requires no order of the board to establish it. The board properly found that there were no other points to which intrastate commutation service is afforded where the rates for such service, designating the termini of the intrastate journey, are not quoted. We are unable to perceive why commutation service should be furnished from New Brunswick to Trenton for instance, and rates quoted therefor specifically, and commutation service be furnished from New Brunswick to Jersey City, and rates not quoted therefor specifically.

Moreover, it will be observed that the fixation of rates is not the only power conferred upon the board upon which this matter hangs. The act, as we have seen, provides (section 16e) that the board shall have power, "after hearing, by order in writing, to fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed thereafter by any public utility as herein defined." To afford a service and to quote no rate and sell no ticket for the same specifically designating both termini of the journey does not commend it-

self to our judgment as a just and reasonable "regulation" or "practice."

[3] The objection and argument that the order under review requires the establishing of a commutation service from and to other New Jersey points to and from Jersey City and Hoboken cannot avail the prosecutors, for such is not the effect of the order. We have pointed out that the insistence of the prosecutors throughout the proceedings before the board was that they already afford commutation service to Jersey City and to Hoboken, but have not established rates to Jersey City and Hoboken, but only through these places (where a stop-off is allowed) to New York City, and the board properly found such service to be in fact afforded. Hence the order does not require the establishment of a commutation service. It merely requires that tickets shall be sold for an existing service designating specifically the termini of the journey within this state in accordance with the fact; and that commutation and other special rates for such service be quoted and filed.

[4] So, too, the objection and argument based upon alleged want of power of the state, through the board, to compel the prosecutors, independent of any action on their part, to issue commutation or other special form of tickets, cannot avail the prosecutors in this proceeding. Such a power is not essential to sustain the order under review. The order involves merely the exercise by the state, through the board, of the power to end unjust discrimination growing out of the refusal of the prosecutors to quote and sell tickets designating specifically both termini of the intrastate journey. It will be seen, therefore, that the case of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 665, 43 L. Ed. 858, and the adjudications following it have no application to the cases at bar.

[5] It will also be seen that the order, viewed in this light, is not affected by the dictum in *Atwater v. D., L. & W. R. R.*, 48 N. J. Law, 55, 2 Atl. 803, 57 Am. Rep. 543, to the effect that a company is under no obligation to establish commutation rates for a particular locality. That case was decided before the enactment of the statute upon which this order is based. Wyman in his work on Public Service Corporations says that "at common law the public servant dealt with the individual, except under a statute a community as such cannot complain of discrimination against its inhabitants." Section 1371. But the Public Utility Law of 1911 (section 18d) expressly forbids the giving, directly or indirectly, of any undue or unreasonable preference or advantage to any locality in any respect whatsoever or the subjection of any locality to any prejudice or disadvantage in any respect whatsoever.

[6] There is no merit in the contention

that the order under review involves an interference with, or imposes a burden upon, interstate commerce. It relates to intrastate transportation solely. Under it contracts issued for such transportation will be in accordance with the fact. When complied with, an ascertainment of the total revenue derived from intrastate transportation will be rendered possible. Under the system which the order is designed to correct, revenue from interstate commerce and that which is in fact and substance intrastate commerce are intermingled. The importance of a means of identifying the revenues flowing from these two distinct sources, in passing upon the justice and reasonableness of rates for intrastate transportation, and otherwise administering the Public Utility Law, must be apparent.

The order under review will be affirmed, with costs.

BENNAN v. PARSONNET.

(Supreme Court of New Jersey. July 13, 1912.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS (§ 18*)—ACTIONS FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

The plaintiff applied to the defendant to perform a surgical operation upon a rupture in his left groin. After the patient had been etherized, a rupture on the right side was discovered of a character more seriously endangering the life and health of the patient than the other. The defendant, having operated upon the more serious rupture, was sued by his patient for assault and battery, and a substantial verdict recovered, which (1) is set aside as against the weight of evidence, with (2) a statement of the question that should be left to the jury in view (3) of the adaptation of the common-law rule to the employment of anæsthesia in surgical operations.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

2. PHYSICIANS AND SURGEONS (§ 16*)—RELATION TO PATIENT—SURGICAL OPERATIONS.

When a person has selected a surgeon to operate upon him, and has no other person to represent him during the period of unconsciousness, the law will, by implication, constitute the surgeon the representative of his patient, and will cast upon him the responsibility of so acting in the interest of his patient that the latter shall receive the full benefit of that professional judgment and skill to which he is entitled, but the surgeon has no right to perform an operation of a sort different from that to which he had consented, or that involved risks and results of a kind not contemplated.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 31; Dec. Dig. § 16.*]

Action by Harris Bennan against Victor Parsonnet. Verdict for plaintiff. Heard on rule to show cause. Verdict set aside.

The plaintiff applied to the defendant to operate upon a rupture in his left groin that

had been unsuccessfully operated upon two years before by another surgeon. Upon learning that the plaintiff was a poor man, the defendant engaged to operate free of charge. At the time fixed for the operation the plaintiff was placed under the anæsthetic by two assisting surgeons who, when Dr. Parsonnet came into the operating room, directed his attention to a rupture they had just discovered in the patient's right groin, which, upon examination and the employment of the usual diagnostic tests, was determined by the three surgeons to be a serious menace to the patient and likely to cause his death should strangulation occur, dangers not to be apprehended from the rupture that had once been operated upon. Dr. Parsonnet thereupon operated upon the more serious rupture, intending to operate also upon the other, which he was prevented from doing by the patient's condition under the anæsthetic. The patient, upon being informed that the operation would be completed on a following day, apparently acquiesced, but later declined to go on with the operation, and brought this action against the defendant for assault and battery.

The jury under the charge of the court found that the defendant had performed an operation upon the plaintiff without his consent, and rendered a verdict of \$1,000 against him.

Argued February term, 1912, before GUM-MERE, C. J., and SWAYZE and GARRISON, JJ.

Phillip J. Schotland, of Newark, for the rule. Charles B. Dunn, of Paterson, opposed.

GARRISON, J. (after stating the facts as above). [1] This verdict cannot be permitted to stand. It is against the clear weight of evidence. The trial court charged the jury that the operation was a legal wrong to the plaintiff, unless he had consented to its performance, explaining to them that such consent as to conditions discovered after the operation had actually commenced might be inferred from circumstances, and that it should be inferred if the condition thus discovered endangered the life or health of the patient, leaving to them the question whether the condition for which the defendant had operated was of this character. Upon the question thus submitted to the jury, the evidence was overwhelmingly against the verdict. The testimony of unimpeached medical witnesses that the rupture that was operated upon was a serious menace to the health of the plaintiff, and even to his life, should it become strangulated, was not even attempted to be contradicted. Upon this point the direct testimony of the witnesses, who had personal knowledge of the facts, was corroborated by that of Dr. Edward J. Ile, who is shown by the testimony to be a surgeon of great experience and a recognized authority in his profession.

A verdict rendered in the face of this testimony can rest only upon the assumption of superior knowledge by the jury.

The duty of the jury was to render a verdict upon the evidence, and that it did not do.

[2] The verdict must, therefore, be set aside without regard to whether the question that was left to the jury was or was not the precise question that should have been submitted to them. We think that it was not. It is true that the judge in his charge laid down the common-law rule with substantial correctness, but it is also true that the introduction of anæsthesia into the practice of surgery has modified the application of the common-law rule in certain fundamental respects of which the law must take notice.

The trial judge in his charge followed the opinion of Judge Brown in *Mohr v. Williams*, decided by the Supreme Court of Minnesota, 95 Minn. 261, 104 N. W. 12, 111 Am. St. Rep. 462, 5 Ann. Cas. 303, which as annotated in 1 L. R. A. (N. S.) 439, correctly presents the common-law rule upon the subject. That rule is thus stated in 1 *Kincaid on Torts*, p. 395: "The patient must be the final arbiter as to whether he shall take his chances with the operation or take his chances of living without it. Such is the natural right of the individual which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate."

In general justification of this common-law rule, Judge Brown says this in his opinion:

"There is logic in the principle thus stated, for in all other trades, professions, or occupations contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient."

Without stopping to point out the fallaciousness of the premise that a surgical operation can be contracted for or performed according to plans and specifications, it is enough to say that the entire foundation of the supposed analogy is swept away by the surgical employment of anæsthesia, which renders the patient unable to consent at the very time that the rule of the common law required that his consent be obtained; for in those days the patient (such was the horror of it) was a conscious participant in such surgical operations as were then performed, and as his consent could be obtained the rule of the common law was that it must be obtained.

The surgical employment of anæsthesia has, as matter of common knowledge, not only eliminated the possibility of obtaining the patient's consent during the operation, but has also had other radical effects of

which notice must be taken. Thus it has rendered possible and of everyday occurrence surgical operations of a character and magnitude not dreamed of at the time the common law was in the making, and, as a matter of practical moment, has also advanced the period that marks the commencement of a surgical operation from the time when the patient's body is actually invaded by the knife to the time when the anæsthetic is administered, or at least when the patient has succumbed to its influence. The employment of anæsthesia has also postponed to this same period of relaxation and unconsciousness the making of that complete and final diagnosis of the patient's condition that at common law was made at a time when he could be both informed and consulted. By these considerations the scope of modern surgical operations has been greatly enlarged, and the legal rule applicable thereto extended beyond the emergencies of actual surgery to other matters more or less vitally affecting the patient's welfare. To meet these changed conditions, the rule of law must, in the interest alike of the patient and the surgeon, be adapted to the changes that have been so wrought, chief among which is the unconscious state of the patient at a time when by the common-law rule his consent must be obtained. To meet this fundamental change in the condition of the patient, it is imperative that the law shall in his interest raise up some one to act for him—in a word, to represent him in those matters affecting his welfare concerning which he cannot act for himself because of a condition that has become an essential part of the operation.

If such a representative has been chosen by the patient himself, the rule we are considering has no application, but, if no one has been so appointed, the law by its constructive power will raise up such a representative without which the welfare and even the life of the patient might be needlessly sacrificed. To meet the requirements of the case, such representative should not only keenly appreciate the nature of the duty that is thus cast upon him, but also be possessed of the knowledge and skill to perform such duty with wisdom and promptness. He should also be one in whom the patient reposes confidence and on whose judgment he would presumably rely. The surgeon whom the patient himself has selected alone fills all of these requirements, and hence upon him the law should cast the responsibilities of this office by the legal implication that the patient intended him to act for him when he had made no other selection.

This implication accords with those analogies of the common law by which prompt and timely aid to accidentally injured or unconscious persons is secured from those not expressly authorized to render it. And I have no doubt that, should such an accident

occasion a depression of the skull that rendered the injured person unconscious, the consent of such person to the necessary surgical operation would be implied at common law, although I find no such reported case. A like analogy to some extent is found in the American Decisions touching actions for compensation for services rendered to unconscious persons, a topic upon which the English cases are silent owing to that hallucinatory honorarium upon which the learned professions in Great Britain are supposed to rely for their subsistence. At bottom these analogies all rest upon the maxim that one is presumed to accept that which is beneficial to him, a doctrine that, if applied to commerce and the transfer of property, should surely be applied where life and health are at stake.

The conclusion, therefore, to which we are led is that when a person has selected a surgeon to operate upon him, and has appointed no other person to represent him during the period of unconsciousness that constitutes a part of such operation, the law will by implication constitute such surgeon the representative *pro hac vice* of his patient, and will, within the scope to which such implication applies, cast upon him the responsibility of so acting in the interest of his patient that the latter shall receive the full benefit of that professional judgment and skill to which he is legally entitled. Such implication affords no license to the surgeon to operate upon a patient against his will or by subterfuge, or to perform upon him any operation of a sort different from that to which he had consented or that involved risks and results of a kind not contemplated. As to such matters, the rule in question submits nothing to the judgment of the surgeon, who as the implied representative of his patient can under such implication truly represent him only in so far as he gives to him the benefit of his professional wisdom within the general lines of the curative treatment agreed upon between them, unless, of course, a wider discretion has been accorded to him. Within such general lines, however, much is necessarily left to the good judgment of the operating surgeon, just how much will depend upon the circumstances of the individual case.

If the surgeon transcends his implied authority as thus defined, the question of his skill and wisdom is irrelevant, since no amount of professional skill can justify the substitution of the will of the surgeon for that of his patient; but where this is not the case, and where the act done or the decision made in the interest of the patient is fairly within the implied duty and authority of the surgeon, the question for the jury is whether upon the evidence it appears that such professional skill and wisdom as the patient was entitled to receive had been exercised by the surgeon in his behalf, not

whether in the opinion of the jury the surgeon had acted wisely or whether the patient had been benefited.

Such being the question for the jury, the admissibility of the technical or expert evidence on which it rests presents, as in other cases of relevancy, a preliminary question for the court which in the present case the trial judge rightly resolved in favor of the admission of such evidence. A ruling that the operation that was performed by the defendant was of a different sort from that to which the patient had consented would be based upon too narrow a view. The condition for the cure of which the plaintiff applied to the defendant was rupture. He is therefore presumed to have contemplated all of the risks incident to an operation for such a condition. Now rupture is simply a protrusion of the intestine. Whether it occurs on the right side or on the left the intestine is the same, the muscular wall is the same, the operation is the same, and its dangers and the risks are the same.

In the present case it is not conceivable that if the plaintiff had known that at the same risk and with the same absence of expense he could by the contemplated operation be relieved of a condition that seriously threatened his life and health, he would not have assented to it, or that he would not have relied upon the judgment and have acted upon advice of the surgeon who was so kindly disposed towards him. Under these circumstances, the operation that was performed was not in any true sense against the will of the patient or in any legal sense an operation of a different sort from that which the plaintiff had consented to undergo.

The trial judge was therefore right in admitting the evidence and in sending the case to the jury; the fact that the proper question was not left to them being amply explained by his having followed the reputable authority to which reference has been made.

The question, however, is one to be settled, not by authority, but by reason, and its importance is such that it touches at a vital point the interests of the entire public, any member of which may at any time suffer in life or health by the establishment of a rule that will paralyze the judgment of the surgeon and require him to withhold his skill and wisdom at the very juncture when they are most needed, and when, could the patient have been consulted, he would manifestly have insisted upon their being exercised in his behalf.

This concluding suggestion may perhaps be ethical rather than legal, but it does seem that in good morals a patient ought not, in his efforts to obtain a money verdict, be permitted to repudiate the sound judgment exercised in his behalf by the surgeon of his choice in whose judgment, had he been capable of being consulted, he would unquestionably have concurred.

The matter cannot, of course, be put to the jury in this offhand way which after all presents a view of the situation so consonant with common sense and common honesty that it cannot be entirely ignored by this court in dealing with a verdict that is clearly inequitable.

PAPPAGELLO v. HYDE et al.

(Court of Errors and Appeals of New Jersey.
July 1, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—FELLOW SERVANTS.

At common law, an omission by workmen to use or a careless use by them of safety appliances furnished by the master, the operation of which is incident to their employment, will not impose liability upon the master for injury to a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 252*)—INJURIES TO SERVANT—NOTICE OF CLAIM.

If the notice provided for by the second section of "An act to extend and regulate the liability of employers for injury or death to employés in certain cases" (P. L. 1909, p. 115) fairly apprises the employer of the time, place, and cause of injury, it is sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 306; Dec. Dig. § 252.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

The evidence examined, and held to make a prima facie case of negligence under the said act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

Error to Supreme Court.

Action by Pasquale Pappagello against Frank D. Hyde and another. Judgment for defendants, and plaintiff brings error. Reversed, and venire de novo issued.

Weller & Lichtenstein, of Hoboken, for plaintiff in error. Lindabury, Depue & Faulks, of Newark, for defendants in error.

VOORHEES, J. The plaintiff was employed as a laborer by the defendant, and was engaged in wheeling stone, cement, and concrete to the mixing machine from piles where they had been stored on the first floor of a new structure then in course of erection by the defendant under contract. After the concrete had been mixed, it was loaded into small trucks or cars which were run to and upon an elevator, and thus were raised to the floor above, where they were run off the elevator to the men engaged on that floor to be used in the work of construction on the second floor. The defendants had constructed about the well hole or shaft of the elevator barriers composed of four boards, one on each side of the opening. When the lift came up with its loaded trucks, one of

these boards was removed to allow the trucks to be run off the elevator. The board was then replaced. The same operation was repeated when the elevator was sent down with the empty trucks. When the plaintiff had been thus employed two days, he was, by the foreman, directed to place pieces of boards or lumber on the elevator to be taken to the floor above, and while so engaged, without warning, one of the empty trucks from the floor above fell through the shaft, upon the plaintiff, and severely injured him. For these injuries this action was brought and resulted in a nonsuit. A single assignment of error to that action is before us here.

The nonsuit was asked upon the ground that the negligence proved, if any, was that of a fellow servant. The declaration alleged a failure to provide a reasonably safe place for the employés to work in and a reasonably safe system. No one pretended that a proper guard had not been installed by the master in the barriers, nor that, if they had been properly used, this would have proved sufficient to prevent the fall of the truck. It was shown that there was a man at the top of the shaft, whose duty it was to remove the trucks from the elevator, and pull them to the place where the concrete was to be used, and in like manner, after the trucks had been dumped, to return them empty and place them again upon the elevator, to be taken below. He also attended to removing the board from the front of the elevator when it came up, and after unloading to putting it in place again. The duty to operate the barriers was connected with and incident to this servant's employment in the general work of the master. The rule exacting of the master the duty to use reasonable care to keep safe the place where his servants are required to work is subject to modification, where the work itself gives rise to the danger to be apprehended. Cases of this sort are collected in *Curley v. Hoff*, 62 N. J. Law, 758, 42 Atl. 731. In the case sub judice the danger arose in the course of the erection of a building, and the place of work was of necessity in the very building where the temporary elevator with its shaft, giving rise to the danger, was an essential appliance for the hoisting of the material used in the progress of the work. No evidence of the furnishing of an improper guard was adduced. The place, so far as the cause of this accident is concerned, had been rendered reasonably safe by the master by the installation of the barriers, capable of preventing the trucks from falling into the well hole. If it can properly be asserted that under these conditions the place became unsafe, it was not by any act of the master, but by the negligent omission of a fellow servant, in failing properly to use the barriers, the operation of which was incident to the work of construction of the building.

It was much as if the lift itself had been carelessly operated and had crushed a workman.

[1] At common law an omission by workmen to use or a careless use by them of safety appliances furnished by the master, the operation of which is incident to their employment, will not impose liability upon the master for injury to a fellow servant. *McLaughlin v. Camden Iron Works*, 60 N. J. Law, 537, 38 Atl. 677; *Koneski v. D., L. & W. R. R. Co.*, 77 N. J. Law, 645, 74 Atl. 516, 28 L. R. A. (N. S.) 644; *Sofeld v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417; *Knapp v. Voorhees*, 78 N. J. Law, 510, 74 Atl. 440. The accident, therefore, resulted from a fellow servant's negligence, and the nonsuit was proper, so far as the defendant's common-law liability was concerned. But another reason is set up in the brief of the plaintiff in error why there should be a reversal.

[2] The second count was contained in the declaration founded upon "An act to extend and regulate the liability of employers for injury or death to employés in certain cases." P. L. 1909, p. 114. The pertinent portion of this statute deals with personal injury to an employé who is in the exercise of reasonable care at the time, where the injury results from (1) "any defect in the condition of the place, ways, works, machinery or plant, which defect arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and intrusted by him with the duty of seeing to the proper condition; (2) by reason of negligence of any person in the service of the employer intrusted with and at the time of the injury exercising superintendence, whose sole or principal duty is that of superintendence, or in his absence, by the negligence of any person acting as superintendent." It remains, therefore, to determine whether there is liability under this statute. The second section of the act provides that no action shall be maintained unless notice in writing, signed by the person injured, stating the time, place, and cause of injury, is given to the employer within 120 days after the occurrence of the accident causing the injury or death. The giving of the proper notice is a condition precedent to the maintenance of the action. The time and place of the accident were undoubtedly sufficiently set forth in the notice. The cause is thus stated: "I was injured by a small iron wagon or truck used to convey concrete, which was negligently allowed to fall from the iron structure or overhead platform of said railway terminal upon me and break my leg, while I was standing on the ground engaged in my work loading boards and pieces of wood upon the elevator." It is argued that, as the act enlarges the common-law liability of the master in the class of cases

legislated for (*Quigley v. Lehigh Valley R. R. Co.*, 80 N. J. Law, 486, 79 Atl. 458), the Legislature provided for the notice in order that the employer might examine into the circumstances surrounding the accident and secure proper evidence, while still possible to do so to maintain his defense, that to do this effectively the notice should apprise the employer that the statute was claimed to be the basis of his liability, and that the particular duty neglected or violated should be stated, as well as the manner in which the neglect or violation occurred. Such notice was, of course, not necessary to enforce a common-law liability, and as the statute law, as well as the common law, is presumed to be known by all, the mere fact that a notice of the character above alluded to is given is sufficient to convey to the master that responsibility for the injury is sought to be sustained under the statute.

Our statute is a substantial redraft of the English Employers' Liability Act of 1880, and with reference to it it has been held not necessary that the notice should be drawn with technical particularity, or to state a cause of action as a pleading at law, but merely such facts as will substantially notify the employer of what has occurred so that he may investigate, and be prepared to defend at the trial. *Stone v. Hyde*, 9 Q. B. 13 D. 78; *Clarkson v. Musgrave*, 9 Q. B. D. 390. In the latter case it was observed that "the statute was intended for the use of unlearned persons for whom it meant to provide a cheap and speedy remedy." And to this effect is the great weight of authority in this country. In the note to *Finneran v. Graham*, 198 Mass. 385, 84 N. E. 473, reprinted in 15 Ann. Cas. 291, have been collected the cases both English and American on this subject. If the notice provided for by the act fairly apprises the employer of the time, place, and cause of injury, it is sufficient. We think that the notice given to the defendant in this case is sufficiently explicit, to enable the plaintiff to maintain his statutory remedy.

[3] It remains, finally, to consider whether the evidence adduced was sufficient to go to the jury to establish statutory liability under the act. There was evidence tending to show, and from which the jury might draw the inference, that the man upon the upper floor was charged by the master with the duty of taking the barrier from the well hole as the car came up on the elevator, and of replacing such barrier when it had been removed from the elevator, that such barrier was intended to prevent the car from rolling into the well hole, and that when he failed to replace the barrier, after each ascent of the car, and allowed it to remain out of position from the commencement of the work in the morning to the close of work at the end of the day, it constituted a "defect in the condition of the place, ways,

works, machinery, or plant, which defect arose from * * * the negligence of * * * a person in the service of the employer and intrusted by him with the duty of seeing to the proper condition."

In *Tate v. Latham* 1897, 1 Q. B. 502, the facts of the case as they appeared in the court below were thus stated: "The plaintiff, a lad of 17 years of age, was employed at the defendant's sawmills. His duty was to assist a sawyer named Cook, who worked at one of the circular saws. The plaintiff commenced working at Cook's saw bench in January, 1896. At that date, and for three months afterwards, the saw was not provided with any fence or guard under the bench. In April Cook told the plaintiff to make a guard for the saw, because the factory inspector was coming round, and the plaintiff accordingly made one. The guard was movable, as it had to be taken off from time to time for the purpose of removing the sawdust which collected under the bench. On the afternoon of August 17th, Cook removed the guard as it was in his way, and neglected to replace it. Cook was in charge of the bench, and it was his duty to put up the guard. On the following morning, soon after 8 a. m. the plaintiff, whilst helping another boy to clear away a plank, slipped under the bench, and, owing to the absence of the guard, his foot was cut off by the revolving saw. The plaintiff brought an action under the Employers' Liability Act 1880, alleging that the injury was caused by (inter alia) the defective condition of the ways, works, machinery, and plant of the defendants. The county court judge ruled that, the defendants having furnished a complete machine, the temporary absence of the guard was not a defect in the condition of the machinery or plant within the meaning of section 1 (1) of the act, and he accordingly dismissed that part of the plaintiff's claim. (2) The plaintiff appealed." Lord Esher, M. R., said: "A guard had been provided for that purpose, which was movable when it became necessary to remove the sawdust which in the course of working collected under the bench. It seems to me clear that, if the machine were left without that guard, a defective condition * * *. The question therefore arises whether there was evidence that Cook was a person intrusted by the defendants with the duty of seeing that the machinery was in proper condition. I think there was. There was evidence that he acted as a person intrusted with that duty, for the evidence was that he told the plaintiff to make a guard for the machine, because the factory inspector was coming round. He therefore acted as if it was his duty to see that the machine had a proper guard, and he was not called by the defendant. It seems to me that there was evidence on which the jury might find that Cook was a person intrusted by the defendant with the

duty of seeing that the machinery was in proper condition. The argument for the defendants was that the machine could not be said to be in a defective condition because a guard had been provided. But I do not think that the machine could rightly be said to be in a proper condition merely because there was a guard provided which could be fitted to it, if that guard was not so fitted whilst it was in motion. The evidence was that, Cook being the person whose duty it was to put the guard on, he had left it off for some considerable time. It was proved that on the previous day he had removed it, because it was in his way, and that on the day in question it was not replaced." It was held that there was evidence for the jury that the machine was in a defective condition.

We deem this a proper and reasonable construction to be applied to our statute, in view of the evident remedial purpose of its enactment. Because the evidence above alluded to was in the case, and because the learned trial judge refused to permit the jury to consider it, the judgment of nonsuit must be reversed to the end that a venire de novo issued.

KAY et al. v. BOARD OF EDUCATION OF KEARNY et al.

(Court of Errors and Appeals of New Jersey. June 20, 1912.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—PROPERTY AND CONTRACTS—STATUTORY PROVISIONS.

Where there is no direct proof that article 6 of the school law (4 Comp. St. 1910, pp. 4735-4747, §§ 38-76) had been adopted by vote of an incorporated town, but the resolution of the board of education under review, which provided for the building of a schoolhouse, was passed subject to the approval of the board of estimate, it will be deemed that said article governed the administration of school affairs in that town.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191, 192-194; Dec. Dig. § 80.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—CONTRACTS—COMPETITION.

Where a public board, required by legislative enactment to award a bid for public work to the lowest responsible bidder after advertisement, allows bidders to furnish "full and complete plans and specifications showing the method of construction" to be approved by the board's architect, *held*, that all bidders were not made acquainted with the specifications in their entirety by this method, and that the opportunity to compete, afforded by definite specifications open to all bidders and to which all could conform, was not given.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191, 192-194; Dec. Dig. § 80.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—CONTRACTS—MODIFICATION.

A public board, charged with the duty of obtaining bids for public work, after advertisement, and of awarding a contract for it to the

lowest responsible bidder, will not have discharged its duty in that regard, where, after bids have been received and opened, but before it has formally taken final action upon the bids, it agrees with the then lowest bidder to diminish the amount of the work in consideration of a reduction of the bid.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191, 192-194; Dec. Dig. § 80.*]

Error to Supreme Court.

Certiorari prosecuted by John P. Kay and others against the Board of Education of Kearny and others. From a judgment dismissing the writ, prosecutor brings error. Reversed, and resolutions of the board of education set aside.

Pierre P. Garven and Gilbert Collins, both of Jersey City, for plaintiffs in error. Arthur F. Egner and Robert H. McCarter, both of Newark, for defendants in error.

VOORHEES, J. This writ of error brings to a test the propriety of a judgment of the Supreme Court dismissing a writ of certiorari. By the latter writ, a resolution passed by the board of education of the town of Kearny on October 2, 1911, was reviewed, awarding a contract to the defendant, the American Concrete Steel Company, for the sum of \$94,750 for a reinforced concrete school, and providing that the contract be signed, subject to the approval of the board of school estimate, on the evening of October 18, 1911. It was further resolved that a copy of the estimate be sent to each member of the board of school estimate. On the same evening, the following entries appear in the minutes: "American Concrete Steel Company proposes to deduct \$3,500 from their proposal if the general basement is made ten feet and the gymnasium fifteen feet under slab." Also a further resolution of the estimate of money required for the erection of the school building in which appears the item "General contract, \$91,250." "Note. Where the American Concrete Steel Company allowed \$3,500 for the difference in the height of the basement, E. W. Waldron & Co. would only allow \$1,908 in brick."

In September, 1911, the board of education accepted the plans and specifications of an architect for a new schoolhouse, directing that bids be separately received for brick and concrete construction—that is, partly brick and partly concrete—and they also in the alternate provided for a construction entirely of concrete. The specifications provided with great particularity for the brick and concrete construction, but, as to the concrete construction, the provision was as follows: "Alternate bids for the construction of the building throughout of reinforced concrete will be considered. Full and complete plans and specifications showing the method of construction must be submitted to and approved of by the architect seventy-two hours before

the opening of bids. Only such systems as have been previously approved of by the architect as above will be considered." There were nine proposals submitted, two of them only for the concrete construction; the defendant, the American Concrete Steel Company, being the lower of the two bids, the contract was awarded to it by the resolution above recited.

It appeared by the proofs that the receipt of the bids was the first business transacted by the board on the evening of October 2d; that, immediately after their reception, they were referred to the committee on buildings and grounds, and a recess was declared by the president. The board then retired to another room, and went into a committee of the whole and looked over the bids; that there was some difficulty in listing them, but, after it had been done as well as they could, it was found that concrete was perhaps cheaper, and they decided to adopt it; at that time, Mr. Conklin, the architect, stated that the Concrete Steel Company would be able to reduce their bid \$3,500, if the basement height was lessened.

The president of the Steel Company had previously mentioned to the architect that such alteration would save about \$3,500. The Steel Company's president was sent for and came into the private room where the board was in session as a committee of the whole. The board announced to him that they had decided to award the contract to his company, and asked whether he would make a cut of \$3,500 suggested by the architect. He assented, and wrote the memorandum agreeing to it above referred to. The board then came back into the public room and voted to award the contract to the Steel Company on its original bid, and then voted for the reduction of \$3,500, which the company had offered to make if the alterations were made. The Steel Company, with their bid, submitted their own working plans and specifications, which indicated their system, and which had been approved by the architect 72 hours before the opening of bids.

[1] The school law by article 6, which includes sections 38 to 76 (C. S. pp. 4735 to 4747), provides for the regulation of boards of education in cities. Sections 72 and 73 enact that there shall be a board of school estimate in every city school district, and then define its duties. Section 52 prohibits the execution of any contract for building of a new school except after advertisement, and section 53 forbids the acceptance of any bid for building schoolhouses "which does not conform to the specifications furnished, and all contracts shall be awarded to the lowest responsible bidder." C. S. 4741. Section 243 (C. S. 4805) provides that by a referendum vote a town may accept the provisions of article 6 and be governed in all respects by it. By the act of 1909 (P. L. 1909, p. 277; C. S. p. 4762, § 105c), it is enacted that "ev-

ery school district heretofore organized * * * in any town * * * and now acting under the provisions of article 6 * * * shall be deemed and held to be organized and existing under, and in all respects governed by the provisions of said article."

There were therefore two ways in which the district of the town of Kearny might have legally been governed by the city scheme as set out in that article; one by the vote of its inhabitants, and the other by having acted under it before the passage of the act of 1909. There was no direct proof that the city plan had been adopted by vote, but the fact that the resolution was passed, subject to the approval of the board of estimate, and that copies of the resolution were ordered to sent to each member thereof, is persuasive that such board existed in Kearny, and hence article 6 governed the administration of school affairs in that town. Therefore, before a bid for the construction of this schoolhouse could be accepted and a contract awarded, it was requisite that it be the lowest bid received in answer to advertisement, and conform to the specifications furnished.

[2] The board decided to adopt the alternate of concrete construction throughout. For this work, the board of education did not furnish the specifications in their entirety, but to the bidder was committed the making of "full and complete plans and specifications, showing the method of construction." This probably involved a double test in ascertaining the lowest bid, viz., least money and most satisfactory plan. But the latter was not submitted to the competing bidders, it remained with its author, unseen except for exhibition to the architect, 72 hours before the bids were received, for his rejection or approval. The latter feature, it may be remarked, might work to smother competition, if disapproval of such specifications were made at the very beginning of the prescribed interval of 72 hours by preventing the submission of other plans. All bidders were not made acquainted with the specifications in their entirety by this method. The bids were thus not competitive within the principle approved in *Van Relpen v. Jersey City*, 58 N. J. Law, 262, 33 Atl. 740, because the opportunity to compete, afforded by definite specifications open to all bidders and to which all could conform, was not given.

The court below held that "full and complete plans and specifications showing the method of construction" was merely providing for the statement of a method by which the reinforced concrete was to be made, and this necessarily involved the submission to an expert in order that the board might be advised whether the proposed method was feasible and desirable. But the proofs would indicate that more was involved than method. The difference between the two con-

structions under consideration affected the exterior of the walls. In the compound construction of brick and concrete, the outside of the walls would be brick. In the construction entirely of concrete, of course the entire walls would be composed of the latter material. Of this the president of the company said: "The building having reinforced exterior walls, it became necessary to illustrate clearly and concisely what these walls would be made up of. The original specifications provided for the working stresses in concrete, and also in reinforced steel. It then became necessary to duplicate the façade shown on the original plans in concrete, illustrating thereon the necessary reinforced steel required for this work, and the details or working drawings that were submitted covered those points. The alternate clause in specification providing for 'full and complete plans and details,' they were made complete." The same witness testified that the plans prepared by the architect called for brick trimmed with stone or terra cotta, resting on concrete foundations, and, so far as the exterior was concerned, they had no reference to the reinforced concrete; that in them (the original specifications) there is reference to the reinforced concrete of the exterior where it specifies the materials and the proportion of the same that is to be used as the basis of the reinforced concrete work, and when asked, "Does not that specifically apply to the interior and not to the exterior?" he answered, "It could be held to govern both."

The plans furnished by the bidder called for walls of 16 inches in thickness, while the brick walls were specified by the board to be 16 inches and 20 inches thick. This witness, on that topic, testified that his authority to change the thickness of the walls to that extent was derived from his study of engineering, and as an expert engineer he was capable of preparing the plans. As to the system referred to in the alternate requirements, he stated that there were many different systems, and that his company had one of its own. But that was not involved in this building. That he adopted the system that the architect specified and used what he called for.

I think it is clear from this testimony that competitive bidding for the concrete work was put upon different bases. Each bidder selected his own data. In Dillon on Municipal Corporations (5th Ed.) p. 211, the author says: "The plan and specification are essential to competitive bidding because it is only through their agency that there is a reasonable assurance that all bidders are competing upon the same basis and without favoritism and that no fraud enters into the award. Under such a charter provision, a city cannot require each bidder to submit with his bid a scheme for doing the work. Such a course leaves no definite basis for competi-

tion among the bidders, and the municipality has no authority under such a statute to make comparisons as to different material proposed to be used, or the work proposed to be done according to different bids. In keeping with the same general principle that all the proceedings must be of such nature as to secure competition, the bid must conform to the plans, specifications, and advertisement of the municipality, and the contract entered into must also conform to the plans, specifications, and advertisement."

There is a public policy involved in a statute requiring a contract for public work to be awarded to the lowest bidder after advertisement for proposals, and "that each bid, actual or possible, shall be put upon the same footing." *Case v. Trenton*, 76 N. J. Law, 696, 74 Atl. 672.

[3] We may now turn to the effect upon the bid of the offer to reduce it, dependent upon alterations to be made by which the quantity of construction would be diminished. I seems to be clearly shown that, before the bids were opened, the Concrete Steel Company had suggested the changes and its willingness to make this modification in its bid, and that, pending the formal passage of the resolution of acceptance, that suggestion was made to the board, and was definitely agreed to by the bidder in writing.

It is said that before the reduction the board had communicated to the Steel Company its decision to award the bid to that company, but as yet no official action had been taken, and, when later that action was taken, it was with the full knowledge possessed by the board, and with the express agreement between the bidder and the board that the original bid was not the one contemplated, but a modified bid based upon changes to be made in the plans and specifications. Now the changed plans and specifications had not been furnished to bidders, and it was not within the power of the board to accept a bid not conforming to such specifications as had been furnished, or to determine the lowest bidder under such circumstances. For aught that appears, if the height had been reduced in the specifications, lower figures would have been sent in by others, perhaps making one of them the "lowest responsible bidder."

A public board, charged with the duty of obtaining bids for public work, after advertisement, and of awarding a contract for it to the lowest responsible bidder, will not have discharged its duty in that regard where, after bids have been received and opened, but before it has formally taken final action upon the bids, it agrees with the then lowest bidder to diminish the amount of the work in consideration of the reduction of the bid.

We conclude, therefore, that the competition which the Legislature designed to secure by its enactments was not obtained in this case, because there was not a full publica-

tion of the criteria which must govern all bidders before competition can exist.

Because of the disposition of this case upon the foregoing grounds, it becomes unnecessary to consider the case of *Scola v. Bd. of Education of Montclair*, 77 N. J. Law, 73, 71 Atl. 209.

The judgment of the Supreme Court will be reversed, and the resolutions brought up by the writ of certiorari will be set aside.

ZEBROWSKI v. WARNER SUGAR REFINING CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 141*)—INJURIES TO SERVANT—RULES FOR EMPLOYÉS.

No duty to make rules is imposed upon the employer for the safety of his employés in the conduct of his business where the business is neither complex nor extrahazardous, nor where the dangers incident to it are obvious, or of common knowledge, and are understood by the servants.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 141.*]

2. MASTER AND SERVANT (§ 141*)—INJURIES TO SERVANT—MASTER—FAILURE TO ENACT RULES.

Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufacturing under similar conditions, is general. In the absence of proof that it is the general usage of other employers engaged in similar lines of business to adopt rules claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 283; Dec. Dig. § 141.*]

3. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where the danger is one that a servant should have reasonably anticipated as a result of the practices customarily carried on and participated in by himself and their dangerous character one that he must have appreciated, whether such danger arose from a lack of rules or a defect in the system, it was a risk known to him, which he assumed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

Kalisch and White, JJ., dissenting.

Error to Supreme Court.

Action by Peter Zebrowski against the Warner Sugar Refining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

George D. Hendrickson and Merritt Lane, both of Jersey City, for plaintiff in error. Marshall Van Winkle, of Jersey City, for defendant in error.

VOORHEES, J. The trial resulted in a judgment of nonsuit, and the propriety of the court's action in ordering it forms the

basis of the argument of the plaintiff in error.

The plaintiff, about 80 years of age, a Pole, speaking and understanding English imperfectly, having been in this country but three years, had been employed by the defendant in its sugar refinery to wash bags for about ten months before the happening of the accident which resulted in the injuries for which the suit was brought, and during which time he had been accustomed to perform the same kind of service as that which he was doing on the day of the accident. His foreman and fellow workmen were Polish. On April 3, 1910, the plaintiff was working on the fourth floor of the defendant's building, picking bags, when the foreman ordered him to go to the eighth floor for a truck and bring it down on the elevator. He went up by the stairway, found the truck, took it to the elevator which was in a position even with the floor, with the guard gate up, as it should be, and stepped into the car, drawing the truck after him, when the elevator began to move upward, the gate pinching his hands, and he holding to the arms of the truck, was forced forward with his head down, while his feet went up, his head going through the opening in the safety gate. He was pulled up to the ninth floor, between the wall and the car, causing severe and painful injuries and mutilating him seriously and permanently.

The declaration avers that the elevator was a dangerous agency, and that it was the duty of the master to warn and instruct the servant, and, further, that the master failed to adopt rules and a safe system of operation. It was a Reidy Standard elevator, put in motion, stopped, and controlled by means of three ropes, one to move it up, another to move it down, and a third or center rope, called a "check rope," which would stop its movement. A further use of the third rope was to hold the elevator in any desired position by twisting the third rope around a catch or shoulder within the car. The plaintiff's insistence is that there was no proper scheme of operation or code of rules promulgated for the guidance of the employés in the operation of the elevator, and that, as elevators are dangerous machines, it was the duty of the defendant to have one man detailed specially to run the car.

[1] The point is further made that there was an entire absence of system governing its use. It will not be denied that an employer may conduct his business in his own way, although another method might be less hazardous. No duty to make rules arises where the business is neither complex nor extrahazardous, nor where the dangers incident to it are obvious, or of common knowledge and are understood by the servants, and where the practice pursued by the employés renders rules unnecessary. The question has

usually arisen and been decided in railroad cases where the business is admittedly dangerous and complicated, and therefore rules are considered necessary in order to afford reasonable protection against the dangers arising to employes to and from each other in the performance of their several and respective reciprocal duties. In *Voss v. D., L. & W. R. Co.*, 62 N. J. Law, 59, 41 Atl. 224, the Supreme Court said: "A general averment in the declaration of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition, and it cannot be founded upon any sound reasoning. * * *

The master is not bound to make any such rule, but is entitled to have his liability to his servant for the dangers of the work determined by the application of the general principles of law regulating and governing the relation of master and servant to each particular cause or case of injury as it arises, and to the system or manner in which his business is operated or conducted." The principle requiring a code of rules has never been applied except when the nature of the business requires it. The rule is thus stated in 26 Cyc. 1157, where the authorities are collected: "Where a master is engaged in a complex or dangerous business, he must adopt and promulgate such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them. But no duty to adopt rules is imposed upon the master where the business is neither complex nor extrahazardous, where the dangers incident to the work are obvious, or of common knowledge and fully understood by the servants, or where the practice actually in force renders a rule unnecessary, nor is the master bound to make rules as to how his servants shall conduct themselves outside the scope of their employment, nor as to how business shall be carried on or any act done which is not carried on or done with his knowledge and permission."

There was no proof in this case that the business was of the complicated character which the law obligates the employer to guard by a scheme of laws. The only evidence on the point was that between 150 and 200 men were employed, and that an elevator must be regarded as dangerous. It is not perceived how from the mere count of the employes an inference of a dangerous and complicated business is raised; nor from the presence in a manufacturing plant of a single dangerous agency a similar situation can be predicated. The plaintiff in error does not stop here, but contends that the specific duty cast upon the master under these circumstances was to employ a man specially to operate the elevator.

The plaintiff produced a witness, a builder of elevators, and who had been in the business of installing them in large factories, who testified that "the general custom in large factories is to have one man to run the elevators; that is, in large factories where they have a good many men." The following answer given by him: "The custom is to have one man operate it [elevator] and give the instructions, so far as I can when I put them up. Have been called on this week to give the instructions"—was properly stricken out, because it related solely to his own business, and not to customary usage. He also gave further testimony in effect that he did not know that there was any special danger in running an elevator of this kind to the initiated—to the man who knows how to handle it—that it was not a complicated operation, but simple, and that a man of ordinary intelligence would learn how to run and operate it in a day or two. The foregoing is the only evidence in the case bearing upon the question of how others ran similar elevators, and it falls short of showing a general usage. It did not necessarily concern a rule of operation to guard against dangers. He had developed the fact that it prevailed in large factories where many men are employed. It was not at all predicated upon the safety of the operation of the appliance, but as well might refer to economy of operation, for rules are intended for economic efficiency, as well as for lessening the risks of servants. *Sutherland v. Troy & B. R. Co.*, 125 N. Y. 737, 26 N. E. 600.

[2] Whether a particular rule should be enacted should not be left to the jury arbitrarily to find, but there should be proof that the practice of promulgating such rules in similar manufactories under similar conditions is general. In the absence of proof that it is the general usage of other employers engaged in similar lines of business to adopt rules claimed to be necessary, and that they would be practicable and useful, a master will not be charged with negligence for failure to make them. See 20 A. & Eng. Ency. of Law, 101 et seq. What standard was proved by way of system to which it was incumbent upon the defendant to conform? It cannot be asserted that in a case like this each jury may say what they deem to be a proper rule, and thus arbitrarily direct the conduct of each manufacturing plant under regulations not general, but special, in their application. Such a practice was denied with regard to the construction of railway station platforms in *Fell v. West Jersey & Seashore R. R. Co.*, 77 N. J. Law, 502, 72 Atl. 362, and to the angle at which barriers to protect travelers on a highway should be placed to warn them of repairs being made in *Halm v. Freeholders*, 78 N. J. Law, 712, 76 Atl. 1014, 28 L. R. A. (N. S.) 946, and as to the height of a car step in

Kingsley v. D. L. & W. R. R. Co., 81 N. J. Law, 536, 80 Atl. 327, 35 L. R. A. (N. S.) 338. Juries may decide whether the ordinary standard has been attained, but they may not impose a standard of their own.

In *Ford v. Lake Sh. & M. S. R. Co.*, 124 N. Y. 493, 28 N. E. 1101, 12 L. R. A. 454, cited by the plaintiff, it was proven that the rule which it was alleged should have been made existed on all other railroad companies. In *Abel v. D. & H. Canal Co.*, 128 N. Y. 662, 28 N. E. 663, an exception was taken to a charge which proceeded as follows: "I think rules might have been suggested not adopted by any company. You have a right to consider whether some rule which occurs to you even though no company has adopted it would have been a better rule and given better protection and such an one as ought to have been adopted and maintained." Upon review, the Court of Appeals said: "If the charge is to be construed as leaving it to the jury to determine, irrespective of evidence what rules ought to have been adopted for the safety of the repairmen and to find the one way or the other on the question of the defendant's negligence in conformity with a conclusion so reached, the charge was undoubtedly erroneous." So in *Atchison, T. & S. F. R. Co. v. Carruthers*, 56 Kan. 309, 43 Pac. 230, the court held that, in the absence of any testimony as to possibility or usefulness of a code of rules, a jury is not justifiable in finding the company negligent in failing to promulgate such system. In *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57, the rule is thus stated: "There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury." See, also, *Morgan v. Hudson River Ore & Iron Co.*, 133 N. Y. 666, 31 N. E. 234, where the court said: "The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by

other corporations of the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and, if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in some way to have prevented it, or in case it did not respond to him in damages. Almost every conceivable injury that a servant received in the course of his employment may in this way be submitted to a jury, and with the same result. * * * Even if it could be shown, after the accident occurred, that it might have been prevented by adopting and enforcing some suitable rule, that would constitute no proper test of liability. The failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care should have foreseen and anticipated the necessity of such precautions."

The plaintiff has failed to bring himself within the principle claimed because he has not established by proof that the business was complex and extrahazardous, and that the special regulation insisted upon was by general custom adopted by employes in like lines of manufacture. But it is not perceived how, if such proof had in fact been made, it would have been possible for the plaintiff to recover in this case. The plaintiff had acquired knowledge of running the elevator. The accident happened because another employe, on another floor, wishing to make use of it, reached into the car and pulled the rope, causing the elevator to start upward. He admitted that the unannounced starting of the car, by other workmen, was a frequent occurrence, and that he was not only familiar with it, but had so started it himself. He, furthermore, knew that this was customary. He testified that, if anybody wanted it, they took it; that "anybody could take the elevator, and go up to the second or fourth floor or any floor and get off, and then soon another could come after, and that is all. I saw how the others did, then I put my work on the elevator and pulled it up. * * * Yes, often happened when we was on the elevator and working on it and somebody from below started the elevator. I would come with my work down with the elevator and suddenly some one else wanted it." Whether the plaintiff knew of the risk that the elevator might be started by an employe in another floor, when he first entered the employment, is not material, for he had acquired that knowledge during his term of serv-

ice, and had learned that it was customary for an employé, wishing to make use of this agency, to reach in over the gate, pull the rope and draw the elevator to the floor where he was, and that the one who first did it acquired the control of it. He had done that himself and so he knew from his observation and practice, acquired during his service, of the danger, yet he continued in his employment without protest, and he must, therefore, be held thereby to have assumed this obvious risk. *Johnson v. Devoe Snuff Co.*, 62 N. J. Law, 417, 41 Atl. 936.

[3] It is urged that the doctrine of obvious risk is inapplicable, because it is subject to the qualification that the master must take proper care to guard the servant from unnecessary hazards—citing *Abel v. D. & H. Canal Co.*, 128 N. Y. 662, 28 N. E. 663, *Pakusewski v. Ringwood Co.*, 81 N. J. Law, 552, 79 Atl. 319, and *Zellers v. De Lany*, 80 N. J. Law, 452, 78 Atl. 212. The rule is correctly stated in the last case thus: "The known absence of safeguards or precaution cannot prevent a recovery, where the danger that renders them necessary is unknown to the injured servant." The danger that the elevator was subject to movement by a fellow servant in another floor was one that he should have reasonably anticipated as a result of the practices customarily carried on and participated in by himself, and its dangerous character one that he must have appreciated. If the danger arose from a lack of rules or a defect in the system, it was a risk, known to him, which he assumed.

The judgment under review will be affirmed.

KALISCH and WHITE, JJ., dissenting.

PAVAN v. WORTHEN & ALDRICH CO.
(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

1. MASTER AND SERVANT (§ 276*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—DEFECTIVE MACHINERY.

In a servant's action for injuries, evidence that plaintiff was working on a machine, and complained of a change made that day in the machine to a representative of the master, who promised to fix it, but said, "Go ahead, got too much work to-day," and that plaintiff was injured later in the same day by the "jumping" of cloth upon the machine, was sufficient to show that the accident was caused by the defective condition of the machine.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§ 280*)—INJURY TO SERVANT—DEFECTIVE MACHINE—PROMISE TO REPAIR.

Evidence that a representative of the master to whom plaintiff complained as to a machine on which he was working had charge of the room in which plaintiff worked and received reports as to the machinery and caused it to be repaired held sufficient to warrant an infer-

ence that such person had authority to promise repairs.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 981-986; Dec. Dig. § 280.*]

3. MASTER AND SERVANT (§ 154*)—MASTER'S LIABILITY—INSTRUCTING SERVANT.

Where plaintiff, an adult, had had three years' experience working with a drying machine, only the stretcher and roller of which were new at the time of his injury therefrom, and he knew of the difficulty and made complaint at once, he could not recover because of a lack of instruction.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

4. MASTER AND SERVANT (§ 221*)—ASSUMPTION OF RISK—DEFECTIVE MACHINERY—PROMISE TO REPAIR.

Where an authorized employé promised on complaint to have a defective machine fixed, but said that he had "too much work to-day," the fair, if not the necessary, inference, was that the promise held good at least until the next day.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

5. MASTER AND SERVANT (§ 295*)—ACTION FOR INJURIES—INSTRUCTIONS—ASSUMPTION OF RISK.

In a servant's action for injuries, where a promise by the master's representative held good until the next day and plaintiff was injured thereby on the same afternoon, the failure to charge that the plaintiff was not justified in relying on such promise if a reasonable time had elapsed without fulfillment was not error.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

6. WITNESSES (§ 37*)—KNOWLEDGE—DISCRETION OF TRIAL COURT—STRIKING OUT TESTIMONY.

The action of the trial judge in a servant's action for injuries in striking out testimony that plaintiff refused to submit to an operation was within his discretion, where such testimony was at best an inference of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

Parker and Vroom, JJ., dissenting.

Error to Supreme Court.

Action by August Pavan against the Worthen & Aldrich Company. From a judgment of the Supreme Court (80 N. J. Law, 567, 78 Atl. 658) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Ward & McGinnis, of Paterson, for plaintiff. George S. Hobart, of Jersey City (Collins & Corbin, of Jersey City, on the brief), for defendant.

SWAYZE, J. [1] There was evidence from which the jury might infer that the cloth upon which plaintiff was working "jumped," owing to a change made that day in the character of what are called "stretchers"; that Pavan complained to one Campbell, who promised to fix it "by and by," but also said, "Go ahead, got too much work to-day." The plaintiff was injured in the afternoon of that day.

[2] The evidence of the negligence and of its causal connection with the injury is meager, but we think sufficed to permit an inference that the machine was in defective condition, and that the accident was caused thereby. The risk was, of course, obvious, since the plaintiff himself made complaint. There is evidence that Campbell to whom the complaint was made had charge of the room in which the plaintiff worked, received reports as to the machinery, and caused it to be repaired. We agree with the Supreme Court that an inference of Campbell's authority to promise as the plaintiff said he did was justifiable.

[3] The general effect of the entire charge was to permit the jury to infer negligence from the failure of the defendant to instruct the plaintiff as to the machine; but the plaintiff was an adult, and had had three years' experience with this very machine. Only the stretcher and roller were new; and he knew of the difficulty and made complaint at once. It was erroneous, therefore, to permit a recovery based on the lack of instruction; and, if this question were presented by the exception, the judgment would have to be reversed. It is difficult to point out the exact language that is objectionable, since the error was not so much in the specific language used as in the implication involved in the charge as a whole. We agree with the Supreme Court that the language excepted to does not present the question. That language is a mere statement by the trial judge of the respective claims of the plaintiff and defendant, and seems to be a correct statement thereof. He was not requested to charge that a verdict for the plaintiff could not be based on lack of instruction.

[4, 5] The plaintiff in error complains that the judge failed to charge the jury that the plaintiff was not justified in relying upon Campbell's promise if a reasonable time had elapsed without that promise being fulfilled. This complaint and the requests to charge upon which it rests overlook the fact that from the statement attributed to Campbell that he had "too much work to-day" the fair, if not necessary, inference was that the promise held good at least until the next day; and, since the accident happened the same afternoon, a request to charge based upon an indefinite promise only was properly refused.

[6] We think the trial judge acted within the limits of his discretion in striking out the testimony that the plaintiff refused to submit to an operation. Whether he refused or not was at best an inference of the witness, since he did not understand the plaintiff's language nor the interpreter, and the plaintiff's shake of the head may not have meant what the witness thought it did.

We think the question asked of Stark

on cross-examination was permissible. If not, the answer was harmless to the defendant.

The result is that the judgment is affirmed, with costs.

PARKER and VROOM, JJ., dissent.

NEW JERSEY S. P. C. A. v. RUSS.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

JUSTICES OF THE PEACE (§ 34*)—CIVIL JURISDICTION—STATUTORY PROVISIONS—"QUI TAM ACTION"—"CIVIL ACTION."

A prosecution brought under P. L. 1880, p. 218 (1 Comp. St. 1910, p. 59, § 35) § 13, prohibiting cruelty to animals, with a penalty collectible in an action of debt, in fact followed the procedure prescribed by section 16, P. L. 1880, p. 223 (1 Comp. St. 1910, p. 62, § 38), which provides that an offender may be taken before the nearest district court or justice of the peace, who may fine him not to exceed \$100. Section 15, P. L. 1880, p. 222 (1 Comp. St. 1910, p. 62, § 37) provides that one half of the fines and penalties collected under the act shall be paid to the informer, and the other half to the Society for the Prevention of Cruelty to Animals. P. L. 1902, p. 500, declares that no justice of the peace resident in any city where there is a district court shall exercise any civil jurisdiction. *Held* that, as the penalty recoverable was payable in part to the informer, the action was a "qui tam action," and as such a "civil action," of which the justice had no jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 77, 78, 80-82; Dec. Dig. § 34.*

For other definitions, see Words and Phrases, vol. 2, pp. 1183-1193; vol. 8, p. 7603; vol. 7, p. 5888.]

Error to Supreme Court.

Ralph Russ, on prosecution by the New Jersey Society for the Prevention of Cruelty to Animals, was convicted for violation of the act for the prevention of cruelty to animals. From a judgment of the Supreme Court setting aside the conviction, the Society brings error. Affirmed.

A. A. Melniker, of Jersey City, for plaintiff in error. McDermott & Enright, of Jersey City, for defendant in error.

GUMMERE, C. J. This writ of error brings up a judgment of the Supreme Court setting aside the conviction of Ralph Russ had before a justice of the peace of the city of Hoboken for a violation of the provision of section 13 of the act for the prevention of cruelty to animals. The alleged violation took place in the city of Hoboken, and the principal ground of attack in the Supreme Court upon the conviction had before the justice of the peace was the lack of jurisdiction on the part of that judicial officer to entertain the proceeding. Mr. Justice Swayze, who delivered the opinion of the Supreme Court, held that the proceeding before the justice of the peace was a civil one, and that

the eighth section of the act relative to justices of the peace, passed in 1902 (P. L. p. 500), and which provides that "no justice of the peace resident within the limits of any city where a district court is, or may be, established, shall exercise any civil jurisdiction whatever," deprived him of the power to entertain the proceeding. We concur in the view expressed in the opinion of the Supreme Court, and would be content to affirm, without more, except for a statement contained in its first paragraph which is not exactly accurate. That statement is as follows: "The proceeding is under section 13 of the act for the prevention of cruelty to animals." The fact is that, although the proceeding was brought for a violation of the provision of section 13, the method of procedure followed before the magistrate was that provided by section 16 of the act, and found in the Comp. Stat. p. 62. The thirteenth section of the act, not only prohibits certain kinds of cruelty to animals, and imposes a penalty for violation of its provisions, not to exceed one hundred dollars together with costs, but also provides for the collection of the penalty in an action of debt. It goes without saying that such an action is a civil proceeding. Section 16 of the act provides that any person found violating any of the provisions of the statute in the presence of any member, officer, or agent of the society, or any sheriff, undersheriff, constable, or police officer, may be arrested without warrant, and taken before the nearest magistrate, district court, or justice of the peace, and that thereupon, a complaint being made and warrant issued returnable immediately, the party being in custody, the magistrate, court, or justice of the peace upon being satisfied as to the guilt of the party may adjudge that he shall forfeit such sum, not to exceed \$100, together with costs, as shall be determined against him, and shall be imprisoned and kept in custody until the said amount and costs are paid. The real question presented for decision, therefore, was whether a proceeding had under the sixteenth section of the act was a civil proceeding within the meaning of the eighth section of the act relative to justices of the peace passed in 1902.

An examination of section 15 of the act is, we think, all that is necessary to resolve this question. That section provides that: "Of all fines, penalties and moneys imposed and collected for any offense being in violation of this act, or under the provisions of this act, and not herein specially provided for, one half shall be paid by the justice, court or magistrate, or by the clerk or other officer of the court receiving the same, to the informer, complainant or prosecutor, and he shall pay within thirty days, and without demand, the other half to the district Society for the Prevention of Cruelty to Animals of

the county where the same were imposed and collected." An action for a penalty a portion of which when recovered goes to the informer is a *qui tam* action, and such an action, as was decided by this court in the case of *Brophy v. Perth Amboy*, 44 N. J. Law, 217, is a civil action. Being a civil action, the fact that there was at the time of its inception a district court in existence in the city of Hoboken operated to oust any justice of the peace in that city of jurisdiction in this class of cases for the reasons pointed out by Mr. Justice Swayze in his opinion delivered in the Supreme Court.

The judgment under review will be affirmed.

NEW YORK BAY R. CO. v. CITY OF NEWARK.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 145*)—PROPERTY SUBJECT—USE FOR RAILROAD PURPOSES.

Where an authorized right of way has been acquired by a railroad company over which it has constructed and is operating its road, and such right of way is not devoted to any other use, it is in legal contemplation land used for railroad purposes although the entire right of way may not, for the time being, be occupied by tracks or other railroad appliances; hence a judicial determination that, upon the foregoing facts, the part of the right of way thus unoccupied is, for purposes of taxation, land not used for railroad purposes, is not a determination of a disputed question of fact which this court will not review, but a failure to apply the proper legal rule to an undisputed state of facts which this court will correct.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 252, 253; Dec. Dig. § 145.*]

2. MUNICIPAL CORPORATIONS (§ 425*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—PROPERTY SUBJECT.

This rule is equally applicable to assessments for local improvements; its practical effect being to eliminate the enhancement of the market value of land included in a railroad right of way either as a ground for its assessment for such improvement or as a basis for the estimation of benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1031-1034; Dec. Dig. § 425.*]

3. MUNICIPAL CORPORATIONS (§ 458*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—AMOUNT.

The proper rule with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis of the enhancement of its market value, but may be assessed to the extent of actual benefits conferred upon such land for railroad purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1100; Dec. Dig. § 458.*]

Error to Supreme Court.

Certiorari by the New York Bay Railroad Company against the Mayor and Common Council of the City of Newark and others to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

review an assessment. From a judgment affirming the assessment (80 N. J. Law, 146, 76 Atl. 327), the Railroad Company brings error. Reversed and assessment set aside.

An assessment for benefits for paving Rose avenue in the city of Newark was sustained by the Supreme Court as to a lot of land having a frontage of 75 feet on Rose avenue and a depth of 100 feet; said lot being a part of the right of way of the plaintiff in error not occupied by its tracks. The facts are fully stated in the opinion of the Supreme Court reported in 80 N. J. Law, 146, 76 Atl. 327.

Vredenburg, Wall & Carey, of Jersey City, for plaintiff in error. Herbert Boggs, of Newark, for defendant in error.

GARRISON, J. [1] In the case of United N. J. R. R. Co. v. Jersey City, 55 N. J. Law, 129, 26 Atl. 135, we held that, "where an authorized right of way has been acquired, over which a railroad has been constructed and is in good faith operated, which right of way is not devoted to another purpose, it is used for railroad purposes within the meaning of the statute considered, although it may not, for the time being, be wholly occupied by tracks or other railroad appliances."

The statute referred to was "an act for the taxation of railroad and canal property" (P. L. 1884, p. 142), and, while the matter directly adjudged was that the land in question was not subject to local assessment for taxation, the broader point decided was that the right of way of a railroad company, although at the time not wholly occupied by railroad appliances, was nevertheless and to its entire extent, in legal contemplation, "land used for railroad purposes."

[2] This decision, which was reached not upon the circumstances of the particular case, but upon public considerations arising from the given state of facts, lays down the legal rule to be applied in all cases where such state of facts exists, and the matter for determination is the assessment of the right of way of a railroad company, and hence is equally applicable to assessments for local improvements with this practical difference, viz., that the determination that lands are used for railroad purposes which, in the case of general taxation, removes them altogether from local assessment, in the case of local improvements, permits such lands to be assessed to the extent of the actual benefit conferred upon them for their present use, i. e., for railroad purposes.

The practical effect therefore of the rule in question is to eliminate enhancement of the market value of the land included in a railroad right of way either as a ground for its assessment for local improvements or as a basis for the estimation of benefits. *Morris & Essex R. R. Co. v. Jersey City*, 36 N. J. Law, 56.

The sound reason upon which this rule

rests is that land acquired under a legislative sanction that implies its permanent devotion to a public use cannot, without a violation of such public use, have a market for any other purpose, and hence, as such a violation will not be presumed, such land has, in legal contemplation, no market value to be enhanced. Of course, if such land is actually put to an alien use, the rule in question does not apply.

There is nothing, however, to prevent the land, while so devoted to its public use, from receiving from a public improvement actual benefit for such public use, and hence to the extent that such land is thus benefited the right of way of a railroad company may be assessed for such an improvement.

[3] The rule, therefore, with respect to assessments for local improvements is that the right of way of a railroad company, being in legal contemplation land used for railroad purposes, cannot be assessed upon the basis either of the general or special enhancement of its market value, but only for actual benefit to such land for the public uses for which it was acquired.

The case of *Morris & Essex R. R. Co. v. Jersey City*, 64 N. J. Law, 148, 44 Atl. 937, affirmed 65 N. J. Law, 683, 48 Atl. 1117, involves no derogation from this rule, since in that case the land assessed consisted of city lots *underneath which* the railroad ran through a tunnel constructed at so great a depth that the lots were left available for ordinary building purposes and had a market value as such.

Nor does the case of *Paterson & Hudson River R. R. Co. v. Passaic*, 54 N. J. Law, 340, 23 Atl. 945, depart from the rule, but on the contrary enforces and illustrates it, since the drainage of railroad property by a sewer (which was the improvement in that case) is an actual benefit to the land in its present use, i. e., for railroad purposes.

Where, however, the railroad ran on a trestle so that a sewer was of no benefit to it, the assessment was properly set aside and the correct reason therefor is given by Mr. Justice Parker in *Lehigh Valley R. R. Co. v. Jersey City*, 81 N. J. Law, 290, 80 Atl. 228.

The rule was also applied with like discrimination in *Erie R. R. Co. v. Paterson*, 72 N. J. Law, 83, 59 Atl. 1031, where the Supreme Court sustained an assessment for the paving of the part of a street immediately connecting with the paved yard of the railroad passenger station. In the opinion delivered by Mr. Justice Dixon, he fully recognized, however, the rule that such assessment rested upon the increased facility of use for railroad purposes and not upon enhancement of market value.

In a later case the same court, while citing this opinion with approval, held that the discrimination there made had no application to an assessment for the paving of a street crossed at right angles by the freight

tracks of the railroad company, so that the unused part of the right of way actually fronted on the improved street; the reason being that no benefit for railroad use was conferred, and that for general improvements that enhanced market value the railroad right of way could not be lawfully assessed. *New York Bay R. R. Co. v. Newark*, 77 N. J. Law, 270, 72 Atl. 455.

It is impossible for me to distinguish the case last cited from the case before us.

The cases relied upon by the court below, viz., *Morris & Essex R. R. Co. v. Jersey City*, 36 N. J. Law, 56, and *Morris & Essex R. R. Co. v. Haight*, 35 N. J. Law, 40, were cases not of a railroad right of way but of other property held under the special charter of the same company upon the terms of which the decision was rested. Had it been otherwise, they must be deemed to be overruled by the more recent case of *United N. J. R. R. Co. v. Jersey City*.

Tested by the legal rule thus illustrated, the judgment of the Supreme Court in the present case was erroneous, and its error consisted, not in its determination of a disputed question of fact, but in its failure to apply to a given state of facts the legal rule properly applicable thereto.

An examination of the opinion filed in the court below shows that the court based its judgment upon the conclusion reached by it that the right of way of the prosecutor, because not wholly devoted to present railroad use, was, as to such part, land not used for railroad purposes, and hence sustained as to such unused part of the right of way an assessment for an improvement that enhanced the market value of such part of the right of way, but was of no benefit to the prosecutor's land for railroad uses.

This conclusion violates the established rules illustrated by the cases cited, and especially that laid down by this court in *United N. J. R. R. Co. v. Jersey City*, 55 N. J. Law, 129, 26 Atl. 135. For, upon the precise state of facts upon which this court in that case laid down the rule that a right of way, although but partially in railroad use, is in legal contemplation land used for railroad purposes, the court below decided that, as to such unused part, the right of way was land not used for railroad purposes. This was not a finding upon a disputed question of fact, for as to the facts there was no dispute; it was a failure to apply to a given state of facts the established legal rule. To put it in another form, it was the drawing of an inference from a state of facts with respect to which judicial decision had prescribed the only permissible inference; that is to say, had laid down a legal rule.

No other point was decided by the Supreme Court, and hence its judgment rests, not upon a matter that this court will not review, if supported by any evidence, but

wholly upon an error which this court will review and correct.

The judgment of the Supreme Court is reversed, and the assessment of benefits on the prosecutor's right of way is set aside, with costs.

KNIGHT v. CAPE MAY SAND CO.

(Court of Errors and Appeals of New Jersey.
June 25, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 218*)—RIGHTS OF PARTIES—ACTION ON ORIGINAL INDEBTEDNESS.

An indebtedness secured by two separate bonds and warrants of attorneys, and subsequently further secured by the same obligor by its bond and mortgage for the aggregate sum of the two separate bonds, payable in one year, and containing the usual interest, tax, and insurance clauses, did not thereby lose its original identity but remained the same debt, and therefore the bond and mortgage are within the operation of section 2 of the act of March 23, 1881 (2 Gen. Stat. 1895, p. 2112), which reads: "That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage."

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 568-585; Dec. Dig. § 218.*]

2. JUDGMENT (§ 67*)—WARRANT OF ATTORNEY—SETTING ASIDE JUDGMENT.

In such a case the holder of the bond and mortgage is under a legal duty to first foreclose the mortgage, and therefore the judgments entered upon the separate bonds will be set aside.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 109-112, 114, 116-129; Dec. Dig. § 67.*]

3. APPEAL AND ERROR (§ 5*)—NATURE AND FORM OF REMEDY—WRIT OF ERROR.

Following *Eames v. Stiles*, 31 N. J. Law, 494, *Defiance Fruit Co. v. Fox*, 76 N. J. Law, 482, 70 Atl. 460, and *McAdams v. Mundy*, 79 N. J. Law, 480, 76 Atl. 1031, a writ of error was the proper remedy to review the action of the Supreme Court in discharging the rule to show cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8-21; Dec. Dig. § 5.*]

4. APPEAL AND ERROR (§ 124*)—DECISIONS REVIEWABLE—JUDGMENT BY CONFESSION.

A judgment by confession may be reviewed at the instance of a party to the judgment record, where the legality of the right to enter judgment is involved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 882; Dec. Dig. § 124.*]

Minturn and Vroom, JJ., dissenting.

Error to Supreme Court.

Action by Annie C. Knight against the Cape May Sand Company. From a judgment of the Supreme Court (81 Atl. 361) discharging a rule to show cause why judgments against defendant should not be set aside, defendant brings error. Reversed.

Grey & Archer, of Camden, for plaintiff in error. Charles R. Stevenson, of Camden, and McCarter & English, of Newark, for defendant in error.

KALISCH, J. Two judgments by confession were entered in the Supreme Court in favor of the plaintiff and against the defendant on bonds and warrants of attorney. The total amount of those judgments is \$25,888.98, which is exactly the sum of the amounts secured by the two bonds referred to. The defendant sued out a writ of error on each judgment, which brings under review the action of the Supreme Court in discharging a rule to show cause granted by it in each case upon the application of the Cape May Sand Company and defendant why the said judgments entered against it by Annie C. Knight, the plaintiff, should not be vacated, and the proceedings thereon set aside. The facts, which appeared before the Supreme Court and which constituted the basis of the final action in discharging the rule, are succinctly and accurately stated by Mr. Justice Garrison, who delivered the opinion of that court, as follows:

"On May 20, 1909, the Cape May Sand Company executed its bond with warrant of attorney to Annie C. Knight conditioned for the payment of \$18,698.03.

"On the same day the same obligor executed a like bond to J. Henry Edmunds conditioned for the payment of \$7,190.95, which bond was forthwith assigned by said Edmunds to Annie C. Knight.

"These bonds were due at once, and contained no other obligation than the payment of their principal sums, which aggregated \$25,888.98. Later, on the same day, the same obligor executed to Annie C. Knight its bond conditioned for the payment of \$25,888.98 in one year, with interest payable semi-annually, with a provision that upon a default of 30 days in the payment of such interest the principal should be payable immediately, and a further obligation by the obligor to pay all taxes, with a provision that, upon a default thereof for 90 days, the principal should be due immediately.

"For the better securing of the debt evidenced by this bond, the obligor executed to the obligee a chattel and real estate mortgage, which recited said bond and the obligations contained in it, and also further bound the mortgagor to carry insurance to the full amount of the debt secured by said bond, to assign the policy to the mortgagee, and, in default thereof, the expense of so doing to be incurred by the mortgagee and added to the principal debt of the bond.

"On January 30, 1911, judgment by virtue of the warrant of attorney was entered by Annie C. Knight on her bond conditioned for the payment of \$18,698.03, and also on the Edmunds bond for \$7,190.95, which had been assigned to her.

"The defendant in each of these judgments—i. e., the Cape May Sand Company—thereupon obtained a rule to show cause why these judgments should not be vacated; the contention of the defendant being that the

judgments were entered in violation of the provision of section 2 of the act of March 23, 1881 (2 Gen. Stat. p. 2112), which reads: "That in all cases where a bond and mortgage has or may hereafter be given for the same debt all proceedings to collect said debt shall be first to foreclose the mortgage."

[3] The same questions are involved under both writs, and, for convenience, may be considered together. Before entering upon a consideration of the main question involved in the case, it becomes necessary to dispose of two preliminary questions raised by the plaintiff, which not only go to the root of the procedure, but vitally affect the defendant's right to any relief. The first contention of the plaintiff is that a writ of error will not lie to review the discharging of a rule to show cause. While the general legal rule is that a writ of error will not lie to review the granting or discharging of a rule to show cause, it has always been confined to cases where the action of the court was founded solely upon the exercise of its discretionary power, but not to a case where the effect of the granting or discharging of the rule is dispositive of the entire case, in that its action is tantamount to the rendering of a final judgment. The mere fact that the proceeding was by a rule to show cause, does not and cannot affect the real function of the writ of error; that is, to bring the judgment record under review. The rule to show cause was simply an orderly procedure by which to bring to the knowledge of the court circumstances and facts under which the judgment was entered. The same object could have been attained by an application to the court to vacate the judgment, without an intervening rule to show cause. It is clear that, if there was a defect on the face of the judgment record and an application had been made to vacate it and the court had in the first instance granted a rule to show cause and subsequently either discharged or made the rule absolute, the action of the court could not have operated to prevent the party prejudiced by such ruling to have the validity of such judgment brought under review by writ of error. And where the invalidity of the judgment can only be made to appear by matters *de hors* the record, as in the case *sub judice*, no different rule is logically applicable. The general doctrine governing this subject is luminously stated by Beasley, C. J., in *Eames v. Stiles*, 31 N. J. Law, in delivering the opinion of this court, on page 494, as follows: "The only requisites are that the decision of the inferior court is final, and has proceeded from a matter not resting in discretion. It is to be understood, however, that the term 'final' is here used in the sense of the common-law rule applicable to writs of error. The decisions must have settled definitely in the suit or proceeding the rights

of the parties. The rule as established appears simply to have removed the requisites of the coincidence of the proceedings with the course of the common law. The other tests of the common law still obtain. What are matters of discretion and what is a final decision are still to be decided by reference to the ancient system and the principles established in the decisions of the court." *Defiance Fruit Co. v. Fox*, 78 N. J. Law, 482, 70 Atl. 460; *McAdams v. Mundy*, 79 N. J. Law, 480, 76 Atl. 1031. We are therefore brought to the conclusion that upon the authority and reasoning of the cases referred to the writs of error were properly sued out.

[4] But it is further urged by the defendant that the writs of error should be dismissed, because the judgments, being by confession, are not reviewable on a writ of error, at the instance of one of the parties to the judgment. This theory is untenable. In *Clapp v. Ely*, 27 N. J. Law, 555, a judgment by confession was reviewed at the instance of a creditor. The eminent counsel who were engaged in the case did not question the right. In *Parker v. Washoe Manufacturing Co.*, 49 N. J. Law, 465, 9 Atl. 682, this court, on a writ of error, reversed the action of the Supreme Court in vacating a confessed judgment by a corporation because the authority of its president to execute the papers was not shown, and upheld the confessed judgment on the ground that the court below had not considered the probative force of the corporate seal. Here, it is to be observed that the writ was sued out for the benefit of a party to the record. Surely, if a creditor may be heard as to a matter involving the legality of the right to enter judgment, there seems to be no valid reason why a party to the record may not.

[1, 2] We now approach the consideration of the action of the Supreme Court in refusing to vacate the confessed judgments. The refusal of the Supreme Court to vacate the judgments is based upon the ground that "the aggregate sum of the two judgments and the debt to secure which the mortgage was given were not identical in any strict sense," and that, therefore, there was no legal barrier in the way of the plaintiff's taking action upon her bonds as at common law. We agree with the Supreme Court that the statute which provides "that in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage," must be strictly construed, as it is, as is said by *Bensley, C. J.*, "in derogation of the common-law force inherent in the bond and mortgage." It was not intended, however, that the strictness with which this statute should be construed should attain to that degree as to destroy its purport and efficacy. The statute was enacted to counteract a prevailing evil which

then existed and which was very oppressive to mortgage debtors. Its palpable object is to prevent an obligee of a bond from suing thereon, until he shall have first foreclosed the mortgage, which has been given as collateral security for the payment of the bond. Before the passage of the act, the mortgagee could foreclose his mortgage, and bring his action on the bond at the same time, if he saw fit, and thus harass the mortgage debtor, and put him to needless expense and costs. It was at such oppressive proceedings that the statute aimed. It would follow, therefore, that, in order to effectuate the policy of the law, the strictness of construction required to be given to the statute should be within the bounds of a liberal sense, and not an illiberal one.

The aggregate sum of the two bonds held by the plaintiff was \$25,888.98. For this sum the defendant was indebted to the plaintiff. And it was to secure this sum that the defendant gave its bond and mortgage payable in one year, with interest payable semi-annually, with a provision that upon a default of 30 days in the payment of such interest, and with such other provisions regarding the payment of taxes and insurance as are usually contained in such instruments. The view taken by the Supreme Court is that the debt represented by the aggregate sum of the two judgments and the debt to secure which the mortgage was given were not identical in the strict sense of the statute, because, though the mortgage seemed a debt of like amount which was owing from the defendant to the plaintiff, it was with the addition of a year's interest, and because its due day was not like that of the separate bonds, and was uncertain, being contingent upon defaults by the obligor in the payment of interest or taxes, and because the amount secured was rendered uncertain, not only by reason of such default clauses, but also because it was liable to be swelled by the cost of insurance which, in case of default, was to be added to the principal debt of the bond. This is altogether too narrow a view of the effect of the transaction and of the spirit of the statute. The loaning of money on bond and mortgage possesses no different features from those presented by the transaction between the plaintiff and defendant. The tax and insurance clauses are usual in bonds and mortgages. They are for the benefit of the mortgagee and aid in securing and protecting the indebtedness. These incidents do not change the character of the debt secured. The debt remains the same, however it may be surrounded with clauses and provisions for its security and payment.

Now, it appeared that on May 20, 1909, the defendant owed the plaintiff the sum of \$18,698.03, for which the defendant executed its bond and warrant of attorney to the plaintiff to secure the payment of such debt. On the same day the defendant executed a like

bond to J. Henry Edmunds to whom it owed \$7,190.95, which bond was forthwith assigned by him to the plaintiff. The legal effect of this transaction was to merge the two debts into a single indebtedness of \$25,888.98 as owing from the defendant to the plaintiff. This indebtedness was secured by bonds and warrants of attorney. The time for the payment of this indebtedness was by consent of creditor and debtor extended for one year, and, as further security for the payment of this same indebtedness, the bond and mortgage were given. In a strict sense it was the identical debt that had been secured by the separate bonds and warrants of attorney. The fact that the plaintiff extended the time of the payment thereof for one year and accepted a bond and mortgage, which represented the aggregate sum of the separate bonds, plus one year's interest to be paid thereon, did not thereby cause the debt to lose any of its original identity, but it still remained the same debt, within the meaning of the statute, that had been originally owing to the plaintiff from the defendant and which had been secured by the two separate bonds and which was further secured and finally represented by the bond and mortgage.

This leads to the result that the judgment of the Supreme Court in each case, discharging the rule to show cause, will be reversed and the judgments under review be set aside.

MINTURN and VROOM, JJ., dissenting.

VAN CLIEF v. MELVILLE et al.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

1. CORPORATIONS (§ 568*)—INSOLVENCY—DISTRIBUTION OF ASSETS—FRAUDULENT CONVEYANCES.

Annulment of a mortgage by a corporation given for the benefit of assenting creditors, on the ground that it was a fraudulent conveyance as to nonassenting creditors, does not deprive the assenting creditors of their right to share pro rata with the nonassenting creditors in the proceeds of the mortgaged property on foreclosure by the receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283, 2289; Dec. Dig. § 563.*]

2. CORPORATIONS (§ 568*)—DISTRIBUTION OF ASSETS—FRAUDULENT CONVEYANCES—REIMBURSEMENT FOR ADVANCES.

Where complainant, who was made a trustee of a mortgage given by a corporation for the benefit of assenting creditors, was induced by the assenting creditors to advance money in reliance upon the mortgage, he is entitled to subrogation to the rights of the assenting creditors, to the extent required to repay his advances, on distribution of the proceeds of the mortgaged property in the hands of a receiver, after the mortgage was declared void as constituting a fraudulent conveyance as to nonassenting creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. § 568.*]

Appeal from Court of Chancery.

Bill by William S. Van Clief, trustee, against Frank Melville and others. From a decree, complainant appeals. Reversed.

See, also, 81 Atl. 824.

Roberson & Demarest, of Jersey City, for appellant. Condict, Condict & Boardman, of Jersey City, for respondent.

SWAYZE, J. [1,2] We held when the case was formerly before us that the mortgage sought to be foreclosed in this suit was void as to nonassenting creditors, and that such equities as might have arisen by reason of the assent of other creditors would arise in the Court of Chancery upon the distribution of the fund in the hands of the receiver. The learned Vice Chancellor conceived that the effect of our decision was to give nonassenting creditors a preference, and he has therefore modified the decree by directing that they be paid in full and that the balance only be paid to the complainant.

We pass over the fact that this decree of distribution is made in a suit to foreclose a mortgage which has been pronounced void as to the very persons who are to benefit by the decree of distribution. Strictly speaking, the distribution of the fund in the hands of the receiver representing the mortgagee's property should be by proceedings in the administration suit in which the receiver was appointed; but the objection is perhaps only formal, as all creditors seem to have been made parties to the foreclosure. We pass, therefore, to the merits. By adjudging the mortgage to be void as to nonassenting creditors, we deprived the assenting creditors of any benefit or priority that the mortgage might give them; but we did not deprive them of their rights as creditors to share pro rata with nonassenting creditors in the assets that might come to the hands of the receiver. No such issue was made in the suit, which was an ordinary foreclosure. Since, however, the creditors who assented to the scheme of the mortgage had thereby induced the complainant to advance money in reliance on the mortgage, it would be inequitable to allow them to receive a dividend on their claims before the advances are repaid. The complainant can be protected by subrogating him to the rights of the assenting creditors to the extent required to repay his advances. The result puts the nonassenting creditors in the same position they would have had if the mortgage had not been made. They receive a pro rata dividend on their claims. It puts the assenting creditors in the same position in which they agreed to be placed, subject to the prior lien of the complainant for his advances. They are estopped to deny the priority of the complainant for the advances made on the faith of their assent, but they are not estopped to assert their right to share pro rata with oth-

er creditors. The latter have not been misled into any change of position. It is true that this may enable Van Clief to recoup himself for his part of his advances; but it is not at the expense of the nonassenting creditors, who will receive their full pro rata share of the assets.

The decree must be reversed, and the record remitted for further proceedings in conformity with this opinion.

SCHULZ v. ZIEGLER.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§ 14*)—ESTATE BY ENTIRETIES—NATURE.

The right of possession of husband and wife existing by virtue of an estate by the entireties as modified by the married woman's act amounts in its essential features to a tenancy in common for the joint lives, with remainder to the survivor.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. § 14.*]

2. HUSBAND AND WIFE (§ 15*)—ESTATE BY ENTIRETIES—CONVEYANCE OF HUSBAND'S INTEREST.

By the husband's conveyance of his interest in such an estate, the grantee becomes tenant in common with the wife, but only for the joint lives of husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13, 16, 37, 84, 90-99, 283; Dec. Dig. § 15.*]

3. PARTITION (§ 12*)—ACTIONS FOR PARTITION—RIGHT OF ACTION.

Such grantee may maintain partition against the wife, but the right is limited to the aforesaid tenancy in common for the joint lives.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38-51; Dec. Dig. § 12.*]

4. EQUITY (§ 263*)—PLEADING—MOTION TO STRIKE.

A motion to strike out a bill, under chancery rule 213, is in the nature of a demurrer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535-540; Dec. Dig. § 263.*]

5. EQUITY (§ 232*)—PLEADING—DEMURRER—DEFECT IN PRAYER.

Demurrer will not lie to the whole bill when the prayer is too broad, but should be restricted to that part of the relief prayed to which complainant is not entitled.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. § 232.*]

Appeal from Court of Chancery.

Bill in equity by Louisa Schulz against Louisa Ziegler. From an order advised by the Vice Chancellor denying a motion to strike out the bill of complaint, defendant appeals. Affirmed.

On appeal from order advised by Vice Chancellor Walker, denying motion made under rule 213 of the Court of Chancery to strike out the bill of complaint. The Vice Chancellor filed the following memorandum: "Walker, V. C. This is a bill for partition.

The complainant is the daughter of the defendant. The lands sought to be partitioned were deeded to the defendant and her husband, who thereupon became tenants of the premises by entirety. The husband and father conveyed all his right, title, and interest in the lands to his daughter the complainant, and thereupon the mother and daughter, the bill alleges, became seized thereof as tenants in common in fee simple in the said premises for and during the joint lives of the said Jacob Ziegler and said Louisa Ziegler, his wife.' It is, of course, erroneous to plead that parties, complainant and defendant, became seized 'in fee simple' during the joint lives, etc. A life estate is not a fee simple. What they became by virtue of the father's conveyance to the daughter was tenants in common for the joint lives of the parents. The father's conveyance to the daughter did not operate in any wise to limit the estate of the wife or her right to the survivorship, and it seems that it will not defeat his right of survivorship, but that it amounts only to a conveyance of his right of possession during his life, and that it cannot operate to let in a third party as tenant by entirety with his wife. That estate exists only between husband and wife, and neither can dispose of any part of it without the assent of the other; the peculiar interest and estate not being severable. *Den. v. Gardner*, 20 N. J. Law, 556 [45 Am. Dec. 388]. The husband can, however, alienate his interest in the estate for his own life. *Id.* See, also, *Servis v. Dorn*, 76 N. J. Eq. 241 [76 Atl. 246]. Life tenants may be tenants in common, and their estates may be partitioned. *Roarty v. Smith*, 53 N. J. Eq. 253, 255, 31 Atl. 1031. The defendant is entitled to the enjoyment of her estate in the lands during the lifetime of herself and her husband by virtue of the married woman's act of 1852 (P. L. p. 407). *Servis v. Dorn*, supra. The complainant is entitled to the enjoyment of the estate and interest in the lands which she derived from her father's conveyance during the joint lives of her father and her mother, the defendant. The first section of our partition act (P. L. 1898, p. 644 [3 C. S. p. 3897]) gives the right to partition to tenants in common, and the parties to this suit are such. True, their estate is less than a fee simple, but it is an estate for the joint lives of the parents of the complainant, and such an estate is partible. If the premises should prove not to be susceptible of division between the parties, and shall be ordered to be sold, the purchaser's estate will terminate upon the death of either Mr. or Mrs. Ziegler. The motion to strike out the bill must be denied, with costs."

George S. Silzer, of New Brunswick, for appellant. Charles T. Cowenhoven, of New Brunswick, for respondent.

PARKER, J. We concur in the result reached by the court below, and, for the most part, upon the grounds expressed in the foregoing memorandum of Vice Chancellor (now Chancellor) Walker.

[1] In *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52, it was decided that, by virtue of the married woman's act, the estate by entirety was affected in such a way as to endow the wife with the capacity during the joint lives to hold in her possession as a single female one-half the estate in common with her husband, the right of survivorship still existing as at common law. The same case holds that the act did not turn the estate by entireties into a tenancy in common; but this must be read in view of the decision below (7 N. J. L. J. 143), which was that it was a general tenancy in common—i. e., in fee; such an estate, in other words, as would have vested under the statute by a deed to two persons not husband and wife, without words of joint tenancy. 2 C. S. p. 1538, § 15. The essential point guarded by our decision was the preservation of the right of survivorship as at common law. Whatever the estate during the joint lives may be called, it is in effect a tenancy in common between husband and wife, or between the husband's grantee and the wife, during the joint lives, with remainder to the survivor. The essential feature of a tenancy in common is the unity of possession, as distinct from unity of title, interest, or time of creation. 2 Blk. 191. Such a tenancy is partible by the express language of the statute. Were this not so, the creditors who in *Buttler v. Rosenblath* enforced their claims against the husband's interest would be compelled to sit idly by and wait to see which would die first, the husband or the wife, or else enter during his lifetime into joint occupancy of the premises with her.

[2,3] We hold, therefore, that by virtue of an estate by entireties the seisin of husband and wife during the joint lives is essentially a tenancy in common, terminated on the death of either, with remainder in fee to the survivor; and that the right of the husband may be transferred by him to a third party who thereby becomes tenant in common for the joint lives in the husband's place; and that partition may be had between such purchaser and the wife of this tenancy in common, but without affecting in any way the common-law right of survivorship.

[4,5] It is suggested that the bill should have been struck out because the prayer is too broad in asking for the absolute sale of the premises, instead of limiting such sale to the right of possession during the joint lives. But a motion to strike out a bill under the rule now numbered 213, which for present purposes is identical with Rule 224

prefixed to 41 N. J. Eq. (8 Atl. 111) Reports, is in the nature of a demurrer (*Stevenson v. Morgan*, 63 N. J. Eq. 707, 53 Atl. 78; *Hanneman v. Richter*, 63 N. J. Eq. 753, 53 Atl. 177; *Holton v. Holton*, 72 N. J. Eq. 312, 65 Atl. 481), and a demurrer will not lie to the whole bill when the prayer is too broad, but only to the part of the relief to which complainant is not entitled (*Whitbeck v. Edgar*, 2 Barb. Ch. [N. Y.] 106).

The order appealed from will be affirmed.

POTTER PRINTING PRESS CO. v. NEWARK DAILY ADVERTISER PUB. CO.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

(Syllabus by the Court.)

1. SALES (§§ 72, 404*)—WARRANTIES—SATISFACTION OF PURCHASER—REMEDIES.

If, under a contract for the purchase of a machine, the purchaser is not required to pay until it operates to his satisfaction, he is not bound to accept and pay for it until he is satisfied, unless the dissatisfaction is based upon some reason not connected with its operation, or is fraudulent in its nature. His contract is to accept and pay when he is satisfied with its operation, and he is not bound even if his dissatisfaction in that regard is to some extent unreasonable, but he cannot keep and use the machine and set up want of satisfaction to sustain a defense of partial failure of consideration or nonacceptance. He must either rescind and offer to surrender the machine or accept it, and rely for his remedy upon the recovery of such damages as he may be able to establish because of a breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197-202, 1146; Dec. Dig. §§ 72, 404.*]

(Additional Syllabus by Editorial Staff.)

2. SALES (§ 181*)—REMEDIES OF SELLER—ACTION FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In an action for the price of a printing press, where the plaintiff attempted to excuse failure to install the machine within the time provided because of interference with the work by defendant, and there was no evidence that there was not sufficient room to do the work of installing the press other than testimony that the space in the room beside the press not occupied by it was about eight feet, a question whether, before the contract was signed, any representative of the plaintiff visited the premises was properly excluded as not affecting the question of interference by defendant arising subsequently.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. § 181.*]

3. SALES (§ 182*)—REMEDIES OF SELLER—ACTION FOR PRICE—QUESTION FOR JURY.

In an action for the price of a printing press, evidence held to authorize submission to the jury of the question whether defendant waived that part of a contract which only required him to pay at the end of 10 days from the satisfactory operation of the press.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

In an action for the price of a printing press, an instruction that if the machine was in all respects according to the contract, and

the excuse made for not having it up in time was a reasonable one and within the terms of a contract, the plaintiff was entitled to a verdict was not objectionable as ignoring the defense that the machine did not work satisfactorily to defendant, where that defense was presented according to defendant's contention in the instruction following.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. TRIAL (§ 194*)—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

In an action for the price of a printing press, an instruction that between certain dates the defendant had used the machine commercially, and that for a large part of that time it had used the machine in getting out evening editions, and that is a circumstance to consider in saying whether it accepted the machine, and whether the use was inconsistent with the claim that the buyer did not own it, was not erroneous in taking from the jury the question whether the machine was used commercially or merely experimentally; the word "commercially" being explained by the portion of the instruction following.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

6. SALES (§ 182*)—REMEDIES OF SELLER—ACTION FOR PRICE—DIRECTION OF VERDICT.

In an action for the price of a printing press, though the defendant was not called upon to accept the press until its operation was satisfactory, it was not error to refuse to direct a verdict for defendant where there was evidence raising the question whether the right of defendant to have a satisfactory operation had not been waived.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 492-495; Dec. Dig. § 182.*]

7. SALES (§ 364*)—REMEDIES OF SELLER—ACTION FOR PRICE—INSTRUCTIONS.

In an action for the price of a printing press, an instruction that the jury may infer that defendants, as they say in their letters to plaintiff, intended to hold plaintiff for damages under the warranty, and, if they so infer, then they might infer that defendants accepted the machine, and a waiver of the clause in the contract that it must be satisfactory to the defendant was not error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

8. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR—SUBMISSION OF ISSUES TO JURY.

In an action for the price of a printing press, where the declaration averred a general performance by plaintiff and the plea was general issue, with notice of special matter not specifying that defendant intended to contest the averment of general performance, the submission to the jury of the question whether defendant had waived performance of a condition by the plaintiff was not harmful to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Gummere, C. J., and Trenchard and Parker, JJ., dissenting.

Error to Supreme Court.

Action by the Potter Printing Press Company against the Newark Daily Advertiser Publishing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Pitney, Hardin & Skinner, of Newark, for plaintiff in error. Vredenburg, Wall & Carey, for defendant in error.

BERGEN, J. By a contract in writing the plaintiff (defendant in error) agreed to furnish and install in the place of business of defendant a printing press for which defendant agreed to pay. The plaintiff furnished, and the defendant retained, the press, and this suit was brought to recover the contract price. The plaintiff recovered a judgment, the propriety of which this writ seeks to review.

[2] The declaration of the plaintiff avers performance by it of all covenants on its part except completion within the time stipulated in the contract, which it attempts to excuse because the defendant neglected to keep its premises in such condition as to enable the plaintiff to properly and expeditiously prosecute the work required by the contract; failed to properly and promptly prepare the foundation for the press as it had agreed, and also that the defendant waived the covenant as to time of completion. The covenants of the plaintiff required, among other things that the press should be completed and shipped about March 30, 1909, and erected on defendant's premises in good running order by April 20, 1909, subject to any delays due to any cause except such "as is within the control of the party of the first part, and all time so lost shall be an extension for such completion and shipment." Testimony was admitted, over objection by defendant, tending to show that, in preparing the pit necessary to erect the foundation, the defendant neglected to remove the excavated earth, but allowed it to remain after the foundation was finished which interfered with the work of installing the press; that the place was small, and the space necessary for plaintiff's work was obstructed by the servants of the defendant engaged in its service, which also interfered with the prosecution of the work by the plaintiff; and that the foundation was not properly put up by the defendant—all of which plaintiff claims were causes of delay not within its control. In addition to this, the defendant urges that the plaintiff was allowed to prove, over objection, that the space afforded for working was not sufficient to enable it to assemble the parts of the press as conveniently as could have been done if a more ample space had been allowed, but a careful examination of the record relating to such testimony shows that it was admitted to support plaintiff's claim that the practice of the defendant, in using what space there was in conducting its business, was an interference with the work of the plaintiff. Whether this was so in fact was a jury question. The issue was not the shape and size of the building in which the press was being installed.

but whether the character of the occupation of the premises by the defendant was such as to amount to an unreasonable interference with the progress of plaintiff's work, because the plaintiff had contracted to install the press, within the time stipulated, in the premises of the defendant without any condition as to the size of or space within the building.

On this point one of plaintiff's witnesses was asked, "Q. Did you see whether there was or not any interference with the erection of that press?" This question was objected to as immaterial because there was no claim in the declaration based upon interference. The court decided to admit the testimony, to which ruling the defendant prayed an exception which was sealed, but the question was not answered. The next question was an inquiry as to the condition of the premises, and the answer was confined to the amount of gravel and sand which the defendant had left, which the witness said interfered materially with putting up a fine piece of machinery. The witness was then asked, "What place was made for the location of your loose parts to enable you to assemble your machinery together, if any?" This question was objected to, allowed by the court, and an exception sealed, but it was not answered, and instead of it the following question was asked, "Q. How much space was there in the room of the defendant not occupied sideways by this press that you were erecting there?" The answer was, "About eight feet." This latter question was objected to before it was answered, but no reason was given for the objection.

From this statement of the case, it would appear that the testimony given related entirely to the question of interference by the defendant with the work of the plaintiff, under the conditions existing which the plaintiff charged were created by the defendant, and is referred to because of its bearing upon the ruling of the court excluding a question propounded to a witness of the defendant which is one of the alleged errors argued by the defendant. The question which is the basis of this assignment was, "Before this contract was signed, did any representative of the plaintiff ever visit your premises?" This question being objected to, the court overruled it upon the ground that "both sides are assumed to have made that contract with their eyes wide open, and that, unless you can show that the contract was impossible of performance, I do not see that the mere fact that it was difficult to perform makes any difference, they agreed to do a certain thing, so I do not think that evidence is competent."

It is argued in support of the objection to this ruling that, at the time the contract was made, it was known to the plaintiff not only that the work was to be performed in the pressroom, but a representative of the plaintiff had visited the place to make an ex-

amination, from which it appeared that there was in use in the pressroom another press, and therefore the plaintiff knew, and made its contract with the knowledge, that there was a lack of room for assembling the loose parts. Whatever force there might have been in this proposition if the question had been answered disappears when lack of room for such purpose was not shown; the only testimony on the subject being that the passageway was eight feet wide, and that answer, taken in connection with the proof that the passageway was obstructed by the use made of it by defendant's servants, had no bearing upon the claim that there was not sufficient room for assembling the parts of the machine, for it does not appear that eight feet would not have been enough if it had not been obstructed by the defendant. The plaintiff contracted with reference to the space that existed, and a prior examination would not have disclosed the subsequent conditions alleged to have been created by defendant, and whether it was improperly obstructed was, as we have said, a question for the jury. In view of the fact that the contract contained a stipulation that the time of completion was to be extended if a delay resulted from any cause not within the control of the plaintiff, and as the proof of the plaintiff was directed to facts showing an interference by the defendant after the contract was made, we are of opinion that no observation made before the contract was entered into would charge the plaintiff with knowledge that it was to be obstructed in the prosecution of its work by any subsequent conduct of the defendant which produced that result, and therefore the question under discussion was properly rejected.

[3] It is also urged by the plaintiff in error that the court improperly left to the jury the question whether the defendant had waived that part of the contract which only required the defendant to pay "at the end of 10 days from the satisfactory operation of said press." The court instructed the jury that this meant satisfaction to the buyer, and that, with such a provision in a contract, "unless the dissatisfaction is shown to be due to the defendants acting in bad faith, or from an endeavor to perpetrate a fraud, even though the dissatisfaction may be unreasonable, and although the machine might be satisfactory to others, yet the law says that the buyer is the one to be satisfied, and, until he is satisfied, he is not obliged to pay for it." It is not necessary to now determine the correctness of this instruction as applied to the contract under consideration, for the rule adopted by the court was satisfactory to the plaintiff in error, and it does not object to it, but, as the contract does not declare, in express terms, that the buyer must be satisfied, it is not beyond the realm of logic, in view of the contract by the plaintiff to erect the press "in good running or-

der," that the expression "satisfactory operation," as used by the parties, is synonymous with "good running order," and to be treated as a warranty instead of a condition precedent. No rescission appears to have been attempted in this case until after so long a time had elapsed that an acceptance might be inferred, for the defendant kept the press and used it for eight months before indicating any desire to rescind the contract and return it to the plaintiff. We are of opinion that there was evidence tending to show an acceptance of the machine from which an inference might be drawn that the defendant had waived the right to rescind, if he had such a right because of want of "satisfactory operation," and therefore there was no error in the submission of waiver to the jury.

[4] It is next urged that an error was committed by the trial court in instructing the jury that, if they were satisfied the machine was in all respects according to contract, that the excuse made for not having it up in time was a reasonable one, and within the terms of the contract, then they need not go any further, because, under such circumstances, the plaintiff was entitled to a verdict. The objection urged to this is that, if the jury acted on this instruction, it could have found for plaintiff without a finding of acceptance and without a transfer of title to the defendant, although by the contract title remained in the plaintiff until acceptance. The excerpt from the charge which is objected to is only part of a paragraph, all of which should be read in considering this objection. Immediately preceding this paragraph the court had charged, in speaking of the delay, that "it is not claimed in this case that the delay was due to anything which was done by the plaintiff company," and then, after describing the excuses offered by the plaintiff for the delay, follows the paragraph which contains the words objected to, in which the court stated that the plaintiff claimed that it performed its work exactly as called for by the contract, and that the press was in every respect calculated to do the work it was designed to do, and would have done the work if it had been properly manipulated, and then follows the part objected to. We see no error in this.

If the jury found from the evidence that the claim of the plaintiff was true as to the furnishing of a machine according to the terms of the contract, except that it was not put up in the time stipulated, and that it had been made to appear to the satisfaction of the jury that the delay had resulted from causes not within the control of the plaintiff, we can see no reason why the plaintiff was not entitled to its verdict, because, if all of the conditions of the plaintiff's contract had been performed, the defendant was bound to pay. This part of the charge did not of course deal with the question of the

satisfaction of the buyer, and the criticism which the plaintiff in error makes is that the jury were thus instructed to give the plaintiff a verdict without the consideration of this element. But that matter was fully considered in the succeeding paragraph in which the court instructed the jury as follows: "But the defendant says, even if the machine was erected in time, yet it never did work satisfactory to the defendant, and that therefore it was never accepted"—and then the court proceeded to instruct the jury upon this question. All parts of the charge cannot be delivered at the same time, and in this case the court first stated the claim of the plaintiff, and then that of the defendant, charging them distinctly that the buyer was entitled to be satisfied, and that this would bar the plaintiff unless they should find from the evidence that the defendant, by its conduct, had waived this covenant, leaving to the jury to say where the truth rested.

[5] The next point raised is that the trial court erroneously charged the jury that the evidence showed "commercial operation" of the press by the defendant; the argument being that it was a disputed question of fact whether the defendant had operated the machine commercially—that is, to carry on its business, or whether the operation was experimental. What the court said on this subject was: "It further appears that between the 21st of June, 1909, and the date of that letter, the 24th of February, 1910, the defendant had used this machine commercially. There is evidence before you to show that for a large part of the time during that period they had used the machine in getting out their evening editions. Now that is a circumstance for you gentlemen to consider in saying whether or not they had accepted that machine; whether or not the use of that machine was inconsistent with their claim that they did not own it. If they did not own it, then they had no right to use it for any length of time or any longer than was absolutely necessary to make a reasonable test." We think that what was intended by the use of the word "commercially" is fully explained by what immediately followed, namely, that they had used the machine in getting out their evening editions, of which there was evidence. In the same paragraph the court instructed the jury that, if they were satisfied from the evidence that the defendant had not waived the provisions of the contract, and that the machine was not satisfactory, and had only been held a sufficient time to enable the plaintiff to make a reasonable test, then the plaintiff could not recover. We fail to see how the jury could have been misled by this charge.

[6] Again it is urged that there was error in refusing to direct a verdict for the defendant. The argument is that, under the contract, the defendant was not called upon to accept until operation of the press was satisfactory to the defendant, and that, while

this was the construction of the contract adopted by the court, the motion was denied; not because it appeared that defendant was satisfied, but on the assumption that the defendant was dissatisfied; there being no evidence of defendant's satisfaction. This argument is not consistent with the record, for the court did not put the refusal upon the ground that the defendant was dissatisfied, but upon the ground that it was a question for the jury whether the right of the defendant to have a "satisfactory operation" had not been waived; the court saying, "although they may have expressed their dissatisfaction, they went on and used this machine for months, and it is a question for the jury to say whether there is not a waiver."

[7] The next point argued is that the trial court committed an error in charging the jury that it might infer from the letters of the defendant company, complaining that the machine did not work satisfactorily, that the defendant had accepted the press and had waived the clause in the contract that it must be satisfactory. Counsel for plaintiff in error admits that the court interpreted the contract as to "satisfactory operation" in accordance with his view, but complains that it was error to charge the jury that they might find a waiver of this covenant from the letters of the defendant. What the court said was, "You have the right to infer that the defendants in this case, as they say in their letters, intended to hold the plaintiff for damages under the warranty. If you do so infer, then you would have the right to infer that they had accepted the machine, and, if there was an acceptance, of course then it is a waiver of the clause in the contract that it must be satisfactory to the defendant corporation." We see no error in this part of the charge, for it was an instruction that the jury might infer, as was stated in one of defendant's letters, that it intended to hold the defendant responsible for damages, and that, if they found that as a fact, it would amount to an acceptance of the machine. That such an inference might be drawn from the evidence cannot be doubted.

[1] If under a contract for the purchase of a machine the purchaser is not required to pay until it operates to his satisfaction, he is not bound to accept and pay for it until he is satisfied, unless the dissatisfaction is based upon some reason not connected with its operation, or is fraudulent in its nature. *Gwynne v. Hitchner & Yerkes*, 67 N. J. Law, 454, 52 Atl. 997. His contract is to accept and pay when he is satisfied with its operation, and he is not bound even if his dissatisfaction in that regard is to some extent unreasonable, but he cannot keep and use the machine and set up want of satisfaction to sustain a defense of partial failure of consideration or nonacceptance. He must

either rescind and offer to surrender the machine or accept it and rely for his remedy upon the recovery of such damages as he may be able to establish because of a breach of the contract. *Woodward v. Emmons*, 61 N. J. Law, 281, 30 Atl. 703.

[8] The remaining assignment argued is that the trial judge committed an error in submitting the question of waiver by the defendant of the clause relating to satisfactory operation. It is urged in support of this position that waiver was not within the issues; not having been pleaded. The declaration averred a general performance by the plaintiff of the conditions imposed upon it by the contract, and, if satisfactory operation was an obligation of the plaintiff, it averred performance. The plea was general issue, with notice of special matter which does not specify that the defendant intended to contest the averment of general performance by the plaintiff of this condition precedent.

If this contract be interpreted to mean that, under one of its conditions, the plaintiff was to furnish and install a machine which would operate to the satisfaction of the defendant, the plaintiff having averred performance of that condition, the defendant was required to specify it in his pleading if he intended to deny it, and the action of the trial court in submitting to the jury the question whether the defendant had waived the performance of a condition by the plaintiff, which the defendant had not by its pleading indicated an intention to contest, was not harmful to the defendant.

We have considered all of the points raised by the plaintiff in error in its brief, and, not discovering any error in the record, the judgment should be affirmed.

GUMMERE, C. J., and TRENCHARD and PARKER, JJ., dissent.

SALTER v. BURK et al.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 48*) — GOVERNMENT—GENERAL LAWS.

By the act entitled "An act relating to, regulating and providing for, the government of cities, towns, boroughs and other municipalities within this state" (P. L. 1911, p. 462), the management of municipal affairs is intrusted to a board of commissioners; but it largely leaves the mechanism of the adopting city's government and the provisions of its charter untouched. It does not alter general laws or charter provisions relating to the government of such city, except when inconsistent with its provisions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130–133; Dec. Dig. § 48.*]

2. MUNICIPAL CORPORATIONS (§ 124*)—OFFICERS—APPOINTMENT.

Where the law prescribes the term of a municipal officer, it is beyond the power of the board of commissioners of a municipality to elect for a greater or less term, or for an indefinite term, and an attempt to do so will not constitute a valid appointment; and a vacancy, in contemplation of law, will still exist in such office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 290-297; Dec. Dig. § 124.*]

3. OFFICERS (§ 83*)—TITLE TO OFFICE—PROCEEDINGS TO DETERMINE.

One complaining of the illegality of the election to office of another in his stead must first show that he himself has legal title to it.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 115-123; Dec. Dig. § 83.*]

4. OFFICERS (§ 69*)—QUALIFICATIONS—CIVIL SERVICE ACT.

The application of the Civil Service Act (P. L. 1908, p. 235) must be limited to the protection of officers de jure, and cannot be extended to keep in office de facto officers.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

Certiorari prosecuted by Harry B. Salter against William F. Burk and others, Commissioners of the City of Trenton, to review a resolution, whereby Frank Thompson was elected city clerk. **Affirmed.**

The prosecutor, claiming to be the clerk of the city of Trenton, prosecutes this writ to bring under review a resolution of the board of commissioners of Trenton, passed October 13, 1911, whereby Frank Thompson was elected city clerk, his election to take effect December 1, 1911.

The following facts appear by stipulation and affidavits taken: On June 20, 1911, the so-called Commission Government Act (P. L. 1911, p. 462), or, as it is sometimes known, the Walsh Act, was duly adopted by the voters of the city of Trenton. On August 15, 1911, at a municipal election held therein, a board of five commissioners, pursuant to said act, were duly elected and duly qualified and organized on August 22, 1911. After organization, they duly adopted the following preamble and resolution, spoken of as the "Omnibus Resolution": "Whereas, in and by the act of the Legislature of the state of New Jersey, entitled 'An act relating to, regulating and providing for, the government of cities, towns, boroughs and other municipalities within the state,' approved April 25th, 1911, it is provided that, 'upon the organization of the commissioners in any such city, elected under this act, the city council or other governing body or bodies theretofore acting as governing body or bodies in such city and having any other functions, shall be ipso facto abolished, and the terms of all councilmen or aldermen, and all other officers, whether elective or appointive, shall immediately cease and determine; providing, however, that nothing herein contained shall be construed to affect in any way the term of office of any policeman, fireman or other

employé of any police or fire department, veteran of any war or other official employé now protected by any tenure of office act; and whereas, it is deemed inexpedient and inadvisable by hasty and injudicious action to fill by immediate appointments the several offices by the above recited act made vacant; and whereas, it is essential and advisable in the judgment of this body that some provision be made, of a temporary character, for the transaction and conduct of the business of the several city departments and offices: Therefore, be it resolved, that all and singular the officers, servants and employes now in the service or employ of the city in any office or department thereof, except the mayor of said city, the common council and the members of the board of police commissioners, fire commissioners and excise commissioners, respectively be, and they are hereby continued in their several and respective offices and employments, at the same rate of compensation as is now respectively received by each, until the further order of this commission; and be it further resolved, that nothing herein contained shall be deemed or adjudged to be an appointment to any position or office, but that all and singular the officers, servants and employes of the city aforesaid who shall continue in the city employ under the provisions of this resolution, except those now protected in the tenure of their offices or positions by any law of this state, shall hold their several and respective offices and positions at the pleasure of this commission, and shall be deemed to have waived any personal privileges or benefit respecting the periods of their respective appointments under any law of this state."

The prosecutor, who was the city clerk at the time of the adoption of the Walsh Act, continued to act as such after the passage of the Omnibus Resolution.

On October 2, 1911, the commission passed the following resolution: "On October 2d. Mr. Lee moved that the commissioners proceed to the election of a city clerk, city treasurer and city comptroller to serve until December 1, 1911. Mr. Lee nominated Harry B. Salter for city clerk, and he was elected." On November 7, 1911, at the general election, the Civil Service Act (P. L. 1908, p. 235) was adopted by the voters of the city of Trenton. The writ was allowed before the last resolution went into effect.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

McCarter & English, of Newark, for prosecutor. Charles E. Bird, of Trenton, for defendants.

VOORHEES, J. (after stating the facts as above). The controversy in this case concerns the legality of a resolution appointing one Thompson to be city clerk on and after December 1, 1911. Salter, the prosecutor, had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

served under the charter of Trenton (P. L. 1874, p. 331) for several years. His last election, by vote of a majority of all the members of the council, was January 1, 1910, and, the term having been fixed by statute at three years (P. L. 1900, p. 415), his term would have expired January 1, 1913, but for the adoption of the Walsh Act.

The reasons assigned by the prosecutor for setting aside the resolution brought up may be concisely stated as follows: That there was no vacancy in the office at the time of Thompson's election; that the prosecutor was protected by the Civil Service Act, and interference with his tenure of office was unwarranted—no cause for his removal having been assigned or hearing afforded to him.

[1] The title of the Walsh Act is "An act relating to regulating and providing for the government of cities, towns, boroughs and other municipalities within this state" (P. L. 1911, p. 462). Its provisions very clearly indicate a new form of government in such municipalities as may adopt it, to take the place of the then existing form, and as well in express terms depose those in office at the time of its adoption. The second section says that, "upon the organizing of the commissioners, the city council or other governing body or bodies theretofore acting * * * shall be ipso facto abolished, and the terms of all councilmen or aldermen, and all other officers whether elective or appointive, shall immediately cease and determine." The fourth section gives to the commissioners "all administrative, judicial and legislative powers, and duties now had and possessed and exercised by the mayor and city council, and all other executive or legislative bodies in said city, and have complete control over the affairs of the city." Moreover, the eighteenth section contains a repealer of all inconsistent legislation, and the eighth section vests an adopting city with "all powers necessary for its government not in conflict with the laws applicable to all cities of this state or the provisions of the Constitution." More appropriate language to describe a complete obliteration of the former government and a comprehensive constitution of a new government in its stead could not have been chosen.

The right of the Legislature to abolish its agency created by it, in the form of a municipal corporation, whereby it may the more readily administer local affairs, if not conceded, is not contested, and it is admitted that in the present case the term of the prosecutor as city clerk came to an end when the city began its government by commission.

But the terms of the act disclose that it was not intended in any sense to be a charter or grant of municipal power, except in a most general way. The management of municipal affairs is intrusted to a board of commissioners, but it largely leaves the

mechanism of the city's government and the provisions of the charter untouched. It does not alter general laws or charter provisions relating to the government of the city, except when inconsistent with its provisions. Its effect is to impose upon the board of commissioners the duty to fill existing offices, made vacant by the adoption of the act and the organization of the board, under the laws and ordinances then in existence. Authority for this statement is sufficiently contained in the above-noted sections of the act. That the city clerk to be thereafter elected by the commissioners must be elected for a term of three years must therefore be conceded; for neither the statute of 1900, above cited, nor the act of 1911, p. 679, making the term three years, and until a successor shall be appointed and qualified, was legislation inconsistent with the Walsh Act. Hence an unqualified election of a city clerk would have constituted the selected person such for the term then prescribed by law, namely, three years.

[2] If there was a vacancy, the right to elect Thompson to the office for the legal term existed in the board of commissioners. It cannot be asserted that such occupation of the office by the prosecutor as may have constituted him a de facto officer, as to the public and third parties, could be offered to show that there was no vacancy. As against the municipality, there was in fact a vacancy, unless the incumbent was an officer de jure. *Anderson v. Myers*, 77 N. J. Law, 186, 71 Atl. 139; *Oliver v. Jersey City*, 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228; *Loper v. Millville*, 53 N. J. Law, 362, 21 Atl. 568; *Heaviland v. Freeholders*, 64 N. J. Law, 176, 44 Atl. 963. Unless the office was filled de jure by the Omnibus Resolution, or by the subsequent one of October 2d, a vacancy existed at the time of the passage of the resolution under review. Neither of these resolutions was a legal appointment. Each attempts to fix a term less than that provided by law, which was beyond the power of the board. Nor could they fix an indefinite term. *O'Rourke v. Newark*, 66 N. J. Law, 109, 48 Atl. 578; affirmed 66 N. J. Law, 265, 49 Atl. 468, states: "The fact that the common council attempted to fix a term for the positions to which the prosecutor was appointed different from that which the city charter fixes is of no consequence. Such a resolution is of no force as against the express provisions of the city charter."

[3] The prosecutor argues that the resolutions appointing him to office were illegal, one because it continued him in office during the pleasure of the commission, an indefinite term; the other because it elected him to serve for a definite term less than the three year term prescribed by law. He then contends that, while the appointment is in these particulars unwarranted, it is nevertheless

sufficient to continue him in office for the full legal term, although contrary to the express language of the resolutions and to the expressed intention of the appointing body. Our opinion is that, if the appointment was invalid for the reasons urged by the prosecutor, it was also invalid for the legal term. It was not an appointment for three years, which the law prescribed, and therefore the attempt by such resolutions to fill the office must be deemed invalid; and hence a vacancy, in contemplation of law, existed in the office, warranting the municipal action of October 13th, whereby the office of city clerk was filled. One complaining of the illegality of the election to office of another in his stead must first show that he himself has legal title to it.

[4] The Civil Service Act has no application to this case. It was adopted by the city after the adoption by it of the Walsh Act; and therefore the provisions of the latter act prevail against the former. Nor could they apply to a mere de facto officer. To construe the Civil Service Act so as to keep in office one holding such office without right would subvert the beneficent purposes of that legislation. It is manifest that its application must be limited to the protection of officers de jure.

The resolution under review will be affirmed, with costs.

ZIEGLER v. BURK et al.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 218*) — CITY EMPLOYÉ—REMOVAL.

A mere employé of a city under contract, embodied in a resolution passed before the adoption and the taking effect of the Civil Service Act (C. S. p. 3795), terminable at the pleasure of the municipality, is subject to removal, according to the terms of his contract, at any time before that act becomes operative in such city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 589-598; Dec. Dig. § 218.*]

Certiorari by Stephen Ziegler against William F. Burk and others to review a resolution of the Commissioners of the City of Trenton. Affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

McCarter & English, of Newark, for prosecutor. Charles E. Bird, of Trenton, for defendants.

VOORHEES, J. The prosecutor was appointed assistant city treasurer of the city of Trenton January 1, 1910, by the treasurer, for a term of three years, and he continued in that position to the date of the passage of

the resolutions which are sought to be reviewed by this writ. The resolutions under inspection were introduced on the 13th day of December, 1911, at a meeting of the board of commissioners of the city of Trenton, which board had been established under the so-called "Commission Government Act" (P. L. 1911, p. 462), by force of which, it is admitted, the position held by the prosecutor became vacant.

We are not referred to any statute creating the office of assistant city treasurer, either the charter of Trenton (P. L. 1874, p. 331) or any general law. The nearest approach to it is found in the seventeenth section of the charter (P. L. 1874, p. 340), which authorizes the common council "from time to time to appoint such other subordinate officers as the common council deem necessary for the ordering and governing of the city and the execution of the powers and duties conferred and imposed upon the corporation by this act; the officers above named shall hold their several offices for one year, unless sooner removed and until their successors shall be appointed and qualified." This does not authorize an appointment by the treasurer himself, but only by the common council, and then for a term of one year only, the incumbent to be removable at the pleasure of the council. And we take it, therefore, as he was appointed by the treasurer, that he was a mere employé of the city, engaged by the treasurer for the term of three years—the most favorable view for the prosecutor. The status of the prosecutor, therefore, would seem to be determined by the case of *McAvoy v. Inhabitants of Trenton*, 80 Atl. 950, viz., that he was never legally appointed to office as such, but became a mere employé of the city.

The resolutions above referred to, introduced on the 13th of December, were as follows: "Resolved, that the services of Stephen Ziegler as assistant city treasurer be discontinued and ended on the 31st day of December instant." The other resolution was as follows: "Whereas, in the interest of economy in the administration of public affairs, a resolution, has been introduced providing for the termination and ending of the services of Stephen Ziegler as assistant city treasurer: Therefore, resolved, that the city clerk notify the said Ziegler of the introduction of said resolution, and that he make answer thereto, in writing, and file same with the city clerk on or before the nineteenth instant, stating any reasons he may deem proper why said resolution should not be adopted, or appear in person before the board at a meeting to be held on the twentieth inst., and be heard concerning the same."

The copies of these resolutions were sent to the prosecutor, and on the 19th of December he entered his formal protest against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dismissal, arguing that because of the increase of work in the office it was not true economy to dispense with one of the assistants, and that he had been advised that the proceeding was illegal. These resolutions, notwithstanding, were regularly passed on the 20th of December, and a further resolution, as follows: "Resolved, that the subordinate office or position of assistant city treasurer, now held by Stephen Ziegler, be and the same is hereby abolished; and resolved, that this resolution shall take effect January 1st, 1912."

The prosecutor's contention is that by virtue of the so-called "Omnibus Resolution" of August 22, 1911, set out in full in the opinion of *Salter v. Burk*, 83 Atl. 973, decided at this term, the employment of Ziegler by the city treasurer was expressly affirmed by the commissioners, by this recognition of the prosecutor's occupation of the position, and by payment to him for services rendered, and that it was an employment, in the language of the resolution, "until the further order of the commission," and hence he became an employé for an unfixed term. This being so, it is further argued that the prosecutor became subject to the provisions of the Civil Service Act (C. S. p. 3795).

In the case before us, it appears that the Civil Service Act was adopted by the city of Trenton at the general election held November 7, 1911; consequently it became operative in the city of Trenton 45 days thereafter (section 1); that is, on the 22d day of December of that year.

It appears by stipulation in the case that the prosecutor had been placed on the classified service list of the city by the board of civil service commissioners of New Jersey; but the date when he had been so placed is not disclosed. Presumably it could not have been before the Civil Service Act took effect, viz., December 22, 1911. Being an employé, therefore, under the contract embodied in the Omnibus Resolution passed before the adoption of or the taking effect of the Civil Service Act, he was subject to removal, according to the terms of his contract, at any time before that act became operative.

But, aside from that aspect of the case, there was a resolution whereby the position of the assistant city treasurer was abolished by the commission government. The right to abolish a position in the interest of economy is recognized by the twenty-third section of the act, which provides: "Whenever any permanent office or position in the classified service is abolished or made unnecessary, the person legally holding such office shall be deemed to be suspended without pay and the name of such person * * * be placed by the commission on a special list."

The right so to abolish this office or position is not controverted by the prosecutor, provided it be done in good faith (*Belrne v.*

Jersey City, 60 N. J. Law, 109, 36 Atl. 778; *Sutherland v. Jersey City*, 61 N. J. Law, 436, 39 Atl. 710; *Paddock v. Hudson County Bd. Taxation*, 83 Atl. 185); but he urges that in the present case it was not done bona fide, and seeks to justify that position by his own testimony that, in his opinion, the work of the office to which he is attached cannot be properly carried on by a diminished force, inasmuch as the duties of the office have considerably increased with the growth of the city. We think, however, the effort of the commission to cut out what, in their judgment, are superfluous employes, so rendered by systematizing the work and doing away with unnecessary operations, and in other ways making for economy of time and effort, appears to be an honest attempt to economize. An inference of bad faith cannot be drawn from the prosecutor's contrary opinion, based upon the previous conditions with which he was familiar. The testimony shows a reconstruction of the department, whereby duties have been combined, work simplified and reduced to less complicated system, whereby a less number of employes are required. Of the working of this system, the prosecutor has no knowledge. There is, however, no reason assigned which involves the bona fides of this action of the board of commissioners in abolishing the prosecutor's position.

The resolutions under review will be affirmed.

WILSON v. BURK et al.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

OFFICERS (§ 69*)—COMMISSIONER OF ASSESSMENTS—DISMISSAL.

A resolution by the board of commissioners of a city, dispensing with the services of a de facto commissioner of assessment of taxes, is not an interference with his rights.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 69.*]

Certiorari by E. Clifford Wilson against William F. Burk and others to review a resolution of the Commissioners of the City of Trenton. Resolution affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

McCarter & English, of Newark, for prosecutor. Charles E. Bird, of Trenton, for defendants.

VOORHEES, J. The prosecutor brings here for review a resolution passed by the board of commissioners of the city of Trenton on the 20th day of December, 1911, reading as follows: "Resolved, that the services of E. Clifford Wilson as commissioner of assessment of taxes be discontinued and ended

on the thirty-first day of December instant."

He had been one of five commissioners of assessment of taxes of the city of Trenton, pursuant to the act of 1889 (4 C. S. p. 5148), at the time of the adoption by it of the Commission Government Act (P. L. 1911, p. 462), which latter act removed such commissioners from office. *Salter v. Burk*, 83 Atl. 973, decided at this present term. The above resolution was introduced at a meeting held on December 13th, and its further consideration deferred to December 20th. At the same meeting of December 13, 1911, the board of commissioners of Trenton also introduced the following: "Whereas, the board of commissioners of assessment of taxes has been reorganized by the appointment of John P. Dullard, Charles D. Gallar, Robert R. Volk, and Charles H. Metzger, to take effect January 1, 1912; and whereas, it is the judgment of this board that four commissioners will be able to properly and efficiently perform all the work of the board: Therefore, resolved, that the city clerk notify E. Clifford Wilson forthwith of the introduction of a resolution providing for the termination and ending of his services as commissioner of assessment of taxes, and that he make answer thereto, in writing, and file the same with the city clerk on or before the nineteenth inst., stating any reasons he may deem proper why said resolution should not be adopted, or appear in person before the board, at a meeting to be held on the twentieth instant, and be heard concerning the same."

These resolutions were served upon the prosecutor, and on December 20th, the date mentioned therein for him to appear before the board, he did appear, and protested against their passage, because the board was without power to remove him, except in accordance with the Civil Service Act (which had been adopted in Trenton after the adoption of the Commission Government Act), and also because there was no power to diminish the number of commissioners of assessment of taxes. The proposed two resolutions, as introduced, were finally passed on December 20th.

This case is governed by our decision in *Salter v. Burk*, supra. The acting as a commissioner by the prosecutor under the omnibus resolution, set out in the opinion in the cited case, did not constitute him a de jure officer; hence his dismissal was not an interference with his rights. He could not claim protection under the Civil Service Act, assuming that that act was in force at the time of the passage of the resolution. *Ziegler v. Burk*, 83 Atl. 973.

The question of the power of the board to diminish the number of commissioners of assessment of taxes does not arise in this case.

The resolution brought up will be affirmed.

VOLK v. BURK et al.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 138*) — APPOINTMENT OF OFFICERS—REVIEW.

One claiming to be an officer of a municipality, but not such de jure, held to be without legal standing to institute proceedings to review a municipal resolution appointing another to such office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 300-311; Dec. Dig. § 138.*]

Certiorari by Robert R. Volk against William F. Burk and others to review a resolution by the Board of Commissioners of the City of Trenton. Dismissed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Richard S. Wilson and James J. McGoo-gan, both of Trenton, for prosecutor. Charles E. Bird, of Trenton, for defendants.

VOORHEES, J. The prosecutor, by his writ of certiorari, seeks to review the resolution of the board of commissioners of the city of Trenton, electing Michael F. McDade chief clerk to the board of commissioners of assessment of taxes, passed at a meeting of that body on the 29th day of November, 1911. The prosecutor had been appointed clerk to the board of commissioners of assessment of taxes of Trenton in January, 1907, under an act empowering the commissioners of assessment of taxes to appoint a clerk. P. L. 1890, p. 261 (4 C. S. p. 5149, § 89). The prosecutor under this act we think was a city officer, as distinguished from a mere employé. The position is in the act termed an office, and therefore the adoption of the city government act and the subsequent organization of the board of commissioners ipso facto terminated the prosecutor's term as such clerk.

The adoption by the board of commissioners of the so-called "Omnibus Resolution" recited in the opinion in *Salter v. Burk*, 83 Atl. 973, decided at this term, did not in our opinion constitute a legal appointment of the prosecutor as clerk to the board of commissioners of assessment of taxes. The power to appoint such clerk resided not in the board of commissioners of the city of Trenton, but under the above cited statute. Hence the action of the board of commissioners of Trenton failed to constitute an appointment of the prosecutor. Whether or not the attempted appointment of Michael F. McDade by the board of commissioners of the city of Trenton by the resolution under review was valid or not need not be decided in this case. If it was a valid appointment, the prosecutor, not being a de jure officer, cannot complain. If it was invalid, he still is without

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

standing to set it aside. The principles in this case are governed by *Salter v. Burk*, supra, and *Wilson v. Burk*, 83 Atl. 973, decided at this term.

The writ of certiorari will therefore be dismissed.

HIRSCH v. BURK et al.

(Supreme Court of New Jersey. July 10, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 48*)—COMMISSION GOVERNMENT ACT—CONSTRUCTION.

The language of the so-called Commission Government Act (P. L. 1911, p. 462) is broad enough and sufficiently clear to include a department of the city of Trenton created by special act (P. L. 1859, p. 38), which acted as a governing body having functions for the administration of the affairs of the municipal waterworks, and this department and the water commissioners were abolished as soon as the commissioners for the government of the city of Trenton organized.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130–133; Dec. Dig. § 48.*]

Certiorari prosecuted by Leon D. Hirsch against William F. Burk and others to review a resolution dismissing the prosecutor from the position of assistant secretary-treasurer of the Trenton Waterworks. Resolution affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

McCarter & English, of Newark, for prosecutor. Charles E. Bird, of Trenton, for defendants.

VOORHEES, J. The prosecutor in this case was appointed assistant secretary-treasurer of the Trenton Waterworks by the board of water commissioners created by an act of the Legislature approved March 1, 1859 (P. L. 1859, p. 38). The fact that he was an appointee of the water commissioners created by this act differentiates his case, he contends, from *Ziegler v. Burk*, 83 Atl. 976, decided at this term, which otherwise is controlling. This act empowers the water commissioners to sue and be sued, prosecute, and defend actions in the name of the water commissioners of the city of Trenton, and enacts that they shall be considered from the time of the organization of the board a body corporate. The first commissioners were appointed by the act, and thereafter it was provided that the common council should annually elect two commissioners for three years.

It is argued that the prosecutor occupies a different position from *Ziegler*, because the board of commissioners of the city of Trenton have no jurisdiction whatever over him. It is also urged that the so-called Commission Government Act (P. L. 1911, p. 462) did not abrogate the separate organiza-

tion or department known as the "Water Department." The special act provided that "the waterworks shall be conducted and managed exclusively by and through a Board of Commissioners" to possess all the authority and powers theretofore exercised, and performed by the directors of the private water company, formerly owning the works which said special act provided might be acquired by the city. These waterworks were essentially matters of local and municipal concern, and the board organized for the purpose of controlling them is not a state agency, but is in substance a municipal board, and its members are city officers. Such municipal board is a representative and agent of the city, and is not an independent corporation, although it may be authorized by statute to sue and have a common seal and to contract with reference to the works in its own name. *Morton v. Power*, 33 Minn. 521, 24 N. W. 194. The opinion in *Board of Water Commissioners v. People*, 137 Ill. 660, 27 N. E. 698, reads as follows: "The mere fact that the Legislature saw fit for purposes of convenience and of administration to give it (the board of water commissioners) a corporate existence and invest it with certain corporate powers, did not prevent it from being simply a branch or an agency, created for a special purpose of municipal government." See, also, *Brenan v. People*, 176 Ill. 620, 52 N. E. 353, in which the foregoing case is cited.

Although they were in a sense a body corporate, yet they were amenable to general acts of the Legislature concerning municipal boards or departments. A case very similar to the one under consideration is *Cohn v. New Brunswick*, 73 N. J. Law, 128, 62 Atl. 285. The water commissioners in that city were a body corporate with power to sue and be sued, yet they were held amenable to "an act regulating the receipt and disbursement of money and the passage of ordinances pertaining thereto, in any city of this state." P. L. 1904, p. 259. The creation of such departments is a legislative function, and not a municipal function, unless specially delegated to the municipality, and it follows that such departments may also be abolished by the power which created them. Did the so-called Commission Government Act effect the abolition of the water commissioners in the city of Trenton? The language of the act is: "Upon the organization of the commissioners in any such city, elected under this act, the city council, or other governing body or bodies, theretofore acting as governing body or bodies in such city, and having any other functions, shall be ipso facto abolished." We think this language is broad enough and sufficiently clear to include a department of the city such as that created by the special act above cited, which acted as a governing body having the functions for the ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ministration of the affairs of the municipal waterworks, and hence that this department and the water commissioners were abolished as soon as the commissioners for the government of the city of Trenton organized. The resolution, therefore, dispensing with the services of the prosecutor, is placed upon the same basis as the resolution in *Ziegler v. Burk*.

The resolution in question will therefore be affirmed, with costs.

**TRUSTEES OF FREE PUBLIC LIBRARY
OF NEWARK v. CIVIL SERVICE
COMMISSION OF NEW JERSEY.**

(Supreme Court of New Jersey. July 13, 1912.)

(*Syllabus by the Court.*)

MUNICIPAL CORPORATIONS (§ 216*) — EMPLOYÉS—QUALIFICATIONS—CIVIL SERVICE.

The action of the state civil service commission in classifying under the Civil Service Act (C. S. p. 3795) the appointees and employés of a free public library organized under "An act to authorize the establishment of free public libraries in the cities of the state" (P. L. 1884, p. 110), and governed by the revised act (P. L. 1905, p. 273), *held* valid because such appointees and employés are in the paid service of the municipality within which such library is located.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 578; Dec. Dig. § 216.*]

Certiorari prosecuted by the Trustees of the Free Public Library of Newark against the Civil Service Commission of New Jersey to set aside the action of the commission in classifying appointees and employés of the free public library of Newark. Action of the commission affirmed.

Argued February term, 1912, before BERGEN, VOORHEES, and KALISCH, JJ.

Pitney, Hardin & Skinner, for prosecutor. Edmund Wilson, Atty. Gen., and Nelson B. Gaskill, Asst. Atty. Gen., for defendant.

VOORHEES, J. The prosecutor by this writ of certiorari would set aside the action of the state civil service commission in classifying the appointees and employés of "the Trustees of the Free Public Library of Newark" as part of the civil service of the municipality of the city of Newark.

The following facts appear: The provisions of an act entitled "An act to authorize the establishment of free public libraries in the cities of this state" (P. L. 1884, p. 110) were duly accepted by the city of Newark at an election on the 11th day of October 1887. Thereafter five trustees were appointed by the mayor of the city of Newark from among the citizens of that city to serve for the terms of one, two, three, four, and five years, respectively. Said five trustees, together with the then mayor and city superintendent of schools, duly organized, pur-

suant to the provisions of said act, on the 9th day of May, 1888. The trustees at the present time are the present mayor and city superintendent of schools of said city and five trustees appointed from time to time in succession to the original trustees. The said board of trustees was constituted by said act a body corporate under the name of the prosecutor.

The prosecutor has established, maintains, and administers in the said city of Newark a free public library, as authorized by the provisions of the act under which said prosecutor was originally incorporated and by the act entitled "An act concerning free public libraries," approved April 14, 1905 (P. L. 1905, p. 273), by the provisions of which the prosecutor is now governed. The city of Newark since the adoption of the act has appropriated and raised by taxation annually for the support and use of said library moneys in accordance with the provisions of the act of 1905, and has paid them over to the treasurer of the prosecutor, to be used by the prosecutor for the support of said library. On the 27th day of December, 1910, the civil service commission of New Jersey, claiming to act under the provisions of the Civil Service Law (P. L. 1908, p. 235), classified the employés of the prosecutor as of the classified civil service of the city of Newark, and as subject to the jurisdiction of the civil service commission and to the operation of the civil service law.

The question presented is whether the appointees and employés of the corporation known as "the Trustees of the Free Public Library of the City of Newark" fill offices or positions in the paid service of the state or of the city of Newark. If they do not, they are not subject to the provisions of the Civil Service Act. The first general act which authorizes cities to establish free public libraries was passed in 1879. P. L. 1879, p. 262. Before that, legislation authorizing the formation of corporations for library purposes referred not to associations of a public character, but in the nature of private corporations, with power to issue stock and disconnected with any governmental agency. See P. L. 1854, p. 448; 2 Gen. St. 1895, p. 1915; P. L. 1856, p. 47; P. L. 1857, p. 409; P. L. 1860, p. 96; P. L. 1867, p. 272; P. L. 1882, p. 34; P. L. 1884, p. 139—as examples of such enactments. The act of 1879, *supra*, gave the common council the right to establish public libraries for the benefit of the inhabitants of any city and to levy a tax of not more than one-fifth of a mill on the dollar annually on all taxable property in the city to be collected like other taxes to be known as the "Library Fund." General oversight and control by the city is provided for in this act by the appointment by the mayor, with the approval of council, of the directors, and although such directors have power to make by-law-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

for their own guidance in conformity with the act, and exclusive control of the expenditures, etc., yet all moneys are to be deposited in the city treasury, but separate from the city's other funds, and to be drawn by city officers upon the vouchers of the directors. The library and reading room shall be forever free to the use of the inhabitants of the city, subject to reasonable rules to be adopted by the board "in order to render the use * * * of the greatest benefit to the greatest number." Reports are to be made to common council, and the latter body are empowered to pass ordinances imposing penalties for the punishment of persons injuring the library or grounds, and for the failure to return any books, to be enforced in any manner provided in the charter of the city.

It is true that this act with the evident intent of encouraging private gifts provides that "any person desiring to make donations of money * * * shall have the right to vest the title to the money * * * in the board of directors * * * to be held * * * by such board when accepted, according to the terms of the deed, etc., * * * and as to such property, the board shall be held and considered to be special trustees." This act was permissive, and did not contain a referendum. It, however, sufficiently indicates a legislative intent to furnish to the inhabitants of cities by means of taxation free access to books for the improvement of their condition, while yet securing to donors as theretofore the same security for gifts as if this public character had not been imported into the organization. It was not an incorporation perhaps, but became a part of the municipal government. Act 1884, p. 81, may be passed without further comment than to state that it was designed to encourage free libraries, and where an incorporation under the act of 1875, and a free library maintained by public moneys coexisted in the same city, the municipal body might loan the latter to the former, conditional upon the city's representation in the board of trustees of the incorporated association.

We next notice the act of 1884, "An act to authorize the establishment of free public libraries in the cities of this state. P. L. 1884, p. 110. Under this act, the prosecutor claims its present incorporation. It contains a referendum under which its provisions have been adopted by the city of Newark, and the trustees are constituted a body corporate. Seven trustees constitute the board, one of whom shall be the mayor of the city, and one the superintendent of public instruction ex officio, the other five to be appointed by the mayor. The treasurer is to give bonds to the city for the faithful performance of his duties in an amount which the board of aldermen shall fix. The board of trustees, who shall act without compensation, and are interdicted from incurring expenses or creating obligations in excess of annual

appropriations for library purposes, and of its funds on hand, are intrusted with the management of the property which they shall hold in trust, and are authorized to receive from the city the money raised by taxation for library purposes. By this statute it is "the duty of the appropriate board of said city annually thereafter to appropriate and raise by tax, in the same manner as other city taxes are assessed, levied and collected in said city, a sum equal to one-third of a mill on every dollar of assessable property * * * of said city * * * which sum * * * shall be used for no other purpose than that of a free public library." The trustees may receive and manage any donation made or to be made "for the establishment, increase or maintenance of a free public library within their city."

A supplement passed in 1895 (P. L. 1895, p. 383) gave the trustees, when in their judgment it was advisable to purchase lands or erect buildings, in excess of annual appropriations and funds on hand, power to certify to council the amount of money necessary for the purpose, and the city authorities in their discretion, with the consent of the mayor, may empower the board to make the expenditure to such amount as the council may deem proper, no land to be purchased except with concurrence of council and approval of mayor, and then the title to be taken in the name of the city, and be exempt from taxation, but the control to be in board of trustees. The city may issue bonds, with sinking provision, for their payment, for this purpose, and may direct the library board to pay to the sinking fund moneys then on hand.

In 1905 an act was passed (P. L. 1905, p. 273) consolidating and revising the laws upon the subject of free libraries, by which all such organizations are now governed and inconsistent legislation is repealed, and since July 4, 1905, when it became operative, the prosecutor has been amenable to it. It is a substantial re-enactment of all previously existing acts.

The prosecutor argues that the legislation hereinbefore referred to places the absolute control and management of the library and its funds raised by taxation in the body corporate created by it; that the establishment of libraries are not usually objects of municipal corporations, either by definition or enumeration; that charters in the state have not ordinarily included such power, and that of Newark (P. L. 1859, p. 476) is silent in this particular; that their establishment now is possible under the general legislation only after referendum, and that they are then not intrusted to municipal management. It is asserted that, under the plan outlined in this general legislation, to use the language of the brief, "the library corporation is not a mere fractional part of the municipality, but is an independent entity created by the state, deriving its authority directly from the Leg-

lislature and expressly designated by that body as the only means whereby a free public library can be maintained at public expense, within the limits of a municipality. By this legislation, the conduct of a public library is not only not intrusted to the municipality within whose territory it may be established, but is expressly removed from its control and intrusted to a corporation specially created for the purpose." We cannot give our assent to this argument.

In this state libraries have for many years been considered as charitable institutions. They have been exempted from taxation, and with regard to a specially incorporated library with a stock issue it was held by the Court of Errors in *Re Newark Library Association*, 64 N. J. Law, 265, 45 Atl. 622, wherein the association contended that it was "a charitable enterprise pro bono publico," that "the charter and history of the association show that it was organized not for pecuniary gain, but for educational purposes, and that so long as the association was a going concern the shares of stock represented scarcely anything more than the holders' contribution to this benevolent object." Of late years, however, highly organized systems of education have been adopted throughout the country, and specially is this true of our state.

The state not only fosters its public school system, but a review of the foregoing legislation to our minds indicates a public policy to bring into requisition, as an adjunct to it, the library as a means of placing in the hands of its citizens sources and collections of knowledge to aid and add to their education, while the public schools are performing their functions, and after the attendants upon the schools have been graduated therefrom. The spread of knowledge and the making it possible for all citizens to gain an education is deemed for the highest interest of the state. Public libraries, especially of late years, have been counted as a means to this end, so much so that the Legislature has deemed it wise to confer the right upon a municipality to give in aid money raised by taxation to these enterprises.

To sustain the right to make these donations, in view of article 1, §§ 19 and 20, of the Constitution, which forbid any city to give any money or property to or in aid of any individual association or corporation, and further forbid the donation of land or the appropriation of money by the state, or any municipal corporation to or for the use of any society, association, or corporation whatever, it would seem necessary to hold that these corporations are a branch or a board of the municipal government, public in their character, to manage educational matters for the benefit of the whole community. They have been invested with a right of eminent domain by the state. They foster

the general good of the community by promoting the intellectual health which leads to good citizenship, perhaps as much as boards of health promote the bodily health and physical soundness of the citizen, always considered a requisite to good and efficient government, and a matter of governmental concern. To justify the donations of public moneys, it seems necessary to regard these organizations as public agencies of the state, created by it in connection with its municipalities, and as an incidental part of their government.

In *Rutgers College v. Morgan*, Compt., 70 N. J. Law, 460, at page 473, 57 Atl. 250, at page 255, it was held that the Constitution "does not bar instrumentalities for public education provided by the state and under its control by general laws, where the appropriation is made for such schools. * * * They were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education, under its own supervision." A construction of the Library Act holding libraries thus constituted to be under the municipal control and as furnishing facilities for public education will render it consonant with the Constitution, and enable the needed support to be furnished as contemplated by the Legislature. That the employes of this free public library are officers in the paid services of the city of Newark seems to follow at once from the determination that the library association, properly considered, is a mere municipal board, and not an independent entity, although constituted a corporation by statute, and such we think is its true character.

Although the Legislature saw fit, for its convenience and for purposes of the administration of this branch of its educational duty, as now constituted under its public policy, to create a corporation will not prevent such corporation from being considered a mere branch or agency for that special purpose. *Hirsch v. Burk*, 83 Atl. 979, decided at this term. See, also, 1 Dillon, *Mun. Corp.* (Ed. 1911) vol. 1, p. 696.

The action of the state civil service commission in classifying the appointees and employes of the prosecutor will therefore be affirmed.

HOWLAND v. ANDRUS.

(Court of Chancery of New Jersey. June 18, 1912.)

1. INJUNCTION (§ 62*)—BREACH OF RESTRICTIVE COVENANTS.

Where a covenant on the part of a grantor, as to restrictions to be inserted in deeds of adjoining lots, was part of the consideration for the grantee's deed and was intended to impose a burden on all lots for the benefit of all, equity will restrain its violation, not only against the grantor-covenantor, but also against

all subsequent purchasers with notice of the covenant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 124-127, 129; Dec. Dig. § 62.*]

2. DEEDS (§ 174*)—RECORDING—NOTICE.

P. L. 1903, p. 489, § 1, provides for the recording of all instruments in any wise affecting the title to any lands, tenements, or hereditaments, and section 2 provides that the provisions of the conveyance act shall apply to such instruments. Conveyance act (P. L. 1898, p. 690) § 53, provides that, as to instruments authorized to be recorded, the record shall thereafter be notice to all subsequent purchasers of the execution of the deed or instrument and its contents. *Held*, that a purchaser of a lot had constructive notice of an agreement of her grantor, contained in a recorded grant of another lot in the same parcel, that no house should be built on any lot sold therein whose front was nearer than a given distance from the street on which the lots fronted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 544; Dec. Dig. § 174.*]

3. COVENANTS (§ 51*)—RESTRICTIONS — CONSTRUCTION.

One covenant in a deed restricted the grantee from locating his dwelling nearer than 60 feet to a certain street, while another bound the grantor not to convey any adjoining lots "except by a deed containing the same restrictions as above recited." A conveyance of lots located at the corner of the street, on which the first grantee's lot fronted, and another street, contained no restriction on the right of the grantee to build with respect to the first street. *Held*, that the agreement with the first grantee referred to the first street, and, although the second purchaser's house faced the cross street, the side of it must be held to be the front line intended by the covenant, so as to preclude its being built within 60 feet.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 50; Dec. Dig. § 51.*]

4. DEEDS (§ 176*)—BUILDING COVENANTS—ENFORCEMENT.

Though an owner of property, holding under a deed containing a restrictive building covenant, built his house with the second story overhanging a piazza which extended four feet over the building line fixed, it would not so substantially affect the beneficial effect and operation of the covenant as to preclude such owner from enforcing it against purchasers of adjoining lots with notice of the location before their purchase.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 546; Dec. Dig. § 176.*]

5. COVENANTS (§ 72*)—BUILDING COVENANTS—ENFORCEMENT.

And where the builder located his house as he did with the consent of his grantor, the original owner of all the property, and as a substantial compliance with the restriction, one subsequently purchasing adjoining lots from such grantor may not treat the location as made without agreement and in the assertion of independent adverse rights under or in violation of the covenant, but is bound by the consent given.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 73-76; Dec. Dig. § 72.*]

3. INJUNCTION (§ 113*)—RESTRICTIVE COVENANTS—ENFORCEMENT.

An owner of property is not estopped by aches to enforce a restrictive building covenant against an owner of adjoining property where he objected to the erection of the building as soon as its proposed location was brought to his attention, and any delay in filing a bill for an injunction was caused by a

neighborly agreement that work on the building would not be commenced until the controversy over the location was settled; the conduct and statements of the builder and his agents showing that he proceeded with the work at his own risk.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 189-210, 263; Dec. Dig. § 113.*]

Injunction by Henry S. Howland against Pauline F. Andrus. Decree for complainant advised.

This suit is brought to enforce a building line restriction in a suburban residential district of the town of Montclair. Joseph Bardsley, the owner of a tract of land lying between Park street on the east and Valley road and North View avenue on the west, about 900 feet in length by 500 feet in width, laid out the land in building lots, with a street called Wildwood avenue 55 feet in width through the middle of the tract from east to west. This avenue was conveyed to the town by Bardsley and his grantees by a deed dedicating it as a public street. The deed was dated June 1, 1903, duly recorded, and referred to a map attached, which showed the lots located on both the northerly and southerly sides of the avenue. The lots, except the corner lots, fronted 100 feet on Wildwood avenue, and most of them were about 220 feet in depth. The entire tract had been laid out in building lots by Bardsley before the dedication, and previous thereto one lot on the north side of Wildwood avenue had been sold to Mr. Mead in 1901, and one on the south side to Mr. Grout in 1902. Mead and Grout joined in the dedication deed. The lots in the tract were put on the market for sale as fully restricted by Mr. Bardsley personally and through his agents, and also by a sign on the property near the Valley road. The full restrictions inserted in the Mead and Grout deeds were covenants on the part of the grantees (1) that the property should be used for residential purposes only; (2) that not more than one dwelling should be erected on the lot; (3) that the cost of the dwelling should not be less than \$6,000 (on Mead's lot) and \$8,000 (on Grout's); (4) that the dwelling should be so located that the front line thereof shall not be nearer than 60 feet to the street measured at right angles thereto; (5) that the front line of any outbuilding erected should not be nearer the street line than the rear line of the dwelling. These covenants and agreements were to run with the land and be in force for 25 years.

Upon the lot purchased by Grout, a house had been erected by Bardsley himself previous to the purchase, the front line of which was approximately 60 feet from the street line of Wildwood avenue. After the dedication of the avenue and in 1903, Bardsley conveyed to one Bruggeman a lot on the north side of Wildwood avenue adjoining Mead's lot on the west, with the same covenants on

the part of the grantee, except that the building cost was increased to \$9,000. These lots of Grout, Mead, and Bruggeman fronted only on Wildwood avenue, and upon their deeds no question could arise as to the street referred to in the restriction. Complainant was the next purchaser in March, 1906, and at that time both Mead and Bruggeman had erected on their respective lots dwellings complying with the restrictions, and complainant purchased a lot on the south side of Wildwood avenue fronting only thereon. This lot on its easterly side adjoined the corner lots at the southwest corner of Park street and Wildwood avenue, and was distant from Park street about 200 feet. The lines of Park street and the avenue form an acute angle, and on the avenue complainant's lot is about 208 feet from Park street, while at the rear it is 192 feet. This fact is important, because defendant's house has been built on the corner lot parallel with Park street and not with Wildwood avenue.

On the map attached to the dedication the corner lots both on the northwest and southwest corner of Park street and Wildwood avenue were laid out as fronting on Park street and abutting on the adjoining Wildwood avenue lots. Complainant previous to his purchase of his abutting lot had not actually seen the map, but knew, as he says, that the corner lots fronted on Park street. He first contemplated, as he says, the purchase of the two corner lots instead of the lot abutting on them, and during negotiations on this basis was informed by Mr. Bardsley that the building to be erected on the corner lots was to be 60 feet back from Wildwood avenue. On concluding to purchase the abutting lot, complainant required, as he says, some protection by a restriction on the corner lots, and Bardsley by a letter of March 14, 1906, stated that he had instructed the insertion of a clause in the deed "to the effect that the adjoining plots will be restricted in the same manner as yours." On March 16, 1906, Bardsley conveyed to complainant his lot fronting 100 feet on Wildwood avenue by a deed containing the same restrictions *ipsisssimis verbis* as all the previous deeds; the building cost being \$9,000. This further special covenant follows on the part of the grantor, and its precise form is important because of the correction of the original draft, which is noted before execution: "And the parties of the first part hereby agree that they will not convey any of the adjoining lots, except by a deed containing the same restrictions as above recited." This interlineation and the erasures were noted by the attorney of the Title Company who received instructions to draw the deed and who witnessed the deed.

Complainant after the purchase erected at once a dwelling, locating its front line approximately 60 feet from Wildwood avenue, and, after an approval as to location by

Grout, his neighbor on the west, and Bardsley, the then owner of the lots adjoining on both sides. In the following month, Grout purchased the vacant lot lying between complainant and his own lot, with the usual restrictions. Grout still owns this lot and it forms part of his residence property of 200 feet frontage on the avenue. In September, 1907, the lot on the north side of Wildwood avenue, opposite complainant's and abutting on the corner lots on the north corner of Park street and the avenue, was sold to a Mr. Ludlow, and in May, 1909, and February, 1910, lots on the north side of the avenue were sold to Vaux and Betts, with the usual restrictions. On December 17, 1909, occurred the first sale of any of the corner lots located on Park street, when Bardsley conveyed to Mr. Hubbard the lot on the northwest corner and described as fronting 117 feet on Park street and 185 feet on Wildwood avenue. In this deed the building is restricted to dwellings, but the restriction of the building line was "not less than 50 feet from Park street or 30 feet from Wildwood avenue." No dwelling has been erected on the Hubbard corner lot.

The defendant, Mrs. Andrus, on October 1, 1910, purchased the tract on the southwest corner of Park street and Wildwood avenue, fronting about 226 feet on Park street and 208 feet on Wildwood avenue. This comprised the two corner lots shown on the map, but the description conveys as a single lot, and without any reference to the map. The restrictions are (1) that no more than two one-family private dwellings costing not less than \$9,000 each are to be placed on the tract; (2) the houses to face on Park street on lots having a frontage of not less than 100 feet; (3) the front foundation walls of said dwellings to be at least 50 feet from the westerly side of Park street; (4) the outbuildings to be next the southerly line of each lot and no nearer Park street than the rear line of the dwelling. No restriction as to distance from the Wildwood avenue line is made. No restrictive covenants on the part of the grantor are contained in the deed, nor was there in this deed, or in any other of the grantor's deeds except the deed to the town of Montclair, any reference to the map referred to in the town deed. The conveyance to complainant, containing the grantor's covenant as to restrictions to be put in the deeds for adjoining lots, was recorded on March 19, 1906, and, as defendant's actual notice of this covenant is denied and has not been proved by the complainant, the deed is relied on as constructive notice. The husband of defendant, who acted as her agent in the purchase of the lot, admits that, from passing through the avenue, he knew in a general way that the Wildwood avenue houses were on a line at a uniform distance from the avenue, but says that he had no actual knowledge of the

covenant in complainant's deed in reference to restrictions on adjoining lots until about April 10, 1911, after he had located defendant's house and commenced its construction. Defendant's house, a building about 60 feet front by 30 feet deep, with an extension of about 17 feet, is located parallel with Park street and not Wildwood avenue, and 75 feet distant from Park street; the north line of the house as located is 40 feet only from Wildwood avenue on its easterly end, and 36 feet at the westerly end; Park street and Wildwood avenue making an acute angle.

The substantial questions in the case raised by the defense, as to the operation and effect of the restrictive covenant in the complainant's deed, are (1) that the covenant is purely a personal covenant of the grantor, and neither runs with defendant's land at law, nor creates a burden thereon in equity; (2) that the covenant in complainant's deed strictly construed, as it is claimed it must be, applies, so far as the corner lot is concerned, to a frontage of the house on Park street and not on Wildwood avenue. As further defenses to the issuance of an injunction, if the covenant should be held to impose an equitable restriction on her lot, defendant sets up (1) complainant's own violation of the restriction as to the building line, by the erection of his own house nearer than 60 feet, and (2) laches in application for the injunction.

B. D. Whiting, of Newark (Sommer, Colby & Whiting, of counsel), for complainant.
E. B. Goodell, of Montclair, and John R. Hardin, of Newark, for defendant.

EMERY, V. C. (after stating the facts as above). [1] The covenant on the part of the grantor as to the restrictions to be inserted in deeds of "adjoining lots" was part of the consideration for the complainant's deed. The restrictions upon complainant's lots were imposed by way of benefit to the adjoining lots of the grantor and for the purpose of carrying out a general plan as to lots fronting on Wildwood avenue. They were declared to run with the lands conveyed, and the covenant as to similar restrictions on the adjoining lots was intended to be of the same character as attaching a burden on the land and to run with the land, and not to be merely personal to the grantor. And so far as purchasers with notice are concerned, the covenant is enforceable and must be considered as inserted in their deeds upon the fundamental principle that equity regards that as done which ought to be done. This principle is the general basis and origin of equitable estates and interests in lands arising out of executory contracts in relation thereto. 1 Pom. Eq. Jur. § 369.

An executory covenant restricting the use

of real property operates by way of imposing an equitable burden on the property affected, as pointed out by Chief Justice Beasley in *Brewer v. Marshall*, 19 N. J. Eq. 537, 544, 97 Am. Dec. 679, Err. & App. 1868, and by Sir George Jessell in *London & S. W. R. Co. v. Gomm*, 20 Ch. Div. 582, 583 (C. A. 1882); 3 Pom. Eq. Juris. § 1295, and notes. Purchasers acquiring legal title to the lands subsequent to a restrictive contract made by their grantor and with notice thereof hold the lands subject to the burden. *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Leaver v. Gorman*, 73 N. J. Eq. 129, 131, 67 Atl. 111 (Stevens, V. C. 1907).

[2] By the act of 1903 (P. L. p. 489) § 1, all instruments of every kind in any wise affecting the title to lands, or containing any agreement in relation thereto, or granting any right or interest therein, were authorized to be recorded, and by section 2 the provisions of the conveyance act (Revision of 1898) were extended to all such instruments. By the Fifty-Third section of the conveyance act revision (P. L. 1898, p. 690), it was provided that, as to instruments authorized to be recorded, the "record shall be thereafter notice to all subsequent purchasers of the execution of the deed or instrument and of its contents." By force of this statute, defendant, as purchaser of a lot in reference to which the agreement was made, had constructive notice of the agreement of her grantor relating to the covenant to be inserted in the deed for defendant's lands. Whether the record of the agreement would have been constructive notice if it had been contained in any deed or instrument executed by the grantor other than that of the lot adjoining defendant, it may not be necessary to determine, but, as it seems to me, defendant was bound to examine the record of the conveyances of adjoining lots, and is as much bound by agreements in reference to her lot benefiting these adjoining lots as if the deeds for the latter had contained grants of legal easements or covenants legally running with the land for the benefit of the adjoining lots.

The evidence shows, I think, that, as to lots fronting or sold as fronting on Wildwood avenue, there was a general plan of restricted building line adopted by the grantor and enforceable against him and all claiming under him, and by one grantee of lots fronting on the avenue against any other grantee, without regard to any express covenant on the grantor's part in his deeds, but this evidence as to such general plan is not perhaps sufficient of itself to cover the corner lots as laid down on the map. But as no lots were sold by reference to the map, it was plainly within the power of the grantor to change the frontage of the corner lots, and by an express contract to make clear to an intending purchaser of an abutting lot that the restriction as to Wildwood avenue did extend to the corner lot.

And this was the object, I think, of his express covenant in complainant's deed.

[3] Assuming that the covenant in question affects defendant's lands, it is next claimed on her behalf that the restrictive covenant, properly construed, would not apply to the line of her dwelling toward Wildwood avenue, but is a covenant applying to the front line of the building to be erected, which line is toward Park street. The agreement with complainant in reference to the adjoining lots was that they should not be conveyed "except by a deed containing the same restrictions as above recited," i. e., as recited in complainant's deed. Inasmuch as complainant's lot fronted or bounded only on Wildwood avenue, this avenue must be the street referred to in complainant's deed as the street from which the distance of 60 feet was to be measured. If, therefore, the deed conveying the adjoining lots contained the same restrictions as recited in complainant's deed, they must necessarily, I think, apply at least to the line of the house measured from Wildwood avenue, and the language of the covenant, when inserted, should be such as to apply to Wildwood avenue. If the same restrictions as to distance of the front line from Wildwood avenue are to apply, then no part of this front line can be nearer than 60 feet, and this without regard to the street on which the house itself on the corner lots may front. Complainant's deed would not, as I take it, prevent his building a house on his lot which fronted toward Park street, but no part of the line of his dwelling which "fronts" to Wildwood avenue can be nearer than 60 feet. For the purpose of the covenant, the line of the dwelling "fronting" toward the street from which the measurements are to be taken is to be considered as the "front line" intended by the covenant, although this line might be in fact the side line of the dwelling.

On the merits of the case, therefore, and so far as relates to the question whether defendant's lot is subject to the burden of the covenant restricting the distance from Wildwood avenue, the complainant's case is made out.

[4] Defendant further claims that the complainant is disentitled to the aid of a court of equity in enforcing the covenants by injunction, or otherwise, for two reasons: First, because he has himself violated the covenant by the erection of his dwelling four feet within the restricted line; and, second, because of laches in his application for relief.

As to the erection of complainant's dwelling, the facts proved are that the dwelling fronts toward Wildwood avenue; the building being about 60 feet in width. The cellar or foundation wall of the entire front is on or back of the restricted line, but a terrace or piazza supported and inclosed by a solid wall three or four feet high extends about 10 feet beyond the cellar line

and is about 30 feet in length—one-half of the whole frontage of the house. This piazza or terrace is an open one, but above it the second story of the house (being at this part about 30 feet in width) extends four feet beyond the 60-foot line, and is about four feet nearer the street line than the cellar wall. This part of the dwelling projects over the rear portion of the open piazza and is supported by four columns, which go through the piazza floor and rest on piers. The open piazza or terrace itself cannot in my judgment be considered as a portion of the front line of the dwelling within the restricted line, but the second story projection is within the restricted line, and as to this the real question is whether this violation of the covenant by complainant is such as to disentitle him to any enforcement of the covenant whatever.

The equitable rule applicable to the solution of the question is the general fundamental rule or maxim that the complainant must come into court with clean hands, or, as it is sometimes expressed: "He that hath committed iniquity shall not have equity." In determining whether the complainant is chargeable with such inequitable conduct as to disentitle him to enforce any rights whatever under a restrictive contract, the whole situation and circumstances as to the nature, burden, and object of the restrictive contract, and the extent to which the violation by the complainant affects the contract, must be considered as well as the circumstances of its violation. The denial of the remedy or relief upon the covenant is not a conclusion which follows necessarily upon the fact of complainant's violation, but the denial of complainant's right to equitable relief for protection of his equitable right depends on the whole circumstances of the case as affecting his own equitable status.

The violation to have this effect must, I think, be such as to affect in a substantial manner the benefit to the adjoining lots of the covenant imposed on the complainant as part of the consideration of the grantor's deed to complainant. Considering the manifest general object of the covenant and the effect of this structure, this projection of the second story a few feet beyond the 60-foot line does not, in my judgment, so substantially affect the beneficial effect and operation of complainant's own covenant as to disentitle complainant to its enforcement against purchasers of the adjoining lots with notice of the location before their purchase.

[5] There is a further reason why the complainant's construction of his dwelling on these lines cannot be considered as an inequity which deprives him of any relief on his grantor's covenants. It is proved that, before locating and building his dwelling, he submitted the plans to his grantor, Mr. Bardsley, then still the owner of the adjoining lots on both sides, and that Mr. Bardsley approved and consented to them as comply-

ing with the restrictions, and the dwelling was erected after such approval. This approval was proved, it is true, by parol evidence dehors the deed, and no evidence of defendant's knowledge of it has been shown. But while this fact would be important as a defense if the application now were made to enforce against defendant a parol question of the covenant in the deed of which defendant has constructive notice, it is not entitled to any decisive consideration upon the precise question now to be solved, viz., whether the complainant's location of the upper story of his dwelling a few feet within the restricted line is, on the whole circumstances of the case, such an inequity that he should be deprived of any equitable relief upon the covenants as to the adjoining lots. And, in solving that question of complainant's status, the conduct of the grantor who then owned these adjoining lots, in approving the construction as a proper location of the line under the covenant, is vital and decisive.

Defendant's contention is that this location, even if consented to by the grantor, had the effect ipso facto of relieving the adjoining lots from any burden of the covenants as to the restricted line, so far as they were imposed by the deed itself, and that any subsequent grantee, without notice of the location by consent and with notice only of the restriction in the deed, holds the adjoining lots free from any restriction as to the distance of the dwelling from Wildwood avenue merely because a portion of the dwelling is within the line.

In my judgment the matter of the location of the dwelling on the line in this case was somewhat analogous to the location of a boundary, and locations of dwellings, not being such as apparently and substantially affect the beneficial operation of the covenants, should not as between subsequent purchasers claiming under the parties agreeing on the location be treated as if made without agreement and under the assertion of independent adverse rights under the covenant, or in violation of it.

Defendant's claim that this location was a violation of the covenant, putting complainant in such an inequitable position as to disentitle him to enforce the covenant in equity, is therefore fairly met, I think, on the proofs with the answer that the location was agreed on by the parties then interested, as a substantial compliance with the restriction, and with the object of substantially complying with it and securing its benefits to the adjoining lots.

[8] The objection of laches on the part of the complainant in applying for relief is not well founded, and for two reasons: First, there was in fact no unreasonable delay. Complainant objected to the erection of the defendant's dwelling promptly and as soon

as its proposed location was brought to his notice. He had immediate conferences on the subject with the defendant and his agents, and, as the result of these, there was, as he says, an understanding with him that defendant would not proceed further until they came to some agreement about the building line. This understanding is not denied by defendant, and was made about the 10th of April, 1911. Work on the building was in fact stopped at intervals after this time, but, as defendant and his architect say, not permanently, but for the purposes connected with a change—not in the location, but in the plans for the structure. Complainant had no information as to this cause of the stoppage. The actual construction of the cellar walls on the line as located did not take place until about the 1st of June, and the foundations were completed about June 20th. On the 23d of June complainant communicated with Mr. Andrus by telephone, asking about the agreement, to which Mr. Andrus replied that "we decided that the agreement was not necessary, that we were well within our rights the way we were building, and the work was going ahead." Complainant on the 28th of June gave formal written notice of his claim through his attorneys, and on July 5th filed the bill. Application for preliminary injunction was promptly made but was denied, and defendant at his own risk has gone on with putting up the frame of the building and inclosing it since the interview of June 23d.

On these facts, it is clear, I think, that there has been no such laches as to deprive complainant of a right to apply for relief, and that the delay in filing the bill in fact occurred by reason of complainant's reliance on the conclusion of some neighborly arrangement about the location. And, inasmuch as it appears from Mr. Andrus' evidence that the defendant had decided to proceed with the erection of the dwelling on the line proposed, solely on the ground that it was within their rights, and therefore declined to make any agreement, there can be no claim that defendant relied on complainant's delay, or was so injured thereby as to make it a bar to relief. The defendant, as it appears in the case, received a warranty deed from Bardsley and a guaranty of title from a title company, and on the advice of counsel determined to stand on her rights and contest complainant's claim. Relying on this claim of right, and not on any encouragement by complainant's laches, she proceeded with the building at her risk. This circumstance differentiates this case from the cases cited where laches was held to be a bar to an injunction.

Decree for complainant will be advised, to be settled on notice.

GOODBODY et al. v. DELANEY et al.

(Court of Chancery of New Jersey. June 14, 1912.)

1. EQUITY (§ 212*)—PLEADING—REPLICATION.

Where a replication is filed without objecting to the answer, it will be assumed that defendant answered fully all of the allegations of the bill in accordance with the course and practice of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 485; Dec. Dig. § 212.*]

2. CORPORATIONS (§ 213*)—REPRESENTATIVE ACTIONS BY STOCKHOLDERS—NATURE—JUDGMENT.

A suit by stockholders on their own behalf and on behalf of all other stockholders similarly situated on a cause of action in favor of the corporation is a suit on behalf of the corporation, and a decree adjudicates the rights of the corporation, and, after the institution of the suit, no other stockholder may prosecute a similar suit in his own name for the same cause of action.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 213.*]

3. EQUITY (§ 237*)—PLEADING—ANSWER—DEMURRER.

Where defendant fully answered the bill and claimed the benefit of the facts as if demurred to, the demurrer, so far as it relies on facts stated in the bill which have been answered, must be considered as overruled by the answer, and the questions of law raised by it must be determined at the final hearing on the facts disclosed by the evidence in support of the answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 492; Dec. Dig. § 237.*]

4. CORPORATIONS (§ 211*)—ACTIONS BY STOCKHOLDERS—DISQUALIFICATION—MANNER OF RAISING.

Where the disqualification of a stockholder, suing on his own behalf and on behalf of all other stockholders similarly situated on a cause of action in favor of the corporation, appears on the face of the record, the question may be raised by demurrer, but, where it does not so appear, it can only be raised by answer or by a proper amendment to an answer already filed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

5. CORPORATIONS (§ 211*)—ACTIONS BY STOCKHOLDERS—DISQUALIFICATION—MANNER OF RAISING.

Stockholders brought a suit, on their own behalf and on behalf of others similarly situated, on a cause of action in favor of the corporation. Defendant answered the bill fully and claimed the benefit of the facts as if demurred to. Subsequently other stockholders, claiming to be similarly situated with complainants, were admitted as parties complainant, and defendant demurred to the bill as prosecuted by such other stockholders. *Held*, that the answer overruled the demurrer and it must be suppressed for irregularity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. § 211.*]

6. CORPORATIONS (§ 210*)—ACTIONS BY STOCKHOLDERS—RIGHT OF STOCKHOLDERS TO SUE AS COMPLAINANTS.

A defendant in an action by stockholders, suing on a cause of action in favor of the corporation, may question the standing of other stockholders admitted as complainants after the making of the issues between the original parties, and the omission in the order admit-

ting such other stockholders to give defendant such right does not prevent his questioning their qualifications by way of amendment to the answer, but the amendment must be strictly confined to the qualifications of such other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808-813; Dec. Dig. § 210.*]

Suit by Marcus Goodbody and others against Ordener J. Delaney and others. Motion to suppress a demurrer granted.

John B. Humphreys, of Paterson, for the motion. Samuel H. Richards, of Camden, contra.

HOWELL, V. C. This is a motion to suppress a demurrer on the ground of irregularity. The original suit was brought by Marcus Goodbody and William U. Goodbody as stockholders of the Fisheries Company for the purpose of litigating a cause of action which they claim in their bill runs in favor of the company. The suit was brought not only on their own behalf but on behalf of all other stockholders similarly situated with them, who might come in and contribute to the expenses of the suit.

[1] The principal defendant, or the defendant against whom the principal proceeding is, Delaney, chose to answer the bill, and, inasmuch as a replication was filed without objection to the answer, it will be assumed that he answered fully all of the allegations in accordance with the course and practice of this court. The cause was then referred to a vice chancellor; considerable testimony has been taken before him on the part of the complainant; in fact, they say that they have nearly completed their principal case. At this point 52 persons, claiming to be stockholders of the company and to be similarly situated as such stockholders with the complainants, applied for leave to be admitted as parties complainant to the suit. The application was made, heard, and granted ex parte, and an order was made admitting them as parties complainant. Among the parties who were thus admitted were Shepard, Canda, Goodkind, and Aron.

A motion was made to discharge the order admitting these 52 complainants as improvidently made, on the ground that the petition and other moving papers failed to show that they had authorized the application therefor. This motion was denied, whereupon the defendant Delaney filed a demurrer to the bill as prosecuted by Shepard, Canda, Goodkind, and Aron, four of the newly admitted defendants.

Delaney by his answer had prayed that he might have the benefit of the facts set out in such answer by way of demurrer for reasons stated in that behalf in the answer. For causes of demurrer to the bill as exhibited by Shepard, Canda, Goodkind, and Aron, he alleges the same causes that he had

previously set out in his answer. The demurrer was filed without the consent of the complainant or the leave of the court, and motion is now made to suppress it for irregularity or in the alternative to strike it out as frivolous. At the time of the filing of the demurrer, it was noticed for argument and duly set down for argument at the present May term of the court. The present motion was noticed and argued prior to the opening of the term.

[2] The decision of this motion requires some consideration of the character and scope of the original suit. As has been stated, it was brought by stockholders, not only on their own behalf, but also on behalf of all other stockholders who might be similarly situated with them, upon a cause of action running in favor of the corporation against the defendants, and therefore belongs to that class of suits which are known as representative suits. The corporation and all the stockholders who are affected by the cause of action as the complainants are represented in the suit by the complainants. They are proceeding in behalf of the corporation only because the corporation either refuses to sue or because the directors and officers who are charged by the bill with fraud upon the company are disqualified thereby from conducting the litigation. The stockholders do not sue in their own right, but in the right of the corporation, and the use of the names of stockholders as complainants is mere procedure and belongs not to the substantive law of the case, but to the pursuit of the remedy in favor of the corporation. Every stockholder who stands in the same relation to the alleged fraudulent action with the complainants is entitled to aid in the prosecution of the suit if he chooses. After a suit of this character shall have been begun, no other stockholder will be permitted to prosecute a similar suit in his own name for the same cause of action, but subsequent suits will be stayed until there shall have been a decree in the prior suit; and it is quite possible that, if such similar suit were brought in the same court with the prior suit, a plea of former action pending would be sustained. The only recourse, therefore, which the other stockholders have is to unite under the invitation of the complainant in aiding the prosecution of the first suit, for the reason that there can be but one decree against the defendants if the complainants are successful. Such decree will provide for the recovery, not by the complainants, but by the corporation, of the moneys which the complainants may be able to prove under the allegations of the bill to be owing by the defendants to the corporation. The suit, therefore, in contemplation of equity, is a suit in favor of the corporation, with the corporation and its innocent stockholders ranged on one side, and the guilty officers and directors ranged on the other. The use of the name of any individ-

ual stockholder is a mere matter of form. This reduces the litigation to its simplest elements and points out a road over which the court must travel in deciding the present motion.

[3] It will be observed that the defendants to the bill, as originally filed, interposed an answer to the facts therein stated. It must be assumed that they answered those facts fully, and that they waived all the less favored defenses by way of plea and demurrer. It is true that they claim the same benefit of the facts as if they had demurred, but a demurrer in the answer can only be availed of at the final hearing, and, in so far as it relies upon facts stated in the bill which have been answered, such a demurrer must be considered as overruled by the answer, and the questions of law raised by it must be determined upon the facts disclosed by the evidence adduced in support of the answer.

The principles governing the administration of the law in representative suits are well illustrated by the following cases. In *Willoughby v. Chicago Junction Railways Co.*, 50 N. J. Eq. 656, 25 Atl. 277, Vice Chancellor Green discussed the subject. There Ellerman brought a stockholder's suit in this court to enjoin the consummation of an agreement made by his company, in which the company and the other defendants appeared and answered, and the cause was regularly heard and decided. *Ellerman v. Chicago Junction Railways*, 49 N. J. Eq. 217, 23 Atl. 287. Willoughby, another stockholder in the same company, afterwards filed a bill to prevent carrying into effect what was practically the same agreement. It was held that, in the absence of fraud or collusion by Ellerman, a decision of the question in issue in his suit was conclusive as to all the similar questions raised in the Willoughby suit. The vice chancellor says: "Actions of the class to which the Ellerman and Willoughby suits belong are *sui generis* in this: That the complainant does not prosecute in his own right; a stockholder as such does not have a legal or equitable estate in the corporate property; his only right of property is to a proportionate share of the profits of the business while the company is in operation, and to a proportionate share of the net assets on its dissolution. Unauthorized dealing with the franchises or funds of the corporation directly injure it as a legal entity; it is the franchises of the corporation which are to be misused, the funds of the corporation which are to be misappropriated, and the corporation, therefore, is the party to be injured, and should itself seek redress. * * * The Ellerman and Willoughby suits belong to that class of cases in which the corporation itself is directly injured and is primarily interested, and should itself institute and maintain an action for relief, in which the remedy to be obtained, whether pecuniary or otherwise, is

for its benefit and belongs to it alone. The stockholder in such cases has no standing in the court as a party except on the refusal, either express or implied, of the corporation itself to prosecute. * * * From the very form and nature of these suits each stockholder must be considered as represented, for, if he is in sympathy with the complainant, he may become a party complainant by application to the court. If he is in sympathy with the threatened action of the company, he is represented by and in the corporation, which is a necessary party to the suit."

The decision in this case was expressly affirmed by the Court of Errors and Appeals in the case of *Appleton v. American Malt-ling Co.*, 65 N. J. Eq. 375, 54 Atl. 454. That was a suit by a stockholder on behalf of himself and other stockholders similarly situated to compel the directors of the company to restore to the company money unlawfully paid out in dividends. The complainants had received their share of the dividends so illegally declared, and it was held that, although they did participate in the unlawful dividends, they might still maintain their suit without offering to pay back the dividends so received by them. The principle is referred to in *Ft. Wayne Electric Corporation v. Franklin Electric Light Co.*, 57 N. J. Eq. 16, 41 Atl. 666, and in *Dittman v. Distilling Company of America*, 64 N. J. Eq. 537, 54 Atl. 570. The same rule prevails in New York. In *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663, the original complainant was given the right at any time before judgment to settle his claim and discontinue his action, but it was held that, upon prosecution to judgment, such judgment was for the benefit of all the stockholders, and that the original complainant ceased to have control over it. The same doctrine was announced in *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 907, 46 L. R. A. 839, and the general scope and character of this class of suits was commented on in the opinion of *Alexander v. Donohoe*, 143 N. Y. 203, 38 N. E. 263. *Earl, J.*, says: "Suing as a stockholder, the plaintiff's right of action is a derivative one; he sues not primarily in his own right, but in the right of the corporation, the wrongs of which he complains are wrongs to the corporation; they were not aimed at him and did not involve his personal, individual rights; he suffers as a member of the corporation, and it is the party to sue for and recover damages for the wrongs or equitable relief against the frauds alleged; the complaint is that all the alleged frauds, running through 12 years, in the end culminated in the final wrong and injury to the corporation, and, for relief on account of such wrong and injury, a stockholder could only sue in case the corporation upon his demand, or what is equivalent thereto, refused or neglected to sue." Citing *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

A very well-considered case is *Hearst v. Putman Mining Co.*, 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 696. The opinion contains an elaboration of the doctrine that, when a representative suit is prosecuted to judgment, it binds all the stockholders of the corporation, as they are estopped from bringing other representative suits for the same cause of action. In *Burland v. Earle* (1902) A. C. 83, 71 L. J. P. C. 1, the judicial committee of the privy council held that the fact that a suit is brought in the name of a shareholder rather than in the name of the company is "mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are violated if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority." See, also, *Pomeroy's Eq. Jur.* § 1095; *Cook on Corporations*, § 748.

It therefore appears to make no difference whether the suit is prosecuted by one or more or by all the stockholders. There can be but one adjudication on the rights of the corporation.

[4] It is probably true that a stockholder can disqualify himself from acting as a prosecutor of a representative suit, and that, if such disqualification appears upon the face of the record, the question can be raised by demurrer, but, if it does not appear upon the face of the record, it can only be raised by answer or by a proper amendment to an answer already filed, and such I conceive to be the situation in this case.

[5] The defendant *Delaney* has answered the original bill, and, under well-known rules, he may not likewise demur to the same bill. His answer overrules his demurrer, and he must go to final hearing on the issues made up. If the fact which disqualifies a stockholder from becoming a prosecutor does not appear upon the face of the record, it can be introduced by way of amendment to the answer already on file.

[6] The defendant should be permitted to have an opportunity to question the standing of complainants as stockholders, who come into the suit after the issues are made up between the original parties, and it probably would be safer to make provision therefor in the order admitting them as complainants. Such provision was not made in the order in this case, but this omission ought not to stand in the way of questioning their qualifications by a proper proceeding, and such proper proceeding seems to me to be by way of amendment to the answer on file; but such amendment must be strictly confined to questioning the qualification of the four prosecutors against whose complaint the demurrer is leveled. So far as the present motion is concerned, the case of *Atkinson v.*

Hanway, 1 Cox's Equity Cases, 360, seems to me authority for suppressing the pleading.

Let an order be entered suppressing the demurrer for irregularity and allowing the defendants 15 days in which to amend their answer as is above indicated.

OGDEN et al. v. DELAWARE RIVER & A. R. CO. et al.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

1. RAILROADS (§ 209*)—CORPORATIONS—INSOLVENCY.

Section 87 of the General Railroad Law (P. L. 1903, p. 690, as amended P. L. 1908, p. 119) treats the money deposited with the State Treasurer at the time of filing the certificate of organization as the moneys of the corporation, and the receiver of an insolvent corporation, to whom such money is paid upon the order of the Chancellor, must distribute it, after payment of the expenses of the receiver, to such creditors or stockholders as may by law be entitled to receive the same.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692-695; Dec. Dig. § 209.*]

2. RAILROADS (§ 209*)—CORPORATIONS—INSOLVENCY.

Parties, who, at a time when all real stockholders of a railroad corporation were personally acting, at the request of such stockholders and promoters, advanced for the company the deposit of \$2,000 per mile of the proposed line, as then required by section 46 of the General Railroad Law (3 Gen. St. 1895, p. 2649), upon an agreement for repayment out of sales of stock, and that stock equal at par to the amount advanced should be deposited with a trust company as collateral security, which agreement was never carried out, will be deemed, as against the objection of those claiming under such consenting stockholders, as stockholders *pro hac vice*—i. e., as entitled to protection as such on the basis of their having full paid stock to the amount of their cash payment—in the distribution of the fund by the receiver pursuant to section 87 of the General Railroad Law, P. L. 1903, p. 690, as amended P. L. 1908, p. 119.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692-695; Dec. Dig. § 209.*]

3. EQUITY (§ 57*)—MAXIMS.

Equity looks upon that as done which ought to be done.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 179; Dec. Dig. § 57.*]

4. RAILROADS (§ 209*)—CORPORATIONS—INSOLVENCY.

Stockholders of an insolvent railroad corporation who procured stock from the company for which they paid nothing are not entitled to any part of the fund deposited with the State Treasurer as required by section 46 of the General Railroad Law (3 Gen. St. 1895, p. 2649) on the distribution thereof by a receiver pursuant to section 87 of the General Railroad Law (P. L. 1903, p. 119), when such fund is insufficient to pay in full those who in equity hold full paid stock, and of which equity they knew and were instrumental in creating.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692-695; Dec. Dig. § 209.*]

5. NOTICE (§ 6*)—CONSTRUCTIVE NOTICE—WHAT CONSTITUTES.

Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 4-7; Dec. Dig. § 6.*]

6. RAILROADS (§ 209*)—INSOLVENCY—RECEIVERS—RIGHTS OF STOCKHOLDERS.

Stockholders of an insolvent railroad corporation who knowingly procured stock from the company by paying only a part of its par value are not entitled to more than they paid, with interest, out of the fund deposited with the State Treasurer as required by section 46 of the General Railroad Law (3 Gen. St. 1895, p. 2649) on the distribution thereof by a receiver pursuant to section 87 of the General Railroad Law (P. L. 1903, p. 119), when such fund is insufficient to pay in full those who in equity hold full-paid stock.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692-695; Dec. Dig. § 209.*]

Appeal from Court of Chancery.

Bill in equity by Joseph Ogden and others against the Delaware River & Atlantic Railroad Company. From an order advised by Vice Chancellor (now Chancellor) Walker, Walter N. Boyer and others appeal. Affirmed.

Lewis Starr, of Camden, and D. Stewart Robinson, for appellants Boyer and Charles P. Reilly & Co. John G. Horner, of Camden, Edwin L. Kallish, and Theron Davis, for appellant Braxmar. Berry & Riggins, L. Stauffer Oliver, A. S. Weill, and Jos. De F. Junkin, for appellant Yorks. Berry & Riggins, L. Stauffer Oliver, and A. S. Weill, for appellant Grier. Norman Grey, of Camden, Ehrlich & Archbald, and Lester B. Johnson, for respondents Muller and Keator. Bleakly & Stockwell, of Camden, for respondent West.

TRENCHARD, J. These are six appeals from the decree of the Court of Chancery confirming the report and adjudication of William S. Casselman, receiver of the Delaware River & Atlantic Railroad Company, an insolvent corporation, upon claims filed. The Court of Chancery adopted the receiver's findings of fact, and the decree follows the report.

The certificate of incorporation of the railroad company was filed July 11, 1899, and on the same day there was deposited with the State Treasurer \$104,000, being \$2,000 per mile of the proposed line, as then required by section 46 of the General Railroad Law (G. S. 2649). The company became insolvent, and this fund was finally paid over to the receiver pursuant to section 87 of the General Railroad Law (P. L. 1903, p. 690, as amended P. L. 1908, p. 119), who disposed of it according to his report as follows: Firstly, to the satisfaction in full of the claims of bona fide creditors; secondly, to the repayment to certain stockholders the amounts actually paid by them for the stock; and,

thirdly, the residue to Muller, Thompson, and Sweatman (or their respective representatives), who advanced the money to the railroad company to enable it to make such deposit to the State Treasurer.

As this last award is the most important on these appeals, and is challenged by all the appellants, we will consider it first. The claims of these persons, or their representatives, are in a broad sense based upon the fact that at a time when all real stockholders of the corporation were personally acting, and at the request of the promoters and stockholders, they advanced for the company this fund so deposited, upon an agreement for repayment out of sales of stock, and that stock equal at par to the \$104,000, should be deposited with a trust company as collateral security, which agreement was never carried out. The case shows that Zaccur P. Boyer, Walter N. Boyer, and Zaccur P. Boyer, Jr., conceived and promoted the scheme of building this railroad from Gloucester to Atlantic City, and being unable to raise money for that purpose by ordinary stock subscriptions organized a construction company, which, in effect, became the subscriber for substantially the whole amount of 120,000 shares of the capital stock of the railroad company, although the certificate of incorporation indicates that there were other stockholders. To the certificate of incorporation there was attached an affidavit of the three Boyers, Henry Pennington, and Frederick Nicholson that they were directors of the railroad company; that \$104,000 of the stock had been in good faith subscribed and paid for in cash to the directors of the association; and that the amount subscribed and paid was at least \$2,000 for every mile proposed to be made. On June 26, 1899, the construction company entered into a written agreement with Muller. This agreement recites that the construction company had made a contract with the railroad company to construct its railroad, and that, under the laws of the state, it was requisite that there be deposited with the treasurer of the state the sum of \$2,000 a mile, and that the construction company had applied to Muller to advance to and for the use of the railroad company for deposit the sum of \$104,000. It then declares that it is agreed that, if Muller should deposit the money to the credit of the railroad company, then within four months there should be paid to Muller the money advanced or deposited by him. This contract also contained a covenant by the railroad company which was that, if the construction company failed to make the arrangement and refund the money to Muller, it, the railroad company, would execute all papers necessary to enable Muller to have returned to him from the State Treasurer such part thereof as the railroad company would be entitled to under the laws of the state. The railroad company further agreed that 108,000 shares of the

120,000 shares issued, or to be issued, should be issued to the Security Trust & Safe Deposit Company for the use and benefit of Muller, to continue until the amount of money subscribed and paid for the said stock shall equal the amount of money advanced by Muller and until it be paid to him. This we take it must mean that this stock was to be deposited with the Security Trust Company, and, as sold, the proceeds applied to discharging the money advanced by Muller. This agreement was signed by Muller, the railroad company, and the construction company. It does not appear that the stock was ever deposited, but the agreement is useful as indicating the intention of the parties concerning the fund in question. On June 30, 1899, and before the articles of association were filed, the railroad company made an agreement with the construction company for the building of the railroad for which it was to be paid the whole of the capital stock of the railroad company. That agreement to build was never carried out. The contract of the construction company and the railroad company with Muller, though executed before the company was incorporated, binds the company, because the record shows that it was ratified by the railroad company after its organization. It further appears in this record that Muller did not alone advance the money, but that he procured Thompson and Sweatman to join with him, and they are, of course, entitled to the equal benefit of any equities which flow to Muller. We are of opinion that the award to Muller, Thompson, and Sweatman was proper.

[1] The fund of \$104,000 came into the hands of the receiver of the insolvent railroad company, not in due course as an ordinary asset, but by force of section 87 of the General Railroad Law (P. L. 1903, p. 630, as amended P. L. 1908, p. 119). This statute has two material features: (1) It treats the money deposited with the State Treasurer at the time of filing the certificate of organization as the moneys of the corporation; and (2) the receiver of an insolvent corporation to whom such money is paid upon the order of the Chancellor must distribute it, after payment of the expenses of the receiver, to such creditors or stockholders as may by law be entitled to receive the same.

[2] All arguments based on the proposition that this fund is not, in any sense, the money of the corporation, can avail the appellants nothing, because if it is not, the receiver can make no effective order. His special jurisdiction depends upon the fact that the fund he is to distribute is the money of the corporation.

Treating it as such, the receiver directed certain payments out of the fund to certain bona fide creditors and stockholders. These payments are not now challenged, excepting that some of the stockholders, hereafter

more particularly referred to, who were awarded only the amount they paid the corporation for it, with interest, now contend that the par value thereof should have been paid to them. After these payments, the residue, about \$70,000, was awarded to Muller, Thompson, and Sweatman, and we think that this action was justified upon the theory that they were, in equity, stockholders, and were thus entitled to such residue. In equity, they were stockholders within the amendment of the General Railroad Law under which the receiver was acting. We have pointed out that at a time when all the real stockholders of the corporation were personally acting it was agreed that stock equal at par to the \$104,000 advanced should be deposited with a trust company as collateral security for Muller, Thompson, and Sweatman in consideration of their depositing the \$104,000 with the State Treasurer for the corporation.

[3] In view of the maxim that "equity looks upon that as done which ought to be done," as against the objection of those claiming under such consenting stockholders, Muller, Thompson, and Sweatman are to be deemed as stockholders *pro hac vice*; i. e., as entitled to protection as such in the distribution of the fund created on the basis of their having full-paid stock to the full amount of their cash payment for the benefit of the corporation to enable it to contract for construction of its road. This conclusion practically disposes of the most important questions raised upon all the appeals.

[4] The appellants Walter N. Boyer and Zaccus P. Boyer, Jr., appeal from so much of the decree as disallows their respective claims as stockholders. But it plainly appeared that they paid nothing for their stock, and they are not entitled to any part of the fund, which, as we have seen, is insufficient to pay in full those who in equity held full paid stock, and of which equity the Boyers knew and were instrumental in creating.

The appellant Zaccus P. Boyer, Jr., also appeals from so much of the decree as disallows his claim for salary; but this claim appears to have no basis in fact. The appellants Charles G. Braxmar and Charles P. Reilly & Co. appeal from so much of the decree as disallows their claims as creditors of the Boyers who had assigned to them stock, standing in the name of the Boyers, as collateral security. We have seen that, had this stock been in the hands of the Boyers, it could not, under the circumstances, share in the distribution, because nothing was paid for it. And we are of opinion that in the hands of these pledgees its rights rise no higher under the circumstances of this case. The evidence strongly indicates that it was taken with actual knowledge of the situation.

[5] But, if that be not so, clearly the surrounding circumstances put these pledgees on inquiry. And whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding. *Gale v. Morris*, 30 N. J. Eq. 285. It follows that constructive notice is imputed to these pledgees.

[6] The appellants John R. Yorks and John B. Grier appeal from so much of the decree as allows to them only the amount of money they paid to the company for their stock, with interest. These appellants are bona fide stockholders. They purchased from the company knowing that they paid therefor only 33½ per cent. of the par value thereof. They were allowed the amount that they paid, with interest, and in our opinion have no cause for complaint under the circumstances disclosed by the record.

The decree of the Court of Chancery will be affirmed.

STATE v. MacFARLAND.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. HOMICIDE (§ 166*)—CRIMINAL LAW (§ 673*) —EVIDENCE—PASSIONATE LOVE.

A husband was convicted of the murder of his wife by the administration of poison. The evidence was circumstantial. The state introduced a series of letters found in the possession of the defendant, in which the writer, an unmarried woman, expressed the most passionate love for him and a confident reliance upon his promise to marry her as soon as he got rid of his wife by a divorce. *Held*, that the letters were properly admitted to show a motive for the crime and to repel the presumption arising from the matrimonial relation; but that it was error to permit their use as evidence that the defendant had in fact said that he would soon get rid of his wife by a divorce.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166;* *Criminal Law*, Cent. Dig. §§ 1597, 1872, 1876; Dec. Dig. § 673.*]

2. CRIMINAL LAW (§ 446*)—DOCUMENTARY EVIDENCE.

Letters written to a person, though evidence against him for some purposes, are not evidence of the truth of their contents unless besides the mere possession of the letters there is testimony from which acquiescence in the truth of their contents can be inferred.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1032; Dec. Dig. § 446.*]

3. CRIMINAL LAW (§ 407*)—EVIDENCE.

The truth of oral statements made to a person may be admitted by his silence, but the rule is otherwise as to written communications, hence the failure of a person to reply to a statement made in a letter, or the absence of proof that he did reply, is not an admission of its truth.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 900, 901, 902, 949, 968, 970, 971; Dec. Dig. § 407.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. DOCUMENTARY EVIDENCE—LETTERS—ADMISSIONS.

The cases of *Hand v. Howell*, 61 N. J. Law, 142, 38 Atl. 748, and *Howell v. Hand*, 61 N. J. Law, 694, 43 Atl. 1098, followed.

Swayze, Parker, Bergen, Voorhees, and Vredenburg, JJ., dissenting.

Error to Court of Oyer and Terminer, Essex County.

Allison M. MacFarland was convicted of murder in the first degree, and brings error. Reversed.

This writ of error brings up the conviction of Allison M. MacFarland of murder in the first degree. The jury found that the plaintiff in error willfully caused the death of his wife by placing a bottle of poison where she would take it by mistake, and that she did so take it with fatal results. The conviction rests upon circumstantial evidence which, apart from certain letters written to the defendant, consists chiefly of statements made by him, first to the doctor whom he called in, then to the county physician, and afterwards to the officers of the law. The written statement that follows, which was procured from him by the officers at about the same time, presents in consecutive form the substance of the testimony thus added.

MacFarland was advertising manager for the Crocker-Wheeler Company and had gone to New York on the afternoon of Tuesday, October 17, 1911, on business for his company, taking with him his son Robert and remaining over night. After they had gone, Mrs. MacFarland wrote a letter to her parents, telling them of the events of the day, speaking affectionately of her husband and saying that "Robert and Mac (her husband) are in New York." Within a few hours after writing this letter, she took the poison that caused her death.

From this point, the statement referred to takes up the narrative: "Oct. 19-11. Statement made by Allison M. MacFarland: I went over to New York on Tuesday afternoon 1 o'clock something. I took the little fellow along for an outing, and we went on business for the Crocker-Wheeler Co. I went to the New York office of the company and went to the office of the Delaval Separator Company, and other places. When night came we went up to the St. Paul Hotel on Columbus Ave. and 69th St. and we stopped there overnight. I have done this same thing before. We had breakfast the next morning and then came back home getting off at Roseville station. We arrived at the house about 10 o'clock in the morning, on the morning of the 18th day of October. When we arrived home, I went right upstairs to the toilet; the doors leading from the bathroom afford a view to the room where my wife slept, and I looked in and saw the baby running around in its nightdress. I

then went in and the child was standing by the mother's side. My wife was lying on the bed the condition of affairs such as to take my attention immediately to say that the first glance in the room satisfied me that there was something wrong. I am not familiar enough with death for certainty, and I went for the doctor knowing that it was beyond my help. My little boy was downstairs and I did not want him to come up, and I took my baby downstairs with me. I went out and found Dr. Gale and I brought him to the house with me, and he informed me that she was dead and had evidently been dead for some time. We spoke about the death, and I wondered if she might have got hold of something that might have caused her death. The doctor asked me if she could have got hold of something which might have caused her death. The doctor looked around the room to see if he could find anything, and he opened the medicine chest to see if he could find anything. I asked the doctor if he knew the cause of death, and he replied it might be poison or heart failure, and the doctor asked me if there was anything around of a poisonous nature, and we looked over the tables and in the medicine closet and I pointed out everything that I thought was of a poisonous nature including carbolic acid, solution of cyanide, solution of morphine, and pragnats of potassium. The doctor's attention was called to them. The cyanide of potassium was got at the Crocker-Wheeler plant; we have this for photographic purposes. I went into the room where the potassium was kept and I took it from the shelf. Mr. Eymmer did not know that I took it. I did not think it was of any consequence as that can be procured anywhere. It was kept on a shelf and I had access to that department. I did not think it was necessary to ask Mr. Eymmer, I would have asked him if he was there. What I brought home was in a paper—I am not certain but I placed it in an envelope and placed it on a shelf in the medicine closet. I called my wife's attention to it and told her I brought you some cyanide and I put it up here, later on I mixed it up. I was looking up for a suitable bottle on the shelf and I noticed the bromide bottle that had not much in it and rarely used, and I poured it out into a smaller bottle and put the cyanide in the larger bottle; after putting it in the bottle I put a label on it marked 'Poison Cyanide Solution,' and left it on the shelf which was the most secure place in the house for it, on the top shelf. So far as I know, no one but myself touches these bottles, as the shelf was filled with bottles of unknown articles which were left by the former occupant. The bromide was not an article that my wife ever used of herself, as far as I know: I had given it to her on several occasions, not more than three or four times since we

lived there, that is what it is used for; so far as I know she had never mixed any for herself and I had no idea she would ever be looking for it herself, as she knew nothing about it. To the best of my judgment the bottle being plainly labeled 'Poison,' and being in an out of the way place in company with other poisons and other unknown mixtures was not a risky place to place it there. Some of the crystals were left and it's my impression that I threw all this surplus into the toilet bowl, but I am not certain about it. I only brought cyanide from the factory this one instance. Above is substantially correct. A. M. MacFarland."

On this writ of error we are not concerned with the strength or weakness of the state's case but solely with the legal effect of certain letters that were found in the possession of the defendant. The state claimed as the motive of the defendant in the murder of his wife his illicit love for another woman, in order to marry whom it is claimed that he formed the design of getting rid of his wife. A number of letters written to him expressing ardent love and a confident reliance upon his promise of a speedy marriage when he should have got rid of his wife by divorce were put in evidence by the state. These letters having been submitted to the jury, two questions arise: (1) Were the letters admissible in evidence? (2) Were they evidence of the truth of their contents?

McDermitt & McDermitt and Chauncey H. Beasley, all of Newark, for plaintiff in error. Wilbur A. Mott, of Newark, for defendant in error.

GARRISON, J. (after stating the facts as above). [1] The letters were properly admitted in evidence. They were found in the possession of the defendant; they proved that the declarations they contained had been communicated to him; they were sent to and received by him at different places, which shows intercommunication; they expressed the passionate love of the writer for the defendant, and her urgent desire to become his lawful wife. The defendant himself told a witness, who testified for the state, that the writer of these letters was a young lady in Philadelphia who lived next door to him while he was in that city, and whom he had taken into his office in order to become better acquainted with her, and that they had become intimate. He also imparted to this witness the secret meaning of certain characters used in the letters, the signification of which, as explained by him, denoted the greatest degree of intimacy possible between a man and a woman.

We entertain no doubt that the letters were admissible in evidence for the purpose claimed by the state, viz., "to repel the presumption arising in favor of the prisoner from the fact that the deceased was his

wife and to show a motive for the commission of the crime."

When we pass, however, to the question whether the letters were competent evidence to prove the truth of their contents, we come to a totally different and far more difficult question. The transition marks not only the difference between the proof of a communication and the proof that it was true, but also the difference between the proof of a motive for a crime and the proof of a substantive fact in the chain of incriminating circumstances that connects the defendant with the commission of the crime.

The knowledge that the writer of the letters intensely desired and confidently expected to become his wife, as soon as by a divorce he was free to marry her, may have operated upon the defendant's mind as a motive to the commission of the crime of which he was convicted, as also may the urgency of the writer that such divorce be obtained quickly as something that the defendant had promised to do and to do soon; while the mere fact of an intimacy that permitted of such communications was of itself evidence to rebut the presumption arising from the matrimonial relation. But to say that these letters, because preserved by the defendant, proved that he had said that he would in a short time be free to marry the writer and that he would soon get rid of his wife by a divorce is an assumption of a totally different character, involving the broad proposition that letters addressed to a party and found in his possession are evidence that he had in fact done or said the things that the writer of the letters stated that he had done or said. That this evidential force was accorded to these letters at the trial appears from the instructions under which the claim made by the state was submitted to the jury.

The claim made by the state was put before the jury in the following language of the charge:

"The state claims to have proved that the death of this woman was brought about, not by the criminal carelessness of the defendant, but by his intentional act. And it claims that the circumstances which have been laid before you demonstrate to a moral certainty that the purpose of the defendant in doing what he did—in bringing this cyanide to his home after his wife had come back to live with him, and so shortly after that occurrence—that his placing it in the bottle which contained medicine which his wife used with more or less frequency, and leaving that bottle in the position which it occupied when his wife was using it, and putting the bromide in another place, coupled with the fact that at that time he was carrying on a liaison with a woman in Philadelphia, who, from the letters which have been exhibited in this case, would seem to have become thoroughly persuaded that in

the near future the situation would be such that he would be free to marry her, leaves no escape from the conclusion that the death of this woman was intended to be, and was, accomplished by this man for the purpose of clearing the way for the putting into execution of the promises which the state claims these letters show he had made to this woman in Philadelphia. These letters, as I have already intimated before, I think, are, as the state claims, the keystone of the case which it has sought to make against the defendant. The state claims that they not only show a motive existing in the mind of the defendant for taking his wife's life, but a motive which is fully adequate; that motive being complex; the desire to continue his relations with this girl in the future as they had existed in the past, and the continuance of which it would seem, from one of the last of the letters which she wrote to him, was threatened by her to be terminated. I speak of the letter in which she was arranging to meet him in New York, and said that that was the last occasion upon which there would be any 'stolen fruit' to be enjoyed by them. The desire, I say, for a continuance of those relations, and a belief that, unless his wife was put out of the way, those relations would be terminated, and, further, the desire to redeem, to some extent, the promise made by him to this girl in Philadelphia that in the near future she should be his wife. It is for you to say whether, in view of these facts to which I have referred, the state has sustained the burden which, as I pointed out to you in the beginning of my charge, the law imposes upon it."

The use of the letters by the jury as evidence to sustain these claims of the state was treated in the charge as follows: "Most, if not all, of her letters to him refer apparently to things that he has said or written to her, and the contention of the state is—and it is for you to say how far it is justified—that it is to be inferred that the things which those letters state have been said or written by him to her were said or written by him."

That this was an instruction to the jury to use the letters as evidence to determine whether the state had proved what it claimed is rendered clear by the concrete illustration that followed: "That is, that the declaration that he had promised to divorce his wife and that in the days not long before his wife's death he had promised that the divorce should be obtained soon and that he would soon be in a position to make this girl his wife must be inferred from the statements in those letters from her to him which he apparently treasured and kept under lock and key. It is for you to say * * * how far you are forced to the conclusion that he did make these promises

which are asserted in these letters from this girl to him."

This instruction is not modified by the general language, "After a consideration of all the evidence and giving every fact its whole significance, it is for you to determine whether the state has made out the case which it claims to have made out; that is, a case of murder of the first degree."

[2] The jury was therefore instructed that they could find from the letters themselves that the assertions contained in them were true. This was clearly erroneous unless letters written to a person are, by the mere fact of their possession, proof of the truth of their contents, which is not the law.

The fault of this instruction is twofold: First that it did not leave to the jury the question of the defendant's assent to the truth of the statements made in the letters, and second that it permitted the jury from the mere perusal of the letters to determine whether or not their writer told the truth about the defendant.

The error is fundamental both in what the charge omitted and in what it permitted, for it omitted the defendant's assent to the truth of the contents of the letters, which was essential to their use as evidence against him, and it permitted the jury to find that the statements in the letters were true solely upon the internal evidence of the letters themselves, which was to convict the defendant by the acts and declarations of another person. That this internal evidence was of a peculiarly persuasive character does not mend matters; in fact, it constitutes the practical injury of the instruction. For after due allowance has been made for the frantic state of mind in which the infatuated writer insisted upon the fulfillment of the promise that was to repair the consequences of her false step, no one can read these letters without a moral certainty that some such promise had been made by the defendant or tacitly permitted by him to be assumed by her.

It was in fact precisely the sort of evidence that the men who composed the jury and that all of us are accustomed to rely upon in the daily affairs of life, and it is precisely to exclude this sort of evidence from judicial investigations that the rules that constitute the law of evidence have been framed.

For evidence in the sense of that which induces belief or actuates conduct is a widely different thing from evidence as it is administered in courts of law, and one great service that such modern writers as Thayer, Ames, and Wigmore have done is to reiterate the fact that rules of evidence are legal rules for the exclusion of evidence which, but for such rules, would be legal evidence. "This excluding function," says Prof. Thayer, "is the characteristic one in our law of evidence." *Treatise on Evidence*, 204.

In fine, evidence as a term of logical reasoning is much more inclusive than evidence as a term of judicial procedure; the relation between the two being that the initial assumption that all that is logically probative is legally admissible has been, as the result of judicial experience, subjected to a large number of exclusions, based not upon logical, but upon forensic, considerations, which have taken the form of rules of evidence to which in turn there are exceptions; the two together making up the law of evidence. So that the law of evidence as we have it is in the shape of a set of primary rules for the exclusion of evidence that is logically probative and a further set of exceptions to these rules. Such is the thesis of the writers referred to, the pertinence of which, to the matter in hand, is that, notwithstanding the logically probative character of the letters written to the defendant and their peculiarly persuasive character, they are excluded from being legal proof of the facts stated in them by the rule of evidence that testimony to be legal must be given under oath and subject to cross-examination. To this rule of exclusion there are of course exceptions such as dying declarations, matters of pedigree, deceased witnesses, and the like, but none that covers the case of an unsworn statement made in writing to the person sought to be charged with its truth. The truth of a fact, however relevant or persuasively stated, must be proved by legal evidence.

The statement of the letters that the defendant had expressed a purpose to get rid of his wife by divorce was evidence of the fact that he had formed such a design, and this in turn was relevant to the trial theory of the state which was that the design to get rid of his wife, which was actuated by the desire to marry another woman and had originally contemplated the obtaining of a divorce, continued down to the commission of the crime; the mode of effecting it having in the meantime changed from divorce to poison.

If the statements contained in the letters were not thus relevant, we need go no further, since their submission to the jury was in that case without even apparent justification. They clearly, however, were relevant, and if the writer of the letters had testified as a witness in the case that the defendant had said to her that he designed to get rid of his wife by divorce, and that he would soon be free to marry her, it would have been competent evidence to go to the jury.

Moreover, if her testimony were, not that he had said so to her, but that she had said so to him, her testimony would be competent as a step in the proof of his acquiescence in the truth of what she had so stated to him. Such is the evidential force accorded to oral statements made to or in the presence of a party, and the crux of the present matter is the existence of an analogy between oral statements and written state-

ments of so absolute a character that whatever is true of the one is true of the other. The existence, however, of so complete an analogy has not been accepted even by those judges who go the farthest in holding that such oral statements are always competent, and many do not go so far.

Upon one point, however, all agree, including even those text-writers who erroneously treat the matter as an exception to the hearsay rule, and that is that, while the thing that is proved is the statement made to the party, the thing that proves it, i. e., the thing that makes it evidence, is the act of the party himself, viz., his silence. This is the key; for, unless the failure of a party to reply to a written statement is the legal equivalent of the silence of a party when confronted with an oral statement, there is no act of the party that makes the written statement of another evidence against him.

[3] Upon this point there is a substantial unanimity. "Judges," says Mr. Wigmore, "have always pointed out that the failure to reply in writing to a written communication does not have the same significance as a failure to reply orally to an oral communication." Wigmore on Evidence, 1073. The grounds of this distinction are stated in the text, the notes and the cases cited.

Then bearing in mind that, even in the case of oral declarations, the evidential factor is not that the declarant said that such and such things were true, but that the party by his own act said that they were true, it is evident that, in the case of written communications, the evidential factor must be the act of the party who received the letters and not the declarations contained in the letters themselves. The question for the jury, therefore, is, Has the party by some act of his made the statements of another person evidence against him? This question was not submitted to the jury in the present case. This being so, it is immaterial whether there was testimony of such an act to go to the jury; if there was, it was not submitted to them, and, if there was not, there was no way in which the facts stated in the letters could be used against the defendant.

The suggestion that the mere possession of written documents by the party is such an act is so clearly unsupportable that even as ingenious a writer as Mr. Wigmore can discover no ground for its support excepting that "the party may always exculpate himself and disown the inference by proving the true reason for his retention of the document"—an amazing suggestion in view of the disabilities of parties to testify at common law where the rule had its origin.

[4] The question is not *res nova* in this court. In the case of *Hand v. Howell*, 61 N. J. Law, 142, 38 Atl. 748, one of the grounds upon which our Supreme Court sustained an objection to the use made of a letter written to the defendant was thus stated by Mr.

Justice Collins: "It was not legal evidence. Oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, but the rule is otherwise as to letters. The recipient is not called on to rely or be considered as admitting what is written." This case came upon error to this court where the judgment of the Supreme Court was unanimously affirmed for the reasons given in the opinion from which I have quoted. *Howell v. Hand*, 61 N. J. Law, 695, 43 Atl. 1098.

It is to be assumed that the rule thus enunciated will have accorded to it in a case involving human life the same force that was given to it in a case involving a few months' rental of a farm. The rule itself which is in harmony with the great preponderance of decisions elsewhere, is thus stated in one of the most recent works on evidence: "Letters written to the party and received by him may, under some circumstances, be read against him, but, before they can be received in evidence against him, there must be some evidence besides mere possession showing acquiescence in their contents and proof of some act, or reply, or statement." *Jones on Evidence*, 269.

The author cites, among other cases, *Commonwealth v. Eastman*, 1 Cush. (Mass.) 189, 215, 48 Am. Dec. 596, in which the Supreme Judicial Court of Massachusetts said: "The letters, however, if properly identified, would not of themselves authorize any inference against the defendants; they were only the acts and declarations of others; and, unless adopted and sanctioned by the defendants by some reply or statement or by some act done in pursuance of their suggestions, they ought not to prejudice the defendants. Letters addressed to an individual and received by him are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received but never answered or acted upon. So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants, so far they would have been competent evidence." This is the rule that is at once consonant with reason and with the fundamental rules of evidence as applied in English-speaking courts; it accords with our own rule upon this topic; and I can perceive no benefit in multiplying the citation of authorities. They are collected in the *American Digest*, IX, Hearsay, B, (2), 1678 to 1685; in the *Centennial Digest*, Hearsay, 317 (4), and in the *Key-Number Series*, Evidence, 318.

Most of the cases deal with the admissibility of letters, a question that we have disposed of; many of them deal with the probative effect of letters, which is conceded in the present case, if the letters were legal evidence; others deal with the efficacy of

the testimony submitted to the jury to show the assent of the party, which is quite aside from the error in the present case which was that that question was not submitted to the jury, who were, on the contrary, permitted to treat the letters as evidence against the defendant upon their own intrinsic significance. The wrong and injury done to the defendant by such illicit evidence is manifest. He was being tried for the murder of his wife; if he had formed the design to get rid of her by poison, it greatly strengthened the conclusion that he was her murderer. The state under its claim of murder in the first degree, was obliged to prove that such a design existed at the time of its deliberate execution, and it undertook to prove this by showing a previous design to get rid of her by divorce, else there was no relevance in the letters. If the letters were not legal evidence for this purpose, a more injurious error could hardly be imagined, for it was not without reason that the state claimed and the court repeated that "the letters were the keystone of the case that it sought to make against the defendant," since out of them the state forged (to adopt the common figure) one of the links of a chain that is proverbially no stronger than its weakest link, and which, it may be added, ceases to be a chain when a link is wrested from it by the law of evidence.

Without the evidence afforded by the letters, no one can say that the jury would have found that the defendant had formed the design to get rid of his wife or that he was beyond a reasonable doubt guilty of her premeditated murder. This manifestly injurious character of the error that we have pointed out requires the reversal of the judgment of the court of oyer and terminer.

SWAYZE, J. (dissenting). I cannot agree that the so-called Bunny letters were admissible to show a motive for the commission of the crime, and yet were in some way to be restricted in their use by the jury. I agree that, to make them evidential against the defendant as to the facts therein stated, some action on his part must appear. My dissent is upon the ground that the evidence in the case demonstrates not only that the defendant received and retained the letters, but by his conduct assented to the statements therein contained. The letters cover a long period of time and constitute a regular series continued until after his arrest. He acknowledged the receipt of the last three of the series without objection to the statements therein that indicated the expectation of the writer that he would soon be free to marry her. One of the most important of the letters contains his own personal memoranda and comments. He understood and explained to a witness the enigmatical references to the relations between him and the writer; he received letters addressed to him at various points in the country where his

travels took him, which could not have happened unless the writter was informed of his whereabouts. These facts suffice to show that the letters were only one side of a mutual correspondence. In view of the frequent references of the writer to his obtaining a divorce and soon being free to marry her, the correspondence would not have been continued as it was if he had in any way repudiated her repeated allusions to the prospective divorce and marriage. The opinion concedes that the letters were properly admitted in evidence and that "no one can read them without a moral certainty that some such promise had been made by the defendant or tacitly permitted by him to be assumed by her"; and that it was in fact "precisely the sort of evidence that the men who compose the jury and that all of us are accustomed to rely upon in the daily affairs of life."

I know of no rule of evidence that makes documents of this kind admissible and prevents the jury from drawing inferences which these quotations from the opinion show that they could not help drawing. I think that, under the circumstances, it is not a jury question whether the defendant by some act of his made statements of another person evidence against him. If he tacitly or expressly assented, as I think he did, the letters are evidential for the same reason that statements made in his presence by another, to which he either tacitly or expressly assents, are admissible. We have held that, where the court admits a confession as voluntary, it is not for the jury to decide afterwards that it was involuntary. If the court admits declarations as dying declarations, it is not for the jury afterwards to say that they were not made under a sense of impending death. So, in this case, the court having decided that the letters were admissible, it was not for the jury to say whether the defendant had made the statements therein evidence against him, and the court was not bound to submit this question to the jury. No doubt the trial judge would upon a proper request have warned the jury of the care with which evidence of that character must be scrutinized, but when it is once conceded, as the court now concedes, that the letters are logically probative and legally admissible, their effect cannot be limited in any other way. I think the judgment should be affirmed.

I am authorized to say that Justices PARKER, BERGEN, and VOORHEES and Judge VREDENBURGH concur in this dissent.

KEUPLER et al. v. EISELE et al.

(Court of Errors and Appeals of New Jersey.
March 21, 1912.)

1. INTERPLEADER (§ 12*)—GROUNDS OF RELIEF.

The right of the owner of a building erected by a contractor to pay into court money

due under the contract for distribution among those who have filed legal stop notices is unaffected by his failure to give notice to the contractor of the stop notices served, though he incurred thereby a personal liability.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 12.*]

2. CONTRACTS (§ 44*)—BUILDING CONTRACTS—FILING—STATUTES.

A building contract includes all matters agreed on by the parties and may include within itself the specifications, and, when that is done, the filing of the contract is a filing of the specifications within the statute contemplating that specifications accompanying a contract shall be filed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 168; Dec. Dig. § 44.*]

3. INTERPLEADER (§ 23*)—BILL BY OWNER OF BUILDING AGAINST CLAIMANTS—ALLEGATIONS.

A bill of interpleader by an owner of a building erected by a contractor, for distribution among those who have filed legal stop notices, which alleges that the building contract was duly filed in accordance with the statute, sufficiently alleges, as against a demurrer, compliance with the statute contemplating that specifications accompanying a contract shall be filed, and the fact that the contract does not include the specifications is available by answer.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 47, 51; Dec. Dig. § 23.*]

4. MECHANICS' LIENS (§ 113*)—SERVICE OF STOP NOTICES—EFFECT.

All payments to a building contractor are proper credits to the owner as of the date of the completion of the building except as to prior stop notices, and a stop notice, served subsequent to the maturity of the last installment is operative only against the part of the installment remaining unappropriated at the time of the stop notice.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

5. MECHANICS' LIENS (§ 113*)—SERVICE OF STOP NOTICES—EFFECT.

Where an owner of a building erected by a contractor guaranteed payment of an order drawn by the contractor against him for money due a third person, the order operated as an equitable assignment of the amount of the order on the fund due the contractor as against all persons who, at the time of the acceptance of the order, had no prior rights, and as to such persons it is immaterial as to when the order was paid.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

6. INTERPLEADER (§ 23*)—BILL—ALLEGATIONS—SUFFICIENCY.

A bill of interpleader by an owner of a building erected by a contractor for the distribution among those who have filed legal stop notices, which alleges that several claimants, to the amount due under the contract, have made claims on the owner to the exclusion of other claimants, and which sets forth the substance of the stop notices, thereby creating substantial doubt as to the sufficiency of some of the notices, shows sufficient uncertainty as to the rights of the claimants to entitle the owner to file the bill.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 47, 51; Dec. Dig. § 23.*]

Appeal from Court of Chancery.

Bill of interpleader by Stephen Keupler and another against Andrew Eisele and others. From an order of the Court of Chancery denying a motion to dismiss the bill

and overruling a demurrer thereto, defendants appeal. Affirmed.

The following is the opinion of Vice Chancellor Leaming:

"On Demurrer of Elsele & Manning to Bill of Interpleader.

"The objections to the bill, as urged by demurrant at the argument, are as follows:

"1. That it does not appear that complainants are indifferent and disinterested, but on the contrary they have guaranteed or made payment of some of the claims and deducted them, and now ask defendants to interplead as to the balance.

"A motion was heretofore made against this bill in behalf of other defendants. This same objection was then urged and passed upon by me. A copy of my memorandum opinion then filed will be hereto annexed as embodying my present views on that question.¹

"2. That the bill does not disclose sufficient doubt touching the rights of the respective claimants to justify a bill of interpleader.

"That question was also considered by me under the former motions.

[1] "3. That the bill fails to show that complainants, as owners, gave notice of the several claims to the contractor. This objection to the bill has not been heretofore considered by me.

"I do not think it material to complainants' right to pay the money in their hands into court for distribution among the parties who have filed legal stop notices that the bill disclose whether he gave written notices to the contractor of the stop notices so served. Any failure of complainant to give such notices cannot deny to the materialmen, who may have served proper stop notices, their statutory lien on the fund. As pointed out in the annexed memorandum opinion, all payments which have been made by the owner are clearly proper credits to him as of the date of the completion of the building, except as to prior stop notices, and the funds paid into court are more than ample to satisfy all persons claiming under stop notices served prior to that date, and stop notices served subsequent to that time are operative only against the unappropriated balance. If complainants have, perchance, incurred personal liability to demurring defendant by reason of failure to give notice to the contractor of stop notices, such personal liability to demurring defendant will neither enlarge nor diminish the rights of the persons who have served stop notices to enforce their liens against and thereby appropriate the balance of the contract price now in the hands of complainant, nor will any final decree in this case be operative to

bar any personal claim demurring defendant may have against complainant. I am convinced that the failure of complainant to state in his bill that he gave notices to the contractor of the several stop notices served will not render the bill demurrable as to demurring defendant. So far as the present bill discloses, complainant appears to have no interest whatever in the fund in his hands, and I see no reason emanating from the objection now under consideration why he should not be privileged to require all defendants who have asserted a claim against that fund, to settle among themselves their several rights against the fund.

[2] "3. That the bill does not disclose that specifications were filed with the contract. This objection to the bill has not been heretofore considered.

[3] "The statute contemplates that specifications accompanying a contract shall be filed. A contract may be so drawn that all necessary specifications touching material and dimensions are embodied in the contract itself. I apprehend that it is only where the contract is made with reference to independent specifications that the statute contemplates that the separate specifications shall be filed; such specifications necessarily became an important part of the contract and should be accessible to materialmen and laborers. The present bill asserts that the 'contract was duly filed on the 12th day of November, 1909, in the clerk's office of Camden county, in accordance with the statute in such case made and provided.' In the present aspect of this case, I think this averment sufficient as against the demurrer. As already suggested, the contract, in its broad sense, includes all matters agreed upon by the parties; furthermore, the present bill seeks only that the several defendants who assert a claim against the fund in complainant's hands shall interplead. In the absence of attachments or garnishments claims against the fund exist only upon the supposition that the statute has been complied with so far as the requirements touching filing are concerned. If the contract as filed does not include the specifications, the force of that fact is available by answer. Under such conditions, I think the bill should be sustained. See 1 Daniell's Pl. & Pr. 542, 543. But in view of doubt suggested by the bill, whether sufficient specifications have been filed and the possible necessity of an answer to raise that issue, I think no costs should be taxed.

"I will advise an order overruling the demurrer, but without costs.

"On Motion to Dismiss Bill of Interpleader.

"As the present motion is, in effect, a demurrer to the bill, the single question here presented is whether the bill on its face discloses facts sufficient to sustain a bill of interpleader.

¹ Reported herewith under heading: "On Motion to Dismiss Bill of Interpleader."—Ed.

[4] "On August 12, 1910, the day the building was completed, complainants were, by the terms of the contract, required to be in possession of the final installment of the contract price, the amount of which was \$1,616. Complainants were on that day entitled to pay that money to the contractor, except as against such rights in that fund as had at that time arisen in behalf of others. An advance payment made by complainants, as owners, to the contractor or to his order prior to that date is necessarily treated as made on that date and will discharge the owners to the amount of such advance payment, except as against rights of others which, prior to that date, have arisen in the fund. A stop notice served subsequent to the time the last installment became due is operative only against such part of the last installment as remains unpaid or unappropriated at the time such subsequent stop notice is served. Taylor v. Reed, 68 N. J. Law, 178, 52 Atl. 579. There can be no doubt, therefore, touching the right of complainants to interplead so far as the objection is concerned, that they should pay into court the full amount of the last installment without first deducting the sum of \$496 which was paid on contractor's order May 25, 1910, for the stop notices served have no rights as against that payment.

[5] "Complainants also deduct from the amount of the last contract installment \$53 which was paid by complainants December 23, 1910, to the Haney-White Company by virtue of a guarantee made by complainants to that company May 21, 1910, wherein complainants guaranteed the payment of an order issued to that company by the contractor on that date against complainants for money due that company under that contract. With such an accepted or guaranteed order outstanding at the time the last installment fell due, the order clearly at this time became fully operative in favor of the person holding the order as an equitable assignment of the fund to the amount of the order, as against all persons who at that time had no prior rights. It therefore becomes immaterial as to such subsequent claims whether that order was paid by complainant on the day the installment fell due or at a subsequent day, for the holder of the order was entitled to the money on that day.

[6] "I am also satisfied that the bill discloses sufficient uncertainty as to the rights of the several claimants to entitle complainants to file the bill. The bill alleges that the several claimants to the fund have made claims on complainants to the exclusion of other claimants, and sets forth the substance of the stop notices in a manner which may be said to create substantial doubts as to the sufficiency of some of the notices. These

averments I think sufficient to sustain the bill."

French & Richards, of Camden, for appellants. George J. Bergen, of Camden, for respondents.

PER CURIAM. The order appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

GREIMS v. GREIMS.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

1. DIVORCE (§ 49*)—ADULTERY—CONDONATION.

A husband condones his wife's adultery by continuing marital intercourse with her after knowing of her offense.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 171-179; Dec. Dig. § 49.*]

2. DIVORCE (§ 109*)—ADULTERY—CONDONATION—BURDEN OF PROOF.

On a bill for divorce for adultery, condonation is a conclusion of fact, if not of law, and must be proved by defendant, upon whom lies the burden of proof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 354-364; Dec. Dig. § 109.*]

3. DIVORCE (§ 135*)—ADULTERY—CONDONATION—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show condonation of a wife's adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 451; Dec. Dig. § 135.*]

Appeal from Court of Chancery.

Bill by Howard E. Greims against Jennie E. Stanney Greims. From the decree (79 Atl. 1048), both parties appeal. Reversed as to petitioner, and affirmed as to defendant.

Cortlandt Parker, of Newark, for appellant. James R. Mulligan, of Newark, for respondent.

VROOM, J. The bill in this case was filed by the husband, charging his wife with adultery committed with one David Young, Jr., at York, in the state of Pennsylvania, on the 29th day of January, 1908, and at divers other times between January 24th and February 16th of that year, at No. 55 Beaver street in York, and at various other places in that town. The Vice Chancellor held that the evidence established the guilt of the defendant, that the only debatable question was that of condonation, and that it had been condoned, and therefore advised the dismissal of the petition of the husband. The wife appealed from so much of the decree as adjudged her guilty of adultery, and the husband appealed from so much as decreed that he had condoned his wife's defense, and directed a dismissal of his petition. We agree with the conclusion of the Vice Chancellor as to the adultery of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wife, leaving only for consideration the condonation on the part of the husband.

[1] Condonation, as stated by Bishop in *Marriage and Divorce* (vol. 2, § 36), is "where the husband comes into possession of the fact and proof that his wife has committed adultery. Then, if he has marital intercourse with her, the law presumes that he condones the offense, and refuses him divorce."

[2] It is well settled that condonation is a conclusion of fact, and not of law, and must be proved by the defendant, and the burden of proof is upon the defendant. *Graham v. Graham*, 50 N. J. Eq. 701-706, 25 Atl. 358; *Goeger v. Goeger*, 59 N. J. Eq. 15, 16, 45 Atl. 349; *Hann v. Hann*, 58 N. J. Eq. 211, 42 Atl. 564; *Bornstein v. Bornstein*, L. R. 1893, Prob. Div. 292-302.

[3] The learned Vice Chancellor bases his conclusion upon his belief that from the weight of the evidence the husband had marital intercourse with the defendant after he came into possession of the fact and proof, as he says, or, to use the expression in *Marsh v. Marsh*, 2 Beas. 281, "reasonable knowledge." In using the term "reasonable knowledge" in the case of *Marsh v. Marsh* there can be no doubt but that Chancellor Green was considering merely legal proof, for he says "reasonable knowledge may be said to have been when information of a fact is given by credible persons, speaking of their own knowledge, particularly if the same facts be afterwards proved and they become instrumental in the proof." If, then, the evidence in this cause had shown that the petitioner had produced any facts in evidence proving the guilt of the defendant and of which he was aware before he ceased having marital relations with her, admittedly there would be ground for the position of the court below that such marital intercourse was a condonation of the guilt of the wife.

The evidence in this case established the fact that the parties were married in September, 1904. After their marriage, they lived in several cities before coming to York, Pa., where the acts of adultery complained of were committed. Some of these acts were committed during the absence of the complainant from his home. The complainant's business was that of a railroad accountant or auditor, and while at York was employed by a New York firm to examine the accounts of a trolley system in that city. He became acquainted there with David Young, Jr., who is named as co-respondent, who was the superintendent of said trolley system, and Young and his wife and the complainant and his wife were much together. About the 24th of January, 1908, the complainant went on business to New York, and remained for about a month and a half. It was during this absence that the adultery was committed. On complainant's return to York, he

found lying on the bureau in his wife's room a letter from David Young, of a character certainly calculated to arouse his suspicions, and it evidently did, for he demanded an explanation of it from her. She said it was only some of Young's foolishness. She denied any guilt. He believed her, and they became reconciled and lived together, and he continued marital relations with her up to about the time he left her on August 1, 1909. He occupied the same bed with his wife until the separation, and admits that earlier in the week, on up to Thursday night, he may have had sexual intercourse with her. Eight days before he left his wife—that is, the Sunday beginning the last week in July, 1909—complainant stated that he was told by his brother Morton that David Young's wife had gone to York to obtain a legal residence there in order to sue her husband for divorce, and that she was going to name his wife as co-respondent in the case. Although complainant says he "didn't take any stock in what Morton had to say," the next day, meeting his wife's mother, Mrs. Davis, he asked her whether he could not have a little talk with her. On her assenting, while walking on the street with her, he told her he had been informed that his wife had been unfaithful to him for a year and a half, and that Mrs. Young had been in York maintaining a legal residence, and was going to name Mrs. Greims as co-respondent. Mrs. Davis asked him whether he was crazy or not, and said there is no truth in this, and said "she didn't see how I could believe that Jennie [the defendant] ever cared anything for Mr. Young." On returning from the walk, Mrs. Davis told the defendant what her husband had said, and that evening, as the defendant testified, she talked the matter over with her husband. He replied that the little baby did not look a terrible lot like him, that "he had been wise," and that she had been unfaithful to him for a year and a half. Then she added: "I was very nervous and excited, and he harassed me and talked a while, and said everything would be all right, and that is all that was said that night."

The next day, Tuesday, the petitioner went to the office of Charles W. Mercier, an uncle of his wife. Mr. Mercier testified that the petitioner said to him: "Uncle Charlie, I am going to leave Jennie. Would you see her, and have her walk quietly out." Then he (Mercier) asked what the trouble was, and petitioner replied: "Jennie had been crooked for a year and a half, and I have known it." The uncle says he told him, if that was the case, he, the petitioner, was a fool to live with a woman that long, knowing that she was unfaithful to him, to which the petitioner replied: "Well, I thought I would give her a chance." The petitioner denies saying to Mr. Mercier that he had known his wife was unfaithful to him. On the same day,

while returning home in company with his brother, he met Mrs. Young, and she said to him "that she wasn't going to bring an action for divorce against her husband, that she was just back from York, and was living with Dave again."

On Friday of the same week the solicitor with whom Greims had conferred met him and one Clader, who was then living with the petitioner, and it was then that Clader told him that he was carrying notes back and forth from Mrs. Greims to Mr. Young, and that Mrs. Greims had made a confession to him about the child not being a legitimate child, and had told him that she would be willing to tell Howard (the petitioner) everything, "except that she put it to Dave, and had went the limit down to York, Pa." While the petitioner testified that he did not believe Clader's statement, he could not see why a woman should talk to him of those things. He did, however, determine upon a decided step. He says: "I decided to leave Mrs. Greims and to make an investigation, and to find out if what they said was true. In fact, I didn't know anything about it myself, and would have to go down to York to find out whether what they did tell me was true." On Friday and Saturday he remained at the house, and both nights occupied the same bed with his wife, but had no marital intercourse with her.

On Sunday, August 1, 1909, he left the house, and, taking with him his daughter Marjorie, did not return. On that day he sent to his wife the following letter: "August 1, 1909. Mrs. J. E. Greims, 178 N. 17th Street, East Orange, N. J.—Dear Jennie: I requested my attorneys to commence legal proceedings against you to secure a divorce & you will be duly advised by them in connection therewith. In accordance with their advice I have taken Marjorie with me and will provide for her. I enclose you my check No. 607 in the amount of \$10 to cover immediate needs. I have arranged with my attorneys, Cortlandt & Wayne Parker, Room 810, Prudential Building, Newark, New Jersey, to provide you with funds for necessities pending judgment, which money you can procure from time to time by calling on said attorneys. All matters which you desire to take up with me must be done through above attorneys. Yours very truly, H. E. Greims."

From these facts, and they substantially include all that are essential to the determination of this cause, the Vice Chancellor concluded that the petitioner was not entitled to a decree of divorce, for the reason that he had condoned the guilt of his wife. Holding that he had "the right to draw such inferences as the whole evidence may warrant," he thought that Greims did have "reasonable knowledge" of his wife's

guilt as early as or before Thursday, July 29th, and that he may have had sexual intercourse with her up to and including Thursday night. The fact that the Vice Chancellor uses the term "reasonable knowledge" as a quotation makes it certain it is from the opinion of Chancellor Green in *Marsh v. Marsh*, supra. This leads us to consider whether, in fact, the petitioner had on or before Thursday, July 29th, the reasonable knowledge which in *Marsh v. Marsh* is defined to exist "when information of a fact is given by credible persons, speaking of their own knowledge, particularly if the same facts be afterwards proved, and they become instrumental in the proof." You will search in vain through this record for any evidence produced at the trial of this case which was known to the petitioner when he left his wife, and it was urged, and justly so, that the petitioner had then no legal evidence whatever, unless the alleged confession to Clader was legal evidence. That the petitioner may have had suspicions as to the guilt of his wife can readily be assumed, and in looking at the case as presented in the evidence it may seem incredible that he should have continued so long to cohabit with her. But, as Bishop says, "suspicion is not knowledge. It is not belief. Beyond which reason demands that something be conceded—in some instances a great deal—to the special confidence which married parties commonly do and always should have in each other." It must be remembered that the petitioner had faith in his wife and gave full credit to her continued assertions of innocence, and as Malins, V. C., said in *Brown v. Brown*, L. R. 7 Eq. 185, 193, "husbands are apt to believe what their wives tell them." As hereinbefore stated, the burden of proof to establish condonation was upon the defendant, and this she failed to do. There is no proof whatever that the petitioner had sexual intercourse with his wife after Thursday, July 29th. The petitioner testified that he had not, and the defendant although a witness, did not assert that he had. That he occupied the same bed with his wife on Friday and Saturday night might, if unexplained, warrant a conclusion of forgiveness on the part of the husband, but any presumption of condonation arising therefrom may be rebutted, and has been in this case.

We agree with the learned Vice Chancellor that this case is not without difficulties, but we think most of the difficulties of the court below have arisen when, after decreeing without hesitation the guilt of the wife, it has endeavored to establish condonation and condemn the petitioner to "a life of most loathsome bondage."

The decree below, so far as it finds condonation, should be reversed.

SAWTER et al. v. SHOENTHAL, Surrogate.
(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 109*)—SUBJECTS AND TITLES—REQUISITES—"OBJECT."

Under the requirement of the Constitution that the object of an act must be expressed in its title, the true rule is that the object expressed must give notice of the effect of the legislation to one conversant with the existing state of the law. The validity of the title is not to be determined by nice distinctions of etymology or definition of words, but by the facts of the case and the history of the legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139, 196; Dec. Dig. § 109.*

For other definitions, see Words and Phrases, vol. 6, pp. 4875, 4876; vol. 8, p. 7735.]

2. STATUTES (§ 121*)—SUBJECTS AND TITLES—INHERITANCE AND TRANSFER TAX.

The title of the act of 1909 entitled, "An act to change and amend the title of an act entitled 'An act to tax intestate's estates, gifts, legacies, devises and collateral inheritances in certain cases' approved May fifteenth, one thousand eight hundred and ninety four" (P. L. p. 304), sufficiently states the object of the legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 127, 128, 132, 173, 174; Dec. Dig. § 121.*]

3. TAXATION (§ 862*)—INHERITANCE AND TRANSFER TAX—STATUTORY PROVISIONS.

By the passage of the act of 1909 (P. L. p. 304), amending the title of the act of 1894 (P. L. p. 318), the supplement of 1906 (P. L. p. 432), imposing a transfer tax, became enforceable legislation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1677; Dec. Dig. § 862.*]

Error to Supreme Court.

Certiorari prosecuted by Mary L. Sawter and others, administrators with the will annexed, against Isaac Shoenthal and others to review a tax imposed upon the transfer of shares of stock standing in the name of a nonresident decedent. From a judgment setting aside the assessment (81 N. J. Law, 197, 80 Atl. 101), respondents bring error. Reversed, and judgment entered affirming the tax.

Edmund Wilson, Atty. Gen., for plaintiff in error. Frank H. Sommer and Ralph E. Lum (Edward A. Day, on the brief), all of Newark, for defendants in error.

SWAYZE, J. The question raised in this case is the constitutionality and effect of the act of 1909 (P. L. 304), which undertakes to change and amend the title of the act of 1894 (P. L. p. 318), imposing inheritance taxes. The Supreme Court held that the object of the act is not expressed in the title.

[1] This conclusion was rested in part at least upon a distinction explained at length in the opinion between the purpose and the object of legislation. We are unable to adopt this distinction. If we are to go to the dictionaries for aid in the construction

of the Constitution, we find the words treated as synonyms. Webster's New International groups these words with others as synonyms under the definition of "intention." The New English Dictionary gives as its first definition of "purpose," "that which one sets before oneself as a thing to be done or attained; the object which one has in view"; and, as its third definition, "the object for which anything is done or made or for which it exists; the result or effect intended or sought; end; aim." The same dictionary gives as its fifth definition of "object," "the end to which effort is directed, the thing aimed at; that which one endeavors to attain or carry out; purpose, end, aim."

[2] These definitions are supported as usual in that monumental work by extracts from English authors covering the life of the language, some of them from legal writers of repute. So far as the argument rests upon a supposed difference of meaning between purpose and object, we think it lacks foundation. We are unwilling, however, to deal with the question of the constitutionality of a statute upon so narrow a basis as that afforded by lexicographers. We prefer, and we think we are required, to look at the matter from a different, if not a broader, point of view. There can be no doubt that the ultimate object of the Legislature in passing the act of 1909 was to validate the act of 1906 (P. L. p. 432) imposing transfer taxes, which had then just been questioned in *Dixon v. Russell*, 78 N. J. Law, 296, 73 Atl. 51, a case argued in the Supreme Court at November term, 1908. We subsequently held the act invalid as far as it sought to impose a legacy duty because that object was not expressed in the title. *Dixon v. Russell*, 79 N. J. Law, 490, 76 Atl. 982. The intent of the Legislature in 1909 was to put beyond question for the future an act which had been questioned, but had not yet been declared invalid by the courts. We ought, if possible, to effectuate that legislative intent. It is not questioned that the language used in the act of 1909 is apt to effectuate the legislative purpose, if the title is sufficient to comply with the constitutional requirement. If the Constitution means that the immediate object only should be expressed in the title, that is done in this act. The immediate object is, as the title declares, to change and amend the title of the act of 1894. It would, however, be going too far to say that in every case it suffices to express the immediate object, although the ultimate object be left unexpressed. That would open the door to the abuse so forcibly suggested by the Supreme Court; and, although we cannot logically argue from an abuse of power to a negation of it (*Fritts v. Kuhl*, 51 N. J. Law, 191, at page 205, 17 Atl. 102, at page 107; *Pangborn v. Young*, 32 N. J. Law, 29, 40), yet we ought not to adopt a

tax construction of an important constitutional limitation. The true rule is that the object expressed in the title must give notice of the effect of the legislation to one conversant with the existing state of the law. The validity of the title is not to be determined by nice distinctions of etymology or definition of words, but by the facts of the case and the history of the legislation. Language which at one time may be quite inadequate to warn the public of the object of legislation may at another, owing to custom or usage, be entirely sufficient. A striking illustration is afforded by the legislation as to riparian rights. The title of the original act is "An act to ascertain the rights of the state and of the riparian owners in the lands lying under the waters of the bay of New York and elsewhere in the state." This would seem to indicate that the object of the Legislature was merely to ascertain the facts; and yet, under supplements to that act, commissioners have been authorized to convey property of great value, and no one now questions the validity of the legislation. The reason is that, regardless of the precise meaning of the original title, it became by custom and usage generally known that, under that title, the Legislature would deal with the whole subject of riparian lands. We have therefore sustained the validity of the legislation, although our attention was called to the difficulty in the title. *Seaside Realty Co. v. Atlantic City*, 76 N. J. Law, 819, 71 Atl. 912.

[3] In determining whether the title of the act of 1909 gave notice of its ultimate object to one conversant with the existing state of the law, it is essential to bear in mind what the law then was. In 1906 the Legislature, as if in anticipation of our decision in *Neillson v. Russell*, 76 N. J. Law, 655, 71 Atl. 286, 19 L. R. A. (N. S.) 887, 131 Am. St. Rep. 673, had attempted to make a radical change in the inheritance tax act by substituting a transfer tax for the legacy duty imposed by the act of 1894. The title of the act of 1906, however, unfortunately indicated only that it was an amendment of the act of 1894, which latter act by its title purported to relate only to the taxation of intestate's estates, gifts, legacies, devises, and collateral inheritances. The question of the validity of the legislation under such a restricted title was then pending. Under those circumstances, any one who knew, as every one must have known, from the title of the act of 1909 that its immediate object was to amend the title of the act of 1906, could not have failed to perceive that its ultimate object was to avoid the constitutional difficulty that had been raised and make valid the act of 1906. The most natural and obvious, if not the only, reason for amending the title to an act, is to make the title cover the subject-matter of the act. Every one must, according to our legal maxim, be presumed to have known that the

act of 1906, which was on the statute book and not yet declared defective, extended to transfers of decedent's estate, and was not limited as the act of 1894 had been. With that knowledge no one could help inferring that the probable object of changing the title was to make it coextensive with the body of the act. We think that in the then known state of the statutory law the title of the act of 1909 gave notice, not only of the immediate object clearly expressed, but of the ultimate object clearly implied.

Under our decision in *Allison v. Corker*, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564, it is permissible for the Legislature to validate an unconstitutional statute by subsequent legislation, provided that it is not attempted by an amendment of the title to import incongruous legislation into the existing statute. The illustrations given by Justice Collins indicate the line of cleavage. An act respecting wills, as he says, cannot by amendment of the title be given effect as to transactions *inter vivos*; but an act to repeal an unconstitutional act may be efficacious to compel payment of claims incurred under it, as was held in *Rader v. Township of Union*, 39 N. J. Law, 509. If now we look at the essential character of this legislation, it is plain that the Legislature's object was to tax transfers of property occurring upon the death of the owner or made in contemplation of his death or to take effect at, or after, his death. The original legislation reached only certain kinds of transfer. The amendment of 1906 sought to make this more general and to reach all transfers in such cases. In common parlance all were spoken of as inheritance taxes, and, if the title of the act of 1894 had read, "An act to tax estates and inheritance," it would have been broad enough to include the matter of the act of 1906. The Chief Justice in *Dixon v. Russell* went no farther than to hold the statute invalid as far as it was applicable to cases like the one then under consideration. The difficulty, however, was that the title of the act of 1894 did not indicate that it was applicable to all estates, but limited it to intestate's estates, and to legacy duties and collateral inheritances. Legacy duties it had been held were not succession taxes, and the words "intestate's estates" did not indicate a succession by virtue of a will. Succession by intestacy and succession by will are no doubt different, but they are not so different as to be incongruous subjects of legislation. A tax upon successions of either kind is a tax upon inheritance, and such a tax was plainly indicated in the title of the act of 1894. Both this act and the act of 1906 dealt with taxation on the succession to property of decedents, and it was the transfer of such property that the new title purported to deal with. What we decided in *Allison v. Corker* was that an unconstitutional statute was not void but unenforce-

able, and that it might be imported into valid legislation by appropriate reference. When the title was amended by the act of 1909, the act of 1906 became enforceable. The tax in this case was properly imposed. The judgment of the Supreme Court must be reversed, and judgment entered affirming the tax.

DANSKIN v. PENNSYLVANIA R. CO.

(Court of Errors and Appeals of New Jersey.
June 19, 1912.)

1. RAILROADS (§ 350*)—CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action against a railroad company for the killing of a traveler at a crossing, whether decedent would have heard the approaching train had he brought his wagon to a standstill before driving past obstructions to his vision directly on the crossing, and therefore was negligent in failing to do so, *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. RAILROADS (§ 350*)—CROSSING ACCIDENT — DUTY OF TRAVELER — STOP, LOOK, AND LISTEN.

A traveler crossing a railroad, though required to look and listen, is not negligent, as a matter of law, in failing to stop before driving on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

3. TRIAL (§ 139*)—QUESTION FOR JURY—NEGATIVE EVIDENCE.

Negative evidence that witnesses did not hear any bell rung on the engine of a train by which decedent was killed in a crossing accident is sufficient to take the question to the jury, notwithstanding the positive evidence of defendant's witnesses that the bell was rung, where plaintiff's witnesses were in a position to have heard the bell if it had been rung.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 366; Dec. Dig. § 139.*]

4. RAILROADS (§ 347*)—CROSSING ACCIDENT — EVIDENCE.

Where decedent was killed at a railroad crossing while driving a bakery wagon, and plaintiff's counsel stated that there was some evidence indicating that decedent had pans in the wagon when the accident occurred, though there was evidence to the contrary, the court did not err in permitting plaintiff to testify concerning the amount of noise made by the pans, if any, while the wagon was being driven along the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

5. TRIAL (§ 260*) — INSTRUCTIONS — REQUEST TO CHARGE — INSTRUCTIONS GIVEN.

In an action for death at a railroad crossing, the court charged that it was decedent's duty to exercise such care to avoid an accident as a reasonably prudent man would exercise under the circumstances; that, as he approached the crossing, he was bound to look and listen for an approaching train in such a manner as to make looking and listening reasonably effective; and that, the greater the difficulty in discovering the danger apparent from the surroundings, the greater the care required in approaching the track; and, if the circumstances were such that one sense is rendered less reliable, the other must be used to a correspondingly greater extent. *Held*, that such

charge covered a requested instruction that it was decedent's duty in approaching the crossing to exercise the highest practicable degree of care; that, if he did not do so, and his death was caused wholly or in part by the want of such care, the verdict must be for defendant; and the difficulty of seeing or hearing an approaching train, owing to the conditions at the crossing, did not excuse the traveler from making the utmost practicable use of his faculties, and it was only after such use had been made without avail that a verdict could be rendered in favor of such person so injured, or his representatives.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—DAMAGES—PREJUDICE.

Where, under any rational interpretation of a charge on the measure of damages in an action for death, no legal injury was done to defendant notwithstanding the misapprehension of the proper rule of damages in the charge, because the result of the rule as charged would be to award plaintiff less than she was entitled to, the instruction was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

7. DEATH (§ 95*)—DAMAGES—MEASURE.

Where several years had elapsed since the wrongful death of plaintiff's decedent before the final trial of an action therefor, plaintiff was entitled to recover the present worth (at the time of trial) of a sum which, paid in annual installments for the term of decedent's life expectancy, would give to the beneficiaries the annual amount of decedent's contribution to their maintenance, and in addition thereto the several amounts of such annual contributions up to the time of trial, with interest.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108-109, 111-115, 120; Dec. Dig. § 95.*]

Error to Supreme Court.

Action by Jane Danskin, as administratrix of James F. Danskin, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

Alan H. Strong, of New Brunswick, for plaintiff in error. Edmund Wilson, Atty. Gen., for defendant in error.

PARKER, J. This case has been tried three times. On the first trial there was a verdict for the plaintiff against the present defendant and its codefendant, the New York & Long Branch Railroad Company, and the entire judgment was reversed because of an error with respect to the liability of the other company. *Danskin v. Pennsylvania Railroad Co.*, 76 N. J. Law, 660, 72 Atl. 32, 22 L. R. A. (N. S.) 232.

The second trial resulted in a nonsuit on the ground that contributory negligence was shown, which was held by the trial judge to be a court question, but was considered by this court to be a question for the jury. *S. C.*, 79 N. J. Law, 526, 76 Atl. 975. We there held that, assuming a legal duty rested upon the deceased to stop before clearing the obstructions to his vision in order to listen for the sound of a train, the proof

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

did not establish conclusively that the deceased failed to stop, but that, even if the evidence did tend so to indicate, the jury were entitled to entertain the presumption of due care on the part of the decedent, and that it was therefore not established as a court question that he did not stop to listen before he was able to see. We further held that, if he was not negligent in failing to stop before reaching a point where he could see, he could not be held guilty of contributory negligence as a court question at and after that time, because, "by the time he cleared the woods so as to enable him to see an approaching train, his horse was on the first rail of the first or south-bound track, and only about 12 feet from the north-bound track." 79 N. J. Law, 527, 76 Atl. 976.

[1] The uncontradicted evidence on the third trial seems to establish that the deceased was driving his bakery wagon on a jog trot and kept up this gait until he reached the track. It was therefore proper to find as a court question that he did not stop before reaching the track, and the further question then results as to whether, as a court question, he ought to have stopped to listen for the train before reaching a position where he could see the train. This is the first question now argued before us, and the ground on which it is put is that, inasmuch as the wind was toward the train, and the horse was trotting on a gravel road, and the wagon had iron tires on the wheels and was full of pans and tin plates, and was equipped with sliding doors and other appliances calculated to make a rattling noise, therefore, as a court question, the wagon must have made so much noise when in motion over the road in question as to prevent deceased from hearing what, if he had stopped, he must have heard.

We are cited to the case of *Merkle v. N. Y., L. E. & W. R. R. Co.*, 49 N. J. Law, 473, 9 Atl. 690, where the driver had in his wagon a number of empty beer bottles in boxes or crates, and the rattling of these bottles, by the motion of the wagon, made such a noise as to prevent hearing the approaching train; to the case of *Central Railroad Co. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695, where this court took judicial notice that a moving coal train was accompanied by the usual roar and rumble, which must have greatly hindered a person in its immediate vicinity from distinguishing other sounds (*Id.*, at page 279 of 61 N. J. Law, at page 696 of 39 Atl.), to *Conkling v. Erie Railroad Co.*, 63 N. J. Law, 338, 43 Atl. 666, where the wagon was an ice wagon with scales, ice tongs, and other utensils within, which caused considerable noise; and finally to *Keyley v. Central Railroad Co.*, 64 N. J. Law, 355, 45 Atl. 811, where the plaintiff was said by this court to have been traveling with undue speed, hurrying, in fact, over the railroad tracks, "utterly ignoring the fact that the

noise of his horse's hoofs and the rattle of his iron-bound wheels, in their contact with the planks and iron tracks he was crossing, must necessarily interfere with his ability to hear an approaching car which he could not see." Every case differs in its circumstances and must be tested by its own peculiar characteristics.

Returning to the present case, we note that some of the assertions of fact relating to the condition of the wagon and of the road are not borne out by the testimony, and some of the inferences are jury inferences. The so-called gravel roads of that locality are very smooth. The testimony as received in the case was that there were no tin pans or plates in the wagon, but that the pies, etc., were arranged on the familiar paper plates, which made no noise; and that the racks were so arranged that everything was held tightly in place and had no opportunity to rattle. The force of the wind is not given, although it was from the northwest, and the train was approaching from the south.

The proposition now is that we should find, and that the trial judge should have found, as a court question, that the train coming up against the wind, or the crossing whistle which defendants testified was blown, would have been heard by the deceased when listening from his wagon at a standstill, whereas, because the wagon was moving at the time, such sounds were not heard; in other words, that the sense of hearing failed, and that the failure was due to the deceased not stopping.

The question is a close one, and in view of this very fact, we are in no position to say that it should have been removed from the domain of the jury; and we therefore hold that, notwithstanding it was satisfactorily shown that the deceased did not stop his wagon to listen before getting on the track, it was still for the jury to say whether he failed to hear the train, and whether such failure was due to the fact that he did not stop, or in other words, that, if he had stopped, he would have heard it.

[2] It may be remarked that the decisions cited from other jurisdictions are for the most part not pertinent on this point, because of the prevalence of the rule that a traveler about to cross a railroad must stop, as well as look and listen, which is not the case in this state.

[3] The next point relates to the sufficiency of evidence that the bell was not rung in compliance with the statute. As usual in such cases, the evidence of the plaintiff on this point is mostly, if not altogether, negative, and there is positive evidence on the other side that the bell was rung. But, as we have been obliged to hold in many other cases, so long as the witnesses who say they did not hear the bell were in a position where it may reasonably be considered they would have heard it if it had been rung, the

point cannot be removed from the domain of the jury.

[4] The next point relates to the admission of testimony of the plaintiff, the widow of the deceased, on the question whether the wagon made much noise when driven under similar conditions. She testified as to the usual methods of the deceased in loading the wagon for his regular deliveries; that he always had bread and rolls in the morning (when the accident happened), and always carried the rolls in baskets; that he had none of the large pans or small pans in the wagon on the occasion in question, and never took pies and cakes in the morning; that she had ridden frequently in the wagon with her husband. The question was then asked, "Have you ridden in it when it had the big pans in and the pies and cakes in? A. Yes, sir. Q. As the wagon was driving along with the pans in it, what noise, if any, did it make? (Objected to. Objection overruled, and exception sealed, but question not answered.) Q. Mrs. Danskin, my question is whether in riding with your husband, even when he had the big pans in and the cakes and pies, riding along the road or elsewhere, whether there was any rattle or noise in consequence of these pans?" This also was objected to, and the court raising some question as to its relevancy in view of the testimony that deceased did not have the pans in his wagon, counsel for plaintiff explained that there was some other evidence indicating that he did have such pans in the wagon when the accident occurred, and the plaintiff was entitled to negative the theory of noise on any hypothesis derivable from the testimony. The question was asked, and no exception taken to the ruling. Assuming that the ruling is properly brought before us under the previous exception, we do not think there was any error in the admission of the testimony, but that it was competent for the plaintiff to show the usual and normal behavior of the wagon in the matter of noise, and the jury were entitled to take this into consideration in connection with the conditions existing at the point of the accident in determining whether there was so much noise at that time and place as to prevent the deceased from hearing the roar of the train or the whistle that was blown, and which whistle, it may be remarked, did not comply with the statutory requirements.

[5] It is further assigned for error that the court should have charged as requested that "it was the duty of Mr. Danskin, in approaching this crossing, to exercise the highest practicable degree of care, and if he did not do so, and his death was caused wholly or in part by the want of such care on his part, the verdict must be for the defendant." And also that "the difficulty of seeing or hearing an approaching train, owing to conditions at the crossing, does not excuse a traveler on the highway from making the

utmost practicable use of his faculties, and it is only after such use has been made without avail that a verdict can be rendered in favor of a person so injured, or his representatives."

Counsel relies upon the cases of the Penna. R. R. Co. v. Righter, 42 N. J. Law, 180; Penna. R. R. Co. v. Leary, 56 N. J. Law, 705, 29 Atl. 678; Green v. Erie R. R. Co., 65 N. J. Law, 301, 47 Atl. 418, as requiring the use of this language in a charge where applicable to the situation. The court did charge that "the law does impose on every person the duty, as it was the duty of Mr. Danskin, to exercise such care to avoid an accident as a reasonably prudent and careful man should exercise under the circumstances and conditions at that point." Also in response to request No. 6: "He was bound, as he approached this crossing, to look and listen for an approaching train, and to look and listen in such manner as to make looking and listening reasonably effective." And request No. 8: "The greater the difficulty in discovering the danger as apparent from the surroundings, the greater is the degree of care required in approaching a railroad track, and, if the circumstances are such that one sense is rendered less reliable, the other must be used to a correspondingly greater extent."

An examination of the cases cited by counsel will show that the language in the requests that were rejected and are now urged as a ground of error has been treated as substantially identical in meaning with the propositions actually charged by the court and above quoted.

[6] The last point argued relates to the portion of the charge bearing on the measure of damages in death cases, and requires for discussion a full quotation of the language of the trial judge. His charge in this regard was as follows: "It is for you to consider how long you believe Mr. Danskin would have lived; in other words, to calculate, as nearly as you can, the expectancy of his life. In doing this you should not consider exceptional cases, but should take the average length of life for a person of his age and condition of health; and in reaching the amount of your verdict, if you should believe that Mr. Danskin would have lived a certain number of years and would have expended a certain amount each year on his family, it would not do to multiply this amount by the number of years and say that is the damage, because this family would then have in a lump sum at this time, all that the husband and father would have turned over to them during the whole period of his life, which you can readily see could be put at interest and with the interest would amount to much more than he, at the salary he was earning at the time of his death, would have brought in. As has been said, 'What the plaintiff is entitled to recover is a capital fund which will represent the present value of all the pecuniary loss which

will fall upon the widow and next of kin. In other words, such sum as, with interest for the period of such expectancy, would equal the amount which the widow and next of kin would have received by the continuance of the life of the deceased. But in this connection you should remember that eight years and seven months have elapsed since Mr. Danskin's death, and, if you believe that his expectancy of life would equal or exceed that number of years and months, no such rebate of interest as I have mentioned should be made for that period. You should also take into consideration the ages and condition of health of the widow and children, and limit your verdict not only to the expectancy of life of the husband, but to that of the wife and children, and the length of time they would be entitled to enjoy his bounty, provided, however, that such time should not exceed the expectancy of the decedent's life."

The criticism on this we also quote from the brief of counsel: "The charge so excepted to is plainly erroneous. The substance of it is that the verdict should represent a capitalization of all that the widow and next of kin would have received if the deceased had lived out his expectancy, but that, in arriving at the present value, no rebate should be made for the time that has elapsed since the death occurred, if the jury find that he would have lived that long. Thus, if the jury found that Danskin would have lived 20 years, and his family would have received an average benefit of \$1,000 per year, they should find the present value of the entire \$20,000, but in so doing should make no rebate of interest for 8 years and 7 months of the expectancy which have now elapsed. The vice of the charge as given is that it directs the present worth to be ascertained of the entire pecuniary loss, and, by excluding any rebate for the time past, the entire sum (say \$20,000 according to the above illustration) is treated so far as that period is concerned as already earned."

Viewing the matter for purposes of convenience and illustration only, in the manner suggested by counsel for plaintiff in error, as a fixed benefit of \$1,000 per year to the next of kin, to run for a period of 20 years, and thus disregarding the contingencies of death of beneficiaries, decrease of earning power, and so on, we find, by consulting the annuity tables, that the present value of an annuity of \$1,000 per year for 20 years, on a basis of 5 per cent., is \$12,462, which would represent the amount recoverable at the time of death of the deceased.

[7] But eight years and seven months, or say nine years, having elapsed, and the next of kin having received nothing in that time, the correct rule would be to award them still on the foregoing hypothesis) the deferred payments of \$1,000 per year for nine years and interest thereon, and the present value of an annuity of \$1,000 per year for

the remaining 11 years of the time This would work out thus:

Deferred payments and simple interest	\$10,800
Present value of future payments ...	8,307
	<u>\$19,107</u>

If the judge had charged the rule of damages in this form, it would have been correct. At the request of defendant he charged, as we think too favorably to defendant, that no interest should be allowed for the elapsed period, so that the above total would be reduced by \$1,800 and stand at \$17,307. The question is whether, under any fair construction of the charge as delivered, the jury would be justified in finding an amount relatively greater than this hypothetical \$17,307.

The complaint of counsel seems to be that the charge directs the present worth of what would correspond to the \$20,000 payable periodically during the 11 years remainder of the expectancy, to be ascertained as of the time of the trial, but this certainly does not injure the defendant, for, as we have already seen, the application of a correct rule would award \$19,107, and of the rule, as we understand the judge to have laid it down, would award \$17,307; while a calculation of the present value of \$20,000, payable in equal annual installments over the remaining 11 years of the hypothetical expectancy, would be the present value of an annuity of \$1,818.18 for 11 years, which is shown by the tables to be \$15,103.62; being about \$4,000 less than the sum ascertainable by the correct rule, and \$2,000 less than the sum ascertainable by the rule as we interpret the judge's charge. The language of the charge is something of a puzzle in the matter of interpretation, and calls to mind the old cases of *Tuttle v Howell*, 17 N. J. Eq. 176; *Howell v. Tuttle*, 17 N. J. Eq. 540; but, under any rational interpretation of the charge, it is clear to us that no legal injury was done to the defendant notwithstanding a misapprehension of the proper rule, because the result of the rule as charged would be to award the plaintiff less than she was legally entitled to.

We find no error in the record, and the judgment should be affirmed.

DODGE v. LAVIN et al. LAVIN v DODGE MARKS et al. v. SAME.

(Supreme Court of Rhode Island. July 6, 1912.)

1. DEEDS (§ 114*)—CONSTRUCTION—PROPERTY CONVEYED.

Where a deed described land, and gave the grantee the right to land, load, and unload his boat on certain other mentioned land, which was not included in the description, it did not include the land over which he was given the easement.

[Ed. Note.—For other cases. see *Deeds*, Cent. Dig. §§ 314-322, 328-329, 388; Dec. Dig. § 114.*]

to each of the co-owners their respective interests; and he prays that such partition may be effected through a sale, etc.

Bridget Lavin alleges, in her bill, that the deed of August 22, 1857, from Thomas R. Allin and William H. Allin to Patrick Martin and Margaret Martin, included the strip of land in question, and that upon the decease of her father and mother, the said Patrick and Margaret Martin, she inherited the same, and has since been in continuous possession thereof. She also sets up a title by adverse possession. She further alleges that, after the decease of William H. Allin, Howard E. Allin, as administrator upon his estate, was authorized by a decree of the probate court of the town of Barrington, on September 10, 1904, to sell the interest of William H. Allin in a tract of land lying inland, to the east of her said land and still further away from Bullock's Cove, and he accordingly advertised that he would sell at auction on August 2, 1898, the interest of William H. Allin in a parcel of land, with an oyster house and wharf, without claiming any right to sell, or indicating any intention of selling, the strip of land which was a projection of the Lavin land to the west; that at said auction sale Dodge purchased the southerly part of the parcel advertised, with an oyster house standing thereon, and a wharf extending therefrom into the cove, and received a deed from the administrator, September 21, 1898, but that no part of the shore, at the five-rod projection of the Lavin land, entered into such purchase; that later, by authority of the same decree, he conveyed to Dodge, by deed of April 10, 1899, a parcel of land next north of the former purchase, pursuant to an auction said to have been held April 4, 1899; that upon the second parcel of land Dodge erected valuable improvements; that said sales to Dodge were void, because (1) the probate court had not authorized the sale of said property, and (2) under General Laws 1896, c. 213, the authority given to said administrator had expired; that neither the complainant, Bridget Lavin, nor the administrator or heirs of William H. Allin, disputed the right or title of Dodge to that portion of the property advertised by said administrator, or which the deeds to Dodge purport to convey, or to the shore in front thereof.

Bridget Lavin further alleges that following the auction of August 2, 1898, Dodge, by filling, changed the wharf from a narrow plank structure to one of wide, solid construction; that in 1906 the said complainant, Lavin, first heard that Dodge claimed her shore at the said five-rod projection; that Dodge, having learned that his title to what the deeds purported to convey to him was defective, proceeded to procure a deed from certain heirs of William H. Allin, with the professed intention of perfecting such title, but that the description, in said last-named

deed, was drawn to include, not only the property purchased by Dodge at the auctions of August 2, 1898, and April 4, 1899, but also the shore, at said five-rod projection of the Lavin land, which was not included in the previous deeds to Dodge. The complainant, Lavin, also sets forth in her bill, by way of averment upon information and belief, that the aforesaid deed from the Allin heirs was procured by misrepresentation and the withholding of facts; that the said heirs, upon learning that they had executed the deed to Dodge through deception, executed and delivered to the complainant, Lavin, deeds releasing to her all of their interest in the strip of land in question. The complainant, Lavin, disclaims any desire to disturb the title to Dodge to the oyster house lot, fronting ten rods on Bullock's Cove by five rods deep, with the oyster house and wharf as described in the deed from Howard E. Allin, administrator, to Dodge, or the dwelling house described in the later deed; but she prays that such deeds may be annulled in so far as they purport to cover the strip of land in question and to convey therein the interests of heirs of William H. Allin.

Joseph H. Marks in his bill, in which Bridget Lavin is also a party complainant, alleges that the deed of August 22, 1857, from Thomas R. Allin and William H. Allin to Patrick Martin and Margaret Martin, conveyed a tract of land situated in Barrington; that the southerly five rods of the west end of said tract extended five rods further west than the balance of the west end of said tract; and he avers, upon information and belief, that the five-rod projection extended to mean high-water mark of Bullock's Cove; that Patrick and Margaret Martin in their lifetime, and Bridget Lavin since their decease, have continuously been in possession of said tract to the present time. The Marks bill further sets up title by adverse possession in Bridget Lavin; the appointment of Howard E. Allin as administrator of the estate of William H. Allin; the two auction sales, and deeds from Howard E. Allin, as administrator, to Dodge; that such sales were unauthorized and void; that neither Marks, Bridget Lavin, nor the administrator or heirs of William H. Allin ever disputed the right or title of Dodge to the portion of the property which was advertised and covered by the deeds made in pursuance of the two auction sales.

Further allegations in the Marks bill set forth the changes made by Dodge in the wharf; the receipt of information by Bridget Lavin, in 1906, that Dodge claimed the shore at the five-rod projection of her land; and that in 1908 Dodge had apparently learned for the first time that the two conveyances from Howard E. Allin, administrator, did not carry a valid title. The Marks bill in continuation sets forth the conveyance of

Marks' interest in the strip of land in question to Dodge; the method and manner in which the execution of such deed was procured—that is, under cover of correcting the title of Dodge in the property purchased at the auction sales from the administrator of William H. Allin; the making of a deed subsequently, January 7, 1910, from Marks to Lavin, conveying his interest in the latter's property; that at the time of giving said last-named deed the complainant, Marks, first learned that his prior deed to Dodge purported to cover the five-rod projection of the Lavin land; and that the complainants Marks and Lavin do not seek to disturb Dodge in the enjoyment of the property covered by his deeds from Allin's administrator and acquired through the auction sales before mentioned.

The bill prays for the annulment of the deed from Marks to Dodge, so far as the same relates to the land lying between Bullock's Cove and the westerly five-rod line of the said Lavin land.

The three chief questions presented for consideration by these several bills are: First. Has Bridget Lavin any title to the strip of land in question, being the extension of her five-rod line as indicated in red [shaded lines] on the accompanying survey, under the deed from Thomas R. and William H. Allin to Patrick and Margaret Martin of August 22, 1857? Second. Has Bridget Lavin a title by adverse possession in said strip of land? Third. Should the deeds from the heirs of William H. Allin to Dodge be annulled, so far as the same purport to include the strip of land in question?

[1] The deed of August 22, 1857, from Thomas R. and William H. Allin to Patrick and Margaret Martin, conveys a parcel of land lying next north of the Bicknell (later the Higgins) land. The description in this deed is as follows: "A certain piece or parcel of land situated in Barrington and bounded as follows, viz.: Beginning at the southeast corner of the lot called the 'Point Lot,' and running north 74 degrees west, twenty-seven rods and one foot; thence north 15° east, five rods; thence south 74° east, five rods; thence north 15° east, ten rods and twelve and one-half links; thence south 74° east, twenty-two rods and one foot; thence south 15° west, on the line of a 'Juniper hedge,' to the first-mentioned corner—being bounded on the south by land of Elizabeth W. Bicknell, and on the east, north, and west by land of the aforesaid Thomas R. and William H. Allin, containing two acres and forty-seven rods, more or less, with the privileges of landing, loading, and unloading his boat, from the west side of the first-mentioned five rods, and also of passing to and from said land by the road or path leading to the shore on the easterly side of the aforesaid land."

From an examination of the survey in con-

nection with the above description we find that the lines are definite, easily followed, and exclude the strip of land in red [shaded lines] which is the westerly extension of the Lavin property, or, in other words, the westerly extension of the five-rod line. There is nothing in such deed from which it can be reasonably inferred that it was the intention of the grantors to extend the grant westerly beyond the five-rod line, and this conclusion is confirmed by the description itself, which includes a grant of certain privileges over and upon this strip of land, which would have been entirely unnecessary, as well as inconsistent, with the grant of a fee therein. We think, therefore, that Bridget Lavin acquired no title to the strip of land in question under the deed from the Allins to her father and mother, Patrick and Margaret Martin. On the other hand, it is equally clear that Dodge, through the auction sales, and deeds given in pursuance thereof, by Howard E. Allin, as administrator on the estate of William H. Allin, acquired no title in said land, for the reason that neither the advertisement of sale nor the description in such deeds include any part of said strip or contain any language suggestive of such intention.

[2] We now come to the question of title by adverse possession on the part of Bridget Lavin and her predecessors. "Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it. * * * It is ordinarily sufficient if the acts of ownership are of such a nature as a party would exercise over his own property. * * * Actual possession is a question compounded of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of the land, and the purpose for which it is adapted and for which it has been used. The only rule of general applicability is that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of, and must be exercised with sufficient continuity to acquaint the owner, should he visit the land, with the fact that a claim of ownership adverse to his title is being asserted." See 1 Cyc. pp. 983-985, and cases cited.

Upon this question of adverse possession a decided preponderance of the evidence seems to sustain the claim of Bridget Lavin in that regard. There is ample testimony that the Martins and Bridget Lavin for a long period of years, more than the statutory requirement, exercised dominion over the strip of land in question, and that from time to time they filled in the shore front and cultivated the grass outside of the five-rod line. These acts, from their nature and extent, were sufficiently obvious to operate as a notice to others who might claim an interest in said strip of land, and were as con-

tinuous as the care and character of the land in question demanded. We think that the title to the strip of land, as indicated in red on the survey [shaded lines in this report], together with all riparian and other rights pertaining thereto, is in the said Bridget Lavin by adverse possession, and that she is entitled to have annulled, so far as the same may relate to the land and rights in question, the before-mentioned deeds from Marks and the heirs of William H. Allin to Dodge.

This conclusion renders the consideration of any other questions unnecessary.

The parties may present a form of decree to this court in accordance with this opinion.

MORAN v. McDEVITT et al.

(Supreme Court of Rhode Island. July 3, 1912.
On Motion for Reargument, July 6, 1912.)

1. FRAUDS, STATUTE OF (§ 76*)—INTERESTS IN REAL PROPERTY—PARTNERSHIP CONTRACTS.

A partnership agreement for the buying and selling of land need not be evidenced by writing, but may be proven by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 135-139; Dec. Dig. § 76.*]

2. TRUSTS (§ 80*)—RESULTING TRUST—PURCHASE MONEY PAID FOR PROPERTY TAKEN IN THE NAME OF ANOTHER.

Complainant had agreed with defendant to engage in the purchase and development of real estate, defendant to furnish all the capital, and defendant, with money actually belonging to him, took the title to property negotiated for by the firm in his wife's name, though not by way of gift or advancement to her, but to defeat his partner's rights to profits therefrom. Held that, when the wife took title thereto, a trust resulted in favor of the firm, and that complainant was entitled to have the lands held and disposed of as agreed in the partnership contract.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 113, 114; Dec. Dig. § 80.*]

3. HUSBAND AND WIFE (§ 129*)—ESTOPPEL.

A wife who allowed her husband to use and employ her money as his own, and to acquire title to real property in her name for the purpose of defeating the rights of the husband's partner to a share of the profits therefrom, was estopped from claiming the money so as to defeat the rights of the other partner.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 283, 468-470; Dec. Dig. § 129.*]

4. PARTNERSHIP (§ 86*)—TRANSACTIONS IN REAL ESTATE—RIGHT TO PROFITS—FRAUD.

Plaintiff and defendant formed a partnership for the purchase and development of land, he title to be taken in the name of defendant who was to furnish all the capital, profits and losses to be divided equally. After the firm had negotiated for the purchase of a tract, defendant secretly, and to defeat plaintiff's claim to a share of the profits, had the title taken in the name of his wife, and thereafter conveyed a half interest therein to A. Thereafter plaintiff and defendant agreed that M. should have a share in the profits of such tract, in return for which defendant was to give plaintiff a share in the profits of another tract in which he was interested with such third person, who, however, had no knowledge of such agreement

before it was made and who never ratified it, although A. had assented to any agreement made by defendant relating to the profits. Defendant also purchased still another tract out of the profits of the first two tracts, title to which he had secretly taken in the names of his wife and of A. of the interest in the former tract. Held that, under the original agreement as modified, plaintiff was not entitled to any profits derived from the sale of the tract owned by the person with whom he and defendant had agreed to share profits therein as against such person, and that his right to one-third of the profit on that tract and one-third on the tract first purchased by the firm was to be satisfied out of his partner's half-share therein, and that, as to the tract purchased with money derived from the sale of these tracts, profits were to be equally divided between plaintiff and the party who with defendant's wife had taken title thereto.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 134; Dec. Dig. § 86.*]

Appeal from Superior Court, Providence and Bristol Counties; Christopher M. Lee, Judge.

Bill by James P. Moran against John E. McDevitt and others. Decrees for complainant, and respondents appeal. Appeal dismissed.

The following is the rescript of Lee, J., in the superior court:

"This is a bill in equity brought by James P. Moran against John E. McDevitt, his wife, Margaret J. McDevitt, James F. McDuff and James L. McDuff, the said James L. being the son of said James F., and prays that it may be declared by a decree of this court, first, that a partnership or partnerships exist between the complainant and the respondents, or one or more of them, in respect to the transactions mentioned in said bill; second, the fractional part of the profits of said partnership or partnerships to which said complainant is entitled; and, third, for an accounting.

"From the evidence submitted the court finds that on or about the 10th day of May, 1910, the complainant and the respondent John E. McDevitt, by oral agreement, agreed to form, and did form, a copartnership under the firm name of McDevitt & Moran; that said copartnership was formed for the purpose of dealing in insurance, brokerage, the sale of real estate on commission, the purchase of tracts of land for the purpose of developing, and selling the same; that is, the laying out of streets thereon, the division of the same into house lots, the sale of said lots for the benefit of said firm, and that the title to said land so purchased was to be taken in the name of John E. McDevitt. The court also found that the respondent John E. McDevitt agreed to furnish all the capital necessary to carry on the firm business; that the complainant, who was an expert in said business, in lieu of contributing money to such copartnership, should give his services as such expert; that, after deducting the necessary expenses for running said busi-

ness, the profits and losses thereof should be shared equally by said copartners, and that no definite time was fixed for the termination of said copartnership; that, immediately upon the formation of said partnership, said parties opened an office in Pawtucket for the transaction of said business; that, in pursuance of said business, they opened negotiations on or about June 17, 1910, with Rose Ann Grosvenor, through her agent, Frank H. Nottage, for the purchase of a certain tract of land now known as the 'Grosvenor Heights Plat,' with the idea of developing it—that is, dividing it into house lots, and selling the same for the benefit of said firm in accordance with said copartnership agreement—that said Rose Ann Grosvenor finally agreed with said McDevitt & Moran to sell said lot of land for \$2,700, and immediately thereafter said firm of McDevitt & Moran, and before the transfer was made, began to develop said land, did lay out streets thereon, divided the same into house lots, and advertised the same for sale, as a speculative enterprise of the firm of McDevitt & Moran; that on the 29th of June, 1910, said Rose Ann Grosvenor, at the request of said John E. McDevitt, conveyed said lot of land to Margaret J. McDevitt, wife of said John E.; that said land was paid for by a check for \$2,700 drawn July 2, 1910, signed by Margaret J. McDevitt, payable to the order of John E. McDevitt, and indorsed in blank by him; that the fund on which said check was drawn was money originally belonging to said John E. McDevitt and part of a sum of \$25,000 which he had derived from the sale of a clothing business he had previously carried on in Pawtucket, and which said sum he had previous to that time deposited in the name of his wife for purposes best known to himself, but which from the time of depositing the same to the date of this transaction he had been accustomed to use and did use as his own; that this money, although deposited in the name of his wife, was in reality money belonging to John E. McDevitt; that on the 5th of July, 1910, said Margaret J. and John E. McDevitt conveyed one undivided one-half part of said land to the respondent James L. McDuff, and received therefor the sum of \$1,300; that said deeds were not placed on record until the 15th day of July, 1910, the day before the sale of lots on the Grosvenor Heights plat was to begin; that said complainant did not know that said Rose Ann Grosvenor had conveyed said land to said Margaret J. McDevitt, or that said Margaret J. McDevitt had conveyed one-half part thereof to said James L. McDuff until subsequent to the 15th day of July, 1910, and that said conveyances were made contrary to the agreement that was before that time entered into between said Moran and McDevitt in reference to the same; that, immediately upon ascertaining said fact, said complainant inquired of said John E. Mc-

Devitt the reason therefor, and was told by said McDevitt that he, McDevitt, was interested with one of the respondents, James F. McDuff, in another plat of land known as the 'Tumac Plat,' and that he had promised said James F. McDuff that he would let him, McDuff, in on the first plat of land acquired by the firm of McDevitt & Moran, and also told said complainant that if he, Moran, would let McDuff in on the Grosvenor Heights plat, and allow McDuff to have one-third of the profits derived from the sale of land on that plat, that he, McDevitt, in lieu thereof would give him, Moran, one-third of the profits derived from the sale of the Tumac plat; that said Moran then and there assented to said proposition, and thereupon it was agreed between said Moran and McDevitt that said complainant should have one-third of the profits derived from sales of lots both on the 'Grosvenor Heights' and 'Tumac' plats.

"The evidence does not show that James F. McDuff ever knew of any such agreement or that Margaret J. McDevitt or James L. McDuff ever had personal knowledge of the same, but the evidence does show that not only was the Grosvenor Heights plat bought with money belonging to John E. McDevitt, but also that said James L. McDuff did agree and assent to any agreement that John E. McDevitt should make with regard to the same; that early in September, 1910, said complainant and respondent John E. McDevitt negotiated with one Green for the purchase of a certain other lot of land for the sum of \$1,000 to be developed and platted in house lots, and be sold for the benefit of the firm of McDevitt & Moran, and that subsequent thereto said John E. McDevitt secretly and without informing said Moran that he was so going to do took title to said lot in the name of said Margaret J. McDevitt and said James L. McDuff, and paid for the same out of the proceeds of the sales of lots on the Tumac and Grosvenor Heights plats, and that about the middle of September said partnership terminated.

"The respondent claims that, even if the court should find from the evidence submitted that there was a partnership formed between the petitioner and the respondents for the purposes set forth in the bill, still the same cannot be enforced, because, it being a partnership for the purchase and sale of land, it must as between the parties themselves be evidenced by a contract in writing, and cannot be established by parol. To this the complainant replies that such a contract is not within the statute of frauds, and can be established by parol, for such contracts do not contemplate the transfer of the title of the land so purchased or any interest in the same from one partner to the other, but only an interest in and a division of the profits to arise from the sale of the land so acquired.

[1] "While it is true that some authorities

hold that partnerships formed for the buying and selling of land must be evidenced by articles in writing, and cannot be proven by parol on the ground that if one partner makes a purchase of land in his own name, but which is intended for the benefit of the firm, to allow the other partner or partners under the mere form of a partnership agreement, the same being evidenced only by parol, to take advantage of that contract, would be to allow him to acquire an interest in land by parol directly in opposition to the statute of frauds. The great weight of authority, however, seems to be that such agreements of copartnership can be proven by parol, and are not in violation of the statute of frauds, and such authorities base their reasoning on the ground that such contracts do not contemplate any transfer of land from one partner to the other or the creation of any interest or estate therein, do not as between the parties in any way affect the title to realty so bought for copartnership purposes, but that the subject-matter of the contract is the profits or losses to be derived from the sale of said land. This seems to us to be the better reasoning and the rule which this court should follow.

"In the case at bar the court finds that inasmuch as the averments of the bill and the testimony submitted in support thereof do not contemplate any transfer of the land to be purchased for the purposes aforesaid or interest therein from the respondent McDevitt to the complainant, but only a division between them of the profits and losses to be derived from the sale of the land, it is not necessary for the complainant in support of such agreement to produce written evidence thereof, but that he can establish and has established his bill by oral testimony, and it follows, therefore, that, when negotiations were completed for the purchase of the Grosvenor Heights and Green plats, the right to the same having been negotiated for and acquired for firm purposes, the complainant acquired an equity in both of said plats, and was entitled to have the land so acquired held and disposed of the same as agreed upon in the contract of partnership and for the benefit of the firm.

"The respondent also claims that, even if the proposal in paragraph 3 of the bill testified to by Moran in regard to the Tumac and Grosvenor Heights plats was actually made by McDevitt and accepted by Moran, the agreement is in no way binding on the parties respondent because the same is not in writing, is within the statute of frauds, and all trusts in land must be manifested in writing except resulting trusts. Inasmuch as the original copartnership agreement entered into by McDevitt and Moran contemplated only a division of the profits and losses to be derived from the sale of land purchased for partnership purposes, and inasmuch as the court also found that it was unnecessary

for the complainant in support of such copartnership agreement to produce written evidence thereof, but could prove the same by oral testimony, it follows, therefore, that any subsequent agreement between said parties—i. e., between McDevitt and Moran—modifying the original agreement as to the division of the respective shares which each was to have in the division of the profits and losses can be established in the same way—i. e., by oral testimony—and the evidence submitted does show that such agreement was made in respect to the Grosvenor Heights and Tumac property. The court, however, finds from the evidence submitted that James F. McDuff was no party to the agreement made by McDevitt and Moran as to the division of the profits of the Tumac and Grosvenor Heights plats, had no knowledge of the same before it was made, and never ratified the same. It follows, therefore, that, whatever the rights of the complainant are in and to the profits of the Tumac and Grosvenor Heights and Green plats as against the other respondents, the complainant has no right to any share of the profits of the Tumac plat belonging to James F. McDuff.

[2, 3] "The only question remaining is, Does the transfer of the title of said Grosvenor Heights and Green plats to Margaret J. McDevitt and James L. McDuff affect the complainant's right to a share of the profits to be derived from the sale thereof?

"The court finds from the evidence submitted that, although the money with which the Grosvenor Heights plat was purchased stood in the name of Margaret J. McDevitt, this money actually belonged to John E. McDevitt, and, although the title to the said land was taken in the name of Margaret J. McDevitt, it was not so taken by way of gift or advancement to her on the part of her husband, but the same was so taken for the purpose of defeating the rights that others, and particularly this complainant, would acquire against said John E. McDevitt from the sale of said land, and as the property was paid for by money belonging to John E. McDevitt, which he had agreed to contribute to the firm of McDevitt & Moran for the purpose of purchasing land to be sold at a profit, and as the same was not given to Margaret J. McDevitt as a gift or advancement, that immediately, when she acquired title to said property, a trust resulted in favor of said firm of McDevitt & Moran, and said complainant was entitled to have the land so acquired held and disposed of as agreed in the contract of partnership and for the benefit of the firm of McDevitt & Moran; and the court also finds that, even if the money with which the land was purchased and paid for did actually belong to her instead of her husband, still, as she allowed said John E. McDevitt to use and employ this money as his own, she is now es-

topped from setting up this claim that the money belonged to her, to defeat the rights of the complainant.

[4] "We therefore decide that under the original agreement of copartnership entered into between McDevitt and Moran that Moran was to have one-half of the profits to be derived from the sale of the Grosvenor Heights plat; that subsequent to that time this agreement was modified by McDevitt and Moran so that said Moran under said modified agreement is now entitled to one-third of the profits to be derived from the sale of the Tumac and one-third of the profits to be derived from the sale of the Grosvenor Heights plat, and that, as John E. McDevitt owns one-half of the Tumac plat and one-half of the Grosvenor Heights plat, Moran's rights to one-third of the profits to be derived from these two plats can be satisfied out of the shares belonging to John E. McDevitt without deciding as to Moran's rights, which it is entirely unnecessary to decide, as against the rights of James L. McDuff in the Grosvenor Heights plat.

"The court also finds that the whole of the Green plat was purchased with money derived from the sale of the Tumac and Grosvenor Heights plats, and the profits to be derived from the sale should be divided equally between James L. McDuff and this complainant.

"The complainant therefore is entitled to the relief asked for."

James F. Murphy, of Pawtucket, for appellants. Eliot G. Parkhurst, Eugene A. Kingman, and Edwards & Angell, all of Providence, for respondent.

PER CURIAM. This is a suit in equity for a partnership accounting, and to determine the plaintiff's rights in the profits derived from the sale of lots on certain tracts of land mentioned in the bill of complaint.

It is now before this court upon the respondents' appeal from a final decree, and also upon an appeal from an interlocutory decree authorizing the temporary receiver to sell certain lots, etc.

For the reasons stated in the rescript of the superior court, the respondents' appeal from the decree of the superior court, entered December 9, 1911, is dismissed; the respondents' appeal from the decree entered March 30, 1912, allowing temporary receiver to sell certain real estate, is also dismissed, said decrees are affirmed, and the cause is remanded to the superior court for further proceedings.

On Motion for Reargument.

The respondent's motion for a reargument presents nothing which was not considered by the court in arriving at a decision of the case. The motion for a reargument is denied.

JOYNES v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. March 11, 1912.)

1. CARRIERS (§ 106*)—CARRIAGE OF GOODS—DUTY TO FURNISH FACILITIES—QUESTION OF FACT.

Where a carrier seeks to excuse failure to meet the demands for facilities made upon it in a particular case by showing adequacy of facilities under ordinary circumstances and extraordinary demands in the case in question, a question of fact is raised, since the law has no fixed standard for the measure of duty in such case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

2. CARRIERS (§ 95*)—CARRIAGE OF GOODS—DUTY TO FURNISH FACILITIES.

A carrier is bound to do all that is reasonable and use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 396-433; Dec. Dig. § 95.*]

3. CARRIERS (§ 99*)—CARRIAGE OF GOODS—DUTY TO FURNISH FACILITIES.

When an emergency arises and a carrier unexpectedly has more business than it can accommodate, and it receives goods without notice to the shipper of the probable delay, and fails to obtain his assent, express or implied, to the delay, it is bound to transport the goods within a reasonable time, notwithstanding the emergency.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 415-426; Dec. Dig. § 99.*]

4. CARRIERS (§ 106*)—CARRIAGE OF GOODS—DUTY TO FURNISH FACILITIES.

Where a railroad permitted produce dealers to unload cars in a produce yard and allowed them two free days for that purpose, and time thereafter on demurrage, a dealer whose potatoes were delayed in an outer yard until they rotted is entitled to have a jury determine in his action for damages for the detention whether the railroad had done all it could to provide sufficient facilities in the produce yard, and it was improper to instruct that, if he and the other dealers helped to block the yard with their cars after expiration of the free days, there could not be a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

5. APPEAL AND ERROR (§ 1178*)—DISPOSITION OF CAUSE—REMAND FOR NEW TRIAL.

In an action against a railroad for detention of a shipment of potatoes in an outer yard, where the court erroneously instructed that if plaintiff and other dealers helped to block the produce yard with their cars after the expiration of the free days, there could be no recovery, and the court entered judgment for defendant non obstante veredicto, the judgment will be reversed and a venire facias de novo awarded, so as to secure a trial on the issue properly involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. § 1178.*]

Appeal from Court of Common Pleas, Allegheny County.

Action by H. W. Joynes, to use of A. T. James, against the Pennsylvania Railroad Company. From a judgment for defendant non obstante veredicto, plaintiff appeals. Reversed and venire facias de novo awarded.

The facts are stated in the opinion of the Supreme Court. Verdict for plaintiff for \$23,654.03. Subsequently the court entered judgment for defendant non obstante verdicto. Plaintiff appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISER, JJ.

Stephen Stone and William A. Stone, for appellant. Thomas Patterson and James R. Miller, for appellee.

STEWART, J. The appeal is from a judgment entered non obstante. This character of judgment necessarily implies that the case as presented on the trial would have warranted binding instructions. We are to inquire whether this was so here. The evidence on behalf of plaintiff gave support to the following facts: The plaintiff is a produce dealer residing and doing business in the city of Pittsburgh. Being without warehouse or storage facilities of his own, he was accustomed to have all his consignments delivered to him by the defendant company at a certain yard at Twenty-First street in Pittsburgh, known as the produce yard, where all, shippers of produce, conducting like business with the plaintiff, were offered facilities for selling to their customers their produce directly from the car, and for this purpose were allowed to detain, without charge, the cars carrying their shipments for 48 hours after their arrival. The defendant company maintained other delivery yards in Pittsburgh, but at none of them were such facilities afforded as met the requirements of consignees who expected to sell their produce directly from the car. In the early part of July, 1906, the plaintiff had consigned to his order at Pittsburgh a very large quantity of potatoes. While the bills of lading for this produce indicated Pittsburgh as the place of delivery, it is too clear for dispute that the contract of consignment contemplated a delivery at this produce yard. That both parties to the controversy so understood it is abundantly established by the evidence. The cars carrying plaintiff's produce arrived without delay at the outer yard of the defendant company at Fifty-Fourth street. This was not a yard for delivery, but for distribution and storage of cars. Plaintiff was permitted there to examine his potatoes, and he found them all sound and in good condition. The usual time required for the transfer of cars from the Fifty-Fourth street yard to the produce yard is about six hours. Instead of promptly transferring the cars loaded with plaintiff's potatoes to the produce yard for delivery there, the cars were detained at the outer yard, none of them for less than two days and some for as much as seventeen. When delivered at the produce yard, it was found that the potatoes in 128 of these cars had heated and were absolutely without value in consequence.

The action was for recovery of damages for the injury by the delay in delivery.

[1] The case, as thus established by plaintiff's evidence, called for a reply; for, except as the defendant company overcame it, it entitled the plaintiff to a verdict. It showed a delivery of the potatoes in good condition, that they had been utterly ruined while in custody of the carrier, and that the loss had resulted from the carrier's delay in transferring them to the appointed place of delivery. Upon this showing the burden fell upon the defendant to excuse itself for the delay which caused the loss. No defense by way of excuse was attempted, except to show a congested condition in the produce yard which prevented an earlier delivery there of plaintiff's cars. The case turns upon the sufficiency of this defense as matter of law. A fuller understanding of the actual situation with respect to the produce yard is here necessary. The capacity of the yard is limited to the accommodation of 385 cars at any one time. As before stated, shippers of produce are allowed in this yard to hold without charge the cars containing their produce for two days after their arrival. Under the printed rules and regulations of the company, they are entitled to hold them longer but subject to a demurrage charge after the free period. When plaintiff's cars arrived at the Fifty-Fourth street yard, it so happened that the produce yard was full. Many of the cars there were beyond free time, and were subject to demurrage; but none were in the yard that were not rightfully there. And so it is evident that when plaintiff's cars reached the Fifty-Fourth street yard a situation confronted the defendant company in which it was helpless to meet the demand of plaintiff and make prompt delivery of his produce, as it had undertaken to do. For this situation who was responsible? If the defendant company, its responsibility must have resulted from a failure on its part with respect to some duty that attached in connection therewith. That a duty rested on it to provide accommodations in the produce yard for all cars it engaged to deliver there calls for no discussion. That those they maintained in this instance were inadequate for the accommodation of the plaintiff's cars is a fact in the case, and the one fact to which the loss must be referred. This may or may not involve failure of duty, depending entirely upon the facts in the case. Presumably it did involve such failure, and the burden was on the defendant company to justify it. Under such conditions, the carrier may justify by showing that the accommodations it had provided at the produce yard were adequate for the amount of business it was there ordinarily required to handle, and that the demands made upon it in the particular instance when they proved inadequate were unusual and extraordinary. But the law does not presume that such was the case.

The burden of showing it is upon the carrier, and when attempt is made to show adequacy of facilities under ordinary conditions, and excuse failure because of extraordinary demands, a question of fact is raised which the jury alone can determine, since the law has no fixed standard for the measure of duty in such case.

[2] "Where delay occurs in the transportation of goods in consequence of a lack of cars or other facilities, the company is liable for the delay unless it can show good cause therefor. A railroad company is bound to do all that is reasonable, and to use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business, and whether it has done this in a given case is a question for the jury." *Illinois Central R. R. Co. v. Cobb*, 64 Ill. 128. This indicates the first question of fact that necessarily arose in the present case. Had the defendant established to the satisfaction of the jury its first proposition, to wit, that the facilities it provided were adequate under ordinary conditions, still another question of fact would have arisen. Admitting the extraordinary demand made upon it in this instance, did the defendant do what could reasonably have been expected of it in warning the plaintiff of the situation that would delay the delivery of his goods?

[3] "It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. When an emergency arises and more business is suddenly and unexpectedly cast upon a carrier than he is able to accommodate, unless the carrier decline to receive the excess offered, some shippers must necessarily be delayed; yet if the carrier do receive the goods without notice to the shippers of the circumstances likely to occasion delay, or fail to obtain his assent, express or implied, to the delay, he will be bound to transport the goods within a reasonable time, notwithstanding such emergency." *Dawson v. Chicago & Alton R. R. Co.*, 79 Mo. 296. Quite as explicit to this point is *Bussey v. Memphis, etc., R. R. Co.* (C. C.) 13 Fed. 330, 4 McCrary, 405. Just what the measure of defendant's duty in this connection was in the present case depended upon the situation and circumstances of the parties. It may be that circumstances here relieved defendant of the duty of notifying shippers, or this particular shipper, of the congestion at the produce yard. But here again such circumstances were not to be presumed, but shown, and, if a question of fact arose in connection therewith, a reference to the jury would have been unavoidable. Instead of submitting to the jury these questions of fact which were directly in the

case, the court submitted another, which, as we shall endeavor to point out, had no place in the controversy.

[4] In his charge the learned trial judge used this language: "The defendant company says here that Mr. Joynes helped to block the yard, helped in this congestion, that he was negligent and did not take his stuff out, and that the other produce men did the same thing. I submit that to you in two ways, and the first is, if it was the fault of the men who were in the yard there, the produce men, and not the fault of the railroad company, there can be no recovery of course; second, if Mr. Joynes so contributed to this congestion, we say, if they were all in it, the other produce men, and he so helped in this holding his goods beyond the time he should have, then he cannot recover." Now it was not pretended that the cars of the plaintiff or those of the other shippers had been detained in the produce yard with a view to produce a congestion, and make it impossible for the defendant company to introduce other cars into the yard; nor was it pretended that any of the cars had been detained for a length of time exceeding the limit allowed by the company's rules and regulations where cars are subject to demurrage charges. The cars that were then in the yard were there by a right which the defendant company itself recognized; otherwise, in the exercise of a clear duty resting upon it, it would have removed them elsewhere. Of course, the shippers who were holding their cars in the produce yard beyond free time could have relieved the situation by releasing their cars and making place in the yard for others. But what duty rested upon them to do this in relief of the company? They could not be, and were not, in fault in not doing so, as long as they kept strictly within their legal rights. The charge of the court proceeded on the theory that the question was one of negligence on part of shippers, including the plaintiff, in the matter of the unloading and release of their cars, a wholly mistaken theory if, in fact, the shippers had the right under their contract with the company to detain their cars, and that they had such right there can be no doubt. The rules and regulations of the company were the basis of contract between the parties. They measured their reciprocal rights and obligations. Negligence to be actionable must at least be in breach of a legal duty, and it is impossible to derive any other or greater duty resting upon the shippers in this case than the duty to pay the demurrage charges under the contract. It is nothing to the point to say that, under such construction of the contract between the company and shippers, it would be in the power of the latter to create congestion in the produce yards at any time. A sufficient answer to this is that such result would in itself demonstrate that either the rules and regulations which allowed the con-

gestion to occur were insufficient, or that the yard facilities which had been provided for the shippers were inadequate. In either case the responsibility would rest wholly with the company, for it had determined the extent of the facilities and the rules governing their use. The case of Laughlin Bros. Co. v. Railway Co., 225 Pa. 540, 74 Atl. 418, relied upon as supporting the view taken by the learned trial judge, contains nothing contrary to anything we have here expressed. In that case it was the custom of the defendant company, known to all its shippers, to deliver not more than three cars at a time to any one person or firm, and to deliver additional cars only as those first delivered were emptied and released. It was there held that the shipper, having received storage in the produce yard for all the cars he was entitled to under the established rules and custom, of which he had full notice when he made his shipments, had no cause of action against the company for loss resulting from his cars being detained in an outer yard to await room in the produce yard.

[5] We repeat, the question submitted to the jury to pass on was outside the case. On this mistaken issue the jury found for the plaintiff the sum of \$23,654.03, but on a review of the whole case the learned trial judge, adhering to his view of the law, because it was conceded by plaintiff that the congestion in the produce yard was owing to the fact that many cars were being held by shippers in the produce yard under demurrage, directed judgment non obstante. This, as we have indicated, was error, and the judgment must be reversed for this reason. Since, however, the case was not tried on the issues which were properly involved, we shall enter such judgment as will afford the parties another opportunity to have the case tried according to the law and evidence.

The judgment is reversed, and a venire facias de novo awarded.

PROCTOR v. LEHIGH VALLEY TRANSIT CO.

(Supreme Court of Pennsylvania. March 18, 1912.)

STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—COLLISION—QUESTION FOR JURY.

In an action against a street railroad company for injuries resulting from a collision between a car and the wagon in which plaintiff was riding, in crossing the tracks, evidence as to defendant's negligence and plaintiff's contributory negligence held for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Appeal from Court of Common Pleas, Montgomery County.

Action by Edgar E. Proctor against the Lehigh Valley Transit Company to recover damages for personal injuries. Judgment

for plaintiff for \$3,000, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, STEWART, and MOSCHZISKEER, JJ.

Nicholas H. Larzelere, Franklin L. Wright, and Charles Townley Larzelere, for appellant. Joseph S. Kratz and William H. Houston, for appellee.

STEWART, J. The plaintiff was one of a company of five, all employes of the defendant company, who on the day of the accident had been together engaged in doing certain repair work. They were returning from their work to Ambler, the place from which they had started, in a covered wagon drawn by two horses. Yost, the foreman, was driving the team, and the course pursued was along a turnpike at the side of which ran the trolley tracks of the defendant company. There were two ways of reaching Ambler—one, the first to be reached, by turning aside from the turnpike at the point where the crossing of the trolley tracks was attempted, and going by Tennis avenue; and one by following the turnpike further and turning aside into Rose Valley road. When the first was reached, Yost turned his horse to the right with a view to cross the trolley tracks at that point and enter upon the Tennis avenue road. While in the act of crossing, a repair car of defendant company, coming from the same direction as that pursued by the wagon, collided with the wagon, and in the collision the plaintiff received his injuries. The negligence charged to the company was failure in the motorman to give proper signal of the approach of the car, excessive speed of the car, and failure of the motorman to have his car under control. The case exhibits the usual conflict of testimony with respect to each of these several grounds of complaint; and if the appeal involved nothing more than the question of defendant's negligence, little or no discussion would be required, since the evidence clearly warranted a submission of this question to the jury, and it was submitted under proper instructions.

Another question was presented, however, which calls for and has received careful consideration. It is necessary here to state somewhat more fully the facts. The car which collided with the wagon, as we have remarked, was a repair car, and was, therefore, not running on any schedule of which the public had notice. The persons in the wagon, however, knew that this car was being employed on that day, having passed it while it was at rest at a point about 2,500 feet back from where the accident occurred; but they were without knowledge as to when it would start or the direction it would take. Unfortunately for the occupants of the wagon, it followed in their rear. It appears

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from defendant's testimony that as one approaches the crossing attempted by the driver he may, if he look in the direction from which the car came, have an unobstructed view of the trolley tracks for about 800 feet. The parties in the wagon were seated in this manner: Yost, the foreman, was in the driver's seat, with Rosenberger to his left on the same seat. Carruthers sat on a tool box in the body of the wagon. Well sat on the endgate facing to the rear, with his feet or legs outside the wagon. The plaintiff sat on a coil of wire on the floor of the wagon about midway between the front and rear of the wagon and opposite Carruthers. Occupying this position, plaintiff says he was somewhat lower than either Carruthers or Well. The curtains at the side of the wagon were down, completely shutting off the view at either side. But to the rear and front there was nothing to obstruct the view, there being no curtains at either end. This was the situation within the wagon as it approached the crossing and as the crossing was attempted. The wagon was about 5 feet in width, while in height it was quite sufficient to admit of one standing erect within it. Yost testified that, when he reached a point within 50 or 75 feet of the crossing, he "sort of halted his team," which he had been driving at a trot, looked, and not seeing a car—though upon his own admission the track was clear of obstruction for a distance of 800 feet—he drove upon the crossing, and before he had knowledge of danger the collision occurred.

We may assume for present purposes that Yost was guilty of negligence. But his negligence, whatever it was, may not be imputed to this plaintiff. Yost had entire charge or control of the team. One may not, when traveling as this plaintiff was, divest himself of all obligation to exercise reasonable care for his own safety. If the driver negligently incurs a danger which was understood by, or would have been known to, the passenger, had he exercised ordinary care, and the passenger makes no interference and no effort to look out for his own escape, the rule that prevents a recovery by the driver in case accident happens, and injuries are sustained, applies equally to the passenger. In the present case the plaintiff had equal, if not better, opportunity than Yost, the driver, to see the approach of the car, while traveling alongside the trolley tracks. Had he looked, he must have seen the car. The whole rear of the wagon was open, and the view in that direction unobstructed. He may not have been able to see from the exact position in which he sat, but the slightest change in position on his part would have disclosed to him the entire situation. He admits he did not look for a car, and seeks to excuse himself in this regard by putting the duty of looking wholly upon Yost. The proximate cause of the accident, however,

was not the driving alongside the trolley tracks, but the attempted crossing of them at that particular place. It follows that plaintiff's failure to look, and his general inattention to his surroundings, can be counted against him as negligence only as these can be connected with the attempt to cross the tracks. If he did not know, and had no reason to suppose, that Yost would there make the attempt, until it was too late for him to interfere or escape himself from the danger, the fact that he had failed to look as they were traveling along the road cannot be said to have contributed to the accident in crossing; for had he looked and seen the car approach, while a circumstance from which would arise a duty of increased care and caution in driving, the failure in such duty, if any there was, in no way contributed to the accident. It was not careless or reckless driving along the turnpike that caused the accident, but the reckless attempt to cross the trolley tracks.

In this connection, what duty rested on the plaintiff? The turn from the road to the crossing was almost at a right angle. Up until the moment the turn was made, nothing had occurred to indicate to the plaintiff that the crossing was there to be made. Was it, then, too late for him to do anything to avoid the result? So in its final analysis the question in the case must be: Was the plaintiff bound to anticipate Yost's attempt to cross at that point? He knew that the crossing there was into a road which led to Ambler, where they were going. He knew, also, of another further along, which was also into a road which led to Ambler, and which, he says, was the one usually taken. He says he did not know that Yost was going to attempt the former. Had he known that Yost's purpose was to adopt the first crossing, his negligence would be self-confessed. But he says he did not know it, and it cannot, therefore, be said that he failed in any positive duty prescribed by law. Whether he was guilty of negligence which contributed to the accident depended upon consideration of all the circumstances of the case: the precise measure of his duty under the circumstances being indeterminate. The question was, therefore, one for the jury, and it was submitted under careful and proper instructions, resulting in a verdict for the plaintiff.

The assignments of error are overruled and the judgment is affirmed.

CASE et al. v. CONNECTICUT CO.
(Supreme Court of Errors of Connecticut. July 19, 1912.)

NEW TRIAL (§ 70*)—VERDICT—EVIDENCE TO SUSTAIN.

Where, in an action for an injury alleged to have been caused to an automobile through

the defendant's negligence, there was a clear failure to show that the injury complained of was caused by the defendant's negligence, and that the plaintiffs' own contributory negligence was not a proximate cause of the injury, the court properly set aside a verdict for the plaintiffs.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

Wheeler, J., dissenting.

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Action by Frank A. Case and others against the Connecticut Company. From a judgment for defendant after setting aside a verdict for plaintiffs, plaintiffs appeal. No error.

Hadlai A. Hull and Charles Hadlai Hull, both of New London, for appellants. Michael Kenealy, of Stamford, for appellee.

PER CURIAM. The evidence so clearly failed to show that the injury complained of was caused by the defendant's negligence and that the plaintiffs' own negligence was not a proximate cause of it that there was no error in setting the verdict aside.

No error.

From this opinion WHEELER, J., dissents.

ALLEN v. CITY OF NEW LONDON.

(Supreme Court of Errors of Connecticut. July 19, 1912.)

1. APPEAL AND ERROR (§ 933*)—REVIEW—PRESUMPTIONS.

Where the trial court conditioned the setting aside of a verdict on the failure of the plaintiff to file a remittitur of a part thereof, it will be presumed that it was set aside for excessiveness, and not because against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3425, 3772-3776; Dec. Dig. § 933.*]

2. NEW TRIAL (§ 161*)—REMISSION OR REDUCTION OF EXCESSIVE RECOVERY.

A trial court may properly condition the setting aside of a verdict for plaintiff on the ground of excessiveness on his failure to file a remittitur of a part of the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 321, 323; Dec. Dig. § 161.*]

3. APPEAL AND ERROR (§ 979*)—REVIEW—APPEAL FROM DECISION ON MOTION FOR NEW TRIAL.

Where the action of the trial court in setting aside a verdict as excessive was not unreasonably exercised, it will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Appeal from Superior Court, New London County; Ralph Wheeler, Judge.

Action by Eunice H. Allen against the City of New London to recover damages for personal injuries alleged to have been caused

by defendant's negligence. From the court's ruling in setting aside a verdict for plaintiff for \$2,750 as against the evidence and excessive, she appeals. Affirmed.

George Curtis Morgan, of New London, and Charles V. James, of Norwich, for appellant. William J. Brennan, of New London, for appellee.

PRENTICE, J. The plaintiff seeks compensation for personal injuries alleged to have been occasioned by a fall upon a sidewalk in the defendant city, claimed to have been in an unsafe and defective condition by reason of ice thereon, which condition it is averred was due to the defendant's negligence. The parties were at issue upon this averment of negligence. Upon the return of a verdict for \$2,750, the defendant moved to set it aside as being contrary to the evidence and excessive. The court thereupon filed its memorandum stating that, unless a remittitur of so much of the verdict as was in excess of \$900 was filed within a time specified, it would be set aside. No remittitur having been filed within the time so fixed, the motion to set aside the verdict was granted.

[1] The memorandum of the court indicates that its reason for its action was that the verdict was excessive. Had it been the opinion of the court that the issues were found in favor of the plaintiff against the evidence, it certainly would not have signified its approval of a reduced judgment. *Gray v. Fanning*, 73 Conn. 115, 116, 46 Atl. 831.

[2] No question is made, or could properly have been made, as to the regularity in the matter of procedure of the court's action in conditioning the setting aside of the verdict upon a failure to file a remittitur. *Noxon v. Remington*, 78 Conn. 296, 300, 61 Atl. 963. No remittitur having been filed, the question presented is whether or not there was error in setting aside as excessive the verdict as rendered.

[3] The rule to be applied by us in appeals from the action of a trial court in setting aside a verdict as excessive, and its practical result, is well stated by the late Chief Justice Torrance as follows: "In such a matter a large discretion is of necessity vested in the trial court, and only in cases where that discretion is unreasonably exercised ought the action of the trial court to be set aside." *Gray v. Fanning*, 73 Conn. 115, 117, 46 Atl. 831, 832.

Our examination of the evidence in this case fails to disclose that the court below unreasonably exercised the discretion vested in it.

There is no error. The other Judges concurred.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

NICHOLS v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
July 19, 1912.)

STREET RAILROADS (§ 117*)—PERSON ON TRACK—EVIDENCE—QUESTION FOR JURY.

Where the evidence authorized conflicting conclusions as to whether the motorman knew or should have known of plaintiff's peril, and that she was unaware of it, in time to have avoided injuring her, it was error to direct a verdict for defendant, though plaintiff was concededly negligent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

Appeal from Superior Court, New Haven County; William H. Williams, Judge.

Action by Eliza A. Nichols against the Connecticut Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Reversed, and new trial ordered.

Edmund Zacher and William B. Ely, both of New Haven, for appellant. Thomas M. Steele, of New Haven, for appellee.

PER CURIAM. The plaintiff does not claim that she was free from fault in the premises. Her contention is that the verdict was improperly directed, for the reason that there was evidence from which the jury might properly have found the defendant liable upon the application of the doctrine of "the last clear chance." That doctrine had an extended consideration in *Nehring v. Connecticut Co.*, 85 Conn. —, 84 Atl. 301, decided at the present term, and certain principles of general application were there laid down, which do not call for repetition.

The facts of the present case, which, under these principles, must be controlling of its determination, relate to the conduct of the parties within a short space of time, and to the relation to each other of rapidly occurring events, concerning all of which matters much was left to inference and argument from evidence as to distances, speed of travel, and relative locations, which in itself was by no means harmonious or certain. A variety of reasonable theories may be built up upon the testimony, according as different portions of it are accepted as expressing the truth. Under such conditions, the direction of a verdict for the defendant cannot be justified, unless it appear that no theory adequate to support the plaintiff's action could reasonably have been entertained by the jury upon testimony which could have been reasonably credited by it.

Our examination leads us to the opinion that the plaintiff was entitled to go to the jury upon the proposition that, after the motorman knew, or in the exercise of due care ought to have known, that she was in a position of danger, was unaware of that danger, and for that reason would not remove herself to a place of safety, there was time and opportunity for him to have saved

her from harm by the exercise of due care in view of the situation, that he failed to exercise such care, and that as a direct consequence of such want of care she was hurt. Such a proposition, sanctioned by the jury, would have brought the case within the third of the group of cases discussed in *Nehring v. Connecticut Co.*, 85 Conn. —, 83 Atl. —, and justified a verdict for the plaintiff.

There is error, and a new trial is ordered.

JOSEPH WILLIAMS BROS. & CO. v. CONNECTICUT CO.

(Supreme Court of Errors of Connecticut.
July 19, 1912.)

STREET RAILROADS (§ 99*)—INJURIES TO PERSONS ON TRACKS—CONTRIBUTORY NEGLIGENCE.

Where the driver of a wagon hit by a street car looked up the street on which the car ran, when approaching it on another street, but could not see on account of an obstruction to his view, and did not thereafter look again until he was on the tracks, when the car was so close that he could not avoid a collision, he was guilty of contributory negligence which would relieve the company from liability for the injury suffered.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

Appeal from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge.

Action by Joseph Williams Bros. & Co. against the Connecticut Company. From a judgment for defendant on a directed verdict, plaintiffs appeal. No error.

Charles S. Hamilton and Rocco Ierardi, both of New Haven, for appellants. Harrison T. Sheldon and Thomas M. Steele, both of New Haven, for appellee.

PER CURIAM. One of the plaintiffs was driving a horse harnessed to a business wagon, all the property of the plaintiffs, along Olive street, in New Haven, and across Chapel street, one of the principal thoroughfares of the city, about 32 feet wide between curbs, in the middle of which is laid a double line of trolley tracks of the defendant. In his progress northerly across these tracks a car of the defendant approaching from the west struck the wagon and injured it and the horse and harness. The testimony as to the speed of the approaching car varied from 5 to 30 miles an hour. The plaintiff driver estimated it at about 20. His testimony was that he was driving at about 5 miles an hour. that as he approached Chapel street on Olive he started to look up Chapel street to see if a car was coming; that he could not there see on account of the obstruction to his view, caused by a large building on the corner; that he continued on without looking again until he was upon the tracks; that he then saw the car within 10 feet of him and coming fast; and that he then at-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tempted to urge his horse on, but did not succeed in avoiding a collision. This statement of the movement of the team and the conduct of its driver was the only one upon those matters before the jury.

The verdict was directed upon the ground that the plaintiff driver was guilty of contributory negligence. The appellants contend that they were entitled upon the evidence to have this question submitted to the jury, and no other claim is made. We find it impossible to read the driver's story, which, in respect to his conduct, stands unqualified, without reaching the conclusion that a jury could not reasonably have reached any other decision than the one which under the direction of the court was embodied in the verdict.

There is no error.

HUGHES et al. v. HALL et al.

(Court of Appeals of Maryland. Feb. 29, 1912.)

1. APPEAL AND ERROR (§ 70*)—FINAL ORDER—RULINGS ON DEMURRER.

Though an order overruling a demurrer to a bill and thereby fully settling a disputed right of the parties is appealable, an order sustaining a demurrer to a bill, with leave to complainant to amend, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 367-385; Dec. Dig. § 70.*]

2. CORPORATIONS (§ 562*)—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT.

Acts 1908, c. 240, § 41, providing that on the insolvency of a corporation the liability of stockholders for the face value of the stock, less the amount paid thereon, is an asset which may be enforced by the receiver, authorizes a chancery receiver of a corporation to sue in equity stockholders for the amount unpaid on the stock held by them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.*]

3. CORPORATIONS (§ 252*)—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT.

Under Acts 1908, c. 240, §§ 41, 54, providing that on the insolvency of a corporation the liability of stockholders for the amount due on the stock held by them is an asset enforceable by the receiver, and declaring that, when a corporation shall be dissolved by judicial decree, its property shall vest in the receiver, a chancery receiver of a corporation may not enforce the stockholders' liability before exhausting the tangible assets, and a bill by a receiver against stockholders which does not allege that the assets have been exhausted nor aver the amount of the assets, and which does not show anything as to the solvency of the corporation, is demurrable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.*]

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

Action by Adrian Hughes and another, Receivers of the Hopkins Clothing Company,

against Frederick D. Hall and another. From an order sustaining a demurrer to the bill, plaintiffs appeal: Affirmed and remanded.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Sylvan Hayes Lauchheimer and Thomas Hughes, for appellants. Richard S. Culbreth, for appellees.

STOCKBRIDGE, J. The Hopkins Clothing Company was incorporated in the year 1906. The stock was divided into two classes—preferred and common. Apparently from the record no subscriptions were taken for the common stock, only for the preferred, and those upon the condition that each subscriber for preferred stock should receive common stock as a bonus to the amount of 25 per cent. of his subscription for preferred stock.

In June, 1910, a bill was filed by Frederick D. Hall, the president of the company, as a creditor and stockholder, which, while not alleging the insolvency of the company, set forth acts tantamount to an allegation of insolvency, and further alleging that "the business of the corporation is in such a condition that the interests of the creditors and stockholders require that it shall be dissolved under the statute," and praying that the corporation might be dissolved and a receiver appointed to take charge of and conduct the business, and make some satisfactory disposition thereof under the control of the court. On the same day that the bill was filed an answer was filed on behalf of the corporation "admitting the truth of the matters alleged," and consenting to the appointment of a receiver. Thereupon a decree was signed appointing a receiver and authorizing him to take charge of the effects of the company.

In November, 1910, the receiver applied to the court for authority "to take such proceedings as may be deemed proper to enforce" a liability of the holders of the common stock for the value of that stock held by them, and which they had received as a bonus for their subscription to the preferred stock. On this application the court passed an order authorizing the receivers to take "such proceedings as may be deemed proper to enforce the liability of the holders of stock of the Hopkins Clothing Company." In pursuance of such authority, the bill in this case was filed by the receivers against 30 defendants and alleged stockholders. Certain of the defendants demurred, and the demurrer was sustained with leave to the complainants to amend the bill of complaint within 30 days. From that order, the present appeal was prayed.

[1] There was no motion filed to dismiss the appeal, and it may be doubtful whether the case is yet in form to be properly passed upon by this court. The order from which the appeal was taken was in no sense a final order, and, while this court has said in *Hecht v. Colquhoun*, 57 Md. 563, that "an appeal will lie from an order overruling a demurrer to a bill, where the demurrer goes to the entire bill," or "where the ruling of the court finally settles some disputed right or interest of the parties" (*Chappell v. Funk*, 57 Md. 465; *Darcey v. Bayne*, 105 Md. 365, 66 Atl. 434, 10 L. R. A. [N. S.] 863), it by no means follows that an order sustaining a demurrer to an entire bill, which does not dismiss the bill, but grants in terms leave to the complainant to amend, is so far in the nature of a final order that it can properly be made the subject of an appeal.

The present case might therefore properly be disposed of by an order of dismissal, but the nature and importance of the question presented seems to warrant an expression of the view of this court, involving as it does the construction of an important statutory provision.

The demurrer to the bill was sought to be sustained upon two grounds (1) that an "ordinary chancery receiver" took nothing that the corporation itself did not possess, and that the Hopkins Company, having issued the common stock as full-paid stock, could not itself have maintained an action against a holder of the stock, and therefore the receiver of the corporation was powerless to enforce such demand, and (2) that no bill to enforce the liability of stockholders could be sustained in advance of a decree dissolving the corporation.

[2] Numerous cases were cited to show what property and rights passed to a receiver by virtue of his appointment, and, as was stated by Judge Boyd in delivering the opinion of this court in *Colton v. Mayer*, 90 Md. 713, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456, "there is no difficulty in the way of receiver suing for any part of the estate, property, or assets that belonged to the corporation, and he is authorized by section 264A (Act of 1896, c. 349) to maintain suits and proceedings to set aside preferences and void or fraudulent transfers, payments, etc., even when the corporation itself could not have done it if it had not gone into the hands of a receiver. But our law does not authorize a receiver to recover any estate, property, or assets that never did belong to the corporation, but only such as it was entitled to when he was appointed, or such as had belonged to it, but had been disposed of contrary to law." In that case it was held that the receivers could not maintain the action for the reason that the receivers were without express authority to sue, that the test of the liability was the right of the corporation to maintain a claim

of the character there asserted, and the fact that at that time the statute did give an express right to the creditors of the corporation which was in the hands of a receiver to proceed directly against the individual stockholder and recover from him the amount of the indebtedness to the creditor. This case was decided in 1900, and, with unimportant modifications, the condition of the law continued the same until the passage of the act of 1908, c. 305. By that statute the former remedy of the creditor against the individual stockholder was abolished, and in place of it there was substituted as an exclusive remedy a bill in equity in the nature of a creditor's bill against the stockholders for any liability upon their part. This act thus dealt with the enforcement of the rights of creditors as they then existed under the Code of 1904, and continued to be effective until the 1st of June, 1908, when the act of 1908, c. 240, became operative. *Pittsburg Steel Co. v. Baltimore Equitable Society*, 113 Md. 77, 77 Atl. 255; *Bettendorf Axle Co. v. Field*, 114 Md. 487, 79 Atl. 724.

By the act of 1908, c. 240, § 41, it was provided that "every stockholder of any corporation in this state shall remain liable for the benefit of its creditors for the amount of the face value of his stock, or of his subscription in case the stock has not been issued, less the amount he shall have already paid thereon, until he shall have paid said amount in good faith; and in the event of the insolvency of the corporation such liability shall be considered as an asset of the corporation and may be enforced by the receiver, trustee or other person winding up the affairs of the said corporation." In this section there is thus conferred upon a receiver or other person winding up the affairs of the corporation an express power to maintain a proceeding against the stockholders, for such sum, if any, as may remain unpaid upon the stock held by them, and that without any distinction of the character of the receiver as "chancery" or statutory. The remedy of the creditor against the stockholder has been taken away by statute, thus depriving the creditor of any action at law, and to deny to the receiver appointed for a corporation the right to maintain a bill in equity against the stockholders, because he was a "mere chancery receiver," would operate to deprive the creditor of what has long been regarded as a valuable right, and certainly was not within the intent of the General Assembly in framing the act of 1908, c. 240.

[3] 2. Is a bill of the character filed in this case maintainable in advance of a decree of dissolution? In determining this it will be sufficient to consider two sections of the act of 1908, c. 240. Sections 41 and 54 both deal with the same subject-matter in part. The latter section was a combination

of the provisions of sections 377, 382, and 383 of article 23 of the Code of 1904, and provided that, when a "corporation shall be dissolved by a decree of any court of this state, its property shall vest in its receivers appointed and named therein." This vesting in the receiver is thus made the legal consequence of a decree of dissolution. By the same section the receiver is given the powers of a permanent trustee of an insolvent debtor as regards preferences, payments, or transfers which would be void or fraudulent under the insolvent statute. No mention, however, is made in this section as to the liability of stockholders, if any, upon stock held by them. In section 41, the only subject dealt with is the stockholders' liability, which is declared to be an asset of the corporation in the event of insolvency, and without any mention whether such insolvency shall be established by a decree of court, or the proof of it as a fact, and express authority for the enforcement of such liability is conferred upon the receiver, trustee, or other person winding up the affairs of the corporation.

But the primary source to look to for the payment of the debts of a corporation is the tangible assets of the corporation, and these should be first exhausted for the benefit of the creditors before recourse is had as against the stockholders. The bill as filed in this case was filed without affidavit; it did not allege that all of the assets coming to the hands of the receivers had been exhausted or converted into cash; and the record contains no statement of the amount of the assets which had come into the possession of the receivers. Reference is made, in connection with a statement of claims filed, to the fact that an auditor's account had been stated, but what it disclosed, if anything, as to the solvency or insolvency of the company nowhere appears, and the allegation of the bill upon which the receivers were appointed was "that your orator believes with proper management and care enough may be realized to properly provide for the payment of all indebtedness due by said corporation." Before, therefore, the defendants could properly be called upon to answer, they were entitled to definite allegations in regard to these several matters, and, the bill not containing them, the learned judge below was entirely correct in sustaining the demurrer and giving the plaintiffs leave to amend. The order below will accordingly be affirmed and the cause remanded that the plaintiffs may, by proper amendment, if they see fit, make the necessary allegations.

Order affirmed and cause remanded that further proceedings may be had therein in accordance with this opinion. Costs to be paid by the receivers.

MULLEN et al. v. BRYDON et al.

(Court of Appeals of Maryland. Feb. 29, 1912.)

1. EJECTMENT (§ 81*)—PLEADING—ISSUES.

Under the express provision of Code 1904, art. 75, § 71, the plea of not guilty in ejectment is in legal effect a confession of possession and ejectment, and puts in issue the plaintiff's legal title to the premises, the right of possession, and the amount of damages.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 220, 221; Dec. Dig. § 81.*]

2. EJECTMENT (§ 9*)—TITLE TO SUPPORT ACTION.

Plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not on any defect in the defendant's title; and if defendant has a good legal title, or the plaintiff has no legal title, no recovery can be had.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.*]

3. TAXATION (§ 734*)—TAX SALE—RIGHT TO SELL.

The power of a tax collector to levy upon and sell lots was limited under the statute to property upon which overdue taxes had not been paid, and, if the taxes had in fact been paid prior to the levy and sale, the whole proceedings of the collector were void, and conferred no title on the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. § 734.*]

4. TAXATION (§ 692*)—TAX SALE—COLLATERAL ATTACK.

A tax collector's proceedings in selling property for arrears of taxes may be attacked collaterally on the ground of jurisdictional defects.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1387, 1389; Dec. Dig. § 692.*]

5. TRIAL (§ 253*)—INSTRUCTIONS.

Prayers of plaintiff in ejectment which ignored the vital question whether the taxes for the years for which the property had been sold had been paid prior to the levy and sale were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. APPEAL AND ERROR (§ 273*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where prayers given announce correct principles of law, and there are no special exceptions filed to them, the Court of Appeals cannot decide whether there was in the case any legally sufficient evidence to support the hypotheses of facts stated in the prayers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1600, 1620-1623, 1625-1630, 1764; Dec. Dig. § 273.*]

7. APPEAL AND ERROR (§ 1078*)—BRIEFS—EXCEPTIONS NOT ARGUED.

An exception to the court's ruling on evidence, not adverted to in the argument or in the brief, and which does not present any matter of importance, may be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Garrett County; Robert R. Henderson, Judge.

Ejectment by Andrew Mullen, in which Frances M. Mullen and others, his heirs, were made parties plaintiff after his death against John C. Brydon and others. Judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment for defendants, and plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Albert A. Doub and John T. Mitchell, for appellants. Gilmor S. Hamill and Wm. E. Walsh, for appellees.

BURKE, J. In December, 1909, Andrew Mullen instituted an action of ejectment against the defendants in the circuit court for Garrett county for the recovery of three lots of ground, numbered 88, 89, 91, and 92 on the plat of "Bloomington" in that county. After the suit had been brought, Mullen died intestate as to these lots, and the plaintiffs, who are his only heirs at law, were made parties. The defendants appeared and pleaded the general issue plea, and took defense on warrant. Warrants of resurvey were issued, and locations were made by both parties. These locations correspond.

[1] The plea of not guilty interposed by the defendants was in legal effect a confession of possession and ejectment, and put in issue the title to the premises, the right of possession, and the amount of damages. Code 1904, art. 75, § 71. Under the issues made by the pleadings, it was an indispensable condition to the plaintiffs' right to recover that they should show a legal title to the lots sued for.

[2] The plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not by reason of any weakness, or defects of the title of the defendant. If it be shown that the defendant has a good legal title to the premises in controversy, or that the plaintiff had no legal title thereto, no recovery can be had. These principles are elementary in the law of ejectment.

The record shows that the title of Andrew Mullen, the original plaintiff and the father of the present plaintiffs, to the lots involved in this suit, was founded upon and derived from a tax sale and deed made by Richard T. Browning, the collector of state and county taxes of Garrett county. This sale was made under the provisions of article 11 of the Revised Code of 1878, which were in force in Garrett county at the time the sale was made. The tax proceedings on their face show a substantial compliance with the requirements of law authorizing the sale.

The main grounds relied on to defeat the action were, first, adverse possession; secondly, that the sale was a nullity, because no taxes were due upon the lots at the time the collector levied upon and sold them.

[3] It must be admitted that the collector had no power to levy upon and sell the lots, unless the taxes upon them were due and in arrear. *Condon v. Maynard*, 71 Md. 601, 18 Atl. 957. His power to sell was limited under the act to property upon which the overdue taxes had not been paid. If the

taxes on the lots had been in fact paid prior to the levy and sale, the whole proceedings of the collector were null and void, and conferred no title upon the purchaser.

[4] The invalidity of the proceedings for jurisdictional defects may be availed of by collateral attack upon the proceedings. *McMahon v. Crean*, 109 Md. 652, 71 Atl. 995, and cases there cited. This case was tried before Judge Henderson in the court below, and resulted in a verdict and judgment for the defendants, and from that judgment the plaintiff has brought this appeal. While a great deal of evidence was introduced at the trial bearing upon the question of adversary possession, we are not at liberty to consider its legal sufficiency for the reason to be presently stated. The evidence shows that in 1865 William A. Brydon was the owner of four military lots, containing about 50 acres each, located within the present limits of Garrett county. On the 17th of April, 1865, he conveyed these lots to the Savage & North Branch Coal Company, reserving, however, in the deed 45 acres, more or less. The four lots in controversy were included in the 45-acre reservation, a large part of which had been laid out in lots, streets, and alleys, and formed part of the town of Bloomington, then called "Llangollen." In July, 1875, Brydon and wife conveyed the four lots involved in this suit to George G. McKay, and the lots were assessed to him in the assessment of 1876, and were sold under the tax sale referred to for taxes due for the years 1884 and 1885. In December, 1875, Brydon and wife executed a mortgage to the National Bank of Piedmont on the 45 acres reserved in the deed to the Savage & North Branch Coal Company, reserving, however, from the operation of the mortgage the lots sold to McKay. The mortgaged property was sold under the foreclosure proceedings, and was bought by the bank, and was conveyed by it in 1903 to Susan V. Brydon, wife of William A. Brydon, and in 1906 Susan V. Brydon and husband conveyed the property to the defendant. There is evidence in the record tending to show that these lots were included in the 45 acres reserved by Brydon in the deed to the Savage & North Branch Coal Company, that they were included in the assessment of Brydon, and that the taxes thereon for the years 1884 and 1885 were paid by him long prior to the tax sale. This was a matter of fact to be determined by the court below.

[5] At the conclusion of the case, the plaintiff submitted five prayers, all of which the court rejected. All of these prayers ignored the vital question as to whether the taxes for the years for which the property had been sold had been paid prior to the levy and sale, and for this reason none of them could have been properly granted.

The defendants' second and third prayers were granted, and their first and fourth re-

fused. Their second prayer submitted to the court, sitting as a jury, the finding of facts which, if found, would make a title by adverse possession in the defendants, and thereby defeated a recovery. Their third prayer asserted the proposition that the verdict should be for the defendants if the court found that William A. Brydon was assessed on the tax books of Garrett county with 45 acres of land for the years 1884 and 1885, and paid taxes on said land for said years prior to the tax sale given in evidence in this case, and that said 45 acres included the lots in controversy, notwithstanding the court should also find that said lots were separately and additionally assessed on said tax books in the name of George G. McKay, and that said McKay did not pay taxes thereon for said years 1884 and 1885.

[6] These prayers announced correct principles of law, and there was no special exceptions filed to either of them, and we are not, therefore, at liberty to decide, in the absence of special exceptions, whether there was in the case any legally sufficient evidence to support the hypotheses of facts stated in either prayer.

[7] The plaintiffs reserved one exception to the ruling of the court on testimony; but this exception was not adverted to in the argument, nor is it alluded to in the brief, and, as it does not present any matter of importance, we will treat it as abandoned.

Judgment affirmed, with costs to the appellees above and below.

KRETZER et al. v. LORSHBAUGH.

(Court of Appeals of Maryland. Feb. 29, 1912.)

1. MONEY RECEIVED (§ 6*) — RIGHT OF ACTION.

Plaintiff can maintain an action for money had and received to recover money paid by him to defendant for a consideration which has wholly failed.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.*]

2. ASSIGNMENTS (§ 48*)—MORTGAGES (§ 593*)—EQUITY OF REDEMPTION—EQUITABLE ASSIGNMENT.

Any words or transactions which show intention on one side to assign and on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment, and a document whereby one having the record title to land admitted her indebtedness to another, and agreed that she would not alienate it without his consent and after paying him the sums advanced, and that, in case of her death, the property should become his absolutely, is a complete equitable assignment, which entitles the third person to reimbursement out of the surplus proceeds of the property against which mortgage foreclosure has been had after the owner's death.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 48;* Mortgages, Dec. Dig. § 593.*]

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Action by Harry E. Lorshbaugh against Abner Kretzer and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Albert J. Long, for appellants. Scott M. Wolfinger, for appellee.

PEARCE, J. This is an appeal from an order of the circuit court for Washington county as a court of equity, and the principal question arises upon the construction and effect of the following agreement between the appellee, Harry E. Lorshbaugh, and Malinda Ridenour, deceased, whose heirs at law are the appellants:

"This memorandum of agreement made this day of August 1903, by Malinda Ridenour of Hagerstown, Maryland, witnesseth: That whereas Harry E. Lorshbaugh has advanced unto me, Malinda Ridenour, the sum of \$100, the receipt of which I hereby acknowledge, as part of the purchase price of the property recently purchased by me of Charles T. Semler, which said property is situated on the south side of Liberty street in Hagerstown, and is now occupied by Pinkney Cramer as tenant, and whereas the said Lorshbaugh has advanced divers other sums to be used in improvements on the said property: Now, therefore, this is to certify to all therein concerned, that I, the said Malinda Ridenour, have agreed with the said Harry E. Lorshbaugh that, in consideration of the said sums of money to me advanced, I will not alienate the said property without the consent of the said Lorshbaugh, and without paying him the sums of money advanced to me with interest thereon; and I have further agreed that in case of my death the said property shall become the absolute property of the said Harry E. Lorshbaugh, free from all claims of all who may attempt to claim under me; it being the intent thereof that in consideration of certain moneys paid me, I have agreed that, in case the said Lorshbaugh survives me, all my interest in the said property shall become the interest of the said Harry E. Lorshbaugh. Witness my hand and seal.

"Malindi Riden. [Seal]

"Test:—"

Malinda Ridenour died intestate about December 19, 1908, seised of a house and lot in Hagerstown upon which there was a mortgage of \$300 held by Alexander Armstrong, dated August 15, 1903, and leaving as her heirs at law a brother, a sister, and a niece, named in the proceedings. A short time after her death, Harry E. Lorshbaugh filed a creditors' bill in the circuit court for Washington county against the heirs of the said Malinda Ridenour and against the executors of said Alexander Armstrong, then deceased,

alleging that she was in her lifetime indebted to him in the sum of \$407.25 as set out in an account filed with the bill as an exhibit, the items therein being money loaned August 15, 1908, \$130, money advanced to pay interest on the Armstrong mortgage, \$90, money to repair house, \$71, expense, sickness, and burial, \$116.25, and alleging that she left no personal estate of any value. The heirs of Malinda Ridenour answered, admitting her death intestate, and that she died seised of the house and lot mentioned, but denied that she left no personal estate, and that she was indebted in any manner to said Lorschbaugh. They also admitted the execution of the Armstrong mortgage, but demanded proof that it was still unpaid. The executors of Alexander Armstrong answered, claiming that the mortgage was still due and unpaid with interest from August 15, 1908, and consented the property should be sold as prayed, provision to be made for the payment of their mortgage out of the proceeds of sale. Proof was made as to who were the heirs at law as stated in the bill, and that Malinda Ridenour died seised of the house and lot mentioned, and a copy of the Armstrong mortgage was put in evidence, with a copy of a deed from Charles T. Semler and wife to Malinda Ridenour of even date with the mortgage. Semler testified that the negotiations for the lot were conducted by Lorschbaugh, that the price was \$400, which he received by a check of Alexander Armstrong, and he made the conveyance to Malinda Ridenour by Lorschbaugh's direction. An agreement of counsel was filed showing that Lorschbaugh and Malinda Ridenour kept house together and lived together as husband and wife in Hagerstown from 1884 or 1888 to the time of her death. Robert D. Kochenour testified that he had known both those persons ever since he could remember, and remembered the purchase of the Semler property, and that Lorschbaugh sold a house he had owned not long before the Semler purchase. He identified the agreement first mentioned herein as a paper he had seen before, and testified that in the spring following the purchase of the Semler property Lorschbaugh called to him on the street, and he went over to the house where Lorschbaugh and Malinda then were, and had that paper, and that Lorschbaugh told him he wanted him to see that paper signed and told him to read it, that he read it to them, and Malinda said she was going to sign it, and he saw her sign it and deliver it to Lorschbaugh. He said Malinda thought there was not room enough on the paper for her full name, and that was why her full name does not appear, that he told her that did not matter, that he did not think they would ever have occasion to use it, and that he meant by that he always thought Harry would die first. He said she told him that Harry was paying the interest on the mort-

gage, and was giving her \$5 a week to put away to pay on the mortgage. Mrs. Semler testified that Malinda told her Lorschbaugh had paid part of the purchase money, and was to get it back out of the property. There was no testimony offered by the defendants.

In January, 1910, Alexander Armstrong, Jr., to whom the mortgage had been assigned by the executors of his father, obtained an order of court authorizing him, on account of the failure of the parties to the cause, to bring the case to a hearing to sell the property under the power in the mortgage, and directing him, after payment of the mortgage debt, interest, costs, and commissions, to hold the residue of the proceeds of sale subject to the further order of the court, and the property was so sold February 22, 1910, for \$540, and the sale was ratified September 5, 1910. There was no evidence sustaining the three last items in the account filed with the bill, and the court so found in the opinion filed in the case. The learned judge of the circuit court held that the agreement mentioned showed that Lorschbaugh had advanced \$100, part of the purchase money, and was entitled to be repaid said sum with interest from August 15, 1903, and so decreed, and directed the auditor in stating an account in the case where the sale was made, after payment of the mortgage debt, interest, commissions, and costs of sale, to distribute the surplus, first, to the payment of costs in the creditors' bill case, and then to the payment of the \$100, with interest from August 15, 1903, and directed a copy of said order to be filed in the sale case also.

[1] The learned judge of the circuit court, without referring to adjudged cases, rested this conclusion upon the general statement in 27 Cyc. p. 855, that an action for money had and received will lie to recover money paid by plaintiff to defendant for a consideration which has wholly failed, and of the correctness of that doctrine we think there can be no doubt.

[2] But he also said there was another view which, in his judgment, entitled the plaintiff to relief in the premises, and that was that the agreement mentioned operated, under the existing circumstances, as an equitable assignment to Lorschbaugh of all her interest in the property, and in our opinion this ground is the proper ground, and affords the proper measure of relief upon principle. It will be seen that the agreement provided for two contingencies, in either of which the plaintiff was entitled to some remedy, but the remedy was not the same in the two contingencies. The first contingency was that if she alienated the property, as she might legally do without his concurrence, then, and upon that condition only, there was express, rather than an implied, promise on her part to pay him, not only the \$100 advanced as part of the purchase money,

but also the other sums not definitely named, but capable of exact ascertainment, which the agreement states he had advanced for repairs and improvements. This contingency could only occur in her lifetime, and, until it did occur, she came under no obligation to pay the sums so advanced. Where there is an express promise to pay upon a certain contingency only, there can be no implied promise to pay without regard to the contingency. The second contingency was that if she died seised of that property, and he survived her, all her interest therein should become his absolute property. This contingency could only occur on her death. The deed to Malinda and the mortgage to Armstrong were both executed on August 15, 1903, and the agreement under consideration was apparently prepared for execution on the same date, as it reads, "This agreement made this ——— day of August, 1903," etc., though it appears from Kochenour's testimony that it was actually signed the following spring. But, however this may be, the only interest she ever had in the property was the equity of redemption, the legal estate conveyed to her by the deed passing at the same moment to Armstrong by the mortgage, which was delivered concurrently with the delivery of the deed. It is true that the agreement cannot operate as a deed or as a will, nor is it a formal conveyance or legal assignment of the equity of redemption. As the property has been sold, by order of the court in this cause under the power contained in the mortgage, since the filing of the bill, there is nothing upon which a decree for sale could operate; but the equity of redemption is represented by the surplus proceeds of sale in the hands of the assignee of the mortgage, and the agreement operates as a good equitable assignment of the fund representing the equity of redemption. In 4 Cyc. 46, the author of the article on "Assignments," Judge Rombauer of St. Louis, says: "Any words or transaction which show an intention on one side to assign, and on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment"—and there is no necessity that the assignee should formally accept the assignment. 1 Amer. & Eng. Enc. 835-837.

In *Sanguinett v. Webster*, 153 Mo. 370, 54 S. W. 571, the court said: "Any language or act which makes an appropriation of the fund amounts to an equitable assignment of that fund." In *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233, Judge Andrews said: "An

equitable assignment has been defined to be such an assignment as gives the assignee a title, which, although not cognizable at law, equity will recognize and protect. Such an assignment passes an immediate equitable interest in the subject, although it is not essential to the creation of the interest that it should be immediately enforceable by suit for specific performance to recover the interest assigned. * * * There must undoubtedly be a purpose to pass a present interest, but that interest may be absolute, or qualified, a right to the immediate possession or enjoyment, or a right to such enjoyment, postponed until the happening of some future event. In other words, the assignment may be made, subject to limitations, qualifications, and conditions, such as might be inserted in the conveyance or assignment of the legal estate in the same subject." The learned judge of the circuit court has given in his opinion a very clear illustration of this view of the case, saying: "Suppose the agreement had been made in consideration of said advancements and payments made by said Lorschbaugh that the said Malinda had agreed that at the end of five years all the interest of said Malinda in said property should become the interest of said Lorschbaugh; could there have been any question of the right of said Lorschbaugh, at the end of said time, to the execution of such a paper as would have been necessary and proper under the law to pass such interest from said Malinda to him? I do not think so. Under such an agreement, after the expiration of said five years, the said Malinda would have held said interest in trust for said Lorschbaugh, and he would have been entitled to the aid of a court of equity, if necessary, to secure him his rights in the premises. I can see no difference between the case supposed and the case under consideration." Nor can we discover any difference in principle. Her heirs at law have no other or greater rights in this equity of redemption than she could have had in the case supposed. The legal title may be in them, but they hold it in trust for him, and he is entitled as against them to the aid of a court of equity to enforce his right in the most expeditious available proceeding. This view would have somewhat increased the amount allowed by the decree to the appellee, but, as he has not appealed, the decree will be affirmed in the form in which it was passed.

Decree affirmed, costs to be paid by the appellant.

CURRY v. STATE.

(Court of Appeals of Maryland. Feb. 29, 1912.)

1. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY—WORDS OF STATUTE.

An indictment charging in separate counts that accused unlawfully disposed of spirituous liquors, fermented liquors, and intoxicating drink, being in the words of the statute, was sufficient; it not being necessary under Code 1904, art. 27, § 446, to specify the particular variety of liquor sold and disposed of.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. INDICTMENT AND INFORMATION (§ 130*)—COUNTS—JOINDER OF OFFENSES.

Two or more offenses, either felonies or misdemeanors, may be charged in different counts in the same indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423; Dec. Dig. § 130.*]

3. INDICTMENT AND INFORMATION (§ 132*)—ELECTION BETWEEN COUNTS.

Where more than one misdemeanor is charged in an indictment containing several counts, the court in its discretion may either compel the prosecution to elect for which offense he will prosecute or, in a clear case, quash the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-447, 449-453; Dec. Dig. § 132.*]

4. CRIMINAL LAW (§ 1149*)—INDICTMENT AND INFORMATION (§ 132*)—APPEAL—DISCRETION.

The court's ruling upon an application to require the prosecutor to elect upon which of two misdemeanors charged he will prosecute, or to quash the indictment, is a discretionary act, and cannot be the subject of an appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. § 1149.* Indictment and Information, Cent. Dig. §§ 425, 447, 449-453; Dec. Dig. § 132.*]

5. INTOXICATING LIQUORS (§ 223*)—CRIMINAL PROSECUTION—PROOF.

In a prosecution for the unlawful sale of intoxicating liquors, the state must prove the commission of the offense within one year before prosecution, but is not confined in its proof to the date alleged in the indictment.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 263-274; Dec. Dig. § 223.*]

6. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

In a prosecution under an indictment charging accused with the unlawful sale of intoxicating liquors to the prosecuting witness at defendant's place of business, evidence that she sold such liquors at her home to other persons than the prosecuting witness was admissible to show that her home where the liquor was obtained was her place of business, and that she kept liquor for sale at the place where the prosecuting witness testified he bought it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

Appeal from Circuit Court, Harford County; Wm. H. Harlan, Judge.

Ella Curry was convicted of unlawfully disposing of intoxicating liquors, and she appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, and URNER, JJ.

H. A. Whitaker and Harry S. Carver, for appellant. J. Royston Stifter and Edgar Allan Poe, Atty. Gen., for the State.

BURKE, J. Section 228 of the Public Local Laws of Harford county declares that: "It shall not be lawful for any person, or any house, company or association, or body corporate, to sell, directly or indirectly, or to solicit or receive orders for the purchase of, at any place within the limits of Harford county, or to give away, or dispose of under any device whatsoever, at his or their place of business, within the limits of said county, any spirituous or fermented liquors or alcoholic bitters, or intoxicating drinks of any kind, or tonic beer, lager beer, schnapps or gin, or any article used and sold as a beverage, in the composition of which whisky, brandy, high wines or alcohol, or any spirituous or fermented liquors shall be an ingredient or ingredients, nor shall any license be granted for the sale of the same in said county." The appellant was indicted, tried, and convicted for the violation of this section, and was sentenced to pay a fine of \$100 and costs, and be confined in the Maryland House of Correction for a period of six months.

The indictment contained nine counts, but upon the application of the state's attorney the ninth count was withdrawn. Each count charges the violation of the law by the traverser on the 1st day of August, 1911, by selling, giving away, or disposing of certain spirituous or fermented liquors to William Rampley.

[1] The first count charged the sale to Rampley of spirituous liquors; the second a sale of fermented liquors; the third a certain intoxicating drink; the fourth a sale of a certain article used and sold as a beverage to the jurors unknown in the composition of which spirituous liquor was then and there an ingredient; the fifth that the traverser gave away and disposed of at her place of business certain spirituous liquors; the sixth that she gave away and disposed of at her place of business fermented liquors; the seventh that she gave away and disposed of at her place of business a certain intoxicating drink; and the eighth that she gave away and disposed of at her place of business an article used and sold as a beverage to the jurors unknown, and in the composition of which spirituous liquor was then and there an ingredient. Each act charged in each count of the indictment constituted a violation of the section of the Public Local Laws of Harford county which we have quoted, and each count is sufficiently definite and certain to gratify the requirements of the law relating to pleading

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

upon statutes. The offense is a statutory one, and the indictment described it in the words used in the statute, and this manner in stating the offense has been repeatedly held by this court to be sufficient. *Mincher v. State*, 66 Md. 227, 7 Atl. 451; *Cearfoss v. State*, 42 Md. 403; *Steven v. State*, 89 Md. 669, 43 Atl. 929; *State v. Camper*, 91 Md. 672, 47 Atl. 1027. Under section 446, art. 27, of Code 1904, it was not necessary to specify the particular variety of liquor sold or disposed of. The traverser demurred to the whole indictment and to each count thereof. The court overruled the demurrer.

It would seem to be evident from the face of the indictment that it relates to one transaction, and that "the variation of the form in which the offense is charged in the different counts is done with a view to meet the evidence." *State v. McNally*, 55 Md. 559. The experience of every prosecuting officer has shown the wisdom of this method of stating the offense in prosecutions of this kind. But if it was the intention of the pleader to set out in each count a separate and distinct violation of the liquor laws of Harford county, and if it be admitted that this was in fact done, the indictment would not for that reason be demurrable.

[2] It has been definitely settled in this state that two or more offenses, either felonies or misdemeanors, may be charged in different counts of the same indictment. *State v. McNally*, supra; *State v. Blakeney*, 96 Md. 711, 54 Atl. 614. In *McNally's Case*, supra, it is said: "Where several distinct felonies are charged in the same indictment, the rule in England is, as stated by Chitty (1 Cr. L. 449m), 'that the only mode of objecting to such a joinder of offenses is by an application to the court to quash the indictment before plea, or to compel the prosecutor to elect which charge he will try in a subsequent stage of the proceedings. But the court will only listen to such a request when they see that the charges are actually distinct and may confound the prisoner, or distract the attention of the jury.'"

[3] This rule of the common law exists in Maryland, and in a case where there are several counts in the indictment charging the defendant with more than one distinct and separate felony it is competent for the court, in its discretion, either to compel the prosecutor to elect upon which he will proceed, or in a clear case to quash the indictment." The same rule applies to distinct misdemeanors charged in different counts of the indictment. *State v. Blakeney*, supra. No motion was made to quash the indictment in this case, nor was there an application made to compel the state to elect.

[4] An application of that kind is addressed to the discretion of the court, and the action of the court upon it is not the subject of appeal. It will be granted or refused in the exercise of the sound discre-

tion of the court upon careful consideration of the facts of the particular case.

[5] Under the indictment, the state was bound to prove that the traverser had violated the terms of the act under which the indictment was found by selling or disposing of the kind of liquors or drink therein stated to William Rampley within one year prior to the commencement of the prosecution. Code 1888, art. 57, § 10; Code 1904, art. 57, § 11; *State v. Kiefer*, 90 Md. 165, 44 Atl. 1043. The state was not confined in its proof to the date alleged in the indictment; but it was permitted to show the commission of the offense charged at some time within the period of limitations.

[6] Before a conviction could be had under the fifth, sixth, seventh, and eighth counts, the state was bound to prove that the place where the liquor was given away or disposed of was the traverser's place of business. Whether or not the home at which the appellant lived and where the offense was alleged to have been committed was her place of business within the meaning of the act was a material question for the jury, and any fact or circumstance reflecting light upon it was properly admissible. The state proved that the traverser lived in a house in the Fourth election district of Harford county, and that this house was owned by John Harry, the father of the traverser, and was occupied by Harry and his wife, and by the traverser and her daughter, Alice. It was at this house that the offense charged is alleged to have been committed. The indictment was filed November 16, 1911, and the trial was had on November 23, 1911. During the course of the trial the appellant reserved 22 bills of exceptions.

The court, over the objection of the appellant, permitted William Rampley to testify that in May or June preceding the trial he had purchased from the defendant at her home two drinks of whisky for which he had paid her 20 cents, and also permitted Thomas Hilditch to testify that he had met William Rampley at the home of the appellant in May or June preceding the indictment, and that Rampley had bought from the appellant two drinks of whisky for which he paid her 20 cents. These rulings constitute the first, second, fifth, and sixth bills of exceptions. We see no possible grounds of exception to the admission of this evidence. It bore directly upon the very charge contained in the indictment and was properly admitted.

The third, fourth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second exceptions involve substantially the same question, and may be disposed of together. They relate to the admission of evidence of witnesses that they had bought liquor from the traverser, that they had seen

whisky at her house in quantities, and that men had often been seen going to her house sober and leaving there drunk.

The general rule undoubtedly is, as stated in *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851, that, "when a man is put upon trial for one offense he is to be convicted if at all by evidence which shows that he is guilty of that offense alone and that under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." See, also, *Coleman v. People*, 53 N. Y. 81; *People v. Shea*, 147 N. Y. 78, 41 N. E. 505; *People v. Mollineaux*, 168 N. Y. 300, 61 N. E. 286, 62 L. R. A. 193. The reasons for the exclusion of evidence of other crimes are thus stated in *Commonwealth v. Jackson*, 132 Mass. 16: "Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done." But this rule is subject to an exception as firmly established as the rule itself, and under which it is allowable to prove similar and distinct offenses when knowledge or intent, or motive becomes material, and "when the proof shows such a connection between the different transactions as raises a fair inference of a common motive in each." *Jones on Evidence*, § 145; *Lamb v. State*, 66 Md. 285, 7 Atl. 399; *Wharton on Cr. Ev.* § 31.

It would seem to be reasonably clear that under the indictment in this case the court did not violate the general rule which forbids the admission in evidence against the accused of other and different offenses by admitting the evidence embraced in these exceptions, first, because it was relevant upon the fifth, sixth, seventh, and eighth counts of the indictment, which charge that the place where the liquor was obtained was the traverser's "place of business"; and, secondly, as showing that she kept liquor for sale at the place where the prosecuting witness testified he had bought it. In *Guy v. State*, 90 Md. 692, 54 Atl. 879, this court approved an instruction to the jury given by Judge Waters in which he stated that the fact that the traverser, who was indicted under this identical law, held a government license for the sale of spirituous or fermented liquors in Bel Air, was prima facie evidence that he was engaged in the business of selling spirituous liquors in Bel Air, and certainly the evidence excepted to tends to show that this appellant had converted her home into a "place of business" for the sale of spirituous liquors. And in *Guy v. State*, 90 Md. 20, 44 Atl. 997, it was held that the fact that the traverser had procured such li-

cense was admissible in evidence for the purpose of showing what his business was, or that he kept liquor for sale, or generally the question of intent.

The appellant, of course, could not have been convicted upon this indictment for selling or disposing of liquor to any one other than William Rampley, and the evidence we are now considering was admissible only for the purpose indicated, and doubtless the court below would have so informed the jury had it been applied to. Finding no error in the action of the court in overruling the demurrer or in any of the rulings excepted to, the judgment will be affirmed.

Judgment affirmed, with costs.

SIELING v. BRUNNER.

(Court of Appeals of Maryland. March 26, 1912.)

EXCEPTIONS, BILL OF (§ 38*)—DELAY IN PERFECTING—DISMISSAL OF APPEAL.

Under rule 32 of the circuit court for Howard county, requiring bills of exception to be prepared and submitted to the trial court during the term at which the exceptions were taken, unless otherwise expressly allowed, an appeal is properly dismissed for failure to have the bills of exception submitted or signed within that time; appellant having had ample time to have procured an order extending the time.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 49-53; Dec. Dig. § 38.*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

Action by Robert T. Brunner against John Sieling. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTERSON, URNER, and STOCKBRIDGE, JJ.

Edward M. Hammond and Frederick Dallam, for appellant. James Clark and Samuel J. Fisher, for appellee.

BURKE, J. The appellee sued the appellant in assumpsit in the circuit court for Howard county to recover certain commissions alleged to be due him for selling the appellant's farm. Issue was joined upon the general issue pleas, and the case was tried before the court without a jury. The trial resulted in a verdict and judgment for the appellee, and the defendant has brought this appeal.

The appellee has filed a motion to dismiss the appeal upon two grounds: First, because the bills of exception were not submitted to or signed by the court within the time prescribed by the Thirty-Second rule of the circuit court for Howard county; secondly, because the bills of exception were not submitted to or signed by the court during the term at which the case was tried. There was no order signed in the case extending the time for signing the bills of exception.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

112 Md. 607, 77 Atl. 304, that "under the ordinary practice, although the exceptions to a ruling of the court must be taken at the time the ruling is made, it is neither usual nor necessary to prepare the bills of exception, or to have them signed, until after the trial, at some convenient time during the term at which the case is tried, unless otherwise specially ordered by the court, which may, by an order passed during the term, extend the time beyond its expiration. The bills also may be prepared and signed after the expiration of the term by consent of the parties."

There was no consent by the appellee to the signing of the bills of exception in this case. On the contrary, the record shows that he positively objected to the court signing them, and it is conceded that they were signed after the expiration of the term at which the case was tried. Unless, therefore, the bills of exception were signed within the period limited by the Thirty-Second rule of the circuit court for Howard county, the appeal must be dismissed.

The portion of that rule which has relation to the question before us is as follows:

"Every exception taken to the ruling of the court in the progress of a trial shall be noted at the time of the ruling made, and the ground of the exception stated; and when such exception is taken to the granting or refusal of instructions to the jury, the parties so excepting shall state to what prayer or instruction the exception is intended to imply; and as it would greatly and unnecessarily retard the business of the court were it required that upon any exception taken the progress of a trial should be stayed until the formal bill of exception should be prepared and signed by the judge or judges, it shall be sufficient that the parties taking the exception note the same at the time of the ruling made, and thereafter, within a reasonable time after the trial, reduce the exceptions to proper form, in conformity to the rules prescribed by the Court of Appeals for the regulations of appeals, and submit the same to the judge or judges for his or their signature, and in no case shall the progress of the trial be stayed or delayed for the formal preparation of bills of exception or direction of the court. But in every case, unless otherwise expressly allowed by the court, the bills of exception shall be prepared and submitted to the court during the sittings of the term at which such exceptions shall be taken."

The case was tried during the September term, 1911, of the circuit court for Howard county, and on the 25th day of that month a finding was had in favor of the plaintiff for \$930. On the 27th day of September, a motion for a new trial was filed by the defendant. This motion was overruled by the

day, under the September term, the judgment appealed from was entered, and immediately after the entry of the judgment the September term was finally adjourned and the December term called, and 22 days thereafter the bills of exception were signed.

The record shows that the court was in session, engaged in the trial of cases, until the 29th of September, 1911. The appellant, therefore, had ample time to have procured an order under the rule extending the time for the preparation and signing of the bills of exception. They were not signed, therefore, during the term at which the case was tried, and no application was made to the court, or order signed by it, extending the time for signing them. Under the plain language and meaning of the rule, and upon the authority of *Livers v. Ardinger*, 90 Md. 36, 44 Atl. 1042, which we regard conclusive upon the question, the appeal must be dismissed.

Appeal dismissed, with costs to the appellee.

LOFLAND v. STATE ex rel. ROGERS.
(Superior Court of Delaware. Sussex County.
April 9, 1912.)

1. DISORDERLY CONDUCT (§ 1*)—"PUBLIC PLACE."

In Act Gen. Assem. March 26, 1909 (25 Del. Laws, c. 247), prohibiting disorderly conduct in public places, *held*, that the term "public place" was not limited to places where people publicly congregated, but included all places not within a city or town which were not private.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 6, pp. 5806-5813; vol. 8, p. 7773.]

2. DISORDERLY CONDUCT (§ 7*)—PUBLIC PLACES—COMPLAINT.

Act Gen. Assem. March 26, 1909 (25 Del. Laws, c. 247), prohibits disorderly conduct in public places, and section 1 declares that any person who shall brawl, etc., in the state outside any incorporated city or town shall be guilty of disorderly conduct. *Held*, that a complaint under such act, failing to disclose whether the misconduct charged was committed by defendant in a public place within the state, and outside the limits of any incorporated city or town, failed to show that the justice had jurisdiction, and was therefore fatally defective.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 12-14; Dec. Dig. § 7.*)

Willard Lofland was convicted of disorderly conduct, and he brings certiorari. Reversed.

Argued before WOOLLEY and RICE, JJ.

Robert C. White, of Georgetown, for appellant. Andrew J. Lynch, of Georgetown, for the State.

WOOLLEY, J., delivering the opinion of the court:
The Act

*For other cases see same topic and section NUMBER in Dec. Dig. &

(Laws of Del. vol. 25, c. 247), entitled "An act defining the offense of disorderly conduct in public places and fixing the penalty for the commission thereof, and providing a jurisdiction and procedure for the arrest and trial of persons charged therewith," is in the following language:

"Section 1. Any person who shall brawl, quarrel, use abusive, obscene, threatening or profane language in a loud tone of voice or be intoxicated in any public place within the state of Delaware, and outside the limits of any incorporated city or town, shall be deemed guilty of disorderly conduct and the same is hereby made a nuisance, and upon conviction thereof, shall be punished," etc.

"Sec. 2. Any conductor of any railroad or railway car or any person charged with the duty of keeping order in any park, camp meeting or other public place, or any constable, shall have authority to arrest on view any person guilty of disorderly conduct as above defined, without a warrant, and to take him or her before any justice of the peace of the county wherein the offense is committed. The person making the arrest shall thereupon make a complaint in writing, under oath, before such justice of the peace, setting forth the character of the disorderly conduct charged, whereupon the justice of the peace shall have jurisdiction to hear, try, and finally determine the case."

By the transcript of the justice of the peace it appears that the defendant below was arrested, tried and convicted under the provisions of this statute, and on certiorari the judgment below is sought to be reversed upon the exceptions, first, that the complaint made by the person making the arrest failed to disclose the character of the disorderly conduct charged, in that it failed to show that it was committed in a public place; and, second, that a public place, within the meaning of the statute, is a place in which the public congregates and assembles, as a camp-meeting, public vendue, country postoffice, church, etc.

The plain object of the statute is to provide means for the prompt abatement of certain nuisances when committed in country districts beyond the reach of officers of the law. Certain acts generally recognized as nuisances when committed within the jurisdictions of municipalities are defined by the statute likewise to be nuisances when committed "in any public place * * * outside the limits of any incorporated city or town."

The power to arrest for such offenses is extended to "any conductor of any railroad, or railway car or any person charged with the duty of keeping order in any park, camp-meeting or other public place," as well as to constables, and confers upon any such person authority to make an arrest on view and without a warrant, and imposes upon him

the duty thereafter to make a complaint in writing, under oath, before a justice of the peace, "setting forth the character of the disorderly conduct charged."

[1] The jurisdiction of the justice to hear and try any one for such an offense is dependent, first, upon a complaint being made by the person making the arrest, and second, upon the complaint showing "the character of the disorderly conduct charged." As the jurisdiction of the justice to try and judge the accused is dependent upon the character of the complaint made by him who made the arrest, and as the right to arrest the accused and thereafter make against him a complaint that will confer jurisdiction upon the justice, is limited to the misconduct of the accused in a "public place," it becomes essential to the jurisdiction of the justice, that the complaint affirmatively show the nuisance charged to have been committed in a public place, and it becomes important to ascertain what the statute means by a "public place."

As the object of the statute is to give to public places in rural communities protection under the law equal to that given to like places in urban communities by their local laws, it is certain that the expression "public place" is not restricted in its scope to places of public gatherings, but extends to all places that are public in contradistinction to places that are purely private. The statute seeks to protect the rural public from public brawls, quarrels and the other offenses enumerated, and whenever misconduct of the kind mentioned in the statute occurs in a place described in the statute, the offense contemplated by the statute has then been committed and upon complaint properly made and affirmatively showing both characteristics of the offense, the justice is clothed with jurisdiction.

[2] As the record in the case before the court on certiorari fails to disclose whether the misconduct charged was committed by the defendant in a "public place within the state of Delaware and outside the limits of any incorporated city or town," it fails to show that the justice had jurisdiction of the matter in which he rendered judgment.

The judgment below is therefore reversed.

In re J. R. RICHARDSON CO. et al.
(Superior Court of Delaware. New Castle.
April 4, 1912.)

1. JUSTICES OF THE PEACE (§ 135*)—EXECUTION—LEVY—PRIORITY.

Under Rev. Code 1852, amended to 1881, p. 750, c. 99, § 17, providing that an execution issued by a justice of the peace shall not bind the chattels of the judgment debtor until actual levy, an execution issued by a justice, unaccompanied by any levy, does not bind the chattels of the judgment debtor against an actual levy under a subsequent execution issued on

the subsequent execution may appropriate the proceeds of a sale in payment of such execution.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 426-447, 749; Dec. Dig. § 135.*]

2. EXECUTION (§ 112*)—LEVY—PRIORITY.

Where a sheriff made an actual levy under an execution, and on the same day received notice of the issuance of a prior execution under another judgment, and the prior execution, under which no levy was made, was delivered to him by the officer receiving it, the sheriff could not make a levy under the prior execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 226-240; Dec. Dig. § 112.*]

Petitions by the J. R. Richardson Company and by Max Cohen to draw money out of court. Granted in part, denied in part.

Argued before BOYCE and CONRAD, JJ.

Leonard E. Wales, of Wilmington, for J. R. Richardson Co. Christopher L. Ward, of Wilmington, for Max Cohen.

CONRAD, J., delivering the opinion of the court:

On January 5, 1912, the J. R. Richardson Company, a corporation, obtained a judgment before James W. Robertson, J. P., against Isadore Titleman for the sum of \$165.56, with interest from date, besides costs of suit, and on the same date a writ of fieri facias was issued on said judgment directed to the sheriff or any constable of New Castle county, and placed in the hands of Charles Green, constable of said county, for service, at 9:05 o'clock a. m. on said date.

On the same date a judgment against the said defendant, Isadore Titleman, was entered by confession in the Superior Court of the state of Delaware, in and for New Castle county, in favor of Max Cohen, for the sum of \$265.65, being judgment No. 406 to January term, A. D. 1912, and thereupon a fieri facias was at once issued on said last mentioned judgment, being s. fa. No. 8 to the March term, A. D. 1912, and placed in the hands of the sheriff of New Castle county, at 11:54 o'clock a. m. on said 5th day of January, A. D. 1912.

The sheriff on the date aforesaid levied on the goods and chattels of said defendant, on said writ, and afterwards an inventory and appraisalment was made. The goods and chattels so levied upon continued in the possession of the sheriff, and after advertisement were sold by the sheriff on January 17, 1912, for the sum of \$210.10.

On the day that the levy was made by the sheriff, the latter officer was notified by Charles Green, the constable who had in hand the fieri facias issued by the justice of the peace on the aforesaid judgment in favor of the J. R. Richardson Company, that he, the said Charles Green, as constable,

that it was prior in point of time to the writ in the hands of the sheriff. Afterwards, and before the goods and chattels were sold by the sheriff, the said constable delivered the writ issued to him by the justice to the sheriff, but without any levy having been made by him on the goods and chattels of the defendant under said writ.

Subsequent to the sale, demand was made on the sheriff to pay such part of the proceeds of the sale as was necessary to cover the debt, interest and costs to the writ of fieri facias issued on the J. R. Richardson Company judgment, by the justice of the peace, the claim being made that the fieri facias held by the constable on the justice's judgment in favor of the J. R. Richardson Company, being earlier in time, was entitled to priority in payment. This demand being refused, the sheriff on petition, under the statute, was allowed to pay the money into court, the sum so paid being \$184.12, being the proceeds of sale, \$210, less \$25.88 deducted as costs.

Each of said plaintiffs petitioned the court to have the proceeds of said sale applied to his execution. After argument, upon the above stated facts, the court decided that the writ of fieri facias issued on the judgment of Max Cohen and directed to the sheriff was entitled to the proceeds.

[1] The statute provides (Revised Code, c. 99, § 17) "that goods and chattels taken by virtue of an execution issued by a justice of the peace, shall be inventoried and appraised by the officer levying the same, and the execution shall not bind the goods and chattels until it shall be delivered to a constable or sheriff to be executed, and an execution shall, from the time it is so delivered, bind all the goods and chattels of the defendant within the bailiwick of such constable or sheriff which shall be actually levied upon within thirty days thereafter."

It appearing that no actual levy was made by the constable under the writ issued to him by the justice, on the J. R. Richardson Company judgment, his execution did not bind the goods and chattels of the defendant, although delivered to him prior to the time of the delivery of the other execution to the sheriff.

[2] The sheriff, having duly made a levy under the execution in his hands on the Max Cohen judgment, was entitled to apply the proceeds of said sale in payment of the latter execution. The fact of notice to the sheriff by the constable and the delivery of the writ held by the constable, to the sheriff, did not authorize the constable, to the sheriff, or empower the sheriff to make a levy under, and no levy having been made under the J. R. Richardson Company execution, the last mentioned execution is entitled to the proceeds of said sale.

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann.

OLENDANIEL v. CONRAD, Judge, et al.
(Supreme Court of Delaware. July 19, 1912.)

1. STATUTES (§ 217*)—CONSTRUCTION—EX-
TRINSIC AIDS.

In a proper case, reference may be had to the message of the Governor, and other matters constituting a part of the legislative record, in connection with a bill, to aid the court in ascertaining its real object.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

2. STATUTES (§ 113*)—SUBJECTS AND TITLE—
EXPRESSION OF SUBJECT IN TITLE—"BOULE-
VARD."

26 Del. Laws, c. 189, authorizing the organization of boulevard corporations and the construction by them of boulevards 200 feet wide, part to be used as a road for vehicles and part to be ornamented by trees and other parking features, or to be utilized for railways, telegraphs, telephones, pipe lines, etc., and providing for the maintenance of the road for vehicles by the state, for a new state official with supervision over such road, and for a new item of public expense in maintaining it, is not invalid, under Const. art. 2, § 16, as containing more than one subject, part of which are not germane to its title, reciting that it is an act to amend the general corporation law, by authorizing the organization of boulevard corporations, or which are not germane to the title of the general corporation law, since the popular meaning of the word "boulevard" is a broad and attractive highway designed and used for the transportation of persons and things by any of the means now commonly employed on city streets or country roads, and all the provisions of the act relate to the one subject of the construction, operation, regulation, and maintenance of boulevards and boulevard corporations.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.*]

For other definitions, see Words and Phrases, vol. 1, p. 851.]

3. STATUTES (§ 107*)—SUBJECTS AND TITLES
—ACTS RELATING TO MORE THAN ONE SUB-
JECT.

Under Const. art. 2, § 16, providing that no bills excepting those appropriating money shall embrace more than one subject, which shall be expressed in its title, matters apparently constituting distinct and separate subjects are properly included in one act, unless they are incongruous and diverse to each other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

4. STATUTES (§ 107*)—SUBJECTS AND TITLES
—ACTS RELATING TO MORE THAN ONE SUB-
JECT.

The inclusion in one act of provisions relating directly or indirectly to the same subject, which are naturally connected and not foreign to the subject expressed in the title, does not violate Const. art. 2, § 16, providing that bills shall not embrace more than one subject, which shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

5. STATUTES (§ 107*)—SUBJECTS AND TITLES
—ACTS RELATING TO MORE THAN ONE SUB-
JECT.

An act providing for the organization of a corporation may include provisions relating to its operation, regulation, control, and maintenance, without violating Const. art. 2, § 16, providing that bills shall not embrace more than one subject, which shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

6. STATUTES (§ 107*)—SUBJECTS AND TITLES
—ACTS RELATING TO MORE THAN ONE SUB-
JECT.

26 Del. Laws, c. 189, providing for the organization of boulevard corporations and the construction by them of boulevards, part to be used as a highway for vehicles and part for public utilities, such as railways, etc., is not rendered invalid as embracing more than one subject, contrary to Const. art. 2, § 16, by the provision that the highway for vehicles shall be conveyed to and maintained by the state, while the rest of the boulevard is to belong to and be under the care of the corporation, since the act contemplates that the boulevard shall constitute an indivisible entity and be used in its entirety as a boulevard.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

7. STATUTES (§ 107*)—SUBJECTS AND TITLES
—ACTS RELATING TO MORE THAN ONE SUB-
JECT.

Such act does not violate such constitutional provision because it provides for an exemption of the property of boulevard corporations from taxation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

8. STATUTES (§ 80*)—GENERAL AND SPECIAL
STATUTES—CONSTITUTIONAL PROVISIONS.

26 Del. Laws, c. 189, authorizing the organization of boulevard corporations and the construction by them of boulevards, does not violate Const. art. 2, § 1, prohibiting the creation of corporations by special law, nor article 2, § 19, prohibiting special laws relating to the laying out, opening, etc., of highways, since such act is not a special but a general law, authorizing any five persons to form a boulevard corporation, and relating to a class of corporations which by reason of the difference between boulevards and ordinary highways is not an arbitrary or unreal class.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 86-89; Dec. Dig. § 80.*]

9. STATUTES (§ 80*)—GENERAL AND SPECIAL
LAWS.

That a statute framed in general terms, authorizing the organization of a class of corporations, was passed at the instance and request of an individual, who gave the Legislature assurance that he would organize such a corporation, does not render it a special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 86-89; Dec. Dig. § 80.*]

10. STATUTES (§ 77*)—GENERAL AND SPECIAL
LAWS—"GENERAL LAW."

A law having a uniform operation as to all persons uniformly situated is a "general law," and not a special law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3065-3071; vol. 8, pp. 7669, 7670.

11. STATUTES (§ 77*)—SPECIAL LAWS—CLASS-
IFICATION OF SUBJECTS.

To render the classification of subjects of legislation valid, it must not be arbitrary or unreasonable, but must be a real classification, resting upon some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

12. EMINENT DOMAIN (§ 19*)—PUBLIC USE—
WHAT CONSTITUTES.

Land taken by eminent domain under the authority of 26 Del. Laws, c. 189, for the construction of a boulevard on which a highway for vehicles, a railway, and other public utilities are to be built, and the land beautified by means of trees, walks, etc., is taken for a public

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purpose; and hence that act does not violate Const. art. 1, § 8, providing that no man's property shall be taken or applied to a public use without the consent of his representatives, and without compensation being made.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 56-58; Dec. Dig. § 19.*]

13. EMINENT DOMAIN (§ 19*)—DELEGATION OF POWER—CONSTRUCTION OF LEGISLATIVE ACTS.

The provisions of 26 Del. Laws, c. 189, authorizing boulevard corporations to use that portion of a strip of land acquired under that act for a boulevard, not devoted to a road for vehicles, for any other lawful purpose, only authorizes its use for other public purposes, and not for private purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 56-58; Dec. Dig. § 19.*]

14. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER—CONSTRUCTION OF LEGISLATIVE ACTS.

26 Del. Laws, c. 189, authorizes boulevard corporations to acquire by condemnation a strip of land, part to be used as a highway and part for other public utilities, such as railways, telegraphs, etc. It also authorizes state officials to determine the location of the boulevard, and provides that the part to be used for vehicles shall be conveyed to the state. *Held*, that the statute clearly indicates an intention that the boulevard and all its elements shall be for the use and accommodation of the public, and a boulevard corporation, by accepting and exercising the right of eminent domain, imposes the obligation on it of devoting such strip of land to public purposes; and hence such act is not invalid, as not providing that the public shall have the use of such strip.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

15. EMINENT DOMAIN (§ 67*)—DETERMINATION OF VALIDITY OF EXERCISE—JURISDICTION OF COURTS.

26 Del. Laws, c. 189, authorizing boulevard corporations to acquire a strip of land for boulevards 200 feet wide, is not invalid as authorizing the acquisition of more property than is reasonably necessary for the proper and legitimate purposes of a boulevard; the necessity for the exercise of the power of eminent domain and the quantity of land necessary being a question for legislative determination, not reviewable by the courts, unless possibly where there has been a gross abuse of legislative discretion or manifest fraud.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 67.*]

16. EMINENT DOMAIN (§ 55*)—EXERCISE OF DELEGATED POWER.

26 Del. Laws, c. 189, authorizes boulevard corporations to acquire land by condemnation for a boulevard, part to be used as a road for vehicles and part for other public utilities. Section 168 exempts from taxation the land acquired, so long as not devoted to any of the utilities mentioned, and permits its exemption to extend for 50 years. Section 158 authorizes the corporation at any time to construct a railway on the part not devoted to a road for vehicles. Section 161 authorizes it at any time to use such portion for specified purposes. Section 142 defines a "boulevard" as a broad strip of land, upon which must exist a well-built road for vehicles, and upon which may be constructed and maintained a railway and other utilities. The act further requires the construction of the road for vehicles within six years, but does not expressly limit the time within which the other utilities are to be constructed. *Held*, that the Legislature could not

have intended that the public use could be indefinitely postponed, and the corporation, by accepting the provisions of the statute, is bound to devote the whole of the land to a public purpose within a reasonable time, which use may be enforced by the courts, or appropriate penalties imposed for a failure to devote it to such use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 97, 135; Dec. Dig. § 55.*]

17. EMINENT DOMAIN (§ 55*)—EXERCISE OF DELEGATED POWER.

The power of eminent domain cannot be exercised, unless the property taken is to be devoted to a public use within a reasonable time thereafter.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 97, 135; Dec. Dig. § 55.*]

18. STATUTES (§ 64*)—PARTIAL INVALIDITY—EMINENT DOMAIN.

If 26 Del. Laws, c. 189, authorizing boulevard corporations to condemn land for boulevard purposes, does exempt such corporations from devoting the land to public purposes indefinitely, it is to that extent only invalid.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

19. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

While statutes delegating the power of eminent domain are strictly construed, and restricted to their clear expression and intention, the usual presumptions apply in favor of their constitutionality, and the court should so construe them, if possible, as to sustain their constitutionality.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

20. CONSTITUTIONAL LAW (§ 64*)—LEGISLATIVE POWERS—DELEGATION TO CORPORATIONS.

26 Del. Laws, c. 189, authorizing the construction by a boulevard corporation of a boulevard throughout the whole length of the state, creating a commission to have the absolute discretion of determining the feasibility and desirability of the route, requiring plans to be filed with the Secretary of State, and providing that they cannot be filed until approved by the state commission, is not invalid as delegating to the corporation the power of determining whether a state highway shall be constructed; the Legislature having itself determined that it shall be.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. § 64.*]

21. CONSTITUTIONAL LAW (§ 64*)—LEGISLATIVE POWERS—DELEGATION TO CORPORATIONS.

That a boulevard is to be used in part as a road for vehicles does not preclude the state from delegating to corporations the right to condemn lands therefor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. § 64.*]

22. CONSTITUTIONAL LAW (§ 64*)—DELEGATION OF POWER—CONSTRUCTION AND OPERATION OF LEGISLATIVE ACTS.

26 Del. Laws, c. 189, authorizing the construction of boulevards by corporations, part to be used as a road for vehicles and part for other public utilities, and providing that the corporation may grant, lease, or otherwise dispose of any of its streets, franchises, does not authorize such corporations to transfer their right of eminent domain, and hence is not invalid as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. and Series & Rep'r Indexes

constituting a delegation of the state's sovereign power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. § 64.*]

23. CORPORATIONS (§ 370*) — FRANCHISES — GRANT—VALIDITY.

That 26 Del. Laws, c. 189, grants to boulevard corporations franchises ordinarily exercised by separate and distinct corporations, does not render it invalid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1518; Dec. Dig. § 370.*]

24. CONSTITUTIONAL LAW (§ 64*)—DELEGATION OF SOVEREIGNTY.

26 Del. Laws, c. 189, authorizes the construction of boulevards by corporations, the part to be used for vehicles to be conveyed to and maintained by the state, and authorizes the corporation to institute actions to compel the state to maintain such part of the boulevard in as good condition as when conveyed to it. *Held* that, while the authorization to institute such actions may be unwise, it is not invalid, as a delegation of the state's sovereign powers; the question of whether the necessity for repairs exists or not being in every case a question determinable by the court, and not the corporation, especially as there is nothing in the act precluding the Legislature from acquiring boulevards from the boulevard corporations by the exercise of the power of eminent domain.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. § 64.*]

25. PROHIBITION (§ 28*)—SCOPE OF INQUIRY AND POWERS OF COURT.

The Supreme Court, on a petition for a writ of prohibition, cannot determine issues of fact dehors the record, raised by the petition, answer, and accompanying affidavits; it having no machinery for the determination of such issues.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. § 28.*]

26. STATUTES (§ 285*)—ENACTMENT—PASSAGE.

26 Del. Laws, c. 189, was constitutionally enacted; the enrolled bill being the one passed by the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. § 285.*]

Original petition by Jehu H. Clendaniel for a writ of prohibition against Henry C. Conrad, Associate Judge resident in Sussex County, and others. On rule to show cause why the writ should not issue. Rule discharged, and petition dismissed.

Rule to show cause why a writ of prohibition should not issue to the said Henry C. Conrad, Associate Judge resident in Sussex county.

Argued before CURTIS, Ch., PENNEWILL, C. J., and BOYCE, WOOLLEY, and RICE, JJ.

Henry Ridgely, of Dover, and Caleb S. Layton, of Dover, for complainant. Charles W. Cullen, of Georgetown, and Robert H. Richards, for respondents.

PENNEWILL, C. J. (delivering the opinion of the court). On the 2d day of March, 1911, the Senate and the House of Repre-

sentatives of the state of Delaware received from the Governor of this state a special message, which message contained the context of a letter the Governor had received from Gen. T. Coleman du Pont, and the letter set forth that if the state of Delaware by proper legislative action would authorize and enable the same, he, T. Coleman du Pont, through a corporation, would acquire by purchase or condemnation, a strip of land not less than 100 nor more than 200 feet wide, extending from some point in the northern part of New Castle county to the southern boundary of the state, upon which strip of land the said corporation would construct a good modern road, from 12 to 18 feet wide, throughout the whole length of the state; that a portion of said strip of land not less than 30 feet wide should be devoted to the vehicular road and its accessories, and upon the remaining portion of the strip of land acquired the said corporation should have the right to construct certain other public utilities and to plant trees, grass or shrubbery; that as soon as the vehicular road was completed the said corporation should convey title to the 30 foot wide portion of said strip of land devoted to said vehicular road, unto the state of Delaware, free of cost to the state, and that the state should be required forever to maintain the road in the same condition as when turned over to it; that it might not be desirable to immediately use the part of the said strip of land, other than the 30 feet devoted to the road, for any of the public utilities; that the use of boulevards for public utilities would be practicable and that every part of the state would be enabled to enjoy many public utilities at a minimum cost by the use of a boulevard as a main trunk. The suggestion was made that the part of the strip of land not used for vehicular travel should be exempt from taxation for 50 years, or until used by some of the public utilities.

The Governor, in his message, recommended the enactment of proper legislation to effectuate the proposal.

The Senate the same day sent a concurrent resolution to the House of Representatives, providing for a joint session of the two houses to consider the message of the Governor, and on March 10, 1911, a concurrent resolution was passed, providing for a joint session for the purpose of conference with Mr. du Pont in respect to the highway proposition, pursuant to which resolution the said session was held in the Dover Opera House.

Some time after the 10th of March, 1911, a bill covering the essentials of the proposal, as contained in the du Pont letter, was introduced in the General Assembly as an amendment to the General Corporation Law of the state, and on the 31st day of March, 1911, the Governor of the state approved an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

act which had theretofore been passed by the General Assembly of the state of Delaware, entitled "An act to amend an act entitled, 'An act providing a general corporation law' (being chapter 273, volume 21, Laws of Delaware, as amended) by authorizing the organization of boulevard corporations," which said last mentioned act is printed in volume 26 of the Session Laws of the state of Delaware as chapter 189 thereof.

On the 16th day of October, 1911, Thomas Coleman du Pont, Lewis L. Dunham, Frank M. Williams, Sidney H. Henry, and Paul E. Wilson, under authority of said last mentioned act, filed in the office of the Secretary of State of the state of Delaware articles of association, whereby was created a corporation by the name of "Coleman du Pont Road, Incorporated," which, by its said articles of association, disclosed its object and purpose to be that "of forming a corporation, which shall have perpetual succession, for the purpose of locating, building, constructing, maintaining and operating a boulevard extending from a place in the northern part of New Castle county, by as nearly a straight course as may prove feasible and desirable, through the state of Delaware to the southern boundary thereof, and for the purpose of constructing upon said boulevard a well built road for vehicular travel such as is required by said act as amended, and for the purpose of constructing, maintaining, and operating upon said boulevard a railway or railways for the transportation of freight and passengers, the carriages, coaches and cars of which are to be moved or propelled by electricity, by cable, or motor, or by any improved motive power other than steam, and for the purpose of laying, maintaining and operating pipes and conduits beneath the surface of said boulevard for distributing steam, heat and power, and for the purpose of distributing along said boulevard, either by poles and wires above the surface or by pipes or conduits and wires below the surface, electricity and electric current for any purpose whatsoever, and for the purpose of laying, maintaining and operating, beneath the surface of said boulevard, pipes, tubes, mains and conduits for the distribution or transportation of gas, water or oil or any other useful article, and for the purpose of constructing and operating, either upon or under the surface of said boulevard, or both upon and under the surface thereof, telegraph or telephone lines, by means of poles and wires, or cables, or underground conduits, or otherwise, and for the purpose of beautifying said boulevard by means of trees, grass, flowers and shrubbery, and for the purpose of generating, manufacturing, producing and providing steam, heat, power, electricity, electric current, gas, water, oil, or any other useful article for distribution by means of the agencies hereinabove mentioned, and for the pur-

pose of distributing and selling steam, heat, power, electricity, electric current, gas, water, oil, or any other useful article, and for the purpose of transmitting, sending and receiving telegraph and telephone messages, by means of the appropriate agencies aforesaid, and also for the purpose of using said boulevard for any other purpose not unlawful and not necessarily detrimental to the use of the said road for vehicular travel to be constructed thereon. * * *

The said corporation organized the same day, and at its meeting for organization adopted the following resolution, viz.:

"Resolved, that the proper officers of this corporation do proceed forthwith to take the necessary steps to enable the corporation to condemn any land, sand, earth, gravel or other materials that may be necessary to be taken and used in the construction of the boulevard, to construct which this corporation was organized; and

"Be it further resolved, that the proper officers of this corporation be, and they hereby are, authorized to execute all notices, petitions or other papers necessary and proper, and advised by counsel, to effectuate the condemnation of any such land, sand, earth, gravel or other material, and to affix the corporate seal of this corporation thereto."

The said corporation thereafter proceeded to make surveys and to establish the route, or parts thereof, of its said boulevard, in accordance with the requirements of said act, and did further proceed to acquire its right of way. On the 18th of November, 1911, the directors of said corporation did adopt a fixed general plan for the development and construction of the boulevard to be built by said corporation. On the 4th of January, 1912, the said corporation deposited in the office of the Secretary of State a survey of a section of the route of its said boulevard extending from the town of Georgetown to or near the town of Milford, said section being all located in the county of Sussex and state of Delaware, and passing through the lands of Jehu H. Clendaniel, the petitioner. On the 24th day of April, 1912, the said corporation, having previously given the notice prescribed by said act, presented a petition to Henry C. Conrad, Associate Judge resident in Sussex county, for the purpose of condemning the right of way for its said boulevard through the lands of the said Clendaniel, wherein the said corporation, inter alia, did aver that "for the purpose of locating and constructing said boulevard mentioned and authorized by the charter, or certificate of incorporation, of the said Coleman du Pont Road, Incorporated, and for the purpose of constructing upon said boulevard a well built road for vehicular travel, of the character aforesaid, and for the purpose of constructing, maintaining and operating upon said boule-

ward a railway or railways for the transportation of freight and passengers, of the character aforesaid, and for the purpose of laying, maintaining and operating beneath the surface of said boulevard pipes, tubes, mains and conduits for public use and accommodation in the distribution and sale of steam, heat, power, electric current, gas, water, oil or other useful article, and for the purpose of distributing along said boulevard, in the manner aforesaid, electricity and electric current, and for the purpose of constructing and operating, by means of said boulevard, in any of the manners above indicated, telegraph and telephone lines, for public use in transmitting, sending and receiving messages or intelligence, at reasonable rates or charges, and for the purpose of beautifying said boulevard, as aforesaid, it is necessary that the corporation, petitioner, shall take and appropriate the following described parcel of land," etc., and in which said petition the said corporation did further aver that it "intends in good faith to complete all of the said several public utilities, for which it is necessary to take said land, as aforesaid, and to operate the same, or cause the same to be completed and operated."

At the time of filing said petition, and subsequent to the filing thereof, the said Jehu H. Clendaniel, through his counsel, challenged the jurisdiction of the said Associate Judge to entertain said petition or take any action thereon, upon the ground that the statute by which said proceeding is authorized, to wit, the said chapter 189, volume 26, of the Laws of Delaware, is unconstitutional and void and therefore conferred no jurisdiction upon said Associate Judge in the premises. This objection of the said counsel for said Clendaniel was overruled by the said Associate Judge and the motion of the said Clendaniel's counsel to dismiss the said petition was denied, and the said Associate Judge adjourned further action on said petition until the 11th day of May, 1912, for further proceedings thereon according to law.

Subsequently, on the 3d day of May, 1912, the said Clendaniel, through his counsel, filed a petition in this court praying for the issuance by this court of its writ of prohibition to prevent the said Associate Judge from further proceeding in the premises. In his said petition, the said Clendaniel challenges the constitutionality of said chapter 189, volume 26, of the Laws of Delaware, and also raises a question of fact de hors the record, by charging that the said corporation, or that the said directors thereof, do not intend in good faith to devote the whole of the said boulevard, 200 feet in width, to the public use, and have no plan for the devotion of any part thereof to the public use, unless it be the portion upon which is to be built a road for vehicular

travel. With this petition the said Clendaniel filed six affidavits, identical in form and substance, made by William I. Simpson, James P. Lofland, Frederick H. Whitehead, Lizzie H. Whitehead, Willard S. Dickerson and John Kern, who depose and say that Thomas Coleman du Pont, as president of said Coleman du Pont Road, Incorporated, has repeatedly stated and admitted that no plan has been formed to devote any part of the boulevard not used for the road for vehicular travel to the public use and that there exists only a general intention to construct public utilities thereon at some indefinite future time, or to dispose of the same in some manner, and that the use to which said residue of said boulevard will be devoted is indefinite and contingent, and that the said deponents do not believe that the said directors of said corporation intend in good faith to devote said residue to the public use but desire to acquire the same for speculative purposes.

Upon this petition, this court issued a rule upon the above named defendants to show cause why the writ of prohibition prayed for should not issue, and made such rule returnable May 11, 1912.

At the return day of said rule, the Associate Judge filed his answer or return, which was in effect but a certification from him to this court of a true copy of the record of the said proceeding before him. At the same time, the other defendants filed their return or answer, under oath, wherein they do aver their intention, and the intention of Coleman du Pont Road, Incorporated, to devote the whole of said boulevard, 200 feet in width, to the public use, and do set forth a plan for the development of the whole of said boulevard, adopted by said corporation, and state the manner in which the said corporation intends to devote said boulevard to the public use. Thus, by the petition and answer, in addition to the constitutional questions raised, there is raised a distinct issue of fact de hors the record. In addition to their return or answer, the last named defendants also filed an affidavit of Thomas Coleman du Pont, wherein are denied in substance the material averments contained in the said six affidavits filed with the said petition; and certain other affidavits are also filed by the said defendants negating the averments of said affidavits filed on behalf of the petitioner.

It is contended that the statute in question is in conflict with section 16, article 2 of the Constitution of this state, in that it amends chapter 273, volume 21, Laws of Delaware, being an act entitled "An act providing a general corporation law," by incorporating therein provisions not germane to the subject of said chapter and not expressed in the title thereof, and also that the said amendatory act, being chapter 189, volume 26, Laws of Delaware, is in conflict with

said constitutional provision in that it embraces more than one subject.

The Constitution provides that "no bill or joint resolution, except bills appropriating money for public purposes, shall embrace more than one subject, which shall be expressed in its title."

Many states have constitutional provisions, exactly or substantially, similar to our own respecting the title of a bill, and there have been many decisions of the courts thereon. There is, in the main, remarkable harmony in the cases as to the real purpose of the constitutional provision, its meaning and scope.

The following language used by this court in the case of *Monagan v. Lewis*, 5 Pennewill, 218, 59 Atl. 948, 10 Ann. Cas. 1048, expresses the thought and meaning of the courts in practically all the cases, viz.:

"The object of this important provision of the Constitution is to prevent the joining in one act of several incongruous matters, and to prevent deception by provisions of which the title gives no intimation.

"While such construction should be given to this provision as will prevent the evils it was intended to remedy, it should not be so construed as to defeat or embarrass legislation where there has been a substantial compliance with its requirements. Where it is possible, it should be so construed as to uphold rather than destroy legislation.

"If all parts of an act relate directly or indirectly to the general subject of the act, it is not open to the objection of plurality.

"The Constitution does not require that the title should do more than state in general terms the subject of the act; it need not go into details or furnish an abstract, synopsis or index of the contents of the act."

Judge Cooley in his work on Constitutional Limitations (7th Ed.) 209, says:

"There has been a general disposition to construe such a constitutional provision liberally rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it was adopted."

The same writer at page 172 says: "The generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection."

In the case of *People v. Gaslight Co.*, 205 Ill. 490, 68 N. E. 952, 98 Am. St. Rep. 244, the court said: "It is clear that the broader and more general the subject the greater the number of particular or subordinate subjects which will be embraced within it."

Applying these principles to the present case, must the act in question be declared invalid?

It will be noted that the title of the amendatory act is very general, and that the act which it amends is still more general.

The plaintiff insists "that the said pre-

tended act of the General Assembly of the state of Delaware undertook to amend the act entitled 'An act providing for a general corporation law' by incorporating therein provisions which were not germane to the subject of said last mentioned act, and which were not expressed in the title thereof," and that the act, therefore, embraced more than one subject, which is not expressed in its title.

In order to establish this fact recourse is had to the legislative record as well as to the bill itself.

[1] We have no doubt that reference may be had, in certain cases, to the message of the Governor and other matters constituting a part of the legislative record in connection with the bill, to aid the court in ascertaining its real object. It is urged that such record clearly shows that the object of the bill was the securing of a state highway.

Whatever may be thus shown, we think it is nothing more than is disclosed by the bill itself, and it is, therefore, of no assistance in determining the question under consideration.

Counsel for the plaintiff, quoting from the Delaware case of *State v. Ferschke*, 81 Atl. 401, say:

"Unquestionably the principal object of said constitutional provision is that the title of an act, when published, shall be sufficiently comprehensive to give to the people, as well as the members of the Legislature, fair and reasonable notice of the subject-matter of the legislation proposed."

They say that, testing the bill by this principle, no one reading the title "An act providing a general corporation law," or the title of the amendatory act, would suspect that the highway system of the state was involved, that a new state road was contemplated, that a new state official was to be created, and that a new item of public expense was to be incurred. The title of the amendatory act, it is insisted, "is no more illuminating than the title of the act amended, but rather the reverse, for the addition of the words 'by authorizing the organization of boulevard corporations' would merely lead the reader of the title to believe that the object of the bill was the formation of street construction companies." It is not contended that the organization of boulevard corporations could not have been embraced in the general corporation act, but it is strongly insisted that the amendatory act contains provisions that are foreign to the subject of boulevard corporations.

[2] We will consider, therefore, this question: Whether an act authorizing the organization of boulevard corporations would be in conflict with the constitutional provision above mentioned.

The answer to this question must depend upon the meaning of the word "boulevard." What does it embrace or suggest? Certainly much more than it anciently imparted, viz., "a promenade on a demolished fortification."

Later it was defined to be "a broad street, promenade or walk planted with rows of trees."

In the light of modern conditions the word must be given a broader significance still. To the popular mind and understanding it suggests, at least, a broad and attractive highway, designed and used for the transportation of persons and things. Such transportation may be by any of the means now commonly employed on the streets of a city or on the roads of the country. A boulevard from the city of Wilmington to the southern boundary of the state conveys the idea of a state highway of course, and it is entirely in keeping with such idea that the highway should be ornamented by trees and other parking features.

The general subject of the bill, then, is that which is expressed by the title—a broad and attractive public highway; and we think it was entirely competent for the Legislature to provide in the bill for the construction on said highway of any means of transportation now in common use. Railway, telegraph, telephone, and pipe lines are agencies commonly employed today for transportation purposes, and they cannot be regarded as incongruous with, or foreign to, the general subject of the amendatory act, to wit, the organization of boulevard corporations. The matters contained in the act, when thus considered, do not constitute distinct subjects, but merely express different ideas and purposes relating to, and connected with, the same subject.

[3] Matters which constitute, apparently, two distinct and separate subjects, are not so, in the meaning of the constitutional provision, unless they are incongruous and diverse to each other.

[4, 5] The authorities all agree that if the provisions of the act relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional, as in violation of the provision under consideration. It is not violated by any Act having various details properly pertinent and germane to one general subject. And the authorities also practically agree that, where the title provides for the organization of a corporation, the act may include any provisions relating to the operation, regulation, control and maintenance of the corporation.

Chief Justice Parker in the case of *Bohmer v. Haffen*, 161 N. Y. 390, 55 N. E. 1047, used the following language:

"While the title refers to the construction only of a railway and tracks, the regulation of the portion of the completed railroad belongs to and goes with it. Anything germane to the general subject of building and operating a railroad might have been included in the original act of 1863 [Acts 1863, c. 361], provided it was not prohibited by some constitutional provision. And that which might

have been included in the original act without offending the constitutional provision under consideration may be incorporated into it subsequently by amendment without a change of title."

And in the present case, if the several provisions of the amendatory act are germane to the general subject of boulevard corporations, and might have been included in the original act, they can be incorporated by amendment.

In some cases it has been held that in an act to incorporate a railroad company a provision that any incorporated town might subscribe to the capital stock by an election, and issue bonds in payment of the stock, was not foreign to the title. It was contended that such statutes, so far as they undertook to authorize municipalities to subscribe to the capital stock of the corporations, were unconstitutional, because they embraced two distinct subjects, one, the incorporation of the railroad company, and the other, the enlargement of the corporate powers of municipal corporations, the first of which alone was expressed in the title. It is clear we think, that the management and regulation of boulevard corporations, and the construction, management and regulation of the public utilities mentioned in the act, may all be reasonably contemplated by, and embraced within the definition of a boulevard, and that they are germane to and connected with such general subject.

[6] But it is insisted that the statute deals with more than one subject because it requires a certain portion of the boulevard to be conveyed to, and maintained by, the state, while the remaining part is to remain within the control of a private corporation. We cannot see that such a requirement makes the portion conveyed to the state any the less a part of the boulevard which is composed of the entire strip of land which the corporation was authorized to acquire.

According to our conception of the act, there is contemplated by its provisions a single scheme, one comprehensive plan of public improvement. The entire strip of land constitutes the boulevard; and that is an entity. It is not separable. Upon that portion of the strip outside the vehicular road certain utilities may be constructed, or such portion may be used for parking features or purposes—such as walks, trees and other ornamentation and convenience. But the entire strip must be open to public use, and to some use contemplated by the act.

It is argued that the fact that the 30-foot strip is to belong to and be under the care and charge of the state, and that the residue of 170 feet is to belong to and be under the control of a private corporation, separates the two as wholly and actually as though they were to be maintained and operated on opposite boundaries of the state.

But it is a sufficient answer to this argument to say that the act itself provides that

whatever is done by the corporation shall be done upon the "land acquired by it for the purpose of its boulevard." The entire strip of land is necessarily one indivisible entity.

We cannot see upon what theory the ownership and control by the state of the 30-foot strip is not germane to, or directly connected with, the organization of the boulevard corporation. Certainly the Legislature had the power to make such conveyance a condition to the right of the corporation to construct, manage and operate the boulevard, whatever we may think of the wisdom of the provision. If the construction of the vehicular road is germane to the general subject, certainly its maintenance, after its construction, would be equally so. Then, how can the fact that the Legislature saw fit to require such road to be conveyed to the state dissociate it from the general subject? It is none the less a part, and the most essential part, of the boulevard.

It is true that the statute in a sense deals with more than one subject-matter, in that it deals with railways, telegraphs, telephones, pipe lines, etc.; but the obvious answer to this apparent plurality is that the instrumentalities or utilities mentioned are but parts, and reasonable parts, of the boulevard. They are members or functions of the body which is the boulevard itself.

In *State v. Electric Co.*, 52 Or. 502, 95 Pac. 722, the court held that a section of the act in question which provided for the payment to the state of 10 per cent. of the net profits of the tolls as a condition upon which the grant is made was embraced within the title of "An act to appropriate funds for the construction of a steamboat canal." Such a provision was said to be properly connected with the subject of the act. It is the condition upon which the grant is made, with a view to partial compensation to the state for the grant. It is certainly not foreign to the subject. The title to the act contemplates the construction of the canal and locks, and the act may properly embrace provisions for its operation, including compensation to the state, and is not obnoxious to the clause of the Constitution within the rules above quoted.

[7] It cannot be successfully contended that the act violates the constitutional provision in that it provides for certain exemptions of the property of boulevard companies from taxation.

This question was distinctly before the court in the case of *National Loan & Investment Co. v. City of Detroit*, 136 Mich. 451, 99 N. W. 380, where the title was "An act to provide for the incorporation and regulation of certain corporations generally known as building and loan associations," and the act relieved the associations from the payment of taxes.

The court said: "We have frequently held that this section is not to be given a narrow

or strained construction, and that, if the provisions of the statute are germane to the subject expressed in the title, this section is sufficiently complied with."

Our view of the act in question is that its general purpose was to provide for state boulevards, which should contain a road for vehicular travel, and that the remainder, not required for said road and its reasonable construction and operation, might be ornamented with trees, walks and other parking features, or devoted in part to such purposes and in part to such public utilities as are mentioned in the act. None of these purposes we think are inconsistent with the general subject and main idea of the bill, to wit, state boulevards, as expressed in the title. It matters not therefore that the bill does provide for the maintenance of the vehicular road by the state, and for a new state official, and involves an additional public expense.

These are matters of regulation and control, and entirely incidental to the general subject, which is the organization, construction and operation of a boulevard through the state. If there was any doubt that the term "boulevard" is broad enough in itself to reasonably include and contemplate the various provisions of the bill, such doubt must have been removed by the information the public had at the time the bill was pending in the Legislature. If resort may be had to that part of the legislative record which the plaintiff has invoked, viz., the message of the Governor, the public discussion, etc., it is manifest that both the members and the people knew that the organization of boulevard corporations contemplated all the important provisions embodied in the bill. The cases cited by the plaintiff upon the point now under consideration do not conflict with the conclusion we have reached. The argument of plaintiff's counsel is based upon the assumption that the different provisions of the bill are separate and distinct subjects. They treat the vehicular road as one thing, and the other public utilities mentioned as entirely diverse. We regard the boulevard as an entity, and as the one general subject, which includes, not only the vehicular road, but also the public utilities and ornamentation that may be placed on the remaining part of the land.

The cases cited belong, for the most part, either to that class where the title of the act is deceptive, or to that other class where the title is too narrow and restricted. In the present case the title cannot be regarded as deceptive or restricted, because it is of the most general character, neither concealing the real purpose of the act nor failing to express the general subject of the legislation embodied in the act. Because of its general character we are of the opinion that the title of the act sufficiently meets the requirement that we shall give reasonable notice

to the members of the Legislature, as well as to the people, of the legislation proposed.

In enacting the General Corporation Law it was the intention of the General Assembly to provide a broad, general scheme or plan for the creation, regulation and management of corporations, and for conferring powers upon them. This general scheme involves the classification of corporations, and provides different methods for the formation of different classes, and confers different powers upon them.

If the act is not in conflict with the constitutional provision under consideration because it provides for the creation and management of distinct corporations, how can an act be held to be unconstitutional which simply amends the general act by incorporating into it provisions for the organization, construction and management of another class of corporations, to wit, boulevards?

We are clearly of the opinion that the creation of boulevard corporations, with the rights, powers and franchises conferred by the amendatory statute, might have been included in the General Corporation Act, without contravening the constitutional provision under consideration. Such being the case, we cannot see any reason for holding that the amendatory act is in conflict with said provision, because it does not, any more than the original act, deal with more than one subject, nor fail in its title to express its subject.

[8] It is contended by the plaintiff that the statute in question violates section 1 of article 9 of the Constitution, which provides that "no corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law," and that it also violates section 19 of article 2 of said Constitution, which provides that "the general assembly shall not pass any local or special law relating to * * * the laying out, opening, alteration, maintenance or vacation, in whole or in part, of any road, highway, street, lane or alley."

In support of this contention it is argued that the real purpose of the statute was to create a special corporation, and to construct and maintain a special road or highway.

It is true that the corporation created by the act whose validity is attacked could not be created by a special act, neither could the road required by the act to be constructed be laid out and maintained under the authority of a local or special law.

Is the act special or local?

[9] Very much was made at the argument of the fact that the legislation was asked for by a certain individual, Mr. T. Coleman du Pont, and that he gave the assurance to the Legislature that he would, by and through a company to be organized by him, do the various things authorized by the act. We may assume that the occasion, and the re-

quest, for the enactment of the law were special, but that does not necessarily determine the character of the act—whether special or general. Very many, and perhaps most, general laws are suggested to the Legislature, and their passage, in a sense, secured, on account of special conditions existing at the time. Very often the necessity for a general law is not discovered until some individual interest or desire is affected or prompted. A certain person may ask for the enactment of legislation that would be beneficial to himself, and the Legislature may conclude that such legislation would be of general benefit, and enact a general statute. Adopting the very apt illustration used by counsel for the defendant at the argument: Suppose our General Corporation Law had not included electric railways. It is more than likely that in a very short time after its passage such law would have been amended so as to provide for the organization of such a public utility, and such an amendment would have been suggested by the desire of some persons to construct and operate an electric railway.

[10] The distinguishing feature or characteristic of a general law is that it has a uniform operation as to all persons uniformly situated.

We do not think it necessary to review the many cases cited upon this point. The decisions in the various states upon this subject are almost innumerable, but after all the general principles recognized are the same in all the cases, and they are very clearly and correctly stated in *Lewis' Sutherland Statutory Construction* (2d Ed.) §§ 185, 186.

"A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.

"The line of demarcation between general and special laws often seems indefinite and difficult to draw; but if the principles upon which the distinction rests are kept in mind, the difficulty is not nearly so great as it might seem. A law is general in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law, while a special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable."

The same authority in section 203, quoting from the opinion of the court in the case of *Van Riper v. Parsons*, 40 N. J. Law, 1, says:

"A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the Legislature, are

distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law, without regard to the consideration that within this state there happens to be but one individual of that class, or one place where it produces effects."

Again says the same authority (section 215):

"The number of persons affected by a law, does not control or determine the question of its validity; it is enough that the law relates to a subject of a general nature, and is general and uniform in its operation upon every person who is brought within the relation and circumstances provided for by it."

Applying such principles to the case before us, can there be any doubt that the statute in question is a general law? The statute is general in form. It authorizes any five persons to associate themselves together, and by compliance with its terms organize a boulevard corporation. The boulevard which may be constructed by such a corporation is not local. It cannot be confined to any territorial subdivision of the state, but must extend practically throughout the state. The privileges offered by the act are open to all alike. All persons have an equal opportunity to take advantage of them. More than six months elapsed after the approval of the act before the organization of the "Coleman du Pont Road, Incorporated," and during that time or at any time thereafter any five persons had and have the right to organize such a corporation. There can be no such doubt provided the class of corporations created by the statute, and the class of highways provided for thereby are not artificial, arbitrary and unreal classifications, and, therefore, such as are not permissible under the law.

In the first volume of Clark and Marshall on Corporations 105, we find the following:

"The fact that an act authorizing the formation of corporations or conferring powers or privileges on corporations does not apply to every person or corporation in the state, does not render the act special, if it has a uniform operation as to all persons uniformly situated. In other words, the fact that an act classifies persons who may form a corporation, or the purposes for which corporations may be formed, or the corporations which shall enjoy the powers or privileges granted, does not render it a special act, if the classification is reasonable, and if the act applies to all persons or corporations falling within the particular classes."

[11] The classification must not be arbitrary or unreasonable. It must be a real classification, and rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification was proposed.

The classification made by the statute under consideration is of corporations, and the

class established is boulevard corporations. The idea involved, and the thought in the minds of the Legislature, was boulevards.

We think the classification made by the statute is not unreal, unfair, artificial, arbitrary or unreasonable in view of the meaning of the word "boulevard."

The General Corporation Law of this state had already established as a class corporations for the construction, maintenance and operation of electric railways, telegraph and telephone lines, and corporations for the construction, maintenance and operation of pipe lines for the transportation of commodities, and power transmission lines. The statute in question provides for the organization of boulevard corporations. A boulevard as we understand it may include not only a road which is ordinarily known as a public highway, but also any or all of the other utilities mentioned in the act, as well as other features, such as ornamentation by walks, trees, etc.

These features sufficiently distinguish a boulevard from a road or highway to make boulevard corporations a real and distinct class in themselves. There can be nothing unreasonable or arbitrary about such a classification. It may be something comparatively new, but the classification is none the less real and reasonable because it is the outgrowth of modern conditions, and was not thought of at the time of the enactment of the General Corporation Law.

The following clear and concise statement of the law made in *State ex rel. v. Parsons*, 40 N. J. Law, 123, seems to us to be especially applicable to the present case:

"A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law."

Judged by such a test we are clearly of the opinion that the statute before us cannot be held to be in conflict with either of the constitutional provisions now under consideration.

[12] It is further contended that the uses for which the statute authorizes land to be taken by the power of eminent domain are not public uses, and it is therefore in conflict with section 8 of article 1 of the state Constitution, which provides as follows: "Nor shall any man's property be taken or applied to public use without the consent of his representatives and without compensation being made."

We understand that this contention of the plaintiff is based upon the ground that the uses for which the statute authorizes the land to be taken are not public uses. The particular portion of the said land no public use or service is required, it being left entirely

optional with the private corporation provided for in the act, whether the utilities mentioned shall ever be constructed or not.

The court in the case of Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, said:

"The uses which should be deemed public in reference to the right of the Legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement."

In Tuttle v. Moore, 3 Ind. T. 712, 64 S. W. 585, the court used this language:

"What is a public use? A historical research discloses the meaning of the term 'public use' to be one of constant growth. As society advances, its demands upon the individual increase, and each demand is a new use to which the resources of the individual may be devoted."

Courts and text-writers have taken different views of the meaning of the phrase "public use"; but we think the taking of land for boulevard purposes, herein defined, or for any of the purposes mentioned in the act, would be a taking for a public use within the contemplation of the constitutional provision. If the taking of land for a highway, or for an electric railway, would be a taking for public use, it is difficult to see why it would not be equally so if taken for a boulevard, which would include those things and also other public utilities.

There can be no doubt that the power of eminent domain may be delegated to a private corporation for the construction of a highway as ordinarily understood; and no one will say that a highway is not a public use.

It has been held by the Court of Errors and Appeals of this state, *Whiteman v. R. R. Co.*, 2 Har. 514, 33 Am. Dec. 411, that the right of eminent domain might be exercised whenever the interest or convenience of the state is concerned, as where land is wanted for a road, canal or other public improvement; that in case of public improvement from which a benefit would result to the public, this right may be exercised through corporate bodies or by means of individual enterprise.

In *Mills on Eminent Domain* (2d Ed.) § 21, it is said:

"The term 'public use' is flexible, and cannot be confined to the public use known at the time of the framing of the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain. Any use of a thing which will satisfy a reasonable public demand for facilities for travel, for transmission of intelligence or commodities * * * would be a public use."

There can be no doubt that every one of the features or elements of the boulevard

contemplated by the statute, road, railway, telegraph and telephone lines, pipe lines, and the beautification of the land by walks, trees, etc., has been judicially decided to be a public use. But the ground of objection upon which the plaintiff chiefly relies is that the statute does not require the land taken to be devoted to any public use. This is, we think, the most serious and difficult question that has been raised in the case, and has received from the court the most careful and thorough examination.

The practical and plain question is this: Whether the Legislature can authorize an individual or a corporation to take land of another by condemnation, proceedings for public use, and give such individual or corporation the right to hold the land indefinitely, or for a long period of years, without making any use of it that is beneficial to the public, or that is contemplated by the act. Thirty feet of the strip is required to be used for a vehicular road, but the statute does not specifically require the corporation to make any use of the remaining 170 feet. Apparently it is left entirely optional with the corporation whether it shall use this land or not.

[13] We are not at all impressed with the argument of plaintiff's counsel that such 170 feet may be used for private purposes, or for any purposes other than those mentioned in the act.

The statute does provide that "every boulevard corporation organized under the provisions of this act shall have full power and authority to use that portion of its boulevard or strip of land, not devoted to the road for vehicular travel, for any other purpose that may be desired, provided such purpose is not unlawful," etc.

But when the Legislature in the same act delegated to corporations organized under it the power of eminent domain for the purpose of organizing, constructing, operating and maintaining a boulevard, it is manifest that no purpose or use but a public one could have been intended to be meant by the words "any other purpose not unlawful." The words "any other purpose," under a fair and reasonable construction of the act, mean other like purposes, or purposes connected with, or incidental to, the specific public uses mentioned as constituent elements of a boulevard. They probably mean nothing more, and grant no greater privileges than the corporation would possess if such words had not been used. Such words must be construed to import purposes ejusdem generis with the purposes specially mentioned, and to mean other like purposes, or other like public purposes. In *re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195; *Slingerland v. Newark*, 54 N. J. Law, 62, 23 Atl. 129.

[14] Neither do we think there is much force in the point that the statute is unconstitutional because it does not expressly pro-

vide that the public shall be entitled to the use of the boulevard, and of the constituent elements thereof, or shall be entitled to the benefits to be derived from use of the same. Counsel for the plaintiff in determining whether land is taken for a public use seem to make a distinction between the case where the public has the actual use and one where the public has the benefit of the use. While the distinction is rather fine, and academic in a sense, it is recognized by courts and text-writers. Assuming that to constitute a public use the public must have a legal right to the use of the service for which the property is taken, it is unquestionably the law that to give the public the right to such service it is not necessary that it should be expressly conferred by the statute. A corporation by the acceptance and exercise of the power of eminent domain impliedly undertakes such service respecting the subject for which the power is exercised. Lewis on Eminent Domain (3d Ed.) vol. 1, § 313.

We find the following in the text of Nichols on the Power of Eminent Domain, § 320: "A railroad corporation in accepting a charter from the state impliedly contracts to furnish the public with reasonable and proper facilities for the transportation of passengers and freight. It may be compelled to discharge the duty thus assumed, and if additional lands are needed, it may be required to take and pay for them."

In the case of *Thoroughgood v. Georgetown Water Co.*, 77 Atl. 720, the Court of Chancery of this state declared that:

"When a corporation organized by private persons to erect and operate as a private business enterprise works of general public utility * * * receives aid from the public by the grant of valuable franchises * * * or a delegation of the right of eminent domain, the right is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made."

Very often the act delegating to a corporation the power of eminent domain does not expressly impose upon it the obligation of public service. But the corporation, by the acceptance and exercise of the power, impliedly undertakes such service respecting the subject for which the power is exercised.

In the case of *Borden v. Irrigation Co.*, 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640 (approved by the Supreme Court of the United States, 204 U. S. 687, 27 Sup. Ct. 785, 51 L. Ed. 671), the court said: "At the present day it would hardly be doubted that the mere acceptance of a franchise to build and operate a railway, or a telegraph or telephone line, a turnpike or a ferry, coupled with the power of eminent domain, would involve the assumption of duties to the public."

In *Turnpike Co. v. News Co.*, 43 N. J. Law,

381, the question was whether the statute gave to the public the right to the use and benefit of the lines of telegraph companies organized under it for the transmission of intelligence, etc. The statute did not expressly so provide. After considering certain provisions which indicated the legislative intent, the court said:

"These provisions of the law, in connection with the fact that the Legislature has granted the right to take private property, clearly evince a legislative intent to lay such companies under an obligation to the public to permit the use of their lines by all persons, under reasonable regulations; and in accepting the benefits of this law, the recipient of them assumes the performance of this duty to the public. This will admittedly constitute a public use authorizing the exercise of the right of eminent domain."

And so we say in the present case (1) that the company's acceptance of the benefits of the act, with the power and exercise of the right of eminent domain, imposed upon it the obligation of public use or service; and (2) that the provisions of the act itself clearly indicate the legislative intent that the boulevard and all its elements should be for the use and accommodation of the public, and that the public should have the right to such use, or to the benefits thereof, and the service to be supplied thereby. The different elements of the boulevard are described as public utilities and the purposes to which it is authorized to be devoted or used are all of a public nature and for the benefit of the public. The location of the boulevard was to be determined by the agents of the state; and the part to be used for vehicular travel is to be owned and maintained by the state.

Clearly the statute indicates that the land to be taken thereunder was for public use, that the public should have the right to its use, or the benefit of its use, and that there should be an obligation resting upon the company to devote it to the public use.

[15] It is further contended by the plaintiff that in order that land may be taken for public use it must be necessary for such use. And assuming that land taken for a boulevard is for a public use, it is insisted that a strip 200 feet in width is not now, and cannot at any time hereafter, be reasonably necessary for the proper and legitimate purposes of a boulevard upon which the corporation is required to construct only a vehicular road 30 feet in width.

We do not think this contention is very seriously made. It cannot be contended that only 30 feet would be reasonably necessary, even if the vehicular road alone was contemplated by the act. In the construction and operation of such road some additional land on either side thereof would be necessary, but not of an aggregate width of 170 feet.

per side of such road some additional land on either side thereof would be necessary, but not of an aggregate width of 170 feet.

But the land of the plaintiff is sought to be taken under the power of eminent domain for something more than the vehicular road, to wit, for a boulevard. The boulevard, as we have heretofore said, is the entity and the whole, and the road only a part thereof. It is true that the road is the only thing the corporation is expressly required to construct on the entire strip of land proposed to be taken; but, as we have seen, the corporation is impliedly required to use the entire strip for the use or benefit of the public. Such an obligation is imposed by the manifest intent of the act.

Can it be said, therefore, that a strip of land 200 feet in width is unnecessary for the purposes of a boulevard upon which a vehicular road 30 feet wide is expressly required to be constructed, and the residue of which, by implication of law, must be devoted to at least some of the public uses mentioned in the statute? The uses to which the entire strip is to be devoted being public uses, not only is the necessity for the exercise of the power of eminent domain a question for legislative determination, but the quantity of land necessary for such use is also a question for the Legislature to decide.

In 1 Lewis on Eminent Domain (3d Ed.) 674, § 369, is found the following statement of the law on this subject:

"Whether the power of eminent domain shall be put in motion for any particular public purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise, are questions which rest entirely with the Legislature."

In volume 2 of Tiedeman's State and Federal Control of Persons and Property, at page 677, it is stated that:

"The courts cannot question the necessity for the taking, provided the land is taken for a public purpose. The legislative determination of the necessity is final, and is not subject to review by the courts."

And the law has been similarly declared by the courts of this state.

In the case of *Wilson v. B. & P. R. R. Co.*, 5 Del. Ch. 524, Chancellor Saulsbury said:

"The Legislature of the state is the sole judge of the necessity or expediency of the exercise of the right of eminent domain."

In *Whiteman v. Railroad Co.*, 2 Har. 514, 33 Am. Dec. 411, the Court of Errors and Appeals of this state used this language:

"It is the established doctrine of this country, as well as of England, that the power to decide when the public interest requires the appropriation of private property to public use, and the right to provide for such appropriation against the will of the owner, are, with the single restriction of just compensation to him whose individual right of property is invaded, inherent in the Legislature."

The law seems to be equally well settled that the quantity of land that can be taken

for the public use mentioned in the act is a matter wholly within the discretion of the Legislature. And the courts cannot control such discretion when the Legislature has determined and fixed the quantity that may be taken.

We do not undertake to decide whether or not the courts might interfere where there had been a gross abuse of legislative discretion, or manifest fraud in the passage of the bill, because it is not contended that any such conditions existed in the passage of the bill in question.

"The Legislature is the proper body to determine the necessity of the exercise of the power [of eminent domain] and the extent to which the exercise shall be carried; and there is no restraint upon the power save that requiring that compensation shall be made." Mills on Eminent Domain (2d Ed.) 95.

In *McGehee on Due Process of Law*, 275, it is stated:

"We find the absolute nature of the legislative discretion broadly stated by the Supreme Court of the United States in recent cases. 'By granting,' says the court, 'a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.'"

Such a strip was authorized to be condemned for a single track railroad. *Northern Pac. R. R. Co. v. Smith*, 171 U. S. 261, 18 Sup. Ct. 794, 43 L. Ed. 575; *Northern Pac. R. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *U. S. v. Gettysburg*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; *Burlington, etc., Co. v. Railroad Co.*, 165 U. S. 370, 17 Sup. Ct. 359, 41 L. Ed. 749; *McKennon v. Railroad Co.*, 69 Ark. 104, 61 S. W. 383.

In the case of *Stark v. Railroad Co.*, 43 Iowa, 501, the Supreme Court held that land within the limits fixed by the Legislature for a railroad right of way is conclusively presumed to be necessary. *Penn. R. R. Co. v. Nat. Docks, etc.*, 57 N. J. Law, 86, 30 Atl. 183.

In the case of *Croley v. Railroad Co.*, 56 S. W. 615, the Court of Appeals of Texas held that, when the Legislature confers authority upon a railroad corporation to take land for a right of way of a stated width, it determines the necessity for taking a strip of that width, and the judiciary has nothing to do with the question when the limits are respected. *Coe v. Aiken* (C. C.) 61 Fed. 24; *Debuol v. Railroad Co.*, 111 Ill. 499; *Railroad Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485.

It has been no uncommon thing in this country for the Legislature to authorize the condemnation of a strip of land 200 feet wide for a railroad, and sometimes, as we have seen, the width would be as great as 400 feet. It may be said that a railroad is very different from a boulevard, in that its

accessories and future development may require a considerable extent of land. But how can it be said that a boulevard, as contemplated by the act authorizing it, may not reasonably require as great a width as 200 feet?

The Legislature in its discretion has determined that it may, and we are of the opinion that the court has no power to control or interfere with that discretion which we must assume was honestly exercised.

It may be noted that in this state the Legislature has for a century or more authorized the condemnation of land for turnpikes varying in width from 60 feet to 100 feet, with the requirement that an artificial road of only 20 feet wide should be constructed, although it required that the whole breadth taken be kept free and open; and so far as we know the necessity for so much land, or the power of the Legislature to determine the necessity for the improvement and the quantity of land necessary therefor, was never questioned.

[16] But the most important question still remains: Can the land sought to be taken be regarded as taken for public use when there is not only no express requirement that it shall ever be used, other than the 30-foot road, but a clear implication in the statute that the corporation shall not have to use the 170 feet for 50 years, if ever?

Section 168 of the act exempts the land acquired by the corporation, outside the 30-foot road, from taxation so long as it is not devoted to any of the utilities therein mentioned, and permits this exemption to extend for a period of 50 years.

The plaintiff insists, not only "that the construction and operation of none of the utilities is compulsory, but that the corporation may fail to construct any one or all of them without subjecting itself to the penalty of an abandonment, or the loss of the right to the land condemned, because the corporation is authorized to hold the state-long strip of land of 170 feet in width without devoting it to any kind of public use for 50 years, and perhaps forever."

Section 158 provides that every corporation formed under the bill "shall have the right, power and authority at any time to construct, maintain and operate upon that portion of the strip of land acquired by it for the purpose of its boulevard, not devoted to the said road, for vehicular travel," a railway.

Section 161 provides that the said corporation "shall also have full power and authority at any time to use any portion of its boulevard not devoted to the road for vehicular travel for the purpose," etc.

Section 142 states that "a boulevard within the contemplation of this act is defined to be a broad strip of land upon which must exist a well built road for vehicular travel, and upon which may be constructed, main-

tained and operated a railway," and other utilities, "and which may also be used for any other purpose not unlawful and necessarily detrimental to the use of the said road for vehicular travel."

Everything but the vehicular road, it is insisted, is a mere possibility. But we have held the uses authorized to be much more than mere possibilities resting in the option of the corporation.

[17] The authorities cited by the plaintiff upon the point now under consideration undoubtedly show that one of the fundamental principles of eminent domain is that it shall not be exercised unless the property taken is to be devoted to a public use within a reasonable time thereafter, and this is a proposition of law that will not be denied.

Neither can it be denied that the rule, or doctrine, of reasonable time applies when no time limit is set for the construction of the proposed road.

Prior to the enactment of the General Corporation Law of this state, the special charters granted to railroad companies contained, as a rule, no such time limit. Nothing was said about the time in which the road should be constructed. But under the law such companies were required to construct the road in a reasonable time or suffer the loss of the right to condemn, or the right to the land condemned, as the case might be.

As counsel for the plaintiff very clearly and correctly state in their brief: "Such special charters, being silent on the question of the time within which the corporation was to construct its road after it proceeded to condemn land, left that question to the courts, and the owner of the land condemned had his remedy by enjoining the condemnation proceedings in a case where the corporation had no intention to construct or operate the railroad within a reasonable time. Such corporation was also subject to the penalty of a loss of the right acquired by the exercise of the power of eminent domain through an abandonment of the contemplated railroad."

They insist, however, "that in the present bill the Legislature attempts to withdraw this power from the courts, and to deprive the owner of the land condemned of all judicial remedy"; that the "bill not only does not require that the land condemned be devoted to some one of the utilities named within a prescribed period, but it does in positive and express terms undertake to authorize the corporation to withhold this land from any use whatever for more than half a century. Even the 50 years named in the bill is not so named as the time limit for the establishment of the alleged utilities. There is no time limit. The land might be withheld from public use for 100 years and more, in fact, forever."

It is a sufficient answer to such objections

to say that, even if there is in the statute no express requirement that the 170 feet of land shall at any time be devoted to public use, there is an obligation imposed upon the corporation by the statute, and the acceptance of its provisions, to so use the said land in a reasonable time. The word "boulevard" imports public use in its entirety. The public must be entitled to the use, or the benefit of the use, of the property taken. Such use cannot be indefinitely postponed, and we do not understand that this is denied by the defendant corporation. One answer made by its counsel is that "the statute does specifically provide that the boulevard shall be devoted to the public use within six years when it provides that the road for vehicles shall be completed within that time. The portion of the boulevard on which the road exists cannot be separated from the remainder. It is a single entity."

While this is true, it does not seem to us to be a sufficient answer. It could not have been the intention of the Legislature that the 170 feet should not be devoted to any public use or benefit at any time. It could not of course be devoted to any private use, nor could it, for example, be permitted to become a wilderness, an eyesore to the public, or entirely unusable and unenjoyable by the public. It would have to be open in a reasonable time to public use or enjoyment by the construction and operation of the utilities mentioned in the act, or such of them as would reasonably require the quantity of land sought to be condemned.

The use of the land for any utility must be employed within a reasonable time and the employment by the corporation of one utility within a reasonable time will not extend or enlarge to the corporation the right to employ the land for another utility at a time that is unreasonable.

[18] It was unquestionably the purpose of the act, and the intention of the Legislature, to authorize the taking of the entire strip for public purposes, and any provision in the act which undertakes to exempt, or relieve, the corporation from such use indefinitely or forever, could not be effective. It would be an unwarranted and unconstitutional exercise of legislative power. It would not however affect the validity of the remaining parts of the act, for the statute is complete without it. "If when the unconstitutional part of a statute is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Cooley Const. Llm. 211, et seq.

The Legislature could not relieve the corporation from the public use of the land for which alone the exercise of the power of eminent domain is conferred, and which was the manifest and general scope and purpose of the act.

Notwithstanding such attempted exemption or relief, the courts would still have the power to enforce the public use within a reasonable time, or to impose the appropriate penalties for the failure to devote the land to public use. The power of the courts in this regard would be the same as it would be where the act makes no reference at all to the time when the work authorized was to be constructed, as in the charters for railroad companies passed before the enactment of the General Corporation Law. The owner of the land condemned would have the same judicial remedy and redress.

That the courts would have this power under the act in question is not really denied by counsel for the corporation.

In their brief in reply they say:

"Even if it were a serious question as to when any boulevard corporation must construct and operate the other public utilities which it by its certificate of incorporation designated its purpose to construct and operate, if it were the law, we should be perfectly content with the plaintiff's proposition that they should be constructed and operated within a reasonable time. A reasonable time would be for the determination of the court in each case, under the particular circumstances of the case."

We are of the opinion that the act in question as construed is not obnoxious to the above mentioned provision of the Constitution which prevents any man's property from being taken or applied to public use without the consent of his representatives and without compensation being made.

[19] In this connection it may be noted that while statutes delegating the power of eminent domain are to be strictly construed and restricted to their clear expression and intention, nevertheless the usual presumptions in favor of the constitutionality of legislative enactments apply. And the duty rests upon the court of so construing the statute as to sustain its constitutionality if possible.

It is charged also by the plaintiff that the statute in question delegates a part of the state's sovereignty and powers which are essentially and inherently attributes of the General Assembly to a class of private corporations; that it confers upon them peculiar and special powers, privileges and exemptions, and grants to them an aggregation of franchises each of which belongs inherently and essentially to corporations of distinctive and separate classes; that it authorizes such corporations to grant, lease, or otherwise dispose of said franchises severally to other corporations; that it delegates to the first named class of corporations the right of eminent domain without requiring such corporations to use the same, but permitting the same to be disposed of to other corporations.

We think this general statement embraces

all the important elements of the plaintiff's general contention that the statute is void because it delegates to a private corporation a part of the state's sovereignty.

This objection to the validity of the act is based, in part, upon the assumption that the entire strip of land sought to be taken is not an entity, but that the vehicular road is one thing and the other public utilities mentioned in the act entirely distinct and separate things. And the objection is also, in part, based upon the further assumption that the act is special and local.

We have held that neither of these assumptions is sound or tenable, and it is not necessary to repeat here the reasons for so holding. But there are some other questions raised by the contention that the act is a delegation of a part of the state's sovereignty, and these we will now consider.

[20] Does the act vest a private corporation with the extraordinary power of determining finally whether the state of Delaware shall have a state highway? It would seem clear that the state had itself determined by enacting the statute that there should be a highway through the state. The corporation is required to build such a highway in a certain time. The boulevard corporation cannot construct its boulevard, after its organization, but by the permission of the state authorities. The commission created by the statute have the absolute discretion to determine the feasibility and desirability of the route between any stated termini. No work can be done until plans are filed with the Secretary of State, and no plans can be filed until they are approved by the state commission. Such provisions in the law sufficiently protect the state, because they enable it to determine, through its official representatives the feasibility and desirability of the proposed route as well as the character and quality of the road.

[21] We are unable to see any reason why the state may not authorize the organization of corporations for the construction and operation of boulevards such as are contemplated by the statute even though they contain as a part of the boulevard a road for vehicular travel. A turnpike is a public highway, and no one has ever questioned the right of the state to authorize a private corporation to condemn a broad strip of land for a turnpike road.

It is claimed that the statute grants to a particular class of corporations an aggregation of franchises each of which belongs inherently and essentially to corporations of distinct and separate classes, and that it authorizes such particular class of corporations to grant, lease or otherwise dispose of their rights to other corporations to be by them operated on said boulevard.

When it is considered what the rights are that may be thus granted we know of no

constitutional prohibition against the authorization.

[22] By no reasonable construction can the statute be held to permit boulevard corporations to dispose of their power of eminent domain to other corporations. The power of eminent domain is expressly granted to or mentioned in connection with boulevard corporations; and nowhere are such corporations expressly or by implication given the power to grant the right of eminent domain to other corporations with which such boulevard corporations may contract for the operation of some one or more of the boulevard elements. *Jersey City v. Railway Co.*, 74 N. J. Law, 774, 87 Atl. 113.

[23] Having determined that boulevards, as herein defined, is a reasonable and proper classification, we cannot see that the granting to such corporations of an aggregation of franchises, which belong inherently and essentially to corporations of distinct and separate classes, is in contravention of any constitutional inhibition when such corporations, ordinarily distinct and separate, are embraced within the boulevard corporation, and constitute a part thereof.

[24] But perhaps the grounds chiefly relied on in support of the plaintiff's contention that the act is a delegation of the state's sovereignty, are these:

1. That it attempts to place within the power of a private corporation the right to usurp the state prerogative in respect to the construction and maintenance of state highways.

2. That the obligation imposed upon the state to maintain the vehicular road in as good condition as it is when conveyed to it will be perpetual, or at least within the powers, and at the pleasure, of a private corporation—the creature of the state.

We are entirely unable to see that the state is parting with a part of its sovereignty by providing that a private corporation may construct a highway and give it to the state, when it is done by authority of the state, without expense to the state. If the state may, in the exercise of its sovereign power, provide safe and convenient ways for the public necessity and convenience, why is it not possible for it to secure such ways through the instrumentality of a corporation which is willing to construct and convey them to the state? Instead of parting with its sovereignty by so doing, it seems to us to be in the active exercise thereof.

We might question the wisdom of the Legislature in granting to a private corporation the power to compel the state to maintain the vehicular road. It may seem to some persons belittling to the dignity of the state, and inconsistent with their conception of state sovereignty. But that does not make the act unconstitutional, nor is it a surrender of state sovereignty in the constitutional sense. The Legislature had the power

to authorize the construction of the road by a private corporation, and provide for its conveyance to the state. It also had the power of agreeing to maintain the road after the conveyance, as provided for in the act. If there is any question at all, it goes to the propriety and wisdom of the act rather than to the legislative power.

But the corporation has no power to compel the state to repair the 30-foot road unless the road "shall clearly be in worse condition than when completed and conveyed to the state." And even then it can require only "such repairs as shall be necessary to restore said road, or any part thereof, to the same condition as when it was originally completed and conveyed to the state."

The act provides for the appointment by the Governor of a state official, a superintendent of highways, whose duty it is to have supervision of, to direct, and to superintend the repair and maintenance of all roads, and all bridges, culverts and crossings forming a part thereof, constructed and conveyed to the state by boulevard corporations under the provisions of the act.

So long, therefore, as this state official does his duty, the corporation cannot compel the state to make any repairs. The superintendent of highways is constituted the judge of the necessity in the first instance, and the court or jury in the last. The corporation is given the power, it is true, to institute appropriate actions to compel the state to perform this duty imposed upon it by the act; but whether the necessity exists or not may in every case be a question for the court or jury to determine, and not the corporation.

But we can conceive that the Legislature may have thought, and very naturally, too, that in order to insure the maintenance of the road in good condition, it ought to be expressly provided that the state should maintain it, and that the power should be given to some one to secure the performance of that duty whenever the necessity arose. It might have been better, perhaps, certainly more becoming, to confer such power upon a well selected commission, rather than upon the defendant corporation—the creature of the statute. But the Legislature saw fit to provide as they did, and we think the provision was within the scope of their constitutional authority.

There is nothing in the act which precludes the Legislature from exercising the power of eminent domain with respect to the boulevard or any part thereof at any time the public welfare, or the public necessity, in the judgment of the Legislature, should require it.

In *Nichols on the Power of Eminent Domain*, 395, § 325, it is said:

"A corporation which has taken land by eminent domain under legislative authority and devoted it to the public use has acquired no immunity from the condemnation of

such property for some other public use which a subsequent Legislature may deem of greater importance."

The hands of the Legislature are not, therefore, absolutely tied for all time in respect to the road and its maintenance. Future Legislatures are not powerless, and the state is not deprived of its sovereign power, respecting the boulevard so long as exercise of the power of eminent domain is left free.

[25] The plaintiff not only attacks the constitutionality of the act, chapter 189, volume 26, of the Laws of Delaware, but has included in his petition, and accompanying affidavits, averments of fact dehors the record of the proceeding before Judge Conrad which is sought to be enjoined and prevented by the writ of prohibition prayed for.

The defendants contend that this court cannot hear or determine in this proceeding any such averments.

Paragraph 5 of section 12 of article 4 of the Constitution of this state confers upon the Supreme Court jurisdiction "to issue writs of prohibition * * * to the Superior Court, the Court of Oyer and Terminer, the Court of General Sessions, the Court of Chancery and the Orphans' Court, or any of the judges of the said courts, and all orders, rules and processes proper to give effect to the same." By such provision this court is given original jurisdiction to issue writs of prohibition; and this is the first case in which the exercise of such jurisdiction has been invoked.

The writ of prohibition is a common-law writ. It issues only from a superior court to an inferior court, tribunal or judge, and only for the purpose of keeping such inferior court within the limits of its jurisdiction. That is the sole purpose of the writ.

The common-law procedure included a method, and also the means, of determining issues of fact dehors the record in prohibition cases; but the court of last resort in England, corresponding to this court, did not have original jurisdiction to issue writs of prohibition.

No common-law practice or procedure could govern the Supreme Court of this state in the exercise of such original jurisdiction; and no procedure has been established in this state, either by statute or decisions, applicable to the subject.

While this court is given by the Constitution the right to make all orders, rules and processes proper to give effect to its writs of prohibition, it is not thereby given the power or means of trying issues of fact dehors the record. It can have no jury, neither has it the authority to appoint commissioners, masters or other officers or agents to take testimony, examine questions of fact and report their findings to the court. In other words, this court has no machinery for the determination of issues of fact outside the record.

The case of *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373, seems to be particularly in

point, and we quote from the opinion the following:

"Application for the writ of prohibition is properly made in such a case, upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding; and whether it has or not must depend, not upon facts stated dehors the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defense, whether going to oust the jurisdiction of the court or to establish the want of merits in the libellant's case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits; the rule being that every such matter should be propounded by suitable pleadings as a defense for the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court."

It may be true that the plaintiff could not present to Judge Conrad the facts outside the record which he asks this court to consider; but that cannot give to the Supreme Court a power which is not conferred by the Constitution or statute, and which said court does not inherently possess.

We are clearly of the opinion that this court has not the power to hear and determine the issues of fact raised by the petition, answer and accompanying affidavits, which are dehors the record.

But even if the court had the right, and also the means, of determining issues of fact dehors the record, it would be entirely unnecessary to do so in the present case.

The plaintiff contends that every condemnation proceeding involves the question of the necessity of taking the particular land desired, and that this question is a judicial one. This particular question, the plaintiff insists, was raised before Judge Conrad, and is again raised in the petition for the writ of prohibition; and the denial of such necessity is supported by the affidavits of the plaintiff and six other persons, filed with the petition.

The defendants claim that the charge which the plaintiff makes in his averments of fact dehors the record is in substance and effect but an attack upon the good faith of Coleman du Pont Road, Incorporated.

We will not undertake to decide what is the real purpose of the plaintiff in making such averments of fact, but will assume that the purpose was, as he declares, to show that the taking of the land was not necessary.

We have already decided that the purpose for which the statute authorizes a strip of land 200 feet in width to be taken is a public use. It follows, therefore, that the purpose for which the land of the plaintiff is sought to be taken is a public one.

We have also decided that, when the court

is satisfied that the land taken by the exercise of the power of eminent domain is taken for a public use, the question of necessity is for the Legislature and not for the court to determine, and that when the Legislature has, in the exercise of an honest discretion, determined that question the court should not and will not interfere.

Such being our view of the law it would be entirely unnecessary and profitless for this court to determine, or undertake to determine, by facts outside the record, the question of the necessity of the taking of the particular land desired, viz., the land of the plaintiff.

[28] Upon the questions above considered and determined the court is unanimous. Upon the remaining question, viz., the constitutional passage of the act in question, the majority of the court are of the opinion that the act was constitutionally passed, but for different reasons.

I am of the opinion that the act in question was constitutionally passed, and is a valid act under the journal entry doctrine. Under such doctrine every legal presumption is to be made in favor of the validity of the act. If the journal entries fail to show that the enrolled act was not the act that was in fact passed, or if the journal entries are such as to make it doubtful which one of two acts was passed, then the presumption in favor of the enrolled and published act stands, and the same must be held valid.

The court in the Rash-Allen Case, 76 Atl. 370, clearly recognized the fact that the "journal entry respecting the title of the bill upon which the yea and nay vote was taken might be a mistake, and the true and correct title that of the substitute bill."

The court in that case said:

"Of course it is possible that it may sometimes appear from the journals themselves that a mistake was made therein respecting the title of the bill on the final vote, and that the bill actually passed was another bill, with an entirely different title. But we are clearly of the opinion that in the present case the journals not only do not show that such was the fact, but they leave no room for doubt."

It also appears from the Rash-Allen Case that, when there is a contention as to which one of two bills was in fact passed, the court "will examine, not only the entry respecting the final passage of the bill, but all the pertinent journal entries in order to determine which bill was passed. One of such entries," said the court, "is the title of the bill, a similarity of title indicating that a mistake might have been made by the clerk."

The court in that case, after a most careful examination of all the journal entries, concluded that no mistake was made, and that the original Senate bill, and not the substitute, was passed, holding that: "It therefore affirmatively and indisputably ap-

pears from the journals of each house that the ye and nay vote was taken upon a bill which bore an entirely different title from that of the bill which the contestants claim, was passed."

It would require entirely too much time and space to specifically compare the journal entries in the present case with those in the Rash-Allen Case. It will be enough to say that in the latter case there was no such similarity of title between the original and substitute bill as might cause a clerical mistake, as there is in the present case. The probability of such a mistake being made where the titles are very similar was distinctly recognized in the Rash-Allen Case.

In that case it was expressly noted as a very significant fact that the journals showed that the original bill was the one upon which the ye and nay vote was taken in *each house*. The court said: "If the title of the original bill was read by mistake, or inadvertently written, for the title of the substitute, is it not most remarkable that the same mistake should have been made in each house of the General Assembly?"

And the court further said:

"If the substitute bill was the one that was in fact passed, is it not equally remarkable that nothing whatever was done with it in the Senate, so far as the journal shows, after it was reported by the committee, until it was enrolled, and that in the House, so far as the journal of that body shows, it was not presented, read, reported by the committee, or acted upon at all, no mention being made of it there until it was enrolled."

It is true that in the present case the original and substitute bill bore the same number, as they did in the Rash-Allen Case; but in the latter case the court said there might be some significance in that fact "if the similarity in the number proved the similarity in the character of the bills. But we know that the two bills were essentially different in character."

The court in the Rash-Allen Case, after a most careful examination of *all the journal entries*, concluded that no mistake was made, and that the original Senate bill, and not the substitute, was passed.

The question now is, whether in the present case the journal entries clearly and satisfactorily show that it was the original and not the substitute bill that was passed. If they do not, or if they leave it doubtful in the mind of the court, which one of the two was passed, the enrolled and published act stands unimpeached.

What do the journal entries show?

Generally speaking, they show a very different state of facts from the Rash-Allen Case—because:

1. There is but one entry in the House Journal which indicates that the original bill was passed, and that is the entry which states that the Secretary of the Senate in-

formed the House that the Senate had passed the original bill and requested the concurrence of the House therein. Every other entry shows that the substitute bill, that is, the enrolled and published act, was constitutionally passed.

There is but one entry in the Senate Journal which indicates that the original bill was passed by that body, and that is the entry respecting the ye and nay vote. Of course, this is the most important and vital entry respecting the constitutional passage of a bill, under the journal entry doctrine. But, as we have seen, the court may notwithstanding this fact be satisfied, after a careful examination of all the journal entries of both houses, that there was a clerical error made in the title, on the final passage of the bill, and that it was another bill that was in fact passed. And such clerical error is more likely to be made if there is a striking similarity in the titles of the two bills.

2. The *substitute bill* was reported favorably by the Senate committee, and immediately, or at least before any other business intervened, a bill was passed of practically the same title, but called the original Senate bill. The passage of the bill followed right upon the report of the committee, and it is most natural to believe that it was the reported bill that was passed, and that the title of the original was entered by mistake. There are no other entries in the Senate Journal that are inconsistent with the passage of the substitute bill; indeed every other entry in the Senate Journal, and, as we have said, every entry but one in the House Journal, indicates that this was the bill that was passed.

3. The original and substitute bill bore titles that were strikingly similar, and such as were not unlikely to cause confusion and mistake. The only difference in fact was in the parenthetical words contained in the brackets, and even those words meant one and the same thing. There was no real difference in the titles.

4. In the Rash-Allen Case there were certainly two separate and distinct bills, differing not only in title but also in subject-matter. It is not at all certain that there was, at the time the ye and nay vote was taken in the Senate, more than one bill relating to the organization of boulevard corporations, which was the real title of both the original and substitute bill.

5. The entry indicating that it was the original bill that received the ye and nay vote is in the journal of one house only; and while the journal of the House states that the Secretary of the Senate informed the House that the Senate had passed and requested the concurrence of the House in the original bill, the House later informed the Senate that it had concurred in the substitute. There was but one bill sent by the

Senate to the House, the title of which referred to boulevards.

In considering the question now before the court there are two propositions of law that should be kept in mind:

1. The court will presume every enactment of the Legislature to be constitutional, and the burden is upon him who challenges its constitutionality, to show it.

2. The journal entry doctrine holds that the enrolled act, duly authenticated and published, is prima facie evidence of its validity and raises a strong presumption of its constitutional passage. This presumption prevails, and the statute must be sustained, unless the journals show clearly and satisfactorily that the statute was not constitutionally passed. If the journals leave any doubt upon this subject the presumption remains and the statute is sustained.

After considering the journals of the two houses I think the presumption of the constitutionality of the act in question is not rebutted or overthrown, because the journal entries, taken as a whole, do not convince me that any constitutional prerequisite was not complied with in the passage of the act. On the contrary, they lead me to believe that the two entries mentioning the original bill were clerical mistakes, the subject-matter being the substitute bill, and such bill being clearly meant or intended.

From the foregoing statement of facts showing the legislative history of the bill under consideration it is manifest that the present case is clearly distinguishable from the Rash-Allen Case in which the journal entry doctrine was recognized. Under such doctrine, I hold the act now in question to have been constitutionally passed.

RICE, J. One question in this case for the determination of the court is whether the provisions of section 10 of article 2 of the Constitution of the state of Delaware have been complied with by the General Assembly in the passage of the Boulevard Act?

This question involves the consideration of two doctrines known as the "journal entry doctrine" and the "enrolled act doctrine."

In a comparatively recent case in this state the five law judges, sitting at that time, and constituting a Court in Banc, passed upon the merits of the two doctrines, after a thorough and exhaustive argument by counsel in that case.

The majority of that court accepted and applied as the law in this state the "journal entry doctrine," and the minority dissented and expressed their opinion in favor of the "enrolled act doctrine."

In the present case it appears to me that it is not necessary for me to pass upon the merits of the respective doctrines for the following reasons: (1) That the law pertaining to the two doctrines as applicable in this state was not argued to any extent by

counsel on either side; (2) that the present case is distinguishable from the former case.

I therefore concur in the whole opinion as read by the CHIEF JUSTICE.

WOOLLEY, J. In the Rash-Allen Case, and in this case Judge BOYCE and I have concurred in our opinion of the law respecting the valid enactment of statutes under our constitutional provision, and at his request I will briefly embody his views with mine.

Sitting as judges of the Supreme Court in the consideration of this case, we do not here feel bound by the doctrine announced by the majority of the Court in Banc in the Rash-Allen Case; but, on the contrary, we consider that in this court we may express our views and state our positions relative to the law by which the valid enactment of statutes in this state is to be tested and determined, freely and without the restraint of precedent.

In order therefore to make certain our positions upon this question, we state that we cannot subscribe to the journal entry doctrine announced by the majority of the court in the Rash-Allen Case, nor to that doctrine as applied to this case, nor can we distinguish this case from the Rash-Allen Case, for to our minds the journal which is relied upon in this case as the constitutional record of the Legislature's acts discloses precisely the same journal defect that was held to justify the decision in the Rash-Allen Case.

Giving, however, to our constitutional provision the interpretation made by the minority of the court below in the case of Rash v. Allen, and adhering to the enrolled act doctrine as stated in the opinion of the minority of the court in that case, we hold that by the force of that doctrine, and according to the principles it embodies, the statute put in question in this case was validly and constitutionally enacted.

CURTIS, Ch. The petitioner urges as one ground against the right to take his land the failure of the Legislature to comply with the constitutional requirements for the validity of the passage of the act under which the corporation seeking to take his land was incorporated. In the argument of this point counsel referred only to the case of Rash v. Allen. For the petitioner, it was urged that, applying the principles of that case, the act was not validly enacted; and for the defendants, that the two cases can be distinguished, and, further, that the act was validly enacted, whether the doctrine adopted in that case by the court, or that advocated in the dissenting opinion, be applied here.

The case of Rash v. Allen was heard by the five law judges sitting as a Court in Banc (and not including the Chancellor, who is never a member of that court), to deter-

mine a cause then pending in the Superior Court, and there three members of it adopted and applied the doctrine of construction known as the "journal entry doctrine," and the other two joined in adopting and applying the other doctrine of construction known as the "enrolled act doctrine," it being necessary in that case to determine whether an act had been validly enacted.

In this present case a majority of the court here finds that the act in question was validly enacted, though for divers and divergent reasons. Two members of this court, who were members of the Court in Banc, adhere to the doctrine of the minority of the court in that case, and, applying the enrolled act doctrine, find that the act was passed according to the Constitution, while one other member of this court, who was also a member of the court in the case cited, while adhering to the journal entry doctrine, distinguishes the two cases and reaches the same conclusion in favor of the act. In other words, in the present case the majority of this court reach the same conclusion for different reasons.

At this time I am not prepared to adopt either of these doctrines in preference to the other. The general question was not argued by counsel in this case, and all of them referred only to the case of *Rash v. Allen* and the learned and exhaustive opinions there delivered.

A judgment of the Court in Banc is not binding upon the Supreme Court, for an appeal will lie from the latter to the former. Nor would the principles of law adopted by the former be controlling in the latter court in the same or other cases. Great respect should be, and has been, given by the members of the Supreme Court to the opinions of the judges constituting the Court in Banc, especially when the opinions in the latter court agree. Under the circumstances, I do not feel controlled by the views expressed in the case of *Rash v. Allen* as to the rules of constitutional interpretation. The constitutional question there raised was of great importance, involving, as it does, the

rules to be applied in determining whether acts of the General Assembly passed since 1897 meet the requirements of the Constitution as to the procedure for the enactment of laws. It is very important, too, that it should be settled in this the Supreme Court of the state which of the rules of construction should be adopted in Delaware, and I regret very much that I am unable, at this time, to do my part by expressing my own opinion on the subject in this present case. But in view of the magnitude of the question, the extensive study required and the limited time available for consideration of this question, in addition to the several other difficult questions raised and learnedly discussed in this case, I have not as yet been able to reach conclusions satisfactory to myself, or to give to the matter the deliberation which its importance deserves.

Inasmuch as a majority of this court have reached conclusions which will determine the judgment to be rendered in this case, I feel that the rendering of the decision should not be delayed. But I reserve to myself at least an opportunity to file, at or before the next regular term, an opinion on this branch of the case, inasmuch as the conclusions I may reach, whatever they may be, will not affect the rights of the parties in this present cause.

For Judge BOYCE and myself I am constrained to say, and it seems only just to ourselves that we should say, that we have had perplexing doubts, fully known to the members of the court, as to the constitutionality of the act of assembly which we have had under consideration, in several respects.

In concurring with the opinion of the court first read by the CHIEF JUSTICE, in so far as it is the unanimous opinion of the court, we have as it is our duty to do, when it can be done, not without considerable hesitation, resolved our doubts in favor of the validity of the act as expressed in the opinion.

The rule is discharged, petition dismissed and petitioners ordered to pay the costs.

EASTMAN v. DUNN et al.

(Supreme Court of Rhode Island. July 6, 1912.)

1. ACTION (§ 45*)—SEPARATE COUNTS—JOINDER.

In assumpsit for breach of a contract for the erection of a theater and the formation of a partnership in the future, plaintiff may properly join counts sounding in damages for the breach of an express contract and in indebtedness assumpsit for the value of an option delivered to defendants and labor performed at their request, for the two counts grow out of the same transaction, and, both being assumpsit, plaintiff cannot be required to make an election between them before going to the jury, defendants having the right to frame issues so as to determine upon what counts the jury base their verdict.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. § 45.*]

2. PARTNERSHIP (§§ 21, 102*)—WHAT CONSTITUTES.

Where defendants entered into an agreement with plaintiff that, if he would deliver an option on certain property and perform certain services, they would take a lease on the property, erect a theater thereon, and, after their advances had been deducted, would make him a full partner with them in the concern, no present partnership was formed, and plaintiff's cause of action for defendants' breach need not be brought in equity.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 156; Dec. Dig. §§ 21, 102.*]

3. FRAUDS, STATUTE OF (§ 138*)—CONTRACTS—PART PERFORMANCE.

Where plaintiff, in pursuance of a contract whereby defendants were to erect a theater upon land on which he had an option, and, after deducting the amount of their advances, were to form a partnership, delivered his option to defendants, and performed all the services possible, he has a right of action, though the contract was not enforceable because of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 327-333; Dec. Dig. § 138.*]

4. DAMAGES (§ 120*)—DAMAGES FOR BREACH—MEASURE OF DAMAGES.

In such case plaintiff is, for defendants' breach, entitled to recover both the value of the option surrendered and the value of his services rendered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291-305; Dec. Dig. § 120.*]

5. CONTRACTS (§ 350*)—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

In assumpsit for damages for breach of contract, evidence held sufficient to support judgment for plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1819-1823; Dec. Dig. § 350.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In assumpsit for the breach of a contract, the consideration of which was plaintiff's delivery of an option, an instruction that an option may be accepted verbally is proper, where there was evidence of such verbal instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. FRAUDS, STATUTE OF (§ 103*)—ORAL ACCEPTANCE.

Unless an option contract requires an acceptance in writing, an oral acceptance is suffi-

cient, or the acceptance may be shown by the acts of the parties.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 192-198, 200-208; Dec. Dig. § 103.*]

8. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In assumpsit for breach of a contract where the consideration, moving from the plaintiff, was an option to lease certain property which he accepted and delivered to defendants, and it was shown that for convenience he allowed the lease to be made directly to defendants, an instruction that the amount of his recovery was the market value of the lease at the time he delivered it to defendants was not inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

9. GIFTS (§ 47*)—BURDEN OF PROOF.

Defendant who, in an action for breach of a contract, set up that plaintiff gave him an option and relied on his generosity for reimbursement, has the burden of proving the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.*]

10. EVIDENCE (§ 242*)—ADMISSIBILITY—COMPETENCY.

Plaintiff entered into a contract with defendants, whereby he delivered to them an option for a lease on certain property, and they, in turn, promised to erect a theater thereon, and, after deducting the amount of their advances, to make plaintiff a full partner in the enterprise. After the lease was taken, the two defendants had a disagreement, and did not proceed with the erection of the theater. Held, that as the two were jointly interested, and plaintiff did not know of their irreconcilable disagreement, evidence of things done by him at the request of either of them to enable the project to be carried out was admissible; the parties being considered as agents of one another in matters relating to their joint interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 893-907; Dec. Dig. § 242.*]

11. EVIDENCE (§ 185*)—BEST EVIDENCE—NOTICE TO PRODUCE ORIGINAL.

A notice, when served in duplicate, may be proven by the production of duplicate by the one giving the notice, even though he does not request those served to produce the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642-660; Dec. Dig. § 185.*]

12. CONTRACTS (§ 349*)—ADMISSIBILITY OF EVIDENCE—RELEVANCY.

In assumpsit for breach of a contract whereby defendants were, within a year, to erect a theater, and, after deducting certain advances, were to make plaintiff a partner, evidence of a notice served by the plaintiff a short time before the year expired was admissible to show that they had abandoned the project, and demonstrate that the action which was commenced a day before the expiration of the year was not premature.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

13. EVIDENCE (§ 116*)—ADMISSIBILITY—EVIDENCE ADMITTED BECAUSE OF OTHER EVIDENCE.

Such notice was also admissible where both defendants referred to it in subsequent conversations had with plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 134, 135; Dec. Dig. § 116.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

14. WITNESSES (§ 240*) — EXAMINATION — LEADING QUESTIONS.

The propriety of leading questions rests in the discretion of the trial court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. § 240.*]

15. EVIDENCE (§ 286*) — ADMISSIBILITY — PUBLIC POLICY.

Evidence that defendants, to prevent plaintiff from bringing suit, told him he had no chance to win because they had rehearsed their story, and would swear him out of the courthouse if necessary, is admissible on the grounds of public policy.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1051, 1052, 1054-1056, 1058-1060; Dec. Dig. § 286.*]

16. WITNESSES (§ 346*) — IMPEACHMENT — EVIDENCE.

That a witness, who was also defendant, stated to plaintiff that he had rehearsed his story, and would swear plaintiff out of the courthouse, is admissible as affecting his veracity.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1133; Dec. Dig. § 346.*]

17. EVIDENCE (§ 151*) — ADMISSIBILITY — MATERIALITY.

In assumpsit for breach of a contract, where the consideration moving from plaintiff was a lease obtained under an option held by plaintiff, evidence as to why plaintiff did not accept the option before making the agreement with defendants was immaterial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 440; Dec. Dig. § 151.*]

18. EVIDENCE (§ 545*) — EXPERT TESTIMONY — OPINION EVIDENCE.

Where a real estate broker is testifying as to the value of an option, evidence showing his familiarity with the property and its increase in value in the past is admissible to show his competency as an expert.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2360-2362; Dec. Dig. § 545.*]

19. EVIDENCE (§ 113*) — ADMISSIBILITY — RELEVANCY.

In assumpsit for breach of a contract, where plaintiff seeks to recover the value of a real estate option, which he delivered to defendants, evidence as to the value of the property covered by the option, and its increase in value during the ten years preceding the trial and the reasons for such increase, is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

20. EVIDENCE (§ 546*) — APPEAL AND ERROR (§ 971*) — OPINION EVIDENCE — EXPERTS — DETERMINATION OF COMPETENCY.

The determination of the competency of expert witnesses rests largely in the discretion of the trial court, and, unless its ruling is palpably and grossly wrong, errors in this matter are not reversible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2363; Dec. Dig. § 546.* *Appeal and Error*, §§ 3852-3857; Dec. Dig. § 971.*]

21. EVIDENCE (§ 113*) — ADMISSIBILITY — MATERIALITY.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he had transferred to defendants, evidence as to what plaintiff might have obtained from other parties for the option is immaterial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

22. EVIDENCE (§ 201*) — ADMISSIONS.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option under which defendants had obtained a lease, evidence of the figure at which defendants held the lease was admissible as an admission.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 687; Dec. Dig. § 201.*]

23. CONTRACTS (§ 349*) — EVIDENCE — ADMISSIBILITY — MATERIALITY.

In assumpsit for breach of a contract, where plaintiff as the consideration on his part delivered an option for a lease to defendants, evidence that, after defendants had obtained the lease in their own names, they made attempts to sell it, was admissible to show their bad faith.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1818; Dec. Dig. § 349.*]

24. APPEAL AND ERROR (§ 1048*) — EXAMINATION OF WITNESSES.

The refusal of the trial court to allow a witness' memory to be refreshed so as to correct his testimony which was confusing as to an immaterial detail is not error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.*]

25. CONTRACTS (§ 349*) — ADMISSIBILITY OF EVIDENCE — MATERIALITY.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants as his part of the consideration, evidence whether he paid anything for the option is immaterial.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

26. EVIDENCE (§ 113*) — ADMISSIBILITY — MATERIALITY.

Likewise evidence that the owner of the land had previously given an option for its purchase for less amount was immaterial.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

27. CONTRACTS (§ 349*) — ADMISSIBILITY OF EVIDENCE — MATERIALITY.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he had as a part of the consideration delivered to defendants, evidence as to his statements to the owner of the land when he tried to obtain an extension of the option was immaterial; the option having been accepted and exercised before its expiration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

28. CONTRACTS (§ 349*) — ADMISSIBILITY — MATERIALITY.

Likewise it is immaterial as to the reason why the owner extended the option for one day; the parties having availed themselves of such extension.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

29. EVIDENCE (§ 518*) — OPINION EVIDENCE — ADMISSIBILITY.

In assumpsit for the breach of a contract, where plaintiff sought to recover the value of an option which he had delivered to defendants as his part of the consideration, and under which a lease was taken, evidence as to a witness' opinion of the differences between the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

option and the lease was properly excluded, for such a course would make the witness a judge of the materiality of the variations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2326; Dec. Dig. § 518.*]

30. LANDLORD AND TENANT (§ 92*)—OPTIONS TO PURCHASE—VARIATION.

Where an option for a lease did not fix the method of payment in case of purchase, there was no material variation in a lease which permitted payment to be partly in a mortgage.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 290-294; Dec. Dig. § 92.*]

31. CONTRACTS (§ 349*)—ADMISSIBILITY OF EVIDENCE—MATERIALITY.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants under which they obtained a lease, and defendants, who acted as plaintiff's sureties, were satisfactory, evidence whether the owner of the property would have refused to allow plaintiff to accept the option if he had not had satisfactory sureties was immaterial.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1096, 1781-1784, 1788-1798, 1809, 1811-1814, 1817, 1818; Dec. Dig. § 349.*]

32. EVIDENCE (§ 505*)—OPINION EVIDENCE—ADMISSIBILITY.

Expert witnesses cannot testify as to the value of the opinions of other experts, and hence where real estate men, testifying as experts as to the value of an option, were allowed to testify as to the uncertainty of their computations, they could not testify as to the degree of certainty with which real estate men could estimate the probable increase in value of such property, plaintiff's experts having already testified as to such estimates.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2308; Dec. Dig. § 505.*]

33. EVIDENCE (§ 553*)—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.

A hypothetical question which include statements of fact not in accord with the testimony is rightfully excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2360-2374; Dec. Dig. § 553.*]

34. EVIDENCE (§ 534*)—ADMISSIBILITY—MATERIALITY.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants as his part of the consideration, it was proper to refuse to allow a real estate expert to testify whether he had ever known of an option being sold for a considerable sum; such testimony being immaterial, and tending to open collateral issues.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2342; Dec. Dig. § 534.*]

Exceptions from Superior Court, Providence and Bristol Counties; George T. Brown, Judge.

Assumpsit by Albert F. Eastman against William J. Dunn and another. There was a verdict for plaintiff, and defendants except. Exceptions overruled and case remitted with directions to enter judgment for plaintiff.

See, also, 75 Atl. 697.

John W. Hogan and Philip S. Knauer, both of Providence, for plaintiff. Gardner, Pirce & Thornley, of Providence (William W. Moss, of Providence, of counsel), for defendants.

PARKHURST, J. This is an action of assumpsit brought in the superior court for the counties of Providence and Bristol, April 29, 1909, by Albert F. Eastman against William J. Dunn and Daniel C. O'Connor to recover damages for breach of an express contract set forth in the plaintiff's declaration in two counts.

In the first count the plaintiff set forth that on or about the 1st day of May, 1908, he was the owner of and held a certain instrument in writing or option, so called, from one David F. Sherwood, providing that the plaintiff might lease or purchase on certain terms a certain tract of land bounding on Mathewson and Clemence streets, in the city of Providence; that he was desirous of carrying out the terms of said option and of obtaining money to erect upon said premises a building for the purpose, among other things, of conducting therein an amusement business; that on the date aforesaid the defendants offered to provide the funds for the purposes aforesaid, and that it was then agreed between him and them that he should surrender and turn over this option to them so that they might take, in their own names, a lease of the premises in accordance with the terms of the option; that it was further agreed by the defendants, in consideration of the surrender and turning over to them of this option, that before the expiration of a year from May 1, 1908, they would erect and in a workmanlike manner finish a substantial building upon the premises, costing not less than \$10,000, and would equip a portion of it suitably for use as a theater for moving picture performances and such things, and would thereafter and within a year from the making of the agreement enter into an agreement in writing which should provide that all three should be equal owners of the amusement business to be carried on in the building, and of the income from the building, and that he should give his time to the management of this amusement business and property, and that the three of them should share equally in the profits of the business after the defendants had been reimbursed for their advances. The plaintiff then alleged in this count that he performed his part of the agreement and surrendered and transferred his option to the defendants, who accepted it and accepted from Mr. Sherwood a lease of the premises in accordance with the option for the period of 20 years after May 1, 1908; and that they failed to carry out their agreement by erecting, completing, and equipping a building upon the premises and refused to go forward with the performance of their agreement; that they declined to enter into any contract or agreement with the plaintiff with reference to the ownership, conduct, and management of the amusement business.

In the second count of his declaration the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff alleged that on or about the 20th day of April, 1908, he was the owner of a certain instrument in writing or option, so called, described as in the first count, and proceeds substantially as in the first count, and further alleges that on that day the defendants agreed to enter into a copartnership with him to conduct and operate a theater and to carry on an amusement business in Providence; that, to that end, he agreed for his share in the venture to contribute his interest in this option, and to give his time, skill, and ability to the conduct and management of this amusement business, and for their share the defendants agreed to erect and furnish within a year in a workmanlike manner a substantial building on the premises at a cost of not less than \$10,000, and to equip a portion of it for use in the amusement business, and to bear all expenses up to the time said building was ready to be operated for said business; and that it was further agreed that from the first proceeds of this business and from rentals the defendants should be reimbursed for the capital invested in the enterprise, after which all three parties should share equally in the profits and losses of said business and property.

The plaintiff then further alleged in this count that he put the option into the business, and caused Mr. Sherwood to execute a lease to the defendants according to the terms of the option, and permitted them to be named as lessees in the lease in order to secure them for their investment of \$10,000 in the building to be erected by them upon the premises for the purposes of the partnership; that he has always been ready to perform his part of the agreement, but that the defendants have refused to enter into said copartnership, and to contribute their share toward the partnership business and to erect, complete, and equip a building upon the premises and have declared that they would not carry out the agreement. In each count the plaintiff claims \$50,000 damages.

May 4, 1910, the plaintiff filed three additional counts. As the first of these, the third count of the declaration, was withdrawn at the trial, it need not be now considered. The next one was a count in indebitatus assumpsit, reciting that the defendants were indebted to the plaintiff in the sum of \$50,000 for so much money due and payable from them to the plaintiff for a certain option or right of the plaintiff to purchase and lease certain land then and there sold and delivered to the defendants at their request, and accepted and used by them, and a lease of the land acquired in accordance with it.

The last count was also in indebitatus assumpsit reciting that the defendants were indebted to the plaintiff in the sum of \$50,000 for various things, among them "for certain work and labor, skill, care, and diligence * * *

performed and bestowed by the plaintiff for the defendants at the defendants' request, * * *" and for money paid, laid out, and expended to and for the defendants at their instance and request.

The plaintiff also filed a bill of particulars of what was claimed under these additional counts, setting forth two items, one of \$50,000 for the value of the option for a lease from David Sherwood or the lease from Mr. Sherwood to the defendants covering the property at the corner of Clemence and Mathewson streets, in Providence, and dated May 1, 1908, the other of \$5,000 for work and labor done and time spent in relation to removing the old buildings upon this property and for work and labor done, time spent and ideas evolved in developing plans, specifications and blue prints for the erection and equipment of a building upon the property, the interviewing of persons and contractors, and for cash expended in reference thereto. After the filing of this bill of particulars, the defendants filed a motion that the plaintiff be required to elect between the original counts of his declaration and the additional counts, on the ground that the latter were inconsistent with the former, being based on the nonexistence of an express contract between the parties, while the former were based on the existence of such a contract. This motion was denied by the superior court, and the exception taken to the ruling is the first exception set forth in the defendants' bill of exceptions.

The case was tried before Mr. Justice Brown and a jury between May 1 and 9, 1911, and resulted in a verdict for the plaintiff for \$18,000, with certain special findings. The defendants did not file a motion for a new trial, but came directly to the Supreme Court upon a bill of exceptions.

The facts of the case are substantially as follows:

David F. Sherwood, the owner of the property in question, gave to the plaintiff a written instrument dated March 25, 1908, and filed as Plaintiff's Exhibit 1, by which he offered to sell the property to the plaintiff for the sum of \$42,000, or to give him a lease of it for 20 years at certain rentals, with a privilege of purchasing it during the first two years for \$45,000, during the next five years for \$47,500, and during the succeeding three years for \$50,000. It provided that the gangway at the southerly boundary of the property must remain open, as provided in the deeds to Mr. Sherwood, and that the lessee must erect within one year after the execution of the lease a substantial building to cost not less than \$10,000, and to become the property of the lessor at the end of the lease, in case the lessee did not purchase the land, and required that a bond be given with sureties satisfactory to Mr. Sherwood that this building would be built as stated. The option was in the words and figures following: "Providence, R. I., March 25, 1908. Mr. Al-

bert F. Eastman, Providence, R. I.—Dear Sir: First. I offer to sell you my estates designated as No. 116 Mathewson street and No. 43 Clemence street, in the city of Providence, said estates together running from Mathewson street to Clemence street, for the sum of forty-two thousand dollars (\$42,000). Second. I offer to lease you the above estates for the term of twenty (20) years from April 20th, 1908, at the following rental: For the first ten years, \$1,680 per year and for the next succeeding ten years, \$2,520 per year, said rent to be payable quarterly, provided that you pay in addition all current taxes, curbing assessments, sewer assessments and assessments of every kind which may be imposed upon said property during the continuance of the lease, so that the above named rental shall be net to me. Provided further, that you shall erect within one year after the execution of the lease, a substantial building, which shall cost not less than ten thousand dollars (\$10,000), which shall have proper foundation and which shall be erected in accordance with the building laws of the city of Providence. And provided further that you shall give a bond with sureties satisfactory to me, that such building will be erected as above stated. And said building and any improvements made by you upon these estates shall become the property of myself, my heirs and assigns, upon the termination of the lease, unless you elect to purchase the estates as hereinafter provided. In case you take the lease of said estates, you are to have the privilege at any time during the first two years of the same to purchase the property for the sum of forty-five thousand dollars (\$45,000); during the succeeding five years for the sum of forty-seven thousand five hundred dollars (\$47,500); and during the succeeding three years for the sum of fifty thousand dollars (\$50,000). Provided, that at any of the above times at which you may elect to purchase the same, you shall give one month's notice in writing to me; and provided, further, that all taxes and assessments which are imposed or ordered to be imposed prior to the transfer of the title shall be paid by you. The above offers of sale and of lease are expressly subject to the condition that the gangway at the southerly boundary of said property, between Mathewson and Clemence streets, shall remain open as provided in the deeds to me, and also subject to the conditions and agreements as to party walls contained in the agreement between William H. Hall and Herbert D. Goff, trustees of the Central Real Estate Company, and myself, which agreement is duly recorded in the land records of the city of Providence; and, if you elect to take a lease of said premises, any payment or money or any other obligations resting upon me by the terms of said party wall agreement shall be assumed by you during the term of said lease. You further under-

stand that the premises are now rented to tenants who hold from month to month and that it would be necessary to give sixteen days' notice in writing prior to the first of any month in order to have said premises vacated by the tenants. Rents from present tenants shall be apportioned if the deed or lease running to you is signed other than at the first of the month. This offer for you to purchase or lease the above described premises shall remain open for twenty-five (25) days from this date. Yours very truly, [Signed] David F. Sherwood." This instrument expired by its terms on April 19, 1908; but Sherwood agreed, and so admits, that, as the 19th of April fell on Sunday, he considered that the option stood open until Monday, April 20th, and acted on that understanding.

The plaintiff had obtained the offer or option in furtherance of a plan for having a building erected on the property in which he could run a moving picture theater, which he believed would be profitable. He and his wife hoped to be able to provide the necessary money themselves for erecting the building, but found that to be impossible, and abandoned that idea not long after he got the option. He then sought to find some one to go into the enterprise with him and put up the necessary money. Very shortly before the option was to expire, he heard of the defendants as persons who might be induced to go into such a proposition, and he arranged an interview with them. A few days before this interview took place he went to Mr. Sherwood, and asked for an extension of time for accepting the offer, which was refused. The interview took place at the Narragansett Hotel in Providence, the plaintiff giving the date of it as April 18th and other witnesses on the subject as April 20th, the 19th being Sunday. What occurred at this interview is in dispute, the plaintiff claiming that the defendants then and there made with him the contract on which he brought suit, and the defendants denying this. It is admitted that the interview ended about 6 o'clock in the evening, and that at its conclusion the plaintiff called up Mr. Sherwood at the latter's house over the telephone, and arranged to meet him at the Union Station in Providence, where Mr. Sherwood was then about to go. The plaintiff and the defendant Dunn had a short interview with Mr. Sherwood at the station, but what occurred there is in dispute, the plaintiff stating that he simply told Mr. Sherwood that he accepted the offer for a lease, and introduced Mr. Dunn to him as the man who would go on the plaintiff's bond as required by the option, and that Mr. Sherwood agreed and told them to meet him Monday afternoon at the office of Mr. Pirce, of Gardner, Pirce & Thornley, Mr. Sherwood's counsel. Mr. Sherwood and Mr. Dunn both testified that nothing was settled at this inter-

view, but that Mr. Dunn said that he was interested in the matter and asked for an extension of time to consider it, which Mr. Sherwood refused, except that he agreed to hold the matter open till the next day.

On Monday afternoon, according to the plaintiff, on Tuesday afternoon, according to other witnesses, the parties and Mr. Sherwood and Mr. Washburn, Mr. Sherwood's broker, met with Mr. Pirce in the latter's office and discussed matters, and it was arranged that a formal instrument of acceptance or contract should be drawn, to be executed at a meeting of all parties to be held in Mr. Pirce's office the next Thursday afternoon. Late in the afternoon of the next Thursday, April 23d, the second meeting in Mr. Pirce's office took place; the persons present being Messrs. Pirce, Sherwood, Washburn, Eastman, Dunn, O'Connor, and O'Donahue, attorney for Dunn and O'Connor. At this meeting a formal contract between Sherwood on one side and Dunn and O'Connor on the other was drawn up after a long discussion of terms between them and their counsel, in which discussion Eastman took no part. Just before executing this contract, Mr. Sherwood called Mr. Eastman's attention to the fact that the latter's name was not mentioned in it, and asked him if that was satisfactory to him. Mr. Eastman replied that it was; that he had an understanding or arrangement or agreement, as different witnesses put it, with Dunn and O'Connor. The contract was then executed by the parties to it, and is on file as an exhibit in the case. The contract provided for the execution of a lease from Sherwood to Dunn and O'Connor on May 1, 1908, and one was drawn up and was executed on that day at a meeting in Mr. Pirce's office which Eastman did not attend. This lease is also on file as an exhibit in the case.

All these instruments provided that the lessee or lessees should erect on the leased premises within one year after the execution of the lease a building to cost not less than \$10,000. Accordingly very soon after the lease was executed, some small buildings upon the premises were sold to a man who removed them, and the defendants employed a contractor to excavate for the proposed building. Shortly after this, an application for a building permit in the name of "Wm. J. Dunn et al." was filed at the city hall in Providence by the authority of Mr. O'Connor; Mr. Dunn having meantime gone to Europe. The purpose of the proposed building was given as "theater, business building, and hall." The work of excavating was continued steadily for somewhere about six weeks, when it was stopped, because Mr. O'Connor was unwilling to go further in Mr. Dunn's absence. After that work was done only at irregular intervals, without accomplishing much, because upon Mr. Dunn's return in September he and Mr. O'Connor

quarreled, and would have nothing to do with each other. During much of this time the plaintiff was present and overseeing the work, looking to the erection and completion of the building as agreed. In the fall of that year the plaintiff had an interview or two with Mr. Dunn, at which the plaintiff asked what was going to be done, and was told by Mr. Dunn that the defendants were not agreeing, but that he would see what could be done, and take the matter up with the plaintiff later. On December 9, 1908, Mr. Dunn wrote the plaintiff a letter, asking when he could meet him at the Narragansett Hotel. Soon after that they met at the hotel and talked the situation over. Just what took place at that interview is in some dispute, but it is agreed that Mr. Dunn told Mr. Eastman that he did not propose to have anything more to do with Mr. O'Connor, but intimated that he would try to get the latter's interest in the property, and suggested to Mr. Eastman that he go to some architect and have plans drawn of a building that would suit Mr. Eastman's purposes, and provide also for a hall that could be rented and bring in a good income.

In accordance with this suggestion, the plaintiff had several interviews with some architects, and had some plans drawn. He then saw some contractors, and had them make estimates of the cost of erecting a building in accordance with the plans. He and Mr. Dunn also had several interviews with representatives of the Knights of Columbus, who were looking for a hall and club rooms, and tried to arrange satisfactory terms with them for leasing to them the rest of the building besides what would be needed for a theater. As no agreement could be reached with them, the whole matter remained in abeyance. The plaintiff, after vainly trying to get some further information from the defendants whether or not they proposed to carry out their agreement with him, on March 26, 1909, wrote to each a letter which is substantially a notice that he would be obliged to resort to legal proceedings to protect his rights. To these letters he received no reply. On April 29, 1909, having got no definite assurances from either of the defendants as to what they would do, the plaintiff brought the present action.

The plaintiff testified that, when he got the so-called option from Mr. Sherwood, he had expected that enough money could be collected in on accounts due to his wife to enable him to construct a building on the premises as required by the terms of the option; that he soon found, probably within two weeks, that this could not be done; and that he then tried to raise the necessary money by interesting somebody else, but had not found anybody interested until he met the defendants. He said that about the Tuesday or Wednesday before the option

would expire he went to Mr. Sherwood, and asked for an extension of time on it, but did not get it. About this time he told a Mr. Fahey about the option, and that he had not been able to get the money from the source from which he expected it, and Mr. Fahey suggested that he knew two men who he thought would put up a building there, if they could be shown it was a good investment. An interview with them was arranged, and he met them, according to the plaintiff's testimony, about 11 o'clock in the morning, on Saturday, April 18th. He says that he told the defendants that he had secured a piece of property on Mathewson street for the purpose of erecting a theater to be used for a moving picture show, and had not been able to get the money from the source from which he had expected to get it, and was ready to talk with anybody who would erect a building for him. He says they examined the option, and all went and looked at the property. After returning to the hotel, he told them, he says, that he would agree that, if a person would put in the money that was necessary to build the building on that land, he would allow the entire revenue of the property to revert to the people who spent the money until they had got back the money they had spent, and then they would all be equal owners. He suggested a moving picture business and a hall upstairs was discussed. It was finally agreed, he testified, that the defendants should put up the building for him, that he should take entire charge of the property, run a moving picture or other theatrical business there, and take a living salary from the proceeds of the business from the time he took possession of the building until they had been entirely reimbursed for the money they had spent, and then all should share equally in the profits of the business and the income from the building, he guaranteeing that he would pay them back at the rate of \$5,000 a year or lose all his interest in the business. He was not to put any money into the enterprise. He told them that anything that was beneficial to all of them he would agree to, and it was agreed that the defendants could take the lease in their own names as security for the money they were to spend in putting up the building. After the matter had been all talked over until late in the afternoon, he said Mr. Dunn and Mr. O'Connor went one side and came back, and Mr. Dunn said: "Well, I guess we will accept that proposition. Now, then, you would better see Mr. Sherwood, as I am desirous of getting this thing closed up while I am here." Mr. Eastman then called up Mr. Sherwood and talked to him on the telephone. He did not then accept the option, but arranged to meet Mr. Sherwood at the railroad station a little bit later. Eastman and Dunn then went over to the station and met Sherwood. Eastman testi-

fied that Dunn told him on the way over to tell Sherwood that he would go on Eastman's bond for \$10,000; that, when they met Sherwood, he, Eastman, said to him, "I want to accept the lease under the option and Mr. Dunn will go on my bond," and that Sherwood said: "All right. I don't know Mr. Dunn personally, but I have heard of him, and I will accept him as surety." Then Sherwood suggested that they all meet in Mr. Pirce's office the next Monday, and it was so arranged. On cross-examination he testified that he introduced Dunn to Sherwood, and told the latter that he knew that it was necessary by his option to furnish a bondsman satisfactory to Sherwood.

The plaintiff also testified that the next meeting of the parties took place in Mr. Pirce's office on Monday afternoon. There they made arrangements for a drawing of a letter of acceptance, which he told Mr. Pirce to draw in the name of Dunn and O'Connor, and then adjourned to Thursday afternoon at the same place, when the formal agreement was drawn and executed. He testified, further, that he was to get an agreement in writing, and that at the meeting on Thursday, when the agreement between Sherwood and Dunn and O'Connor had been executed, he said to the two latter, "Now, gentlemen, I think it will be a good time to draw up our agreement," but that Dunn postponed it a few days on account of the lateness of the hour. This conversation took place in the presence of all the persons who attended this meeting he said. He said that he tried afterwards repeatedly to get the defendants to enter into a written agreement with him, and that they separately promised to do so, but that he never could get them together. He said that he took part in negotiating the sale of the buildings on the premises to the man who removed them, went to Boston at O'Connor's request to look at some theater chairs which the latter had bought, and made some trips to other cities on his own account to get ideas for the moving picture theater business. He also put on the stand two men to testify as to statements made by the defendants with reference to the plaintiff. Of these Patrick J. Hennessy testified that while Dunn was gone abroad he asked O'Connor who Eastman was, having seen him around the premises while the excavation was going on, and that O'Connor told him that he and Dunn had the lease and were going to build a theater there and that Eastman was to have charge of it; that they were going in on equal shares; that Eastman was to have a salary, and the rest of the returns from the building was to go to Dunn and O'Connor, and, after the building was paid for, they were to be equal partners in the building. He testified that O'Connor said that Eastman was a partner with them.

The other man, Frank Slavin, the con-

tractor who did the excavating, testified that while he was working there he had asked O'Connor about Eastman, and O'Connor had told him that Eastman was going to run a theater there, when it was ready. He also said that later he saw Dunn in Fall River, and asked him who Eastman was, and that Dunn said: "Well, he is a partner with us, and, after we get this thing completed, we expect he is going to run it."

The plaintiff, against the objection of the defendants, introduced evidence by three real estate brokers as to the value of the land involved in the case, as to how much in their opinion it would increase in value during the period of ten years following the spring of 1908, how much profits in their opinion could be made by exercising the privilege provided for in the option of buying the property at the end of ten years for \$50,000, and how much the present value of that profit would be in the spring of 1908, which they gave as their estimate of the value of the option. These estimates were upwards of \$23,000. This testimony was introduced on the theory insisted on by the plaintiff and denied by the defendants that the value of the option could be recovered from the defendants, and that its value could be shown in this way.

The plaintiff also introduced evidence of what the defendant Dunn had asked for the defendants' leasehold interest and estimates which he had given to a broker to be shown to a prospective buyer. These amounts ran from \$23,000 to \$30,000. The defendants objected to all these lines of testimony as to the value of the option, and their objections were overruled and exceptions noted. They then introduced the testimony of three real estate men to the effect that the probable increase in the value of the property was highly speculative and a matter of individual opinion, and that in their opinion all that a man holding such an option as the plaintiff had could expect to get for it was the equivalent of the ordinary broker's commission, which would figure about \$570.

As to the events leading to the taking of the lease by the defendants, they and their witnesses tell a very different story from that of the plaintiff. O'Connor testified that he first met Eastman on Saturday, April 18th, about noon, at the Union Station in Providence; that Fahey introduced them, and they talked about the Mathewson street property; that Eastman said that his time was expiring, and wanted to know whether Dunn and O'Connor were interested in it or not; that he told Eastman that Dunn would be in the city Monday and they would talk it over; that Eastman said that that would be too late, as the option would expire; that Eastman wanted to know if he could not help him to get an extension of time, and seemed so concerned about the matter that he suggested that Eastman and Fahey go and see Mr. Sherwood and ask for an ex-

tension; that he told Fahey that he could use Dunn's name, and his, if he needed to; and that the other two left him and went off to see Mr. Sherwood. Mr. Sherwood testified that on the Saturday before the option expired Eastman and Fahey came to his office in the afternoon and requested an extension of time, which he refused to give; that Eastman did not at that time accept the option, but said that Mr. Dunn of Fall River, who was a man of means, was interested in the matter and would go on his bond; that Fahey said that Dunn was worth half a million dollars, and was absolutely responsible, and he replied that, if that was so, Dunn would be acceptable; that the date of the expiration of the option was spoken of, and, as it ran out on the 19th, the next day, which was Sunday, he told Eastman that he considered that it would include Monday, and he did not see Eastman again until Monday afternoon or evening at the depot. As to the meeting of the parties at the Narragansett Hotel, both of the defendants testified that that took place on Monday, and O'Donahue, who came in just as it was breaking up, testified to the same date, which he verified from his diary, and said was the Monday after Easter. Both Dunn and O'Connor testified that they did not make any contract with Eastman to build a theater building on the premises in which a theatrical business should be carried on by Eastman for the equal profit of all three, or agree, to put any arrangement between them into writing; that, on the contrary, they refused to consider the proposition from a theatrical standpoint, but would simply look at it from an investment standpoint, whether a building on the premises would be a good investment; that Eastman said that he could not exercise the option or accept the offer, as the time was just about up and he had not been able to do anything with it; that finally Eastman said that, if Dunn and O'Connor would take the option, he would trust them to do right by him; that they told him that, if they took it over and decided to put up a theater there, they would certainly look after him, if he cared to go into the theatrical business there, and give him first chance; but that they did not at that time decide to take up the proposition at all, and it was suggested that Mr. Sherwood be asked to hold the matter open a little longer.

At the meeting with Mr. Sherwood at the Union Station at the conclusion of this interview, about 6 o'clock, according to Mr. Dunn's testimony, Mr. Eastman stated that this was Mr. Dunn of Fall River, who was interested in the property, and that he would like to have the thing held up for a day or two. Mr. Sherwood said that the time was up that night, and Mr. Dunn told him that he had only met Mr. Eastman that day, and had not had sufficient opportunity to look over the property to decide on it then, but

that, if Mr. Sherwood would give an extension, he might do it. Mr. Dunn said that he would like three or four days, but Mr. Sherwood said that he would not give three or four days, but would give until the next day. Mr. Eastman did not accept the option, and took no part in the conversation, except to say: "This is Dr. Dunn of Fall River, and I have got him interested in that property." Mr. Sherwood's testimony as to what took place at this interview is the same as Mr. Dunn's in every particular. He fixed the date as Monday, April 20th, and said that the option was not accepted then, but was held over until the next day at Mr. Dunn's request.

According to Mr. Sherwood and Mr. O'Connor, the latter and Mr. Fahey came to see the former on Tuesday morning, and O'Connor testified that he then tried unsuccessfully to get Sherwood to give better terms. According to the testimony of the defendants and of Mr. Sherwood and Mr. Pirce, the first meeting of all the parties interested took place in Mr. Pirce's office on Tuesday afternoon.

The defendants both denied that they made the statements testified to by Hennessey and Slavin as to Eastman's being a partner with them, and both testified that O'Connor had nothing to do with Dunn's causing the plaintiff to see architects and contractors and the Knights of Columbus in the fall of 1908 and the winter following. All that work was done at Dunn's suggestion after he had informed the plaintiff that he and O'Connor were not working together and were not even on speaking terms.

During the taking of testimony at the trial many exceptions were taken by both sides, and at the conclusion of the testimony the defendants made a motion that the jury be directed to return a verdict for them on the fourth count of the declaration, and a similar motion as to the fifth count, and motions that these counts be withdrawn from the consideration of the jury, and also that they be struck out as not supported by the evidence. All these motions were denied and exceptions taken. They then made a motion that the plaintiff be required to elect whether he would rely on the first two counts of his declaration, those in special assumpsit, or on the last two counts, those in indebitatus assumpsit. When that motion was denied and an exception noted, the defendants made a motion that the jury be directed to find separately upon the issues presented in each count of the declaration submitted to them, and this motion was denied, unless the defendants would prepare special issues for the purpose, which the defendants declined to do, and took an exception to the ruling of the court. The defendants then made a motion that a certain special issue be submitted to the jury as being a short statement of the issue raised by the second

count of the plaintiff's declaration, and this motion was denied and an exception noted. A number of exceptions were also taken by the defendants to certain parts of the court's instructions to the jury, and also to the refusal of the court to give certain instructions requested by them.

The jury returned a verdict for the plaintiff in the sum of \$18,000, as already stated, and in answer to questions submitted to them for special findings they found as follows:

(1) The plaintiff did accept the Sherwood option dated March 25, 1908, and the right to the lease thereunder.

(2) The plaintiff did not transfer his rights under said option to the defendants as a gift, trusting to their generosity and sense of fairness.

(3) The plaintiff did, in assenting to the lease mentioned in the option signed by Sherwood dated March 25, 1908, being executed in the names of the defendants as lessees, do so in consideration of an agreement between him and the defendants to the effect that they should erect a building on the premises in which a moving picture show should be conducted substantially as testified to by the plaintiff.

Within seven days after this verdict was rendered the defendants, without filing a motion for a new trial, filed notice of their intention to prosecute a bill of exceptions. In due time a bill of exceptions and a complete transcript of the testimony, etc., were filed and allowed in the superior court and the case transmitted to this court, and is now before us on the merits of the defendants' exceptions.

Of the 95 exceptions set forth in the defendants' bill of exceptions they do not now insist upon those numbered 2, 3, 4, 5, 7, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 28, 29, 30, 35, 36, 42, 46, 48, 49, 50, 51, 58, 62, 65, 67, 68, 71, and 73. Many of the others group themselves under a comparatively few heads, and some need be considered only incidentally. The defendants assert that a decision of the two principal questions involved in the case will dispose of the great majority of them, and that the questions arising for discussion are as follows:

(1) On the facts of this case, can any recovery be had on counts in indebitatus assumpsit?

(2) Was the plaintiff entitled to go to the jury both on the first two counts of his declaration and also on the last two counts?

(3) What was the proper measure of damages on the facts of this case?

(4) Was there any evidence to support a verdict on any of the counts of the declaration for more than nominal damages?

(5) Was it reversible error on the part of the trial court to refuse the defendants' motion that the jury be instructed to find separately upon the issues presented in each

count of the declaration and to refuse to submit to the jury the special issue requested by the defendants?

(6) Was there reversible error on the part of the trial court in giving any of the instructions excepted to by the defendants?

(7) Was there reversible error in refusing to give any of the instructions requested by the defendants?

(8) Did any of the rulings made during the taking of testimony at the trial constitute reversible error?

[1] Defendants strenuously contend that the several counts in the declaration as finally amended, the first and second counts being for damages for breach of an express contract, while the fourth is a count in indebitatus assumpsit, for the value of the option purchased from the plaintiff by the defendants, as above set forth, and the fifth count is for labor and services performed at the request of the defendants, are inconsistent counts, and by motions at different stages of the case, both before the case was on trial and after the evidence was closed, sought to have the trial court order the plaintiff to elect whether to proceed on the first two counts or the later counts. It is to be noted that no demurrer was filed, either to the declaration as a whole or to the counts, but the defendants pleaded the general issue to each. We do not find that the court below erred in refusing to order the plaintiff to elect under the motions. The action is assumpsit, and the several counts are all in assumpsit, and theoretically each count is for a different cause of action, the first for damages arising from breach of an express contract for failure on the part of the defendants to do certain things; the second, for damages arising from breach of an express contract stated in slightly different terms to do certain other things; the fourth, on an implied contract to pay for the option above set forth sold and transferred to the defendants at their request; the fifth, on an implied contract to pay for labor and services done by the plaintiff for the defendants at their request. We see nothing inconsistent in the joining of these counts in one action, the parties being the same in each instance, and the matters alleged growing out of the same transaction. It is merely the ordinary instance of the pleader setting forth his cause of action in different counts, so that, if he failed of proof upon one count, he might succeed upon another. "Before the pleading rules (Hil. T. 4w 4r 5), a declaration might consist of numerous counts, and the jury might assess entire or distinct damages on all the counts; and it was usual, particularly in assumpsit and in actions on the case, to set forth the plaintiff's same cause of action in various shapes in different counts, so that, if he failed in the proof of one count, he might succeed upon another. Such additional counts have

been aptly termed safety valves." 1 Chit. Pl. (16th Am. Ed.) p. 424; 5 Encyc. Pl. & Pr. 324; Ware v. Reese, 59 Ga. 588; Wilson v. Smith, 61 Cal. 209; Whitney v. Chicago, etc. Co., 27 Wis. 327; Stearns v. Dubois, 55 Ind. 258; Snyder v. Snyder, 25 Ind. 399; Sadler v. Olmstead, 79 Iowa, 121, 44 N. W. 292. See, also, Rawlinson v. Shaw, 117 Mich. 5, 75 N. W. 138; Ralph v. Taylor, 33 R. I. 503, 82 Atl. 279. In this case, if the plaintiff failed to satisfy the jury that he had any such express contract as set forth either in the first count or in the second count, he might still be entitled to recover under the fourth count for the value of the option as sold and transferred, upon proof that the option was valuable, and might also recover for the value of his labor and services under the fifth count upon proper proof. We are of the opinion that he was entitled to file these counts originally under the general practice long established in this state, and that to have compelled him to elect, after the evidence was closed, whether to proceed to the jury under the first two counts or under the last two counts, would have been error, because it would have compelled him to determine beforehand for himself upon the sufficiency of the evidence before the jury, instead of leaving it to the jury to determine for themselves as to the sufficiency of the evidence to support any or either of the counts, thereby depriving him of the very benefit to which he was entitled under the rules of pleading permitting the filing of the several counts. The defendants were afforded the opportunity by the court at the trial, after the evidence was closed, to submit special issues to the jury under each count of the declaration, whereby, if they saw fit, the defendants might have so framed the issues as to have determined upon what counts the jury founded their verdict, and the amount of damages awarded under each or any of the counts. This the defendants declined to do, and they cannot now complain. Furthermore, inasmuch as the jury have found by their third special finding that there was an express contract between the plaintiff and the defendants substantially as testified to by the plaintiff, we think it is to be inferred that the general verdict of the jury was based upon the breach of such an express contract, and was an award of damages for such breach, based upon the testimony as to the value of the option transferred to the defendants, and that, therefore, the verdict of the jury was found under the first or second count of the declaration, and not under the fourth or fifth count, for reasons to be hereafter more fully developed. The exceptions based upon the refusal of the court below to require the plaintiff to elect between the first two and last two counts (Ex. 1 & 83) are therefore overruled.

[2, 3] A very large part of the argument of the defendants is devoted to an endeavor

to show that the parties to this suit at the outset entered into a partnership agreement for the development of a theatrical or amusement business, and that the plaintiff in this suit is endeavoring to maintain an action for the breach of a partnership agreement, and thereupon argues most persistently that such an action cannot be maintained at law; but contends that the plaintiff's only remedy is in equity for a dissolution of the partnership and settlement of the partnership accounts. We find no warrant for this contention under the evidence. The defendants undoubtedly led the plaintiff to believe that they would enter into a partnership with him in the amusement business, upon the fulfillment of certain conditions, ultimately, but there is nothing to show that either at the time when the plaintiff transferred his option to the defendants and allowed them to procure the making of the lease to them as security for the advances they agreed to make, or at any later time, these parties had actually formed a partnership. The defendants took the lease in their own name, and the plaintiff was in no way responsible for the rent, nor had he any right thereunder either to occupation of the land or to make purchase thereof. The defendants were to build the building under the terms of the lease, and it was to be their property, in case they exercised their option to purchase, or Sherwood's if they did not, and they alone would be liable for expenses incurred in its building and equipment. The position of Eastman under his contract with the defendants, which he proved to the satisfaction of the jury, as shown by their special finding, was to be that of an employé of the defendants, having the right to occupy the building and run the business, taking only a living salary from the proceeds thereof, until such time as the profits of the business should have been sufficient to pay off all the advances of the defendants, at the rate of not less than \$5,000 per year. After that had been done, and then only, was there to be any such relation between the parties as would constitute a partnership, and then only in the business, but not in the building or the real estate or leasehold. If Eastman did not succeed in paying from the business agreed to be under his charge, at the rate of \$5,000 a year, until all the defendants' advances were paid, he was to cease to have any interest whatever. It is plain, therefore, that the entire agreement between the parties was in no sense at any time a partnership agreement, but rather an agreement looking forward to the formation of a partnership in the future, in the event that Eastman succeeded in making it profitable to the extent that he anticipated, and that in the meantime he was to be in the position of a salaried employé of the defendants and a sublessee of the property. It might be that the conditions to be de-

veloped would never lead to the formation of the partnership, because the profits of the business might never be sufficient to fulfill the conditions upon which alone Eastman could ever become a partner and entitled to one-third of the profits. Since the defendants by their conduct, after they had obtained from the plaintiff his option for a lease and purchase of the property, and thereupon had secured the lease in their own names, in abandoning work on the building and declining to proceed with the undertaking, did nothing which in effect was of the slightest value to the plaintiff, and repudiated any legal obligation to him, claiming that they never at any time had any binding contract with him, thus showing that they never intended in good faith to enable him to get any return for either his services or his option, they placed themselves in the position of having received from him a valuable option and valuable services contributed by him toward the contemplated enterprise, without ever paying him or intending to pay him any valuable consideration whatever for the same; so that, in effect, while the plaintiff in good faith had done all that he agreed to do, and contributed all that he had agreed to contribute so far as he was permitted to do so, the defendants entirely failed to perform the contract or any portion thereof on their part to be performed, and in legal effect are in the same situation toward the plaintiff as if they had never done anything in fulfillment of their contract. The claim on the part of the defendants, therefore, that the contract on their part was partly fulfilled, cannot be maintained. By their failure to carry out their part of the contract the defendants have made it impossible forever to determine what would have been the value of the contract, if carried out, to the plaintiff; so that, on the theory argued by defendants' counsel, that the plaintiff can only recover what the value of the contract would have been to him, if it had been fully carried out by the defendants, they have by their own conduct, and by their repudiation of all legal obligation to him, made it impossible for the plaintiff to recover anything. Such a theory is so unjust in its application to the facts of this case that the mere statement of it sufficiently refutes it. It is plain that a contract of the nature above set forth is one which cannot be enforced, if, as in this case, the defendants see fit to repudiate it, and it makes no difference whether it is nonenforceable as being within the statute of frauds, or for reasons inherent in the very nature of the contract. The case is closely analogous to those cases which have frequently arisen, where, upon agreement for the sale or exchange of land, the plaintiff has fulfilled his part of the contract by making conveyance of his land to the defendant, and the defendant has re-

fused either to pay the agreed price or to convey land agreed to be conveyed in exchange; or where in consideration of labor and services or materials supplied by the plaintiff in making repairs or planting and cultivating the soil, or of money or its equivalent paid, the defendant has agreed to convey land, and, after receiving the agreed consideration, refuses to fulfill his contract. In all these cases it has been repeatedly held that the plaintiff is entitled to recover at law in assumpsit either the value of the land conveyed by him, or the value of the consideration advanced by him, whether in money or materials or labor. *Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764; *Root v. Burt*, 118 Mass. 521; *Williams v. Bemis*, 108 Mass. 93, 11 Am. Rep. 318; *Kneeland v. Fuller*, 51 Me. 518; *Moody v. Smith*, 70 N. Y. 598; *Smith v. Smith*, 28 N. J. Law, 208, 78 Am. Dec. 49.

[4] We think the case at bar is quite analogous in principle to the cases cited. While it is true that the plaintiff did not in fact convey to these defendants an actual estate in land, yet he did under the contract he made with them turn over to them his option whereby they became entitled to receive and did in fact receive a valuable lease of property in one of the best business districts of Providence, with an option of purchase of the real estate upon favorable terms. He did also, in accordance with his agreement, looking to an ultimate partnership interest, devote his time and services at their request in the endeavor to carry out the agreement. Through no fault of his, by their own subsequent acts, they failed to so carry out the agreement as to enable him to receive any consideration whatever either for the option or for his services and ultimately repudiated and denied any legal or contractual obligation to him whatever, thus showing that they never intended to act in good faith in carrying out any agreement with him. Under these circumstances, this court is of the opinion that the plaintiff in this action is entitled to recover both the value of the option so surrendered to the defendants and of which they have availed themselves, and for the value of his services rendered at the outset of the work looking toward the erection and equipment of the building.

The case at bar is quite analogous to those cases where there has been an agreement to form a partnership, but no partnership business has in fact been done, and the defendants after receiving value, either by way of money contribution, or of labor and services, or of business done by the defendants for their own benefit which should have been partnership business, have been held liable in assumpsit either for the money contributed by the plaintiff, or for labor and services rendered, or for the profits on the work done. *Hale v. Wilson*, 112 Mass. 444, 449; *Vance v. Blair*, 18 Ohio, 532, 51 Am. Dec.

467; *Currier v. Webster*, 45 N. H. 233; 2 Bates, Law of Partnership, §§ 870-876, & *cas. cit.* In the case of *United States v. Behan*, 110 U. S. 838, 4 Sup. Ct. 81, 28 L. Ed. 168. Behan, the defendant in error, had been engaged in doing work in the improvement of the harbor of New Orleans under a government contract, and had expended a large amount of money for machinery, labor, and materials, including his own labor in carrying on the work. Before the work was finished, and before he had received any money under the contract, the work was abandoned by the government and he was prevented from finishing the work under the contract. It was found that there was no satisfactory evidence as to what would have been his profit under the contract, if completed.

The United States Supreme Court, after stating fully the findings of fact and conclusions of law of the Court of Claims, and in support of the same says (page 343 of 110 U. S., page 83 of 4 Sup. Ct. [28 L. Ed. 168]): "We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses. The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill

(N. Y.) 69, 42 Am. Dec. 38, they are 'the direct and immediate fruits of the contract,' they are free from this objection. They are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary. The rule as stated in Speed's Case [2 Ct. Cl. 429] is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's Case, and his profits will be measured by 'the difference between the cost of doing the work and what he was to receive for it,' etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought, a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course, there can be no profits. When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits. He recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But, when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on

hand; at least, it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. * * * It is to be observed that when it is said in some of the books that, where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a quantum meruit, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has (not) been damaged to the extent of his actual loss and outlay fairly incurred."

We are of the opinion that the rule of damages set forth in the above quotation is quite applicable to the facts shown in the case at bar. While the plaintiff has not shown that he actually spent any considerable sum of money in attempting to fulfill his part of the contract, yet he has shown that he devoted a large amount of time to the enterprise at the request of either or both of the defendants, who, as they were acting together as lessees of the property, must be deemed to be agents, each for the other, in matters relating to their common interests; and he has further shown, to the satisfaction of the jury, that he also turned over to them his accepted option whereby they were enabled to obtain a valuable lease of property situate in the "retail district" of Providence in a very valuable location, said lease containing a valuable option of purchase. We are unable to see what difference it makes whether the plaintiff actually conveyed valuable real estate to the defendants for which they refused to pay, or whether, by virtue of his accepted option, he enabled them to get title to such real estate. He did actually enable them to obtain such property, and they, repudiating their contract with him, availed themselves of the value thereof. This property was indeed the foundation of the entire enterprise into which the plaintiff appears to have entered in good faith with the defendants, without which such enterprise would have been impossible.

The value of the option and of the lease obtained by the defendants thereunder has been shown, by the evidence of expert real estate men, giving the best evidence obtainable thereof, to have been upwards of \$23,000 at the time when it was procured, and we see no reason to doubt that such value was a fair and reasonable one, having in mind the situation of the property, its then value, its probable increase in value, and the favorable terms of purchase contained therein. The claim on the part of the defendants that the plaintiff is at most entitled to recover a mere broker's commission of less than \$600 is quite untenable under the facts. He was not acting as a broker as between Sherwood and the defendants. He was not attempting as the agent of Sherwood to place a right to the lease in the hands of parties who would take it, for the benefit of Sherwood, but he was acting for himself in the attempt to build up a business which he believed would be profitable to him and to the defendants in the future, and he furnished the foundation upon which such a business could have been built. We are of the opinion that the evidence amply supports the special findings of the jury that the plaintiff did accept the option, that he did not transfer his rights thereunder as a gift trusting to the generosity and fairness of the defendants, and that, in assenting to the lease being executed to the defendants as lessees, he did so in consideration of an agreement between him and the defendants, substantially as he testified.

[5] And inasmuch as the jury by their general verdict found only the sum of \$18,000, which is many thousand dollars less than was testified to as the probable value of the option, we are led to believe that the jury took a very conservative view of the values testified to by the experts, which were corroborated by the values shown to have been placed thereon by one of the defendants, and that they took into account the uncertainties which always exist as to the future increase of value of real estate; and we are further led to believe, in view of these considerations, that the verdict of the jury was based solely upon the value of the option and this lease obtained thereunder, and not upon the services claimed to have been rendered by the plaintiff, because of the fact that he was unable to furnish definite testimony either as to the actual amount of time spent by him, or as to expense incurred. As we have before shown, the defendants had every opportunity, if they had seen fit, to have submitted such issues to the jury under each count, as to have ascertained definitely whether the jury found under one or more of the counts, and the amounts of such findings; but they refused to avail themselves of such opportunity. We think they are not now entitled to complain of the verdict, which, as we have shown, is conservative

and evidently based upon the value of the option alone. We think, therefore, that the verdict of the jury was fully supported by the evidence, and that the rule of damages given to them by the court and under which they found such verdict was a proper rule under the circumstances of the case.

These considerations dispose of a very large number of the entire 61 exceptions which are pressed before this court. A large number of them are based upon the mistaken conception of the defendants' counsel as to the proper rules of pleading in relation to the conclusion of the several counts in one declaration, and as to the admissibility of testimony to prove the damages which the plaintiff is entitled to recover, and many of them are based upon an erroneous view of the testimony with regard to the relations of the parties in the endeavor on the part of the defendants to sustain the position that the parties were partners, and therefore no action at law could be maintained for breach of a partnership contract. It would be futile and would unduly extend the limits of this opinion if we should take up in detail each one of the defendants' exceptions. Indeed, counsel for the defendants substantially admits this in his brief, and has discussed only a few of the exceptions specifically. We therefore proceed to discuss only such of the specific exceptions as have not already been substantially overruled.

The subject of the defendants' eighty-fifth exception is the refusal by the trial judge to submit to the jury a special finding in the following form, to wit: "Did the defendants agree with the plaintiff to enter into a partnership with him for the acceptance of the Sherwood option and the erection of a building for theatrical purposes, with money to be furnished by the defendants, and the operation of a theater in said building and to divide the net profits of the business between them, as claimed by the plaintiff?"

The defendants' counsel asked that this be submitted to the jury as a short statement of the most vital part of the second count, but the trial justice refused to allow it. We find no error in such refusal. This is one of the attempts on the part of the defendants to obtain a finding that there was an agreement for a present partnership between the parties. As we have already shown, there was no evidence of such agreement, nor is any such agreement set forth in the second count, as is attempted to be submitted in the above quoted language. The refusal to submit it was proper and the exception is overruled.

[6, 7] Certain instructions referred to in the eighty-eighth and eighty-ninth exceptions are substantially as follows: At the bottom of page 807 of the transcript, the trial justice told the jury that notice of the acceptance of an option need not be given verbally where the acceptance is sufficiently in-

dictated by subsequent acts or conduct of the parties, and that, if from the acts and conduct of Mr. Eastman and Mr. Sherwood both understood that Eastman had accepted the option and he did accept in this way, in that case he had a right which can be recognized in law, and, if valuable, would entitle him to recover, unless, as the defendants claimed, he gave it to them. At the bottom of page 817 and the top of page 818, the jury were told that, if the plaintiff accepted the option, either in so many words or by act or conduct from which it was understood by him and Mr. Sherwood that he had accepted, then he had the right there. These instructions were correct. There was evidence of the oral express acceptance of the option by Eastman; also sufficient evidence as to the conduct of the parties, from which the jury were authorized to find an acceptance of the option, and, unless a contract or option provides for acceptance in writing, an oral acceptance is sufficient, or it may be proved by the acts of the parties. *Springer v. Cooper*, 11 Ill. App. 267; *Graves v. Smedes*, 37 Ky. 344; *Woodlock v. Meyerstein*, 5 Mo. App. 591; *Souffrain v. McDonald*, 27 Ind. 269; *Smith's Appeal*, 69 Pa. 474; *Ives v. Hazard*, 4 R. I. 14, 27, 67 Am. Dec. 500. These exceptions are overruled.

[8] A certain instruction referred to in the ninety-first exception is substantially as follows: In this part of the charge the jury were told that, if they found for the plaintiff, he would be entitled to recover as an element of damages the fair market valuation of the lease at the time he turned it over to the defendants. It is contended that the plaintiff never had the lease and never turned it over to the defendants, and that therefore this instruction was erroneous, as not being based upon the testimony. The criticism is without merit. The plaintiff had accepted the option, and might have taken the lease in his own name, and assigned it to the defendants. He was willing to avoid this circuitry, and permitted it to be made direct to the defendants as security for their advances to be made. We find no substantial error in this instruction, and, as to the portion of it relating to the measure of recovery, we have already dealt with that question at length. The exception is overruled.

A certain instruction referred to in the ninety-second exception is substantially as follows: In this part of the charge the jury were told that if the plaintiff had the lease, and it was his property, and he turned it over to the defendants upon their promise to do certain acts and they failed to carry out those acts and had got that property, then he was entitled to its fair market value at the time he turned it over to them. This exception is substantially the same as the one last considered, is based upon the

same grounds, and is overruled for the same reasons.

[9] Certain instructions referred to in the ninety-third, ninety-fourth, and ninety-fifth exceptions are substantially as follows: In these parts of the charge the jury were told that if the plaintiff had an accepted option that was of value, as the defendants had set up that it was a gift to them, the burden was upon them to establish their position in that respect, and to satisfy the minds of the jury by a fair preponderance of the evidence that it was a gift; and that, therefore, on the second issue submitted for a special finding the burden of proof was upon the defendants. We find no error in these instructions. The evidence on the part of the plaintiff was that he had an accepted option which was of value, and that he had permitted the lease called for thereunder to be made direct to the defendants in pursuance of certain agreements on their part. The defendants denied that they made any agreements with him and set up that he had given them the option without any undertaking on their part, relying upon their generosity, etc. They thereby assumed the burden of proving the gift in accordance with the usual rule that "he who alleges a gift has the burden of proving the same." *Wheeler v. Glasgow*, 97 Ala. 700, 701, 11 South. 758; *Bunker v. Tufts*, 55 Me. 182, 189; *Wilson v. Wilson*, 99 Iowa, 688, 692, 68 N. W. 910; *Matter of Rogers*, 10 App. Div. 593, 595, 42 N. Y. Supp. 133; *Doty v. Wilson*, 47 N. Y. 585; *Walker v. Welsh* (Mass.) 11 N. E. 727, 728. These exceptions are overruled.

We deem it unnecessary to further consider in detail the exceptions relating to the instructions given to the jury. We have examined them in detail, and have considered the briefs of counsel in relation thereto, and find that there was no prejudicial error in any of them. In view of the principles of law hereinbefore set forth, the charge taken as a whole properly set forth the principles appropriate for the guidance of the jury.

We have also examined in detail the special requests for rulings and instructions which were preferred on behalf of the defendants and refused by the trial judge. They are based upon erroneous views of the effect of the testimony, and of the rules of pleading and of damages, which we have fully discussed in the earlier part of this opinion; and we do not find it necessary or useful to discuss them further.

It remains only to discuss certain exceptions taken to the admission or rejection of testimony during the trial, which are specially referred to in the defendants' brief.

[10] Exceptions 6 and 8 (pages 29 and 40). These were exceptions to the introduction of evidence of things done by the plaintiff at the request of the defendant Dunn at a time

when he had told the plaintiff that he and O'Connor were having nothing to do with each other. Defendants contend that these things could not on any view be charged against O'Connor, but, if anybody should pay for them, it should be Dunn individually. But it does not appear that at this time the breach between Dunn and O'Connor was known to the plaintiff to be irreconcilable; and it does appear that what the plaintiff says he did was in an endeavor to assist Dunn at his request in "fixing it up" between the parties so that they could go on. It is evident that the defendants had joint interests analogous to that of partners in the tenancy and option of purchase under the lease, and in the construction of the building; and it appears that each of them had at times, in the absence of the other, made suggestions to the plaintiff as to what they wished him to do for the common interest. We think that each of the defendants is to be deemed the agent of the other in the matters of their common interest, and that the evidence was properly admitted for what it was worth, to show the relations of the parties, and that the plaintiff was acting in good faith in the endeavor to carry out his contract with the defendants. We find no error in such admission, and these exceptions are overruled.

[11] Exception 9 (page 46). This was an exception to the admission in evidence of a copy of a letter which the plaintiff testified he wrote to each of the defendants and sent to them by registered mail. It was objected to on two grounds: First, because it was not the best evidence and no notice had been given to the defendants to produce the original; and, second, because it was written by the plaintiff himself and had no relevancy except as proof of the truth of a claim made by him in it—in other words, because it was manufactured testimony. We are of the opinion that the letter was properly admitted. It was a duplicate carbon copy without erasure or alteration of a letter proved to have been sent by registered mail to each of the defendants, and appears upon its face to be only a notice to them that the plaintiff would be obliged to resort to law for the protection of his rights. It does not purport to set forth the terms of any contract between the parties, and cannot be regarded as self-serving. Nor, in view of the fact that the letter was a mere notice, intended to ascertain definitely, if possible, whether the defendants would carry out their agreements with the plaintiff without in any way stating what those agreements were, do we think it was necessary that the defendants be notified to produce the original. It seems to us to come within the exception to the rule regarding secondary evidence, to the effect that a notice of claim may be proved by parol or by duplicate and the original need be

Ed.) p. 171; *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180; *Pen. & C. R. Co. v. Braxton*, 34 Fla. 479, 16 South. 317.

[12] From the record it appears that the letter was dated March 28, 1909. The lease was dated May 1, 1908. The building should have been erected under the terms of the lease by May 1, 1909. The writ issued April 29, 1909. To avoid a technical objection that defendants were not yet in default under their agreement, the letters to each of the defendants, together with their subsequent admissions that they intended to do nothing, were introduced by plaintiff to rebut any contention that the action was premature.

[13] There is evidence that the letter was recognized and referred to by both Dunn and O'Connor in a subsequent conversation with the plaintiff, and it was admissible to connect and explain such admissions and conversations. *Dutton v. Woodman*, 9 Cush. (Mass.) 255, 262, 57 Am. Dec. 46. This exception is overruled.

[14-16] Exception 11 (page 51). This exception was to the admission of evidence of what the defendant O'Connor said during a conversation with the plaintiff, when the possibility of a settlement was being discussed between them, after this action was brought, to the effect that, if the plaintiff brought him into court, there would not be a chance in the world for the plaintiff, as Fahey, Dunn, and O'Connor had rehearsed their story over and over, and he himself would swear the courthouse out, if necessary. That any such statement was made was positively denied by O'Connor. The question covered by this exception was objected to solely on the ground that it was leading. The question was not leading. It did not suggest what answer was expected from the witness; and, even if it were, the propriety of it was in the discretion of the court. The answer, however, disclosed that its admission was proper as a matter of public policy, if for no other reason. The statement made by the defendant O'Connor was proper testimony also, as affecting his veracity. We find no error in its admission, and the exception is overruled.

[17] Exception 12 (pages 108, 109). This was to the refusal of the court to allow the defendants' counsel on cross-examination to ask the plaintiff why he did not accept the option before meeting the defendants, if he had made up his mind to accept it anyway. As suggested by the court, if the plaintiff exercised his option before it expired, he was within his rights. Whatever motive he may have had for delay, or whatever reason he may have had for not accepting the option before he met the defendants, or the entire absence of either motives or reasons, either way, within the time provided in the option was wholly immaterial. This exception is overruled.

[18, 19] Exceptions 23, 24, 25, 26, and 27

(pages 197, 201, 204, 210, 211). These were all exceptions to the introduction of testimony of a real estate broker who qualified as an expert as to the value of the option in 1908, as to the value of the property in April or May of that year, and as to the rate at which it had increased in value during the ten years preceding the trial, and the reasons for such increase. The testimony was properly admitted both as showing the familiarity of the witness with the property in question and with other surrounding property, as a part of his qualification as an expert, and was also admissible as showing the value of the option of which the plaintiff allowed the defendants to avail themselves as a part of the consideration for the agreement between the parties. The defendants' objection is principally based upon erroneous views as the measure of damages, which we have already fully discussed. These exceptions are overruled.

[20] Exceptions 31 and 34 (pages 255-272). This was to the ruling of the court allowing Mr. Richard A. Hurley to testify as an expert to the value of the property, its probable rate of increase in value, and the value of the option. Defendants admit that the question whether any witness can testify as an expert is always largely in the discretion of the trial justice, but contend that Mr. Hurley showed so little personal knowledge of the values at different times of properties near enough to the property in question to be affected by much the same conditions that he clearly never ought to have been allowed to testify. The objections urged by the defendants go to the weight of this testimony, rather than to its admissibility. "The competency of persons offered as experts is generally a question to be decided by the trial court. If error is committed in admitting an incompetent person, the cross-examination to which he is subjected may generally be relied upon to show his ignorance and neutralize the force of his opinions. Unless the ruling of the court is palpably and grossly wrong, it will not be reversed by the reviewing tribunal. Rogers on Expert Testimony, §§ 22, 23; Lawson on Expert Evidence, 276, 468; Gillett on Indirect Evidence, § 209; Howard v. Providence, 6 R. I. 514; Sarle v. Arnold, 7 R. I. 586." Ennis v. Little, 25 R. I. 342, 55 Atl. 884. These exceptions are overruled.

Exceptions 32 and 33 (pages 258, 263). These were to the admission of testimony by Mr. Hurley similar to that already discussed under exceptions 23-27, above, and the exceptions are overruled for the same reasons.

[21] Exceptions 37, 38 and 39 (pages 289 second, 290, 291). These were taken to the refusal of the trial justice to permit Mr. Hurley to answer certain questions asked him on cross-examination by the defendants' counsel. He was asked what a man could

get for the option from Mr. Sherwood on the last day of it, if he was not going to exercise it himself. The court refused to allow this on the ground that the question at issue in the case was not what the plaintiff could get for the option. The witness was also asked if a great deal does not depend on whether a man has means to exercise an option himself or has to raise funds from some one else. The exclusion of these questions was proper. They were wholly immaterial. It was shown that he had accepted the option, and had made use of it as a basis of an agreement with the defendants. Whether he could have got anything for it from other parties, or whether he could have exercised it himself without aid from other parties, was not in issue, since he had exercised it with the aid of the defendants and for their mutual benefit and made use of it as a basis for an agreement whereby all of the parties might have been benefited had the defendants in good faith carried out their agreement. These exceptions are overruled.

Exceptions 40 and 41 (pages 293, 294, 297). These were taken to testimony given by William H. Herrick as a real estate expert as to the value of the option in April, 1908, and as to his opinion at the time of the trial of the rate of increase in the value of this property for ten years following April, 1908. The defendants' objections were based upon the same grounds as in previous exceptions to testimony of other experts, and these exceptions are overruled for the same reasons.

[22, 23] Exceptions 43 and 44 (pages 300, 312). These were taken to the admission of testimony by Mr. Herrick that shortly after the lease was executed Mr. Dunn said that his price for it was \$30,000. The testimony related to a conversation shortly after the acquiring of the property by the defendants under the lease from the owner Sherwood, and was a proper admission against interest, as fixing in the estimation of the defendant Dunn, who was largely interested in real estate, as an investor and builder, the value of the lease which the defendants obtained under the option. It was also proper testimony, taken in connection with other testimony in the record, particularly the testimony of Dunn himself, as to other offers made by him to sell the lease to explain the conduct of the defendants in their treatment of the plaintiff after they had thus acquired all his rights and had gotten this property into their own hands. We think this testimony was properly admitted, and these exceptions are overruled.

Exception 45 (page 320). This was to the refusal of the court to allow the witness to tell on cross-examination whether he thought a 2-days option as valuable as one for 25 days. The question was imma-

terial for reasons already discussed (Exceptions 37-39), and the exception is overruled for the same reasons.

Exception 47 (page 331). This was to the admission of a paper containing figures given by Mr. Dunn to a real estate agent to be used in interesting a prospective purchaser of the leasehold interest not long before the time of the trial. This evidence was properly admitted for the same reasons already given (Exceptions 43-44), and this exception is overruled.

Exception 32 (page 414). This was taken to the ruling of the court compelling Mr. Dunn to tell how much he asked for the property when the Shepard Company was trying to buy it. This ruling was correct for the reasons already given, and this exception is overruled.

[24] Exceptions 53, 54, 55, and 56 (pages 436, 437, 438, 439). These were taken to repeated refusals by the court to allow questions asked on redirect examination of Mr. Dunn to clear up a certain confusion in his testimony caused by the fact that he did not remember what day of the week April 21, 1908, was, and thought it was Monday. Questions were asked for the purpose of refreshing his recollection on this point, and a calendar for the year 1908 was offered to him for the same purpose. An examination of the testimony does not show that the matter was of sufficient importance to warrant the further continuance of this line of questions, which would probably have confused the jury. We find no error in these refusals, and think the court properly exercised its discretion. These exceptions are overruled.

[25] Exception 57 (page 443). This was taken to the refusal of the court to permit the defendants' counsel to ask Mr. Sherwood whether the plaintiff paid anything for the option. The question was entirely immaterial. The value of the option to the parties in this suit was not predicated upon what the plaintiff paid for it or whether he paid anything for it, or not. The question was properly excluded and the exception is overruled.

[26] Exceptions 59 and 60 (pages 445, 447, 448). These were taken to the refusal of the court to allow the defendants to prove by Mr. Sherwood that he had been trying to sell his property for some time for less than \$42,000, and had not succeeded, and that, shortly before he gave the option to the plaintiff, he had had an option out for some weeks by which the property could be bought for \$40,000, and that it was allowed to expire without being used. These matters were quite immaterial. If proved, they would simply show that Mr. Sherwood had not been fortunate enough to find a purchaser. The fact that he gave an option of immediate purchase to the plaintiff at \$42,000, of purchase in two years at \$45,000, and in ten years at \$50,000, under the option proved in this case,

which option was accepted, and of which the defendants availed themselves, was all the evidence necessary as to the price at which Mr. Sherwood was willing to sell. It made no difference at what price he had previously offered to sell, or that he had not been successful. These exceptions are overruled.

[27] Exception 61 (pages 450-453). This was to the refusal of the court to allow Mr. Sherwood to tell what occurred when the plaintiff and Mr. Fahey came to his office on the Saturday before the option would expire and asked for an extension of time. In view of the fact that the option was not allowed to expire, but was finally accepted and exercised, it was quite immaterial what was said about an extension. This exception is overruled.

[28] Exceptions 63 and 64 (page 469). These were to the refusal of the court to allow the defendants' counsel to ask Mr. Sherwood what his reason was for holding the option open for one day after Monday, April 20th. The question was quite immaterial. It did not make any difference why Sherwood held the option open and allowed these parties to avail themselves of it, so long as he was willing to do it. These exceptions are overruled.

[29] Exception 66 (page 629). This was to the refusal of the court to allow Mr. O'Donahue to state to the jury the differences that in his opinion were material between the contract and the lease. The question was properly excluded, first, because it left it to the witnesses to say what variations seemed to him to be material, instead of having the differences, if any, pointed out, and leaving the court to instruct the jury as to whether they were material or not, for the jury to consider. [30] Furthermore, an examination and comparison of the lease with the option shows that there is no substantial variation of terms between the two; the only additional provision in the lease being the agreement by the lessor in case of purchase to accept 75 per cent. of the purchase price on mortgage, there being no express stipulation in the option as to the terms of payment in case of purchase. We do not regard this as such a material variation as to make it necessary that it should have been called to the attention of the jury. This exception is overruled.

[31] Exception 70 (page 699). This was to the refusal of the court to permit Mr. Sherwood to testify whether he would have allowed the plaintiff to accept the option, if he had not had a satisfactory financial backer. As it was provided in the option that the plaintiff should give bond with sureties satisfactory to Sherwood to build the building, it is evident that it was contemplated that Eastman should have a "satisfactory financial backer," and he testified that he already had one before he met the defendants. Under the circumstances, as they transpired,

it turned out that the plaintiff did not need to give the bond, since the lease was made directly to the defendants, whose responsibility was satisfactory to Sherwood. It was quite immaterial what Sherwood would have done under other circumstances. This exception is overruled.

[32] Exceptions 69 and 72 (pages 692, 706). These were taken to the exclusion of questions asked by the defendants' counsel of real estate men, who were testifying as experts in their behalf, as to the degree of certainty with which real estate agents could estimate the probable rate of increase in value of property like that involved in this case for ten years in the future. These questions were objected to on the ground that they called for opinions from the witnesses as to the value of the testimony of other experts who had testified in the case, and were rightly excluded on that ground. The defendants' witnesses were allowed full latitude in testifying as to the uncertainty which necessarily exists in the matter of the probable increase of value in real estate within a given period. These exceptions are overruled.

[33] Exception 74 (page 711). This was to the exclusion of a question asked as to what a man with such an option as the plaintiff's could expect to get for it. The question as framed included statements of fact not in accord with the testimony and was rightly excluded. This exception is overruled.

Exception 75 (page 175). This was to certain statements made by the trial justice to the defendants' counsel in the presence and hearing of the jury, and which, the defendants claim, tended unfairly to prejudice the jury against them. An examination of the transcript at this point does not convince us that the court, in its colloquy with counsel, went beyond proper limits in discussion of the effect of certain testimony in the case, and its terse statement of the conflicting claims of the parties. We find no error, and this exception is overruled.

Exception 76 (pages 711-716). This raised the question, which has been already discussed, as to whether the financial ability of the plaintiff to handle the proposition contained in the option himself was a material element in its value. We think, under all the circumstances of this case, that the rulings of the trial judge were correct. It is quite evident that the plaintiff supposed that, when he made his agreement with the defendants, he had put himself in a position to accept the option and to so handle it as to make it of ultimate value to all parties concerned. We find no error in the rulings and this exception is overruled.

[34] Exception 77 (page 743). This was to the refusal of the court to allow the defendants' counsel to ask one of the real estate experts whether in his 23 years of experi-

ence he had ever known an option on real estate to be sold for any considerable sum. It was rightly excluded. If answered in the negative, it would have thrown no light upon the value of the option here in question. If answered in the affirmative, it would have opened a field of inquiry into sales of real estate options in general, with all their attendant facts and circumstances, wherever situate, known to the witness, and would doubtless have resulted only in confusion to the jury and undue extension of the record. This exception is overruled.

All of the defendants' exceptions are overruled. The case is remitted to the superior court, with direction to enter judgment for the plaintiff upon the verdict.

VAILL v. McPHAIL et al.

(Supreme Court of Rhode Island. July 2, 1912.)

1. APPEAL AND ERROR (§ 724*)—REASONS OF APPEAL—STATEMENT.

The statement of reasons of appeal in a case in equity to cancel certain mortgages contained separately assigned and numbered allegations that the decision upon which the final decree was based was erroneous and against the evidence and weight thereof, that it was erroneous and against the law, that the final decree was against the evidence and weight thereof and against the law, that the decision was erroneous and against the evidence and against the law and the final decree was erroneous, against the evidence and against the law. *Held*, that the reasons were sufficiently specific and not indefinite or multifarious though containing needless repetition, and that the statement of reasons of appeal was sufficient to comply with Gen. Laws 1909, c. 289, governing appeals in equity cases from the superior court to the Supreme Court, and to present for review the errors complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.*]

2. APPEAL AND ERROR (§ 1*)—"APPEAL."

The word "appeal," as used in the various state statutes, has become a general term designating appellate proceedings, and "appeals" cannot be said to have a general character, but each depends for its form and nature upon the particular statute giving the right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 442-447; vol. 8, pp. 7577-7578.]

3. APPEAL AND ERROR (§ 893*)—SCOPE OF REVIEW—EQUITY.

Under Gen. Laws 1909, c. 289, providing for appeals in equity cases from the superior court to the Supreme Court, an appeal in an equity case does not remove the cause to the Supreme Court for a retrial as in chancery appeals in England, but only brings up for review the error stated in the appellant's reasons for appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3626-3636, 4620; Dec. Dig. § 893.*]

4. APPEAL AND ERROR (§ 742*)—STATEMENT OF REASONS OF APPEAL—EQUITY.

For the statement of reasons of appeal in equity to be sufficient to require the Supreme Court to review the errors complained of, it must clearly indicate the particular errors of which review is sought, and state them separately and specifically, but it is subject only to the same requirements as is the statement of exceptions in a bill of exceptions and the assignments of error in a writ of error, and it need not state the reasons upon which the appellant bases his claim of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Action by Julia M. Vaill against Donald T. McPhail and others. From a decree for complainant, defendants appeal, and complainant moves to dismiss. Motion denied.

William A. Spicer, Jr., Eugene A. Kingman, and Edwards & Angell, all of Providence, for complainant. Willis B. Richardson and Frank H. Hammill, both of Providence, for respondents.

SWEETLAND, J. The cause is before us at this time upon the complainant's motion to dismiss the respondents' appeal from the final decree of the superior court on the ground that the respondents did not file a sufficient statement of their reasons of appeal as required by the statute.

The complainant in her bill of complaint seeks to have two mortgages upon her property in the town of New Shoreham, purporting to be executed by her and delivered to the respondent McPhail, delivered up to be canceled. She asks this relief on the ground that, if she did execute said mortgages, she did so unwittingly and without consideration, at the request of the respondent Barton, who was acting as her confidential agent, that she was influenced wholly by her implicit trust and confidence in said Barton, and that the respondent McPhail, at the time of the delivery of said mortgage to him, had full notice of these facts. At the conclusion of the hearing in the superior court upon the bill, answer, replication, and proof, the presiding justice gave an oral decision from the bench. He decided that a confidential relationship between the complainant and the respondent Barton was established, that the respondent McPhail had full knowledge of it, and the justice granted the prayer of the bill. Upon this decision a final decree was afterwards entered, in which it was decreed that said mortgages and a certain bond given by the complainant to the respondent McPhail be surrendered for cancellation, and that the same be canceled.

[1] Within the time allowed by statute, the respondents filed in the clerk's office of the superior court a claim of appeal with a statement of their reasons therefor. The said reasons are as follows:

"First. That the decision of the justice

upon which said final decree was based was erroneous, and against the evidence and the weight thereof.

"Second. That said decision of the justice upon which said final decree was based was erroneous and against the law.

"Third. That said final decree is against the evidence and the weight thereof.

"Fourth. That said final decree is against the law.

"Fifth. That the decision of the justice who heard and tried said cause is erroneous and against the evidence and against the law, and that said final decree based upon said erroneous decision is erroneous and against the evidence and the law."

The complainant's motion to dismiss is based upon her claim that the said reasons are indefinite, and that to give this court jurisdiction more specific reasons should have been assigned.

In considering this motion we will first examine the nature of the appeal in equity causes from the superior court to the Supreme Court given by our statute. If the effect of such appeal is to transfer the whole cause to this court, here to be tried de novo, then the statement of the reasons of appeal may well be of a general character, simply setting forth in a formal way that the appellant is aggrieved, that he is dissatisfied with the decree entered in the superior court, and desires to have the cause retried in this court. If, however, the appeal removes nothing to this court except the errors appearing upon the record and complained of by the appellant, then the statement of the reasons of appeal should be specific, should be as full as the claim of the appellant, and must be regarded as the jurisdictional basis of the cause in this court, limiting all subsequent proceedings here. In determining this question, we get little, if any, assistance from the fact that the word "appeal" is used in the statute. Appeals are of civil law origin, early adopted into chancery procedure, and subjected the whole cause to retrial in the appellate court, differing from the common-law writ of error which removed only questions of law for re-examination. In equity proceedings in England appeals, by that name, have existed for centuries and are of two kinds. A party aggrieved by the order or decree of the Master of the Rolls or of a Vice Chancellor may appeal to the Lord Chancellor and the Lord Justices of the Court of Appeal in Chancery. This is known as an "appeal in chancery." Or the aggrieved party may appeal from the decree or order of the Court of Chancery or the Court of Appeal in Chancery to the House of Lords. While some of the qualities of each of these two kinds of appeal, the appeal in chancery and to the House of Lords, are similar, they are in many particulars quite unlike. Their dif-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ferences in general terms are that the appeal in chancery conforms rather to the primary notion of an appeal. It provides a rehearing in the appellate court with the entry of a decree as upon a trial *de novo*. An appeal to the House of Lords must contain a summary of the reasons upon which the appellant relies, and it brings before the Lords the question of error in the order or decree complained of in the appellant's petition of appeal. 5 Bligh (N. S.) 714. After hearing, the Lords give judgment affirming, reversing, or varying said order or decree. It is the contention of the appellees that the equity appeal in this state in its main characteristics conforms to an appeal to the House of Lords. The term "appeal" has been largely used in the statutes of the various states of this country as a general term to designate the proceeding for the removal of causes from a lower to an appellate court for the purpose of review. In many instances it has been used indiscriminately with reference to the removal of suits at law as well as in equity. In some states the courts have endeavored in their interpretation of statutes to maintain the old distinction between appeal for equity and error for law review. In *Horton v. Miller*, 44 Pa. 256, as the relief sought was equitable, the court turned a writ of error into an appeal. In considering this matter the Supreme Court of Nebraska, in view of the uncertainty that attends an examination of the statutes and reports of the several states, said: "An examination of this question is attended with much confusion, owing to the fact that in some states all appellate proceedings are denominated appeals while in others the distinction between appeals in equity and review upon petition in error is strictly adhered to." *State v. Doane*, 35 Neb. 709, 53 N. W. 612. In many states cases at law are removed by appeal to appellate courts and there retried, as were appeals from justice and district courts with which we were long familiar in this state. In *Mann v. Young*, 1 Wash. T. 454, the court held that, under the civil practice act, it was intended "that a writ of error shall be so amplified in use as to bring up, not merely causes of common law, but also those of equity jurisdiction." In *Farish v. Mining Co.*, 5 N. M. 234, 21 Pac. 82, the court held that under the statute a writ of error will lie to review a decree in equity as well as a judgment at law; while the court in *Springer's Adm'r v. Springer et al.*, 43 Pa. 519, said: "But a writ of error cannot, without a change of its nature, become an adequate form of review of equitable remedies, because it brings up only what is properly record, in order to assign error in that. * * * It is by appeal that equity remedies are reviewed in a higher court, and that brings up the whole case, and not merely the

record of it." There is a like diversity of statutes and decisions not only with regard to the kind of causes which are removed by appeal, but also as to the nature of the questions carried to the appellate court, the extent of the jurisdiction of the appellate court over the cause, and as to the procedure in that court.

Mason v. Alexander, 44 Ohio St. 327, 7 N. E. 438, was a suit at law, but we are now considering the nature of an appeal, as it exists in the various states, and the language of the court is as applicable to appeals in equity as to appeals in law. The court said: "The practice in Ohio is essentially different from the practice in other states in removing cases from general trial courts to appellate courts. While in many of the states and perhaps in all except in our own an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record, as to facts as well as law, does not hear additional or other evidence, but confines its adjudications to errors appearing upon the record, in Ohio the appeal itself vacates, without revisal, the whole proceeding as to findings of fact as well as law, and the case is heard upon the same or other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action *de novo*, in respect to pleadings, necessary parties, trial and judgment, in like manner as if the cause had never been tried below."

In *Pierce v. Wilson et al.*, 2 Iowa, 26, the court said: "But it must be borne in mind that this is an appeal in chancery, and in this court the facts as well as the law of the case are again reviewed and readjudicated. *Stockwell v. David*, 1 G. Greene, 115. Upon an examination of the whole case, this court will render such a decree as should have been entered in the first instance consistent with the case made by the bill and sustained by the proof."

In *Durkee v. Stringham*, 8 Wis. 1, it was held: "The first point that naturally presents itself is one of practice. Some of the appellees, or Taylor, at least, as well as the appellant, Joseph Stringham, were dissatisfied with the decree of the circuit court, but neglected to take their appeal, supposing the appeal which was taken brought up the cause for a rehearing in this court, and necessarily opened the whole case for our consideration. But it is contended by the counsel for the appellant that this is a mistake, and that, even if we should be of the opinion that the decree was not as favorable to Taylor as it should have been, still that we cannot modify or amend it to his advantage; he not having appealed. This question has been carefully considered in this case, as well as in the case of *Wood et al. v. Spaulding*, unreported, where the same point was

made and elaborately discussed by counsel. In this case the appeal was from the whole decree, while the case of *Wood v. Spaulding* the appeal was only from a part of the decree; and yet in both cases we were led to the conclusion that the appeal to this court opened the whole case, and that it was competent to modify the decree of the court below, and make it more favorable to the appellee, if the whole merits and equity of the case required that this should be done."

In *Morris v. Richardson*, 30 Tenn. 389, it was held: "1st. This petition being regarded, by our law, as a proceeding in equity, the whole case is open before us for hearing, upon the pleadings and proof, just in the same manner as it was before the circuit judge. We hear the case on appeal, upon its merits, as if no decree had been pronounced in the court below, and make such decree as may be deemed proper, upon the whole case."

The courts of a number of other states in considering the nature of the appeal in equity given by the statutes of their respective states have held that an appeal carried the whole case to the appellate court for retrial. *Glover v. Hedges*, 1 N. J. Eq. 120; *Crane v. Decamp*, 22 N. J. Eq. 614; *Decker v. Ruckman*, 28 N. J. Eq. 614; *Sparhawk v. Buell*, 9 Vt. 83; *Bishop v. Day*, 13 Vt. 116.

On the other hand, it has been held by the courts of several of the states that upon appeal only the errors assigned by the appellant were carried to the appellate court for review. The editor of the *American notes to Daniell's Chancery Pleading & Practice*, vol. 2, p. 1459, states that it is this class of appeals, of the same nature as the appeal to the House of Lords, which prevails in the United States. After an examination of appellate proceedings, as they have been provided in the several states, we are of the opinion that the conclusion of the editor is somewhat too broad, although this class of appeals is provided in a number of the states.

In *Bank v. Fink*, 7 Paige (N. Y.) 89, it was held that on an appeal from the Vice Chancellor the only matter before the Chancellor for review is the decree appealed from. See, also, *Copous v. Kauffman*, 8 Paige (N. Y.) 583; *Mapes v. Coffin*, 5 Paige (N. Y.) 296. In New York, under the Code, appeals in equity and writs of error at law have been superseded by a proceeding called appeal. In the appellate court the action of the lower court is reviewed as in a writ of error upon the grounds stated in the notice of appeal. *Avery v. Woodbeck*, 62 Barb. (N. Y.) 557. In *Sharon v. Hill* (C. C.) 26 Fed. 345, the court said: "The tendency during the past half century has been to assimilate proceedings in equity and law cases, and in the states where the modern code prevails the proceeding by which a judgment is reviewed in the appellate court is generally known

as an appeal, although in effect it is more like a writ of error than an appeal." In considering the Connecticut statute the court said: "'Appeal' is the name given a proceeding for the revision of questions of law arising in a trial, which, prior to 1882, were brought here by motion in error or motion for new trial. The name in no way alters the nature of the proceeding. The act of 1882 substituted such appeal in place of the former methods, authorizing the combining of both in one process. The appeal simply performs the office of the old motion for new trial and motion in error. It is entirely different from the process called appeal, which transfers a case tried in one court to another court for retrial." *White et al. v. Howd*, 66 Conn. 286, 33 Atl. 915.

In *French v. Currier*, 47 N. H. 96, and *Dodge v. Stickney*, 60 N. H. 464, the court considered that it had the "right to investigate only those questions which come within some of the reasons assigned for the appeal."

In *Baldwin v. Sutton*, 148 Ind. 593, 47 N. E. 629, 1067, the court said: "The law of appellate procedure requires the complaining party to specify with reasonable certainty the rulings of the lower court upon which he relies and desires reviewed, and such assignment must be supported by the record, and no error, not well assigned, can be made available."

In *Grimshaw v. Scoggan*, 72 Ill. 103, the court stated that an appeal from the circuit to the Supreme Court only brings in review the decision of the lower court, and a trial de novo on such appeal is unknown in practice. See, also, *Hulett v. Ames*, 74 Ill. 253; *Rockford v. Compton*, 115 Ill. App. 415.

Other cases in which courts have taken a like position in regard to proceedings upon appeal are *Carlin v. Jones et al.*, 55 Ala. 624; *Proctor v. Robinson*, 35 Mich. 284; *Ireland v. Miller*, 71 Mich. 128, 39 N. W. 16; *Blackie v. Cooney*, 8 Nev. 41; *Cain v. Williams*, 16 Nev. 426; *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Clancey v. Clancey*, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168.

[2] Some of the cases cited have been actions at law, but they equally well illustrate the diversity in the nature of the proceedings which have been denominated "appeals" in the different states. The word "appeal," as used in the various statutes, has in many instances lost its original significance, and has become a general term designating appellate proceedings. Appeals in the United States cannot be said to have a general character, but each depends for its form and nature upon the particular statute which created it. In *Rockford v. Compton*, 115 Ill. App. 415, the court gave its approval of the following statement as to the nature of an appeal: "The mere use of the word 'appeal' in a statute furnishes no certain guide to its precise meaning and effect, but to determine

its operation resort must be had to the general policy of the law, and to reasons drawn from analogy and from the practical consequences of applying one interpretation or another."

We have reviewed at this length the character of appeals in England and in this country, because up to the time of the passage of the Court and Practice Act the appeals known to practice in our state courts provided for a retrial of the cause. Some question as to this might be raised in regard to probate appeals. Any person aggrieved by an order or decree of a probate court which operates on his rights of property or bears directly upon his interest may appeal therefrom to the superior court. The statute requires that the appellant shall file in the superior court his reasons of appeal, specifically stated, to which reasons in ordinary cases the appellant will be restricted. The superior court, however, is not a court for the review of error. The appeal is taken to a single order or decree of the probate court, and although, by the terms of the statute, the appellant is restricted to the reasons of appeal specifically stated, unless the subject-matter of the decree appealed from is separable, as in the case of an account, the nature of the proceeding necessitates a retrial of the matter upon which that particular order or decree was based. The rules of practice of the superior court, approved by this court, provide that in appeals the same party shall hold the affirmative in the superior court who held the affirmative in the probate court. The motion of an appeal most common among us is of a proceeding providing for a trial in the appellate court, essentially *de novo*. Previous to the passage of the Court and Practice Act equity jurisdiction was vested in the Supreme Court alone. By the terms of that act original equity jurisdiction was conferred upon the superior court, and provision was made for an appeal to this court. Before that time, from 1867 to 1871, appeals in equity causes had existed in our practice, but not from an inferior to the Supreme Court. Chapter 692 of Acts and Resolves, passed March 15, 1867, provided that equity causes should be heard and determined in the first instance by one justice of the Supreme Court; that any party aggrieved by any interlocutory or final decree made by said justice might appeal to the full court. The intention of the statute appears to have been that, upon an appeal to the full court from a final decree made by a single justice, the entire cause was to be transferred to the full court by it to be reheard, in ordinary cases upon the same evidence which had been presented to the single justice. There was no provision in the statute requiring the appellant to file a statement of his reasons of appeal or in any other way to bring upon

the record an assignment of error in the proceedings before the single justice, thus limiting the proceedings before the full court. This chapter was repealed in January, 1871. Equity appeals did not again appear in our practice until the Court and Practice Act went into effect in July, 1905.

[3] Appeals in equity are now regulated by chapter 289, Gen. Laws 1909. It is there provided that any party aggrieved by a final decree entered in the superior court in an equity cause may appeal to the Supreme Court. The provisions of the statute do not leave entirely free from doubt the question as to the nature of the proceedings in the Supreme Court upon the appeal. Our conclusion is that it is not the intent of the statute to remove the cause by appeal to this court for a retrial. It was said by the court in *Lacy v. Williams*, 27 Mo. 280: "A trial *de novo* in the circuit court would not strictly be the exercise of appellate jurisdiction. It is clearly competent for the general assembly to confer such jurisdiction, but until it is expressly done we do not consider that the bestowal of a mere appellate power would authorize the courts to try causes *de novo*." Certain incidental and subordinate jurisdiction over the cause is given to this court pending the appeal, but the general effect of the appeal is to bring before the Supreme Court for review merely the errors stated in the appellant's reasons of appeal. We are led to this conclusion, among other things, by the general scheme of the relation between the superior and Supreme Courts which has been created by our law, the superior court being generally the trial court, having in most cases exclusive original jurisdiction, with revisory jurisdiction in this court; further, the provisions of the statute that this court after hearing and determining the appeal shall affirm, reverse, or modify the decree appealed from and shall remand the cause to the superior court, and the final decree, though its form may be determined by this court, shall be entered in the superior court. A most important consideration is the provision that together with his claim of appeal in the superior court the appellant shall file a statement of his reasons of appeal. Of a similar provision in the New York Code the court said in *Matter of Davis*, 149 N. Y. 548, 44 N. E. 187, confirming 91 Hun, 53, 36 N. Y. Supp. 822: "Moreover, section 13 of chapter 399 of the Laws of 1892 provides that, upon such an appeal, the notice shall state the grounds upon which it is taken, and, where a statute requires the grounds of the appeal to be stated, none except those specified can be considered. The hearing must be limited to the errors noticed in the appeal. Otherwise the requirement of the statute would be without significance." See, also, *Shook v. Colohan*, 12 Or. 239, 6 Pac. 503; *Avery v.*

Woodbeck, 62 Barb. (N. Y.) 557. In *Lessenich v. Sellers*, 110 Iowa, 314, 93 N. W. 348, the court held that under the Iowa statute an appeal in equity brings the whole case before the appellate court for retrial, and that "hence errors of any character which do not involve the power of the court to finally dispose of the case need not be assigned." As we have discussed above, although our statute in regard to probate appeals provides that the appellant shall be restricted to his reasons of appeal specifically stated, yet in practice the trial in the superior court in most cases is essentially *de novo*. This is due to the nature of the proceedings; and when the subject-matter and the appellant's relation to it permits, although the moving party in the probate court continues to be the moving party in the superior court, the trial in the superior court is restricted within the limits fixed by the reason of appeal. Although this court has not had occasion to determine the particular point now under consideration, it has in a certain aspect treated an appeal in equity as a proceeding to review solely the error assigned. In *Hazard v. Hope Land Co.* this court by rescript filed May 11, 1908, reported in 69 Atl. 602, 18 L. R. A. (N. S.) 293, refused to consider the objections of an appellee to a decree from which he had not appealed. So also in *McElroy v. McCarville*, rescript filed in this court January 20, 1909, reported in 71 Atl. 646. If, by appeal, the whole cause was before the court for retrial as in chancery appeals in England, as distinguished from appeals to the House of Lords, the objection of the appellee in each of these causes should have been considered. Lord Justice Knight Bruce in *Sherwin v. Shakspear*, 5 De G. M. & G., an appeal in chancery, at page 523, said: "I have no doubt on the point that upon an appeal from part of a decree the whole cause is open to the respondent. He may be satisfied with the decree as it stands, but that does not prevent him from contending, if its correctness is called in question in any particular, that it should be made more favorable to him in any other." See, also, *Watts v. Symes*, 1 De G. M. & G. 240.

[4] In conformity with our view of the nature of equity appeals in this state, we hold it essential that the appellant should clearly indicate in his reasons of appeal the particular errors of the superior court of which he complains and which he seeks to have reviewed. These reasons should be stated separately and specifically. The statement of reasons of appeal which the statute requires is a statement of the erroneous rulings, orders, or decrees of which the appellant complains. It is not a statement of the reasons upon which the appellant bases his claim of error. We regard the statement of reasons of appeal in equity

causes, the statement of exceptions in a bill of exceptions, and the assignments of error in an application for a writ of error as of the same nature and subject to the same requirements. Courts have at times gone to great lengths in their insistence upon minute particularity in an appellant's assignments of error, requiring, not only that the rulings, orders, or decrees objected to should be specified, but that all the reasons upon which the appellant bases his claim of error and upon which he may rely in the appellate court should be set out. In consequence members of the bar, not to be placed at a disadvantage by failing to comply with such rules, have filed reasons of appeal and assignments of error so diffuse as to be bewildering, and courts have been forced to adopt a more reasonable construction of statutory requirements. Thus *Wood v. Frazier*, 86 Tenn. 500, 8 S. W. 148, cited by the appellee, is a marked example of the extreme requirement of particularity and of an unwillingness on the part of the court to consider any assignments of error, the grounds of objection to which were not specifically set forth. Yet in *Bleidorn v. Pilot Mountain*, 89 Tenn. 214, 15 S. W. 737, we find Mr. Justice Lurton, then an associate justice of the Supreme Court of Tennessee, saying: "We have construed the rule requiring assignments of error with liberality, and to hold that a good assignment is rendered bad by the insufficiency of the reasons advanced in its support would be highly technical and a sticking in the bark." *Houston v. Blythe*, 71 Tex. 719, 10 S. W. 520, also cited by the appellees, is a case in line with *Wood v. Frazier*, supra, but later the Supreme Court of Texas in *Land Co. v. McClelland Bros.*, 86 Tex. 192, 23 S. W. 576, 1100 (22 L. R. A. 105), said: "Where an assignment of error is sufficiently specific to enable the court to see that a particular ruling is complained of, it should be held good, although it should fail to state the reason why such ruling is claimed to be erroneous. An assignment may be brief and yet specific, and brevity in such a case is commendable and accords with good practice. The reasons by which allegations of error are sought to be sustained find their proper place in the propositions, statements, and authorities required to be set forth in the brief under and in support of the respective assignments." See, also, *Cotton Press Co. v. McKellar*, 86 Tex. 700, 26 S. W. 1056.

A good statement of the proper rule to be observed in assignments of error, which is applicable to reasons of appeal, is contained in *Atchison v. Myers*, 76 Fed. 444, 22 C. C. A. 268: "In the interest of brevity and clearness, it is to be observed that the assignment of error in this record contains much redundant and irrelevant matter. The

first specification is that the 'court erred in denying defendant's motion at the conclusion of all the evidence to instruct the jury to find a verdict for the defendant.' That would have been enough, because it states succinctly just what action is alleged to have been erroneous. But there follows a statement at length of four reasons why the motion should have been sustained. They constitute a good brief, but in the assignment of error are irrelevant." Other cases in the same line are *Sneer v. Stutz*, 93 Iowa, 66, 61 N. W. 397; *Davis, Collector, v. Burnett (Tex.)* 7 S. W. 678; *Gilman, Adm'r, v. Donovan*, 59 Iowa, 78, 12 N. W. 779; *Eslava v. Lepretre*, 21 Ala. 526, 56 Am. Dec. 266; *Piper's Appeal*, 20 Pa. 67; *Ermentrout v. Insurance Co.*, 60 Minn. 418, 62 N. W. 543. What we have said in *Blake v. Atlantic National Bank*, 33 R. I. 109, 80 Atl. 181, and in *Dunn Worsted Mills v. Allendale Worsted Mills*, 33 R. I. 115, 80 Atl. 591, with regard to the form of statement of exception in a bill of exceptions, is applicable to the form of reasons of appeal in equity causes.

We come to the consideration of the respondents' reasons of appeal in the case at bar. The respondents raise no objection to any interlocutory order or decree of the superior court entered in the cause, nor to rulings of the presiding justice admitting or rejecting testimony during the hearing. Upon the testimony presented the justice decided the issues of fact in favor of the complainant, and upon the facts as he found them he held that the complainant was entitled to the equitable relief which she sought. On this decision the final decree was based. It is as to these matters alone that the respondents desire to have the action of the superior court reviewed. These are the only points upon which they consider themselves aggrieved, and these are the reasons for their appeal. If they clearly set out in the statement of their reasons of appeal the claim that the determination of the justice upon the facts was not warranted by the testimony, and that his application of equitable principles to the facts as he found them was erroneous, they have pointed out the error of which they complain, and have complied with the requirements of the statute. To the consideration of the alleged errors which they have thus designated they will be restricted in the proceedings before this court.

We are of the opinion that the reasons of appeal in this case may be open to the objection of containing needless repetition; but that the reasons assigned are not indefinite or multifarious, and that they are sufficiently specific.

The complainant's motion to dismiss the appeal is denied.

PENINSULA CUT STONE CO. v. NIXON.

(Superior Court of Delaware. New Castle.

May 18, 1912.)

JUSTICES OF THE PEACE (§ 164*)—APPEAL—ERRORS—WAIVER.

On appeal from a judgment of a justice of the peace, errors and irregularities in the justice's certificate to the transcript are waived, unless a motion is made to dismiss the appeal at the earliest opportunity, and before the moving party has pleaded in the case; and a motion to dismiss, made after he has pleaded, will be denied.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 607-636; Dec. Dig. § 164.*]

Action by William E. Nixon against the Peninsula Cut Stone Company. From a judgment of the justice of the peace in favor of plaintiff, defendant appeals. On motion to dismiss appeal because of the insufficiency of the justice's certificate to the transcript. Motion denied.

Argued before WOOLLEY and RICE, JJ.

Hugh M. Morris, of Wilmington, for appellant. Walter J. Willis, of Wilmington, for respondent.

RICE, J. (delivering the opinion of the court). On the 9th day of September, A. D. 1910, the Peninsula Cut Stone Company filed a transcript in this court and entered an appeal from a judgment obtained, by William E. Nixon against the company, before a justice of the peace in this county. The writ was made returnable at the September term, 1910, and is No. 116 to that term; the case has now been pleaded to issue and is placed on the calendar for trial at the present term.

The certificate of the justice to the transcript is as follows:

"I, Washington Hastings, a justice of the peace in and for the county aforesaid, do hereby certify that the foregoing is a true and correct copy of this case as recorded in Judgment Docket A, p. 328.

"In witness whereof I have hereunto set my hand and seal this twenty-sixth day of August, 1910.

"[Signed] Washington Hastings, J. P.

"[Seal.]"

The defendant in this appeal makes a motion to this court that the appeal be dismissed, for the reason that the certification of the justice does not state the transcript to be "of all the docket entries in the case," as provided in section 26, chapter 99, Revised Code, page 755, and he claims that the terms of this section must be complied with, before this court has jurisdiction to hear an appeal. In support of his contention he cites several cases in which the court has dismissed appeals when this question has been raised.

The plaintiff in the appeal contends that the form and substance of the certificate are

not jurisdictional facts, and claims that such defects can only be taken advantage of, by the defendant in an appeal, at the earliest possible time and under no circumstances, can they be cause for dismissal, after the respondent has filed pleadings in the case.

The question presented to us is not a new one in this state, for the Court of Errors and Appeals in 1847, in the case of *Lewis v. Hazel*, 4 Har. 470, decided that the provisions of sections 24 and 40, Dig. Del. Laws, pp. 343, 353, which are similar to and provide for the same things as section 26, c. 99, of the present Code, were provisions which did not go to the jurisdiction of the appeal court, and, to take advantage of a failure to comply with these provisions, the defendant must make application for the appeal to be dismissed, at his earliest opportunity and before he had pleaded in the case, otherwise it would be considered that he had waived the requirements of the statute.

Chief Justice Booth in delivering the opinion of the majority of the court in that case said:

"The whole of this argument is founded in misconception, and hence the wrong application to this case, of a sound principle of law. By jurisdiction is meant that power which is conferred by law, upon a court, judge, or magistrate, to hear and determine the subject-matter in controversy between litigating parties. Jurisdiction is conferred by statute on the Superior Court to hear and determine the subject-matter of appeals from justices of the peace; and the transcript of the docket entries of the justice is required to be filed, not to confer jurisdiction, but to enable the court to exercise the jurisdiction conferred by law; that is, to hear and determine the subject-matter in controversy. The transcript is for the purpose of giving the court cognizance of the appeal, and in this respect is in the nature of process requiring a party to appear and answer to a suit where the court possesses original jurisdiction over the subject-matter. If the court never had jurisdiction, no consent of parties can give it. Therefore, if an appeal be taken where the statute confers on the court no appellate jurisdiction, the appeal will be dismissed in any stage of the cause. But any irregularity or defect in the process, or other form of proceeding by which cognizance of a case is given to a court of which it possesses original or appellate jurisdiction, may be waived by the party for whose benefit such process or form of proceeding is required. If he does not take advantage of the irregularity or defect at the earliest period, he is considered as having waived it. In the present case, if the respondent chose to avail himself of the want of a scroll to the justice's certificate of the transcript, he was bound to make the objection at the term to which he was summoned to appear, or before he did any act

from which a waiver could be implied. Neglecting to do so, and having pleaded to the declaration and gone to trial, the defect has been waived. It is an admission by him that the transcript is in proper form, and operates as an estoppel against his alleging otherwise."

This decision was followed by the court in the case of *Waters v. Kirby*, 1 Houst. 384, when the court refused to dismiss the appeal, but gave leave to the justice to amend his certificate. In that case it appeared that the plaintiff had filed his pro narr. before making the application to dismiss the appeal.

In the case of *Hill v. Ableman*, 1 Marv. 401, 41 Atl. 92, in which the appeal was dismissed, while it does not affirmatively appear in the report of the case that the application to dismiss was made before the respondent had pleaded, it does appear that the application was made at the return term of the writ, and the reasonable inference is that pleadings had not been filed by the respondent.

Of the cases cited by the plaintiff, several were decided before the decision of the higher court in *Lewis v. Hazel*, to which we have before referred, and the others we believe to be in point are the cases of *Barker v. David*, 4 Pennewill, 395, 55 Atl. 334, and an unreported case. In the case of *Barker v. David*, Chief Justice Lore, in dismissing the appeal, said: "The statute, in order to bring the case before us as an appellate court, requires that the justice shall file a duly certified copy of all the docket entries, and that must affirmatively appear in order for this court to assume jurisdiction.

In the report of that case it appears that the only case cited to the court was the one of *Trimble, Sides & Co. v. Dugan*, 2 Pennewill, 524, 47 Atl. 1008, in which case the appeal was dismissed. In *Trimble v. Dugan* the application was made at the return time of the writ and evidently before the respondent had pleaded, and it is reasonable to believe that the distinction between the *Trimble Case* and the one then under consideration was not called to the attention of the court at the time. If it had, or had the decision of the Court of Errors and Appeals in *Lewis v. Hazel*, been called to their attention, it can be assumed that the appeal would not have been dismissed in the case then under consideration.

In the unreported case, cited by the defendant, there is nothing to inform this court that the court's attention was called to the fact that the application was made at a time subsequent to the appearance term and after pleadings had been filed by the respondent, and we are of the opinion that failure of the respondent in this respect has been largely responsible for the several decisions inconsistent with the decision of the Court of Errors and Appeals on the case of *Lewis v. Hazel*.

The decision of the court of last resort, in this state controls this and all subsequent cases upon the point raised, until it is reversed or modified by the Supreme Court.

The motion to dismiss is therefore refused.

STATE v. BROWN.

(Court of Oyer and Terminer of Delaware. Wilmington. Jan. 10, 1912.)

1. RAPE (§ 1*)—NATURE AND ELEMENTS.

Rape is the carnal knowledge of a woman by force and against her will; force, either actual or presumptive, being an indispensable element.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5919-5925; vol. 8, p. 7778.]

2. RAPE (§ 36*)—EVIDENCE—BURDEN.

On a trial for rape, the burden is on the state to prove to the jury's satisfaction, beyond a reasonable doubt, that the carnal knowledge or sexual intercourse charged was consummated or effected by force and against the will of the prosecutrix, or by putting her in great fear or terror.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 46, 47; Dec. Dig. § 36.*]

3. RAPE (§ 6*)—NATURE AND ELEMENTS.

Carnal knowledge of, or sexual intercourse with, a woman, if obtained without the use of force, or with her consent or silent submission, is not rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 6; Dec. Dig. § 6.*]

4. RAPE (§ 51*)—QUESTIONS FOR JURY.

On a trial for rape, the jury should consider all facts shown by the evidence preceding, attending, and following the act of intercourse, including the conduct of prosecutrix, as indicating whether she resisted the intercourse or consented thereto.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

5. CRIMINAL LAW (§ 553*)—CONFLICTING EVIDENCE—DUTY OF JURY.

Where evidence is conflicting, if the jury cannot reconcile it, they should accept that which under the circumstances they think most worthy of credit and belief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.*]

6. CRIMINAL LAW (§ 561*)—DEGREE OF PROOF REQUIRED.

A person accused of crime is presumed innocent until proven guilty beyond a reasonable doubt; and if the jury have a reasonable doubt of his guilt, the doubt should inure to his benefit, and they should acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

7. CRIMINAL LAW (§ 561*)—REASONABLE DOUBT.

A doubt which will justify an acquittal must be a real, substantial doubt remaining after careful consideration of all the evidence, and one which reasonable, fair-minded, and conscientious men would entertain after considering the evidence, and not a mere speculative, fanciful, or possible doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

At a Court of Oyer and Terminer, held at Wilmington, January 10, 1912, Walter Brown, a colored man, was placed on trial upon the charge of making an assault upon Bettie Bowman, the prosecuting witness, and her, the said Bettie Bowman, did violently, forcibly, and against her will feloniously ravish and carnally know (being No. 43, to the November term, 1911). Verdict, guilty, with recommendation to mercy.

Argued before PENNEWILL, C. J., and CONRAD and WOOLLEY, JJ.

Josiah O. Wolcott, Deputy Atty. Gen., for the State. Wilbur L. Adams, of Wilmington, for prisoner.

At the trial, the prosecuting witness testified that about 4 o'clock in the afternoon of the 14th day of October, she was walking down the road in Mill Creek hundred, and the prisoner, Brown, overtook her, began a conversation with her, and proceeded to accompany her on her journey along the road until they came to a place where the road passed through a woods, where no one being in sight, the prosecuting witness being the only person present, the prisoner seized her, dragged her into the woods, and there against her will and without her consent, and in spite of her struggles and resistance, had carnal knowledge of her.

The statement of the prosecuting witness that her clothes were more or less disordered and disarranged and her hair in a disheveled condition, due to the struggle with the man by whom she was assaulted, was corroborated by the woman to whose house the prosecuting witness went immediately after the assault and arranged her clothing and reported to the same woman what had happened to her and showing her the condition of her clothing.

The prisoner was seen by other witnesses accompanying the prosecuting witness along the road in question. He was also seen by another witness the afternoon of the assault, coming across a field from the direction of the woods where the assault was alleged to have taken place and about a quarter of a mile therefrom.

The officer who arrested the prisoner stated that at the hearing of the latter, at the office of the justice of the peace, the prisoner stated he never saw the prosecuting witness before. The defense was that the prosecuting witness consented to the act committed by the prisoner.

PENNEWILL, C. J. (charging the jury). Gentlemen of the Jury: The indictment in this case charges that the prisoner, Walter Brown, did violently and feloniously make an assault upon Bettie Bowman, the prosecuting witness, and her, the said Bettie Bowman, did violently, forcibly and against her will feloniously ravish and carnally know.

The crime charged is that which is commonly known as rape, and is claimed by the state to have been committed by the prisoner on or about the 14th of October last, in a woods near the road leading from a paper mill to Milford Cross-Roads, in Mill Creek hundred, this county.

[1, 2] Rape is the carnal knowledge of a woman by force and against her will. Force, either actual or presumptive, is in legal parlance an indispensable element of rape. In a trial for rape the burden is upon the state to prove to the satisfaction of the jury, beyond a reasonable doubt, that the carnal knowledge or sexual intercourse charged was consummated or effected by force and against the will of the prosecuting witness, or by putting her in great fear and terror, before a conviction can be had.

The prisoner denies that he committed an assault of any kind upon the prosecuting witness. He admits that he had sexual intercourse with her at the time and place alleged, but insists that such intercourse was had with her consent and not by force or against her will.

[3] If that be true he cannot be found guilty of the crime charged in the indictment, because rape, as we have said, is the carnal knowledge of or sexual intercourse with a woman, by force and against her will. If sexual intercourse is obtained by milder means, or with the consent or silent submission of the female, it cannot constitute the crime of rape in contemplation of law.

The important question, therefore, for you to determine in this case, is whether the sexual intercourse which the prisoner had with the prosecuting witness was had with her consent or by force or against her will.

[4] In determining that question you should consider all the facts and circumstances as disclosed by the testimony. And in such connection you may consider all the facts preceding, attending and following the act of intercourse, including the conduct of the prosecuting witness, as indicating whether she resisted the prisoner's intercourse with her or consented thereto.

[5] In cases where the evidence is conflicting, and the jury are unable to reconcile it, they should accept that testimony which they think, under all the circumstances, is most worthy of credit and belief. If, after carefully considering all the testimony in this case, you believe beyond a reasonable doubt that the prisoner did have sexual intercourse with the prosecuting witness by force and against her will, your verdict should be guilty; but on the other hand, if you believe that the sexual intercourse which the prisoner had with the prosecuting witness was had with her consent and not against her will, and by force, your verdict should be not guilty.

[6, 7] In conclusion, we say that in every criminal case the accused is presumed to be innocent until his guilt is proved to the

satisfaction of the jury beyond a reasonable doubt. If after carefully and conscientiously considering and weighing all the evidence in this case, you should entertain a reasonable doubt of the guilt of the prisoner, that doubt should inure to his benefit and your verdict should be not guilty. Of course such a doubt should not be a mere speculative, fanciful or possible doubt, but a real substantial doubt that remains after a careful consideration of all the evidence, and such a doubt as reasonable, fair-minded and conscientious men would entertain after considering all the evidence in the case.

Verdict, guilty, with a recommendation to mercy.

STATE v. BOWDLE.

(Superior Court of Delaware. Sussex. May 22, 1912.)

1. BASTARDS (§ 85*)—BOND.

The statutes regarding bastardy were primarily designed to prevent a bastard child from becoming a charge on the state, and the bond which the law exacts from the father when paternity is established is to indemnify the state in the event of the child becoming a charge on it.

[Ed. Note.—For other cases, see Bastards. Cent. Dig. § 216; Dec. Dig. § 85.*]

2. BASTARDS (§ 35*)—LEGAL SETTLEMENT—NONRESIDENCE—JURISDICTION.

Under Rev. Code 1852, amended to 1893, p. 375, c. 48, § 12, providing that the birthplace of a person is the place of his legal settlement, where a bastard was not born in Delaware, and it did not clearly appear that the mother was a resident of the state, the bastard had no place of legal settlement in Delaware, and not being chargeable, for that reason, for its support and maintenance on any county of the state, the courts thereof had no jurisdiction of bastardy proceedings against the putative father.

[Ed. Note.—For other cases, see Bastards. Cent. Dig. §§ 80-90; Dec. Dig. § 35.*]

Habeas corpus on petition of Charles Bowdle. Prisoner discharged.

Frank M. Jones, Deputy Atty. Gen., and James M. Tunnell, of Georgetown, for the State. Daniel J. Layton, Jr., of Georgetown, for defendant.

Argued before CONRAD, Associate Judge of Superior Court, Sitting at Georgetown. Sussex County.

In a hearing before George M. Stengle, justice of the peace, in Sussex county, on complaint made before him in a case of bastardy, defendant was found to be the father of the child of the complainant and he was ordered by the justice to give bond for the child's maintenance as provided by the statute. In default of surety the defendant was committed to the county jail and afterwards a writ of habeas corpus upon petition was issued by Henry C. Conrad, Associate Judge, to George S. Buell, sheriff, to produce the defendant; the latter claiming that he was illegally detained under the commitment.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

After a full hearing of the evidence produced on both sides as to the residence of the mother of the child the following opinion was delivered by

CONRAD, J. The questions of law presented in this case have proved perplexing to me. The evidence clearly established the fact that while the mother of the bastard child was living with her grandparents in Maryland, the child was begotten in that state and also was born there. The evidence as to the residence of the mother was conflicting. The admissions of the mother made at the hearing before the justice indicated that she considered the home of her grandparents her home, and one witness testified that she reiterated several times that she lived in Maryland. The testimony of the father and grandfather of the mother of the child was not clear, but tended to show that the mother spent part of her time with her grandparents in Maryland and part with her father, who since March, 1911, has been residing in Delaware, but prior to that time had also lived in Maryland. In my effort to reconcile the conflicting testimony as to the residence of the mother, and after applying the rules of evidence applicable to conflicting evidence, I cannot rid my mind of the fact that the mother considered herself a resident of Maryland both at the time of the begetting and birth of the child.

[1] The statutes of this state regarding bastardy are primarily designed to prevent the bastard child from becoming a charge on the state, and the bond which the law exacts from the father when paternity is established is conditioned to indemnify the state in the event of the child becoming a charge on it. In the case of *James L. Smith v. State*, Houst. Cr. Cas. 107, the only bastardy case reported in this state in which the question of residence is discussed, it was held that where it clearly appeared that the child was born in Delaware, even though the mother at the time of the begetting of the child were a resident of another state, the fact of its birth in this state brought it within the provisions of our statute (Revised Code 1893, p. 375), which makes "the birth place of a person * * * the place of his legal settlement."

[2] The converse of this proposition must be true: If the child is not born in this state, and if it does not clearly appear that the mother was a resident of this state, it has no place of legal settlement in this state, and therefore is not chargeable for its support and maintenance on any county of this state. Our statute is designed to meet cases where the child has a legal settlement in this state, and that fact not being proven to my satisfaction in this case, the child is not chargeable for support to this state or county; and the prisoner is therefore ordered discharged.

JOHNSON v. JONES.

(Supreme Court of Vermont. Windsor. July 4, 1912.)

1. TAXATION (§ 241*)—EXEMPTIONS—PROPERTY USED FOR PIOUS OR CHARITABLE PURPOSES—"SEQUESTER"—"CAMP MEETING."

P. S. 496, subd. 6, exempts from taxation real and personal estate sequestered or used for public, pious, or charitable uses. Plaintiff, a Methodist evangelist, acquired full title to two lots of land, one of which he set apart and used exclusively for camp meeting purposes, under the auspices of no particular denomination, but open to persons of such denominations as he wished to have there, and on which, with the aid of voluntary contributions of labor and money, he erected cottages, a boarding hall, preacher's stand and seats, a dormitory for preachers, several church tents, and a barn, and during camp meeting, as an incident thereto and without profit, he charged for the use of cottages, including board, for meals, and for feed and shelter of horses, the income from which was used for carrying on the camp meetings. From the other tract, not connected with the camp ground, he sold timber in payment of a note for money borrowed for improvements upon the camp ground. Held, that the word "sequester" meant to set apart, to put aside, to separate, and that a "camp meeting" meant a religious gathering, held usually by Methodists, for conducting a series of religious services in the open air or in a tent, lasting for several days, during which those present lodged in tents or temporary houses; and that the lot not connected with the camp ground was taxable, but that the camp meeting ground and its improvements were exempt; the charges for board, etc., not operating to deprive the property of such exemption.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 389-393; Dec. Dig. § 241.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 946, 947.]

2. TAXATION (§ 441*)—ASSESSMENT—PROPERTY PART TAXABLE AND PART EXEMPT—VALIDITY.

An inseparable tax, in part void because assessed against exempt property, is also void as against the part taxable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 773; Dec. Dig. § 441.*]

Exceptions from Windsor County Court; Willard W. Miles, Judge.

Trespass and trover by I. T. Johnson against W. G. Jones. Judgment pro forma for plaintiff for damages and costs, and defendant excepted. Affirmed.

See, also, 84 Vt. 49, 77 Atl. 945.

Argued before ROWELL, C. J., and MUNSON, WATSON, HASELTON, and POWERS, JJ.

Davis & Davis, for plaintiff. W. E. Tracy and F. G. Fleetwood, for defendant.

WATSON, J. The only question before the court is whether on the agreed case the plaintiff's real estate in the town of Johnson, known as Ithiel Falls, was exempt from taxation under the laws of the state, April 1, 1907.

[1] The plaintiff is a Methodist clergyman, serving no one church regularly, but an evangelist. Prior to 1906 and 1907 he lived

in Johnson. He became owner of this property in part by deed dated November 5, 1893, in part by land contract dated May 31, 1899, acquiring full title by decree based upon said contract, dated August 22, 1906. The property, about eight acres in all, consists of two pieces of land—one of five acres fenced on the roadside and bounded on the south and west by the Lamoille river, and one of three acres situated immediately on the opposite side of the river; that is, the two pieces are separated by the river. On April 1, 1906, and April 1, 1907, the three-acre piece was timber and woodland. On the five-acre piece there were in 1900 two cottages, and prior to the assessment of the tax in question there were nine cottages, one boarding hall, preacher's stand and seats, one dormitory for preachers, one barn and stall for horses, one Binghamville, Vt., Methodist Episcopal Society tent, one tent of the Union Evangelical Church of Montgomery, Vt., all to be used as a place for camp meeting purposes. In the year 1900 all said real estate was occupied by the plaintiff under an agreement with the then owners, and he conducted camp meetings thereon during the months of June and August in that year, and annually thereafter, some cottages being built on the five-acre piece by himself with the aid of voluntary contributions of labor and money. After becoming the owner, the plaintiff built a covering for the tabernacle, and erected additional cottages. From that time he has held and still continues to hold camp meetings thereon, not under the auspices of any particular denomination, but open to the people of such denominations as he wished to have on said premises. He has allowed the Grange and the Knights of Pythias each to hold one picnic there without charge for the use of the grounds. They had no use of the buildings. Since the plaintiff obtained title, he has improved the premises by additional buildings for camp meeting purposes, in which he has been aided by voluntary contributions of labor and material. All camp meeting services have been held on the five-acre piece. During such gatherings the plaintiff charges for the use of the cottages including board for each individual \$5 for the 10 days, for single meals 25 and 35 cents, and for feed and shelter for horses 35 cents. For hitching horses on certain portions of the grounds no charge is made. The income thus derived is put into the general fund, and the same is used in defraying expenses of carrying on the camp meetings. Other than as herein stated the plaintiff has never used any of said real estate, nor permitted the same to be used, except for camp meeting purposes. About three years prior to 1906 the plaintiff owed one Hodgkins a note for \$300, given for money borrowed from the latter solely for the purpose of erecting buildings on the camp ground. At that time

the plaintiff sold to Hodgkins all the timber on the three-acre piece, and the value thereof was indorsed on the note in payment. With this exception no lumber has been cut on the premises and sold therefrom since the plaintiff became the owner.

The tax in question was assessed on all said Ithiel Falls property April 1, 1907. It is admitted that all proceedings in connection with the assessment of the tax, and in respect to its collection, were regular in form, and according to law, if the property was taxable. By P. S. 496, subd. 6, "Real and personal estate granted, sequestered or used for public, pious, or charitable uses," shall be exempt from taxation. It is under this clause of the statute, if any, that the claimed exemption exists. The three-acre piece is entirely separated from the other piece by a river of considerable size, and the record does not show any bridge or other way of passage between them; neither does the record show that it was granted, sequestered, or used for any of the purposes named in that clause of the statute. Consequently the claim of exemption is without foundation as to this piece.

Our further consideration of the case will therefore be confined to the five-acre piece. Mr. Webster, in his New International Dictionary, gives, among other definitions of the word "sequester," "to set apart; to put aside; to remove; separate." He defines the word "camp meeting" as "a religious gathering held, usually by Methodists, for conducting a series of religious services in the open air or in a tent in some retired spot, as a grove or wood. It usually lasts for several days, during which those present lodge in tents, temporary houses," etc. In *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907, it was held that, under the clause of the statute quoted above, "the exemption must turn on the fact of grant, sequestration, or use for 'public, pious or charitable uses,' and not on the language of the deed" under which the land is held. In *Grand Lodge of Masons v. Burlington*, 84 Vt. 202, 78 Atl. 973, the direct and immediate use was made the test. In *Phillips Exeter Academy v. Exeter*, 58 N. H. 306, 42 Am. Rep. 589, a case quoted from with approval in *Willard v. Pike*, the exemption granted to the plaintiff was to "all lands, tenements, and personal estate that shall be given to the trustees for the use of the academy." It was held that the ownership was not to be the test of the exemption, but that the use was; the court saying the fact that the Legislature ignored ownership and made use the test showed unmistakably that they recognized the essential distinction between the two, and fixed the latter, preferably, as the basis of the exemption.

In the case before us the record shows not only that the five-acre piece was in fact set apart, put aside, for camp meeting purposes,

and that all improvements thereon have been made only and peculiarly to that end, but that ever since it has been owned or controlled by the plaintiff the use of this piece has been exclusively, directly, and immediately devoted to such purposes, except when permitted to be used for the two picnics as above stated. And, since the fact of these two picnics being allowed there is not made the basis of any claim by the defendant, it will not be further noticed.

There can be no doubt that the use for camp meetings has been and is a pious use within the fair intent and meaning of the statute, and consequently that the five-acre piece was exempt from taxation on April 1, 1907, unless disentitled to such standing by reason of the pay received by the plaintiff for use of cottage and board or meals of individuals, and for food and shelter for horses, during or within the time of camp meeting services. But the income thus had was put into the general fund and used in paying the expenses of carrying on the camp meetings. It is not conceivable how such religious gatherings, continuing for several days, can be had without attending expenses, to meet which considerable income from some source is necessary. When such income is derived from furnishing the common comforts and necessities of life on the ground in connection with these religious gatherings, and merely incidental and subsidiary thereto, as is shown in this case, there is no element of private gain, and it does not operate to deprive the property of the exemption to which it would otherwise be entitled. *Matter of Will of Vassar*, 127 N. Y. 1, 27 N. E. 394; *Philadelphia v. Women's Christian Association*, 125 Pa. 572, 17 Atl. 475; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

[2] The tax in question was therefore assessed upon property a part of which was exempt and a part taxable, and there is no way of distinguishing that part of the tax which might have been lawfully assessed from that which was unauthorized. And, since the inseparable tax is in part void, the whole is void. *Johnson v. Colburn*, 36 Vt. 695; *Libby v. Burnham*, 15 Mass. 147; *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118.

Judgment affirmed.

In re MASSEY'S ESTATE.

Appeal of MASSEY.

(Supreme Court of Pennsylvania. March 18, 1912.)

WILLS (§ 634*)—CONSTRUCTION—ESTATES CONVEYED.

Where testator, after giving the entire income of his estate to his wife for life, gave

one-third of the residue to his son absolutely, and the remaining two-thirds to his executors in trust to pay the net income to his two daughters, A. and B., for their respective lives, and then to assign their shares to the residuary estate according to appointment by the daughters by will, or, in default of such appointment, to assign the shares of the daughters to their child or children equally, but provided that, if the daughters died without leaving any children or all their children died during minority without issue, the share of such so respectively dying should accrue and belong to the testator's other children and their issue per stirpes, the share coming to any daughter to be held by the executors under the trusts enumerated, and testator's widow died, and later the son died without issue, but leaving a widow and bequeathing all his property to his sister B., and the widow elected to take against his will, and A. subsequently died intestate without issue, the testator's son's estate had a vested interest in one-half of the trust estate held for A. for life, and one-half of this one half should be awarded to the son's widow and the other half to B. under the son's will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of William Massey, deceased. From a decree dismissing exceptions to the adjudication, Helen F. Massey appeals. Affirmed.

Anderson, J., filed the following opinion in the court below:

"After a gift of the income from his entire estate for life to his wife, testator gave one-third of the residue to his son, Walter S. Massey, absolutely and the remaining two-thirds in trust to pay the net income therefrom in equal shares to his two daughters, Margaret R. Massey and Helen F. Massey, for life, and from and after their respective decease upon the further trust to 'assign their respective shares of said residuary estate to and among their respective child or children or their issue for such share interest or estate as my said respective daughters whether married or single may respectively by will or writing in the nature thereof direct limit or appoint to and among their children, and in default of such appointment upon the further trust to assign and convey the shares of my said daughters respectively to their respective child or children equally. But if my said daughters shall die without leaving any child or children living at the time of their respective decease, or, if leaving such then living, all should die during minority without leaving issue to survive them, then the share of such so respectively dying shall accrue to and belong to my other children mentioned in this my will and to the issue of any of them being then deceased, such issue to take equally the share their parent would have taken if living, the share coming to any daughter to be held by my executors upon the trusts above mentioned.'

"Testator's daughter Margaret R. Massey

died July 13, 1910, intestate, unmarried, and without issue. Walter S. Massey died May 29, 1909, without issue, leaving him surviving his wife, Harriet M. P. Massey, and by his will, made prior to his marriage, gave his estate to his sister, Helen F. Massey. His widow elected to take against his will, and therefore his estate is divisible between her and Helen F. Massey. Claim was made at the audit on behalf of Harriet M. P. Massey to one-quarter of the principal of the fund held in trust for Margaret, on the ground that Walter had a vested interest therein in remainder. This claim was resisted on behalf of Helen F. Massey, the surviving child of testator, on the ground that the interest of Walter was contingent upon his surviving Margaret, and having died in her lifetime he took no part thereof. The auditing judge held that the interest of Walter vested in him at the time of the testator's death, and therefore distributed the fund held in trust for Margaret one-half to the trustees for Helen F. Massey and the other one-half as part of Walter's estate, one-half to his widow and one-half to his sister Helen as the sole legatee under his will, and to this distribution the present exceptions are filed.

"We are not convinced that it is necessary to decide what interest Walter Massey had during his lifetime, as the question is rather what interest passed to his estate at the time of the death of Margaret.

"This distinction is pointed out in *Buzby's Appeal*, 61 Pa. 111. In that case the testator devised certain real estate in trust for the use of his son William for life, and, after his death, in trust for his children then living and the issue of such of them as should be deceased, their respective heirs and assigns, in equal parts or shares, etc., and for want of such child or children or lawful issue, then in trust for the use of his (testator's) right heirs forever. William died without issue, and the decision turned on the question as to who were the right heirs of the testator who were to succeed to the estate on the death of William without children or issue of deceased children. Mr. Justice Williams, in a clear and lucid opinion, calls attention to the fact that many cases in Pennsylvania had decided such remainder interests to be vested, and others contingent, and goes on to say: 'If, then, the estate devised to the testator's right heirs was a vested remainder, the heirs at his death took the estate, and as William, the devisee for life, was one of the testator's heirs, it would follow that his devisees became entitled to his share on the termination of his life estate. But there are authorities, and among them some decisions of our own, which show that the remainder in this case is to be regarded as contingent rather than as vested; and the weight of the authorities seems to be in favor of this doctrine. * * * If, then, the remainder is to be regarded as contingent,

in whom did it vest? In those who were heirs of the testator at the time of his death or in those who were heirs at the death of his son William? The remainder, if contingent, did not vest till William's death. But it does not follow that it vested in those who were the heirs at his death. If it did, then it was doubly contingent. The event upon which it was to take effect, and the persons to whom the estate was limited, were both dubious and uncertain. If there was no uncertainty as to the class, the persons composing this class could only be known and ascertained upon the death of the tenant for life. If the remainder had been expressly limited to the heirs living at the death of the testator, it would have been contingent in view of the doctrine of the cases last cited. And the question recurs: Who are the testator's right heirs? As a general rule of construction, it is well settled that a devise or bequest to heirs, or heirs at law of a testator, or to his next of kin, will be construed as referring to those who are such at the time of the testator's decease, unless a different intent is plainly manifest by the will"—citing numerous authorities.

"And speaking of the word 'then,' which in that case as in this, is used at the beginning of the clause giving the estate over, he says: 'Nor will the use of the word "then," as introductory to the bequest or devise over after the death of the tenant or legatee for life, prevent the general rule from applying: unless it is so used as clearly to indicate that the next of kin, or heirs living at the death of the tenant for life, are intended by the testator.' *Holloway v. Holloway*, 5 Ves. Jun. 399; *Ware v. Rowland*, 2 Phillips, 637; *Wharton v. Barker*, 4 Kay & Johns. 480. * * * The limitation in these words 'And for want of such child or children, or lawful issue, then in trust for the use and behoof of my right heirs forever.' Obviously, the word 'then' is not used in this clause as an adverb of time, but as a conjunction, signifying in that case, in that event or contingency. If this be its meaning, there is nothing to prevent the general rule from applying, and the words must be construed as referring to the heirs of the testator at the time of his death." This was followed and approved in *Stewart's Estate*, 147 Pa. 383, 23 Atl. 509.

"These decisions show that it is not essential that the estate must vest either in possession or interest in the ultimate remainderman during his lifetime, if he fills the description as one who is to take in default of the alternative remaindermen. In the present case, as in *Buzby's Appeal*, and *Stewart's Estate*, the question of what interest the children of the decedent had during their lifetime is of no importance. The question before us is as to who is to take upon the contingency which has now arisen; that

is the death of Margaret intestate and without issue. Looking at the will to find who are named as the persons to take, we ascertain that the parties answering the description are the daughter, Helen, and the son, Walter, and no other, unless either of them should die leaving issue. Had either of them died leaving issue, the issue would have stood in the place of the parent, but neither of them having died leaving issue the vesting of the estate in them cannot be affected by the substitutionary clause; and, as far as this fund is concerned, the will is to be construed as though the substitutionary clause had never been written. Carstensen's Estate, 196 Pa. 325, 46 Atl. 495.

"Walter Massey and his sister Helen answer the description of 'my other children mentioned in this my will,' and the estate must pass, under the doctrine of the cases cited, to or through them, one half going to the trustees of Helen and the other half passing to those entitled to Walter's estate, namely, his widow and his sister.

"The exceptions are dismissed."

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

ELL Kirk Price, for appellant. Alfred I. Phillips, for appellee.

BROWN, J. William Massey died testate February 18, 1891. After directing that the income from his entire estate should be paid to his widow for life, he gave one-third of his residuary estate to his son, Walter S., absolutely, and the balance was disposed of as follows: "The remaining two-thirds of my estate (subject to the said life estate of income to my said wife) I give, devise and bequeath unto my executors hereinafter mentioned and their heirs in trust to pay the net income thereof equally to my two daughters Margaret R. Massey and Helen F. Massey for their sole and separate use respectively for their respective lives so that the same shall not be liable for their debts and contracts or for the debts or contracts of any husband that they may take, and from and after their respective decease upon the further trust to assign their respective shares of said residuary estate to and among their respective child or children or their issue for such share interest or estate as my said respective daughters whether married or single may respectively by will or writing in the nature thereof direct limit or appoint to and among their children, and in default of such appointment upon the further trust to assign and convey the shares of my said daughters respectively to their respective child or children equally. But, if my said daughters shall die without leaving any child or children living at the time of their respective decease, or, if leaving such then living, all should die during minority without leaving issue to survive them, then the share of such so respectively dying shall accrue to and be-

long to my other children mentioned in this my will and to the issue of any of them being then deceased, such issue to take equally the share their parent would have taken if living, the share coming to any daughter to be held by my executors upon the trusts above mentioned." The widow of the testator is long since deceased, and the son Walter died May 29, 1909, without having had issue. He left a widow and a will, by the terms of which he gave all of his property to his sister Helen. His widow elected to take against the will, and, upon the audit of the account of his executors, she was awarded one half of his estate and his sister Helen the other half. Margaret, the other daughter of the testator, died July 13, 1910, intestate, unmarried, and without issue, and the question before the court below, in distributing the fund in the hands of the Philadelphia Trust, Safe Deposit & Insurance Company, substituted trustee for the two daughters of the testator, was whether the estate of Walter, who died before his sister Margaret, without leaving issue, was entitled to share in the distribution of the fund held in trust for her. From the decree of the court below, awarding one-half of the said trust fund to the estate of Walter, his surviving sister Helen has appealed.

The auditing judge awarded to Walter's estate one-half of the fund held in trust for his sister Margaret, on the ground that his estate had a vested interest in her trust estate under the terms of his father's will. In overruling the exceptions to the adjudication and confirming it the court below avoided a decision as to what interest Walter had during his life in the fund held in trust for his sister, holding that the only question before it was what interest, if any, in that fund had passed to his estate upon her death.

If the testator had directed that, upon the death of his daughter Margaret without issue, the share held in trust for her should go to his heirs at law, the heirs to take would be those who were living at the time of his death, for no contrary intent appears in his will. Buzby's Appeal, 61 Pa. 111; Stewart's Estate, 147 Pa. 383, 23 Atl. 599; Fitzpatrick's Estate, 233 Pa. 33, 81 Atl. 815. Walter was one of those heirs, and his estate would now take his share in his sister's trust estate; but, that there might be no doubt as to the intention of the testator as to who should take if Margaret should die without issue, he declared that the estate held in trust for her should belong to his two other children, "to my other children mentioned in this my will and to the issue of any of them being then deceased." Walter was one of these two children; the other being the surviving daughter. The survivorship was confined to the daughters. Walter or his issue were to take one-half of the trust fund without condition upon the death of either of his sisters leaving no issue. As Walter died without leaving issue, the limit

tation over to his issue, if he should die without leaving any, becomes utterly unimportant as a substitutionary clause, and need not be considered in the distribution. Carstensen's Estate, 196 Pa. 325, 46 Atl. 495. The clear and well-considered opinion of the court below relieves us from any further discussion of the questions raised by the appellant.

Decree affirmed, with costs to the appellee.

CLARK v. SHARPE.

(Supreme Court of New Hampshire. Strafford. June 28, 1912.)

1. LANDLORD AND TENANT (§ 125*)—CONDITION OF PREMISES—SUITABILITY FOR USE INTENDED.

In the ordinary contract of letting there is no warranty that the premises are reasonably safe or suitable for the uses intended.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441-443; Dec. Dig. § 125.*]

2. LANDLORD AND TENANT (§ 162*)—INJURIES FROM DEFECTIVE CONDITION OF PREMISES—LANDLORD'S LIABILITY.

In the absence of any warranty or of deceit, fraud, or concealment of defects not open to ordinary observation, on the part of the landlord, the tenant takes the risk of the condition of the premises, and the landlord is not liable for injuries sustained by him during his occupancy by reason of their defective condition.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 629; Dec. Dig. § 162.*]

3. LANDLORD AND TENANT (§ 169*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE OF LANDLORD.

In an action by a tenant for the death of his infant child, killed because the cover of a privy vault tilted downward and allowed the child to fall into the vault, there was evidence that the dangerous condition was caused by the rusting of the hinges and the decay of a support, and that such condition was not discoverable by ordinary observation, but only when an attempt was made to lift the cover, and that the landlord had been in the habit of examining the premises to see if repairs were needed, but there was no evidence that the landlord had ever attempted to raise the cover. *Held*, that the evidence did not authorize the conclusion that the landlord knew of the dangerous condition, and he was entitled to a directed verdict.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 663-667, 681-684; Dec. Dig. § 169.*]

Transferred from Superior Court, Strafford County; Plummer, Judge.

Action by William J. Clark, administrator, against Annie J. Sharpe. Verdict for plaintiff, and cause transferred from Superior Court, Strafford County. Defendant's exception to denial of motion for a directed verdict sustained, and verdict for defendant.

June 16, 1910, the plaintiff's intestate, who was his infant daughter, was drowned in a privy vault upon the premises occupied by the plaintiff as tenant of the defendant (a

woman 76 years old), which he hired of her May 1, 1910. At the conclusion of the evidence the defendant moved that a verdict be directed in her favor, on the ground that there was no evidence that she knew of the dangerous condition of the vault cover claimed to have caused the injury. The motion was denied, subject to exception.

Pierce & Galloway, of Dover, for plaintiff. Kivel & Hughes and Robert Doe, all of Dover, for defendant.

PARSONS, C. J. [1, 2] The premises were in the possession of the plaintiff as tenant of the defendant. The right of his child, occupying by his permission, to recover of the owner for injuries received through defects in the premises, is no greater than his. In the ordinary contract of letting there is no warranty that the premises are reasonably safe or suitable for the uses intended; and in the absence of any warranty, or of deceit or fraud on the part of the landlord, the lessee takes the risk of the condition of the premises and cannot make the landlord responsible for injuries sustained by him during his occupancy by reason of defects therein. *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748. The landlord is not liable unless there is such a concealment of defects not open to ordinary observation, which cause the injury, as to amount to fraud or deceit. *Cate v. Blodgett*, 70 N. H. 316, 43 Atl. 281; *Dustin v. Curtis*, 74 N. H. 266, 268, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169.

[3] To go to the jury, the plaintiff was required to offer evidence that the injury was due to a secret defect in the premises, concealed from ordinary observation, known to the defendant, and not disclosed to and unknown by the plaintiff. *Cowen v. Sutherland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469. The sole question presented by the defendant's motion is whether there was evidence from which it could be found that she knew of the defect which caused the injury. The child lost her life, it could be found, because the cover of the vault tilted downward from lack of sufficient support when the child went upon it, thereby allowing the child to fall into the vault below. The question therefore is: Did the defendant know of this trap?

There was evidence that the condition was caused by the rusting away of the hinges and the decay of a support intended to hold the cover at the rear. The plaintiff's evidence was that the condition was not discoverable by ordinary observation. The trap was not discovered until an attempt was made to lift the cover, when it tilted down cornerwise, returning to its ordinary position when released. There was no evidence that the defendant had attempted to raise the cover, or had ever seen it done. The de-

fendant testified that she did not know of the condition. The only evidence claimed to support the verdict came from the defendant upon cross-examination, in which she admitted that she had been in the habit of examining the premises to see if repairs were needed. From this it is argued that, examining for that purpose, it is probable she noticed the hinges were rusted off; and, noticing that, it is probable she made further examination and discovered the danger.

The question is, not what the defendant ought to have done, or what she ought to have known, but what did she in fact do and know. There was no evidence that she had done what was necessary to learn the danger, and the conclusion that she knew what she could not know without such action is a mere surmise or guess, which is not the legal proof the law requires. There is no open, visible connection between the fact proved—that the defendant was accustomed to examine the premises to see if repairs were needed—and the conclusion that she discovered, and therefore knew, the secret danger causing the injury. These principles have been so often relied upon that it is sufficient to cite without discussing the recent cases in which they have been elaborated. *Deschenes v. Railroad*, 69 N. H. 285, 290, 46 Atl. 467; *Carr v. Electric Co.*, 70 N. H. 308, 310, 48 Atl. 286; *Dame v. Car Works*, 71 N. H. 407, 52 Atl. 864; *Cohn v. Saidel*, 71 N. H. 558, 568, 569, 53 Atl. 800; *Reynolds v. Fibre Co.*, 73 N. H. 126, 131, 59 Atl. 615. The absence of all evidence that in making the examination of the premises the defendant made such an investigation as must have disclosed to her the condition of the cover cannot be supplied by guess or conjecture. *Wright v. Railroad*, 74 N. H. 128, 133, 65 Atl. 687, 8 L. R. A. (N. S.) 832, 124 Am. St. Rep. 949; *Gibson v. Railroad*, 75 N. H. 342, 344, 74 Atl. 589. Especially must this be true when no inquiry was made of the defendant whether she had ever seen the cover tilt from an attempt to lift it or a weight placed on it, which the case discloses to have been the only means by which the secret defect could be discovered. The question is not as to the weight to be given to the defendant's denial of a fact the plaintiff was bound to prove, but merely whether any evidence was offered in the affirmative.

The case discloses none, and the order is: Exception sustained; verdict for the defendant. All concurred.

FELLOWS et al. v. CHAMPION INTERNATIONAL CO.

(Supreme Court of New Hampshire. Merrimack. June 28, 1912.)

1. TRIAL (§ 121*)—STATEMENT OF COUNSEL.

A statement of counsel in objecting to documentary evidence, that "I challenge this book

as a book used in the regular course of business; I don't believe it"—was not improper, when not made under such circumstances as to leave the impression that he was testifying.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.*]

2. TRIAL (§ 33*)—RECEPTION OF EVIDENCE—DISCRETION OF COURT.

In assumpsit for the cutting and hauling of wood, the exclusion of plaintiff's evidence of the details of transactions with its employés, which was relevant only upon the collateral issue of its good faith, rested in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 85, 86; Dec. Dig. § 33.*]

3. ASSUMPSIT, ACTION OF (§ 23*)—EVIDENCE—ISSUES.

Where, in assumpsit, the plaintiff's good faith was not questioned, the exclusion of evidence on such subject was not error.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 130-152; Dec. Dig. § 23.*]

Transferred from Superior Court, Merrimack County; Pike, Judge.

Assumpsit by T. Fred Fellows and others against the Champion International Company. Transferred from the superior court on plaintiffs' exceptions. Case discharged.

The action is to recover for cutting and hauling 5,000 cords of pulp wood. The quantity of wood delivered by the plaintiffs was the only matter in issue. Trial by the court. The exceptions are to a remark of the defendants' counsel and to the exclusion of certain evidence.

Niles & Upton and Remick & Jackson, all of Concord, for plaintiffs. Streeter, Demond & Woodworth and Elwin L. Page, all of Concord, for defendants.

YOUNG, J. [1] The defendants' counsel, in objecting to the competency of a book, said: "I challenge this book as a book used in the regular course of business; I don't believe it." The plaintiffs contend that this remark was improper, because it was an expression of opinion; in other words, they contend that counsel was testifying. If that is true, or if the remark was calculated to give the court that impression, either because of its form or the circumstances under which it was made, it was improper; but if it was not calculated to give the court that impression, it was not improper merely because of its form. That is, the remark was all right, unless it was calculated to give the court the impression that counsel was asking him to consider the fact that he thought the book was not one used in the ordinary course of business. It is clear that the remark was not calculated to give the court that impression, and there is nothing to show that it had that effect.

[2] The second exception relates to the use the court made of the daybook and ledger in which the plaintiffs' accounts with their choppers and teamsters (not the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendants) were kept. They were permitted to use those books to show the quantity of wood they paid for cutting and hauling; but the court excluded the details of the accounts with their different employes. The plaintiffs contend that this was error, because these details were relevant to the issue of their good faith. If that is conceded, it does not help them; for their good faith was a collateral issue, and it rests with the court to determine when and how far it is profitable to investigate such issues.

[3] The question, therefore, on this branch of the case is the same as that on an exception to the denial of a motion for a nonsuit or a directed verdict—whether there is any evidence to sustain the finding. Instead of there being no evidence to sustain the finding that it would be unprofitable to investigate the issue of the plaintiffs' good faith, there was no evidence which would warrant any other finding; for that they acted in good faith was not questioned, and the books were admitted, in so far as they were relevant to the other matters in issue.

Case discharged. All concurred.

GERKE v. COLONIAL TRUST CO. et al. SAME v. WILSON.

(Court of Appeals of Maryland. Feb. 29, 1912.)

1. INSANE PERSONS (§ 10*)—GUARDIANSHIP—APPOINTMENT—PROCEEDINGS—WHO MAY INSTITUTE.

While a proceeding for an adjudication in lunacy and the appointment of a guardian or committee should be instituted upon the initiative of a member of the family of a lunatic, it may be instituted by others, as the courts are concerned, not with who commences the proceeding, but rather with whether it is for the best interest of the alleged lunatic and the people among whom he lives.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 18; Dec. Dig. § 10.*]

2. INSANE PERSONS (§ 43*)—GUARDIANSHIP—PAYMENTS TO FOREIGN GUARDIANS—POLICY OF STATE.

Under Code 1904, art. 16, §§ 231, 232, which provide that, when a trustee, committee, or guardian properly appointed by a court of any state is properly bonded, the court, having jurisdiction over the property, may direct the payment to such officer of the principal of the trust estate, if it appears to be advantageous to the cestui que trust or lunatic, ordering the payment of a small sum held by trustees as an accumulation of annuities belonging to a lunatic, and representing the interest of a sum held in trust, to a guardian appointed by a California court, in which state the lunatic was domiciled, was proper as within the policy of the state of Maryland.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 68; Dec. Dig. § 43.*]

3. INSANE PERSONS (§ 43*)—GUARDIANSHIP—QUALIFICATION OF GUARDIAN.

And the fact that the guardian appointed was secretary of the hospital in which the lunatic was an inmate is not sufficient to render the order of court turning over such accumulation to him improper, where there was no showing that, by reason of his position, he was

liable to be actuated by motives other than those dictated by the best interests of the lunatic.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 68; Dec. Dig. § 43.*]

4. COURTS (§ 514*)—JURISDICTION—CONCURRENT—CIRCUIT COURTS—RIGHTS TO EXCLUSIVE JURISDICTION.

A circuit court in which was filed a bill to have a committee appointed to look after the affairs of a lunatic obtained no exclusive jurisdiction of the proceeding, though the filing occurred three days prior to the appointment of a guardian for the lunatic in a California court, where the bill was filed in the California case theretofore, and another circuit court had at the time continuing jurisdiction for the administration of the fund and trust of which the lunatic was the beneficiary.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1434-1436; Dec. Dig. § 514.*]

Appeal from Circuit Court No. 2 of Baltimore City; H. Arthur Stump, Judge. Appeal from Circuit Court of Baltimore City; Chas. W. Heutsler, Judge.

In an action by Norman H. Gerke against the Colonial Trust Company and another, trustees of property of which Walter D. Gerke, a lunatic, was beneficiary, Charles E. Wilson, as foreign guardian of the lunatic, answered under oath. To an application by Charles E. Wilson, as the foreign guardian of a lunatic, to have money due the lunatic paid over to him, the trustees of the property and Norman H. Gerke, the son of the lunatic, answered. From a judgment in both cases for the guardian, Norman H. Gerke appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Leigh Bonsal, for appellant. Richard S. Culbreth, for appellees.

STOCKBRIDGE, J. Two appeals, one from the circuit court No. 2 of Baltimore city, and one from the circuit court of said city, are embraced in the present record. Both deal with the same subject-matter, and the two appeals are so inextricably interwoven that it is necessary to consider them together, and as the result of such consideration arrive at the proper order to be made in each case.

By the will of Charles Gerke it was provided that after the death of the testator's wife, Elizabeth V. Gerke, there should be paid from the rest and residue of the testator's estate the interest or income of \$6,000 at 5 per cent. per annum, being \$300 per year, to his son Walter Duncan Gerke, the same to be paid into his own hands, and not to or into the hands of another during the term of his natural life. The principal sum of \$6,000 was at no time payable to the said Walter D. Gerke, but, upon his death, was to go to and become the property of the issue of his body living at the time of his death. Mrs. Elizabeth V. Gerke died in the year

1907, and by appropriate proceedings in the circuit court the Colonial Trust Company and Thomas Mackenzie were appointed trustees to carry out the provisions of the will of Charles Gerke. In the year 1899 Walter D. Gerke, who was then resident in California, was adjudged insane, and committed to the Mendocino State Hospital as an insane pauper. In that proceeding there was no committee or guardian appointed either of the person or estate of Walter D. Gerke, and it was not until upwards of eight years later that the annuity provided for him by the will of his father came into existence. During all of that time he continued to be an inmate of the hospital, and was such at the time when all of the proceedings now to be considered were taken. The annual interest or income provided by the will of Charles Gerke for the benefit of Walter D. Gerke began to accumulate from the death of Mrs. Gerke, but, the beneficiary being insane and no committee of the estate having been appointed, the trustee could not make any payments of the income as it accrued, and hence it has accumulated until at the present time it amounts to something over \$1,000. It is manifest that, if Walter D. Gerke had not been insane, the trustees could and ought to have paid over the interest to him from time to time in accordance with the will of Charles Gerke without the intervention of any person or persons whatsoever. These trustees were administering their trust in the circuit court of Baltimore city, and were required to account to that court for the discharge of their duties as such trustee.

While matters stood thus, on the 19th May, 1911, a bill was filed in the circuit court No. 2 by Norman H. Gerke, claiming to be a son of Walter D. Gerke, praying for subpoena against the Colonial Trust Company and Thomas Mackenzie, trustees, and by an amended bill filed on the 27th September, 1911, the court was asked to appoint a committee to receive from the trustees the accumulated interest and income of \$300 a year thereafter to accrue, or, as an alternative, for the appointment of a trustee or receiver for the same purpose, and that the committee, trustee, or receiver should apply the income to the support of the said Walter D. Gerke in such manner as might be for the best interests of the lunatic, or as the court might direct. Norman H. Gerke, the plaintiff in this bill, and alleged son of the lunatic, was and is a resident of the state of Oregon, and simultaneously with the filing of the original bill he filed a request that Leigh Bonsal of Baltimore should be appointed as such committee. One week before the filing of the bill of complaint in the circuit court No. 2, a citation was issued from the superior court of Mendocino county, Cal., the court in which Walter D. Gerke had been adjudged a lunatic, commanding the appearance on the 22d of May of the lunatic to show cause

why Charles E. Wilson, the secretary of the hospital where Walter D. Gerke was, should not be appointed as his guardian, and on the 22d of May, upon the affidavit of the superintendent of the hospital that Gerke was unable to attend, the court appointed Charles E. Wilson guardian of his person and estate. This proceeding it is admitted by counsel in these appeals was conducted in accordance with the laws of the state of California, was regular in all respects, and it was further admitted that the said Wilson, as guardian, at first gave bond for \$800, and that thereafter an additional bond for \$1,500 was given.

On July 26, 1911, Charles E. Wilson, the guardian appointed in California, appeared to the bill of complaint of Norman H. Gerke in the circuit court No. 2, and filed his answer under oath, in which he alleges that he was entitled to receive from the trustees under the will of Charles Gerke the moneys in their hands belonging to the said lunatic, and also the installments of said annuity thereafter to become payable. Three days later Mr. Wilson filed his petition in the case in the circuit court where the trust under the will of Charles Gerke was being administered, praying that the trustees pay over to him as guardian of the lunatic the accumulations of the annuity and the installments thereof which should thereafter become due and payable. The bill in the circuit court No. 2 was, upon the application of the attorney for the plaintiff, set for hearing upon the bill and answer of Charles E. Wilson, and in that condition all the allegations in the answer so far as they were material to the case there pending must be regarded as admitted to be true. The petition of Wilson in the circuit court was first answered by the trustees and subsequently by Norman H. Gerke. The case in the circuit court No. 2 came on for hearing upon the bill and answer, and by order of that court on the 30th September, 1911, the bill was "dismissed without prejudice." The petition in the circuit court apparently also was taken up upon the petition and answers, and that court on the 25th October, 1911, passed a final order directing the payment over of the accumulated income, and the income thereafter to accrue, to Charles E. Wilson, the duly appointed guardian of the person and estate of Walter D. Gerke under the proceedings in the California court.

[1] The contention of the appellant is that the proceeding for an adjudication in lunacy and the appointment of a committee is one which ordinarily is and should be instituted upon the initiative of a member of the family of the lunatic. It is undoubtedly true that in the vast majority of the cases such a proceeding is so instituted, but that fact by no means precludes the institution of such a proceeding by some person other than a relative or member of the family. It is mat-

ter of frequent occurrence that proceedings of this character are set in motion by some friend or acquaintance of a lunatic, or even by a law officer of the state, where no such proceeding has been started by relatives and friends, and that with which the courts are mainly concerned is not who institutes the proceeding, but whether the proceeding is for the best interest of the individual alleged to be lunatic, and of the people among whom he lives.

There is no suggestion in either of the cases now under consideration that the original adjudication of lunacy was not properly had. It is only when it comes to the question of property to which the lunatic is entitled that the circuit court No. 2 was asked to intervene by the appointment of a committee, not of the person, but of the estate. If the lunatic possessed in his own right property, either large or small in amount, in the judicious handling of which relatives or friends might be interested, there would be much force in the contention of the appellant, and the cases cited in support of the bill of Norman H. Gerke without exception deal with a condition of this description. But, as already stated, in this case, the lunatic so far as appears from the record has nothing whatever but an annuity of small amount, probably not sufficient to pay for the actual cost of his proper care. The corpus of the estate from which this annuity is to be derived is in the hands of trustees who are acting under the direction of a court of competent jurisdiction, and those trustees are resident in Maryland. Thus the corpus of the estate is here, its administration is under the control of Maryland courts, and the only sum payable to the lunatic or to a committee for the lunatic is an annuity of small amount. Norman H. Gerke, the son, is not a resident of this state, has no right or interest in the annuity or its payment, whatever may be his interest in the corpus after the death of his father, and therefore can in no way be prejudicially affected by the payment of the annuity to the guardian appointed by the California court where his father is.

[2] It is further argued on behalf of the appellant that it is contrary to the policy of this state to permit the estate of a lunatic to be paid over to a nonresident guardian or committee. This contention cannot be successfully maintained in view of the language contained in sections 231 and 232 of article 16 of the Code. By these it is expressly provided that when a trustee, committee, or guardian has been appointed by a court of another state in the exercise of its proper jurisdiction, and such trustee, committee, or guardian has properly bonded, if it is made to appear to be for the interest and advantage of the cestui que trust or lunatic, that the court of this state having jurisdiction over the property may direct the payment over to such foreign trustee, committee, or guardian of the principal of which the trust

estate consists. This enactment of the General Assembly must be taken as defining the policy of this state, and, since the court is thus authorized to direct the payment over of the principal of the estate, a fortiori, it is so authorized where the property is income, and in the shape of an annuity of so small an amount.

[3] Objection to the passage of the order of the circuit court directing the payment over of this income to Mr. Charles E. Wilson was also based upon the ground that he was secretary of the hospital in which Walter D. Gerke was an inmate, and that by reason of this position he was liable to be actuated by motives other than those dictated by the best interests of the lunatic. There is no allegation of any misconduct whatever upon the part of said Wilson, or is any other reason assigned why he would be an improper person to act as such guardian, and it must be assumed in this condition that the superior court of Mendocino county in appointing him had reason to believe that he would be a proper person for the discharge of the duties of guardian. If in the future it should develop that he is not properly discharging his trust, that court will undoubtedly upon such fact being made known to it, exact a proper discharge of his duties as guardian, or, if need be, remove him from such office.

[4] Some stress was laid in argument upon an alleged exclusive jurisdiction, claimed to have been acquired by the circuit court No. 2 by reason of the bill having been filed there prior to the appointment of Mr. Wilson by the court of California, and prior to the filing by Mr. Wilson of his petition in the circuit court. This contention is without force. While the bill in the circuit court was filed three days prior to the appointment of Mr. Wilson, it was some days subsequent to the application for his appointment, and while the courts of this state are not ousted from taking jurisdiction in a proper case, by reason of the fact that a proceeding looking to the same end has been begun in the courts of a sister state, they are at liberty to take the fact of such a proceeding into consideration in reaching a conclusion. But, in addition to this, the trusts created by the will of Charles Gerke were being administered under the supervision of the circuit court, and had been for a considerable time when the bill was filed in circuit court No. 2 and that court thus had full jurisdiction over the fund and trust at that time, and full relief could have been obtained in that court.

It follows from what has been said that no error is perceived in the order of circuit court No. 2 in dismissing without prejudice the bill filed by Norman H. Gerke, and that order will accordingly be affirmed. Neither is an error apparent in the order of the circuit court of October 25th, directing the payment over to Mr. Wilson as guardian of the

person and estate of Walter D. Gerke of the accumulated income provided for by the will of Charles Gerke, and of the payment from time to time hereafter as it shall accrue of the further installments of such income, and that order will be likewise affirmed. A motion was made to dismiss the appeal in both cases, upon the ground of lack of direct interest. But, without passing upon that, it has seemed wiser to consider the appeals upon their merits, where considerations affecting a lunatic were concerned, and the one asking the intervention of the court stood in the relationship of a son.

No. 28, order of the circuit court No. 2 of Baltimore city of September 30, 1911, affirmed, the plaintiff, Norman H. Gerke, to pay costs. No. 29, order and decree of the circuit court of Baltimore city of October 25, 1911, affirmed, costs to be paid by Norman H. Gerke.

VOLLUM v. BEALL et al.

(Court of Appeals of Maryland. March 26, 1912.)

1. JUDICIAL SALES (§ 31*)—VACATING—INADEQUACY OF PRICE.

Mere inadequacy of price is not sufficient to invalidate a judicial sale, unless it be so gross and unreasonable as to indicate misconduct, fraud, or unfairness on the part of the trustee; and if the trustee acts in entire good faith in making the sale a difference of opinion among witnesses as to the value of the property will furnish no ground for disturbing the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.*]

2. JUDICIAL SALES (§ 31*)—VACATING—GROSS INADEQUACY OF PRICE.

Evidence, upon motion to ratify a judicial sale of real estate, *held* not to show that the price for which it was sold was grossly inadequate.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.*]

3. JUDICIAL SALES (§ 31*)—VACATING—FAIRNESS OF SALE.

Evidence, upon motion to ratify a judicial sale of real estate, *held* not to show that the sale was unfairly made.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.*]

4. JUDICIAL SALES (§ 31*)—MANNER OF SALE—IN GROSS OR IN PARCELS.

A tract of land was advertised for sale as three parcels used as a single farm, and to be offered first in three separate parcels, and then as a whole, and to be sold in the manner which brought the best price. The sale was so conducted, and the offer of the farm as a whole brought the highest bid and was accepted. *Held*, that there was nothing to prevent bidding, or to affect the price in the manner of the same, so as to warrant a refusal to confirm.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.*]

5. APPEAL AND ERROR (§ 875*)—REVIEW—SCOPE.

On appeal from an order ratifying a judicial sale, questions of the jurisdiction of the court to pass the decree and irregularity in the proceedings cannot be reviewed; such questions

being matters for consideration on appeal from the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3541-3548; Dec. Dig. § 875.*]

6. JUDICIAL SALES (§ 31*)—CONSENT OF PARTIES—EVIDENCE.

Evidence, upon a bill for the judicial sale of real estate, *held* to show that complainant had full knowledge of the proceedings to the date of decree, and consented to an agreement, filed by her counsel, for the sale of the property according to the decree.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59-67; Dec. Dig. § 31.*]

Appeal from Circuit Court, Frederick County; Edward C. Peter, Judge.

Bill by Marie A. Vollum against Martina Beall and the Union Trust Company of Washington, D. C., for the sale of certain real estate and for partition. From an order ratifying the sale of the real estate, except as to one tract, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, PATTON, URNER, and STOCKBRIDGE, JJ.

Milton G. Urner, for appellant. John S. Newman, for appellees.

BRISCOE, J. The original bill in this case was filed on the 11th day of January, 1910, in the circuit court for Frederick county by the appellant against the appellees to declare a certain deed from them to their mother, Josephine R. Beall, deceased, a trust, and for a sale of the real estate described therein and the distribution of the proceeds of sale equally between them. Subsequently the bill was so amended as to include in the proceedings for sale two other tracts of land owned by the plaintiff and the defendant Martina Beall, as tenants in common, for purposes of partition.

The appellant, Marie A. Vollum, and the appellee Martina Beall are the daughters and the only heirs of James H. Beall, late of Frederick county, deceased. Mr. Beall died in the year 1870, intestate, and possessed of the three tracts of land described in the original and amended bill. The first tract contained 224 acres, the second tract 106 acres, and the third tract 2½ acres, and the three tracts were contiguous and constituted one farm. Mrs. Beall, the widow, died in the year 1909, leaving a will by which she devised whatever interest she might have in tracts No. 1 and 2 to the Union Trust Company of the District of Columbia, to sell and pay over one half of proceeds of sale to the defendant Martina and the other half to be paid to the plaintiff Mrs. Vollum, after the payment therefrom of certain debts due by the testatrix.

On the 30th day of June, 1910, in pursuance of an agreement filed in the case between the plaintiff and defendants, the circuit court for Frederick county passed a de-

cree for the sale of all the property mentioned in the proceedings, and directed that the money arising from the sale shall "be disposed of under the agreement filed" in the case. Samuel A. Lewis and John S. Newman of Frederick county were appointed trustees to make the sale. The trustees first offered the three tracts separately at public auction and reserved the bids, and then offered the whole tract as one farm, and, receiving a higher bid therefor, sold the same in its entirety to the defendant Martina Beall for the sum of \$9,722.57; she being the highest bidder therefor.

Subsequently the sale was reported to the court, and on the 28th of September, 1910, five exceptions, and on the 17th of March, 1911, six additional exceptions, were filed by the appellant to its ratification; and, after proof taken and a hearing, the court below overruled all of the exceptions and ratified and confirmed the sale, except as to a small tract of woodland containing seven acres, more or less, and designated as "Parcel 4," and as to this tract the sale was vacated and set aside. And it is from the order ratifying the sale that the plaintiff has appealed.

While the ratification of the sale in this case is objected to for a number of reasons, those mainly relied upon by the appellant are, first, grossly inadequate price, and the sale was unfairly made; second, that the property should not have been sold in its entirety, but as separate farms; third, the want of jurisdiction of the court to decree the sale, and the property was not sold in accordance with the decree; and, fourth, because of irregularity in the proceedings.

[1-3] We have carefully examined all of the exceptions filed and the grounds urged at the hearing of this case, and are unable to find any sufficient reason for vacating the sale. The rule is well settled that mere inadequacy of price, standing alone, is not sufficient to invalidate a judicial sale, unless it be so gross and unreasonable as to indicate misconduct, fraud, or unfairness on the part of the trustee. The difference of opinion among witnesses as to the value of property will furnish no proper ground for disturbing a sale fairly made, and if the trustee acts in entire good faith in making the sale. The proof does not sustain the contention of the exceptant that the price for which the property was sold was grossly inadequate, and there is nothing to show that the sale was not perfectly fair in every respect.

The property was extensively advertised in newspapers published in Frederick county, in Montgomery county, Md., and in Loudoun county, Va., and also by handbills largely circulated in the above-named places. It was advertised as three parcels of land which had been occupied and used as one farm of 346 acres, 2 roods, and 10 square perches of land, and that it would be offered for sale,

first, in three distinct parcels, as described, the bids for which would be reserved, and it would then be offered as a whole and sold in the manner in which the best price could be realized. The sale was well attended by persons who knew the property, and who were able to purchase it, if they thought the property was worth more than it brought at the sale reported by the trustees. A copy of the advertisement of sale was sent and received by the appellant about a week before the day of sale, and there was no reason why she could not have attended the sale in person, as she admits she was at that time in the city of New York.

Mr. Belt, who testified in behalf of the exceptant, and who lived within two miles of the property, and who had been agent in its management, said it sold for more than he would give for it. "I attended the sale, and it got past my price." The testimony of the other witnesses for the exceptant is not satisfactory as to the present value of the land, although some of them testified that some of the parcels were worth more per acre than they brought. The seven witnesses produced on the part of the appellee testified in effect that the land brought all it was worth. These witnesses were all familiar with the land; several of them owned adjoining properties and attended the sale as prospective bidders.

[4] Nor do we think that the proof sustains the contention that the three tracts should have been sold separately, and not in its entirety as one farm. It was offered in separate tracts, and they brought more as one farm than when offered separately. The mode of advertisement of sale, under the circumstances, could not have affected the price or prevented persons from bidding on the property. There is nothing in either the agreement of counsel as a basis for the decree, or in the decree itself, which could be construed as prohibitive of the mode and method adopted by the trustees for the sale of the property, or departure from the decree itself in any essential particular, so as to prevent a ratification of the sale. The bids for the property, when offered separately, under the facts of the case, furnish a proper basis for the distribution of the purchase money, under the agreement and the decree. The fund can be equitably apportioned among the several tracts, and was the principle and method adopted and approved in *Cornell v. McCann*, 48 Md. 596.

[5] The third and fourth objections, as to the jurisdiction of the court to pass the decree and the irregularity in the proceedings, are without merit, and are not properly before us on this appeal, because presenting matters solely against the ratification of the sale. *Shingluff v. Stanley, Trustee*, 66 Md. 220, 7 Atl. 261; *Wickes v. Wickes*, 98 Md. 307, 56 Atl. 1017. The court, we think, clearly had jurisdiction on the pleadings to

pass the decree for a sale of the property; and there is no such departure from the decree as to prevent the ratification of the sale by this court. The parties to the decree were concluded by the decree until it is set aside or reversed on appeal.

The case of *Kerchner v. Kempton*, 47 Md. 568, relied upon by the appellant is entirely unlike this. In that case, Mrs. Kempton, the appellee, had no counsel, never consulted with a lawyer, and had no knowledge of the agreement for the decree, which was signed by counsel submitting the case for a decree. Judge Bowie, in delivering the opinion of the court, said there is no evidence of express authority being given by the appellee to the solicitor to represent her, and none from which such authority could be reasonably implied. The decree in that case was held to be null and void, because the act of the solicitor, so far as he undertook to represent the appellee, in signing the agreement for decree was unauthorized; and it was apparent that there was an entire want of jurisdiction of the court to decree a sale to bind the separate estate of the feme covert, Mrs. Kempton.

[6] In the case at bar, the original and amended bills were filed on behalf of the plaintiff by Messrs. Samuel A. Lewis and P. F. Pampel, solicitors for the complainant, and an answer thereto filed by Mr. John S. Newman, solicitor for the defendant Martina Beall. The agreement of counsel, submitting the case for a decree, is dated June 30, 1910, and is signed by Messrs. Lewis and Pampel, solicitors for complainant, and by Mr. Newman, solicitor for defendant. On the same day, the decree was passed appointing Messrs. Lewis and Newman trustees to make the sale, representing plaintiffs and defendants.

It appears that the agreement is practically in accordance with the compromise the plaintiff authorized her attorneys to make. She testified that Mr. Pampel introduced her to Mr. Lewis, and that she recognized him as her attorney; that she visited Frederick City, spent a week there, and compromised "it" and gave her sister \$800. "I objected to giving her the \$800, but to get it out of the Trust Co. I gave it to her." She also testified that it was understood and agreed by her that the property was to be sold, and her sister was to get \$800 out of the proceeds. She further testified, upon cross-examination, in answer to the following interrogatories: "Q. 27. You authorized your attorney to enter into an agreement by which the land was to be sold; your sister was to be paid \$800 out of your portion of it? A. Anyway, I thought it would be conducted differently. Q. 28. You say you thought it would have been conducted differently. In what respect? A. I thought I should have been consulted about the selling. I should

have been told to be at the sale. I was not. Mr. Lewis should have notified me to be here at the sale. My sister was here at the sale. She was notified, and they should have told me. I have no experience in this kind of things. Q. 29. Didn't you receive a copy of the advertisement of the sale about a week before the date of the sale? A. Yes, sir. Q. 30. Where were you at that time? A. I was in New York." It is impossible to examine the proof in this record without being satisfied that the plaintiff had full knowledge of the proceedings to date of decree, and consented to the agreement, filed by her counsel, for the sale of the property according to the decree.

The remaining objections to the sale are fully covered by what we have already said; and, as we are convinced from the record that the trustees acted in entire good faith in making the sale, and as there is an absence of proof to sustain the exceptions, the order of court appealed from will be affirmed.

As to parcel 4, the appellant's exception was sustained, and the sale not ratified. The purchaser was allowed a ratable abatement on account of the purchase, and there has been no appeal from this part of the order.

Decree affirmed, with costs.

MUTUAL FIRE INS. CO. OF MONTGOMERY COUNTY v. PICKETT.

(Court of Appeals of Maryland. March 26, 1912.)

1. INSURANCE (§ 665*)—ACTION ON POLICY—BURDEN OF PROOF—NOTICE AND PROOF OF LOSS.

Evidence, in an action on a fire policy, held not to sustain plaintiff's burden of showing either a compliance with the insurer's demand, under the terms of the policy, for his books of account, bills, etc., or that it was impossible for him to comply.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

2. INSURANCE (§ 612*)—NOTICE AND PROOF OF LOSS—EFFECT OF REQUIREMENT OF POLICY.

The object of a condition in a policy requiring the insured, on request, to furnish books of account, bills, etc., and providing that until such proof is made no loss shall be paid, is to protect the insurer by furnishing it with means of testing the accuracy of the proofs of loss; and until the insured can show that he has complied with such demand, or that it was not possible for him to do so by the use of all reasonable means, he cannot sue on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.*]

3. INSURANCE (§ 542*)—NOTICE AND PROOF OF LOSS—PRODUCTION OF BOOKS—EXCUSE FOR FAILURE TO PRODUCE.

Where the insured shows that he could not, by the use of such reasonable means as were within his power, secure bills or duplicates, it is a sufficient excuse for his failure

to comply with a demand for them, made under a provision in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1340-1346; Dec. Dig. § 542.*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by Charles D. Pickett against the Mutual Fire Insurance Company of Montgomery County. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

R. E. Lee Smith, for appellant. John G. Rogers, for appellee.

THOMAS, J. The appeal in this case is from a judgment recovered on a fire insurance policy issued by the appellant and covering property owned by the appellee.

The property, which consisted of a stock of goods in a "general store" kept by the appellee at Florence, Md., was entirely destroyed by fire on the 12th of March, 1909; and, the insured and insurance company being unable to agree on the amount of the loss, suit was brought on the policy in the circuit court for Howard county. The case, at the instance of the defendant, was sent to the circuit court for Baltimore county for trial, and the plaintiff recovered in that court a verdict and judgment for the full amount of the insurance and interest.

The record contains but one exception, and it relates to the ruling of the court below on the prayers, and, in our view of the case, it is only necessary to determine on this appeal whether there was sufficient evidence to show that the plaintiff fairly complied with the condition of the policy which provided that, "whenever required, the assured or person claiming shall produce and exhibit the books of account, bills of purchase, or duplicates thereof, and other vouchers to the insurers or their specially authorized agent, in support of the claim, and permit extracts and copies thereof to be made; and also exhibit to any person or persons named by this company, and permit to be examined by them, any property damaged on which any loss is claimed, and shall also, if required, submit to an examination or examinations under oath by the agent or attorney of this company, and answer all questions touching his, her or their knowledge of anything relating to such loss or damage, and subscribe and make oath to, such examination, the same being reduced to writing. And until such proofs, examinations, declarations, certificates and exhibitions are produced and permitted by the claimant (when required) as above, the loss shall not be payable."

[1] It appears from the testimony of the plaintiff that his books and papers were also destroyed, but that he made out an itemized list of the things in the store "two weeks

after the fire, when it was fresh in his memory." The defendant was not satisfied with the proof of loss presented by the plaintiff, and wrote him, requesting duplicate bills of all purchases made by him within nine months before the fire. In reply to this demand of the company, the plaintiff sent the defendant a number of bills from merchants with whom he had been dealing; but, according to his own testimony, in a great number of instances, he not only failed to produce bills of articles purchased within the specified time, but made no effort to secure or furnish them. For instance, he states he bought axle grease from the Standard Oil Company; that the company's wagon came to his store every two weeks; that he "bought some things from the Standard Oil Company within nine months, but did not furnish any bills to defendant, and does not know whether he made an effort to do so." Again, he states that he had in his store, at the time of the fire, about 300 pounds of meat; that he bought meat from a number of persons named by him who lived in the neighborhood, and from whom he thinks he could have gotten bills for the meat purchased if he asked for them; that he furnished a bill from Knoop Bros., but did not furnish bills from the others from whom he purchased meat within the nine months; that he did not try to get a bill for meat purchased from Mr. Driver; that he bought fresh meat from Mr. Condon in February, 1909, but did not furnish any bill from him; that he did not get them from any customers "that he was taking things from in trade; did not try to get them, and did not go to them." He says, further, that he had on hand, at the time of the fire, five or six hundred pounds of coffee and tea, but did not "furnish bills for coffee and tea, because he did not think to get those bills."

It does not appear what the bills or proof of loss furnished by the plaintiff to the defendant amounted to; but it does appear that, in addition to the items we have already referred to, much of the property purchased by the plaintiff within nine months before the fire, which was said to have been destroyed and for which plaintiff sought to recover, was not covered by the bills produced, and the evidence fails to show that he made any effort to secure bills for such property, or that it was impossible for him to obtain them.

The plaintiff's first prayer required the jury to find that he furnished duplicate bills of all purchases made by him within nine months prior to the 12th of March, 1909, the date of the fire, as far as it was possible for him to do so under all the circumstances of the case. The defendant specially excepted to this prayer, on the ground that there was no evidence in the case to show that the plaintiff did furnish duplicate

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bills of purchases made within the specified time, as far as it was possible for him to do so, and by its second prayer requested the court below to instruct the jury that, under the condition of the policy referred to, it was the duty of the plaintiff, when required by the defendant, to produce to the company duplicates of his bills of purchase, before the loss could be payable; that the plaintiff was required by the defendant to furnish duplicate bills of purchase made by him within nine months before the fire; that it indisputably appears from the evidence that he did not produce to the defendant a number of said bills or duplicates thereof, and that he has not shown that it was impossible for him to do so, and that therefore their verdict should be for the defendant. The evidence in the case, to which we have alluded, shows that the learned court below erred in overruling the exception and rejecting the prayer referred to.

The condition of the policy with which we are here dealing was construed by this court in the case of *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180. In that case Judge Alvey said: "The insured was not only bound to produce and exhibit to the company or its agents, upon being required to do so, the bills of purchase, if within his power or control, but, if they were destroyed, as he himself proved, he was bound to produce duplicates thereof, if it was possible for him so to do. And it was no excuse for his failure to produce such duplicates that they were not in his possession or at his command at the time of the demand made; if they could have been had by application to those who could have furnished them, he was bound to secure and exhibit them as required. Compliance with this condition, if required by the company, was indispensable to the insured's right of action, and there is no answer to the objection that he failed to comply, unless he could show, either that compliance had been waived, or that performance of the condition had become impossible without fault of his own." It is true that, notwithstanding the plaintiff stated that he told the agent of the company that he could not get the duplicates required, and further stated that he did not furnish them, and did not apply to any one from whom he purchased goods to furnish him duplicate bills of purchase, the court, in reversing the judgment in favor of the plaintiff, said that there were some circumstances before the jury reflecting upon the question of the inability of the plaintiff to gratify the demand of the defendant, and that the prayer of the defendant should not have sought to withdraw that question from the jury.

That case was before this court again (*Mispelhorn v. Farmers' Fire Ins. Co.*, 53 Md. 475) on appeal from a judgment in favor of the defendant, and the same learned judge,

in approving the rejection of plaintiff's third, fourth, and fifth prayers, then said: "Whether it was possible or impossible for the plaintiff to produce duplicate bills of purchase was purely a question of facts, to be determined by the jury from all of the evidence before them; and, though it might be found that it was impossible to produce duplicate bills of purchase of a certain class, that fact did not excuse the nonproduction of those that could have been obtained by a bona fide effort on his part. The plaintiff could not be relieved from the duty imposed upon him by the contract by simply sending out his wife to procure duplicate bills from parties with whom she had been in the habit of dealing; nor could he meet the requirement of the condition in the policy by showing that he supposed or believed that duplicate bills could not be obtained. The burden of proof was upon him to show that it was not possible for him to comply with the terms of the condition by the use of all reasonable means within his power."

In the case at bar, the plaintiff not only failed to meet the burden of proof that was upon him to show that it was impossible for him to comply with the terms of the policy, but he states that he could have gotten some of the bills if he had asked for them, and that he did not try, made no effort, and did not think to get others.

[2] The object of the condition of the policy in question is to protect the insurer, by requiring the insured to produce the means by which the insurance company can test the accuracy of the proof of loss furnished by him. It does not exact from the insured anything unreasonable or impossible; and, until he can show that he has complied with a demand to furnish bills of purchase, or duplicates thereof, or that it was not possible for him to do so, by the use of all reasonable means within his power, he cannot maintain an action on the policy, unless the insurance company has waived its demand. By the terms of the contract upon which the insured in this case relies, the loss is not payable until the condition has been complied with, or is waived or shown to be impossible to be performed. Therefore, in order to make out a case, the insured was required to show, either that he had complied with the condition, that it was not possible for him to do so, or that it had been waived by the insured; and upon his failure to meet this burden upon him the defendant was entitled to a verdict in its favor.

[3] There may be cases where the insured cannot, by the use of such reasonable means as are within his power, secure bills of purchase, or duplicates thereof; and when that is shown to be the case it is a sufficient excuse for a failure to comply with a demand for them under a provision like the one in question. *Mispelhorn v. Farmers' Fire Ins. Co.*, *supra*; *Coleman v. N. Y. Bowery Fire*

Ins. Co., 177 Pa. 239, 35 Atl. 729. But where a party who has deliberately entered into a contract invokes the jurisdiction of a court to enforce it, he must show compliance with its terms, or some valid ground for his failure to do so; otherwise judgment will be entered against him.

In the case of *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108, the court, speaking of a similar provision in a fire insurance policy, said: "A full compliance with this condition was indispensable to a right of action upon the policy, unless a compliance was impossible, or was waived by the insurers." In the case of *Langan v. Royal Ins. Co.*, 162 Pa. 357, 29 Atl. 710, Chief Justice Sterritt said: "In the case at bar, the plaintiff not only failed to show that he could not procure the duplicate bills demanded, but proved by his own testimony, most conclusively, that he never made the slightest effort to obtain them. * * * It follows from what has been said that there was no testimony to warrant the instructions contained in those portions of the charge recited in the second and third specifications; and, in view of the plaintiff's own testimony that he made no effort to comply with the just and reasonable demand of the company, the learned trial judge should have directed a verdict for the defendant, as requested in its sixth point."

Because of the failure of the plaintiff to furnish duplicates of the bills of purchase, and his failure to show, or to produce evidence tending to show, that it was not possible for him to do so, the judgment of the court below in his favor must be reversed.

Judgment reversed, with costs.

JONES v. STATE, to Use of JONES.

(Court of Appeals of Maryland. March 27, 1912.)

1. APPEAL AND ERROR (§ 671*)—APPEAL FROM ORDER—BILL OF EXCEPTIONS—SCOPE OF REVIEW.

Where, on appeal from an order denying a motion to strike out the judgment, there were no bills of exceptions presenting the questions of fact, nor any petition designating the points or questions of law, the Court of Appeals could not review rulings not shown by the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

2. JUDGMENT (§§ 386, 392*)—VACATION—MOTION AFTER TERM.

A motion to set aside a judgment after the term cannot be sustained, unless the proof of fraud, deceit, surprise, or mistake is clear and satisfactory, and it appears that the applicant has acted in good faith and with ordinary diligence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744, 750, 753, 754; Dec. Dig. §§ 386, 392.*]

3. JUDGMENT (§ 338*)—BILL OF EXCEPTIONS—LOSS OF PRAYERS.

Where it appeared from the bill of exceptions, presented nearly two months before the

making of a motion to strike out the judgment, that defendant did not rely on the court's rulings on the prayers to sustain his appeal, but solely on rulings in the exclusion of certain testimony offered by defendant, which bill the court declined to sign because of its insufficiency in the statement of the evidence offered at the trial, the fact that the prayers were thereafter lost did not furnish sufficient ground for striking out the judgment, especially where the time for preparing bills of exception was extended, and no steps were taken to have the prayers restored and incorporated in a bill of exceptions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 721; Dec. Dig. § 338.*]

4. APPEAL AND ERROR (§ 928*)—RULINGS ON PRAYERS—PRESUMPTIONS.

In the absence of error disclosed, the Court of Appeals will presume that the court properly disposed of the prayers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

5. APPEAL AND ERROR (§ 543*)—REVERSAL—LOSS OF INSTRUCTIONS.

The mere loss of instructions or prayers is no ground for reversal of the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2409-2411; Dec. Dig. § 543.*]

Appeal from Circuit Court, Wicomico County; John R. Pattison, Judge.

Action by the State of Maryland, at the instance and for the use of Assyria L. Jones, against Benjamin S. Jones. From an order overruling a motion to strike out a judgment in favor of plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, and URNER, JJ.

John H. Handy, for appellant. E. Stanley Toadvin, for appellee.

BRISCOE, J. This appeal is from an order of the circuit court for Wicomico county, overruling a motion to strike out a judgment which had been rendered on the 4th of June, 1910, by that court, in favor of the plaintiff against the defendant, Benjamin S. Jones, for the sum of \$655.81, with interest and costs.

The suit in which the judgment was entered was instituted by the plaintiff, the appellee here, on the 2d day of May, 1902, to recover damages, alleged to have been caused by the issuing of an injunction at the instance of the appellant, and was brought upon the bond filed in the injunction case. The suit was brought in the circuit for Worcester county, but was removed to Wicomico county, and the judgment here sought to be stricken out, is the result of the third trial of the issues in the case; the jury on each trial finding a verdict in favor of the plaintiff.

The first judgment was reversed on appeal to this court, and a new trial awarded, reported in *Jones v. Jones*, 101 Md. 512, 61 Atl. 222, for errors of the court below in its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rulings on the prayers. The second verdict of the jury for the plaintiff, and damages assessed at \$486.31, was rendered on the 5th of April, 1906, and was set aside by the court below, and a new trial granted on the 28th of September, 1906, because, as stated by the appellee in her answer to the motion to strike out this judgment, "owing to the long delay in preparing exceptions, the court refused to sign them, not being able to recall the testimony as given at the trial."

Upon the third trial, and the one we are now considering, the following proceedings were had, as set out by the docket entries in the case:

1910—April 14—Verdict of jury for plaintiff and damages assessed at \$655.81.

1910—April 14—Motion and judgment on verdict nisi.

April 14—Plaintiff's first and second prayers granted filed.

April 14—Defendants' first, second, fourth, fifth, and eleventh prayers granted filed.

April 14—Defendants' third, sixth, seventh, eighth, ninth, and tenth prayers rejected filed.

April 14—Leave granted defendant 30 days to file exceptions.

April 15—Motion for new trial filed.

May 12—Order of court granting the defendant extension of time to June 13th to file exceptions.

June 4—Motion for new trial overruled.

June 4—Judgment extended in favor of the plaintiff for the sum of \$655.81, with interest and costs.

June 13—Order of court extending time to July 13th for defendant to file exceptions filed.

June 14—Order for an appeal and affidavit filed.

June 16—Appeal bond approved and filed.

July 12—Order extending time to August 13th for defendant to file bills of exceptions filed.

July 27—Bill of exceptions filed with Judge Pattison as per letter filed.

September 15—Petition and motion to strike out judgment filed.

1910—September 17—Answer filed.

1911—February 20—Argument argued. Sub curia.

July 3—Affidavit of John H. Handy filed.

September 16—Bill of exceptions filed by Judge Pattison, with his declination to sign indorsed thereon.

September 16—Motion to strike out judgment overruled as per order filed.

September 27—Leave granted defendant to file exceptions by October 3, 1911.

September 30—Petition and order of court extending time to October 17th to defendant to file bills of exceptions filed.

November 15—Order for an appeal and affidavit filed.

The motion to strike out the judgment and to reinstate the case for trial is based upon the single averment, set out in the appellant's petition, that the prayers of both plaintiff and defendant, granted at the trial of the case, had been lost, and that no complete record of the rulings of the court can be presented here for review, and no proper

bills of exception can be prepared until the prayers are found.

While, the plaintiff, in her answer to the defendant's petition, does not deny the allegations of the petition, she avers that, even if the prayers are lost or misplaced, the plaintiff or her attorneys are not responsible, neither she nor they having had or seen same since the trial, or connived at or induced the loss or misplacement of the prayers in any manner; and the loss or misplacement of the prayers, while, perhaps, a misfortune to the defendant, Benjamin S. Jones, is no fault of the plaintiff, and no cause for striking out the judgment. And it is further averred that the filing of the exception as to rulings of the court upon admissibility of testimony, alone, was a waiver of any exceptions as to the prayers, even if they had been reserved at the trial, which does not appear from the record.

The case was heard upon the petition, answer, and motion on the 20th of February, 1911, and by an order of court, dated the 16th day of September, 1911, the motion to strike out the judgment was overruled. And from this order an appeal was entered on the 15th day of November, 1911.

[1] The record now before us only contains the petition to strike out the judgment, the plaintiff's answer thereto, the order of court on the petition, and the order for appeal. There are no bills of exceptions presenting the questions of fact, nor any petition designating the points or questions of law, by which the party appealing feels aggrieved, or the questions of law decided by the court below. In such a state of case, it has frequently been held that this court cannot review the action or rulings of the court below upon the merits of the case on appeal, unless the record itself discloses the questions passed upon and decided by the court below. *Cockey v. Ensor*, 43 Md. 266; *Main v. Kinzer*, 91 Md. 760, 46 Atl. 1070; *Baltimore City v. Austin*, 95 Md. 90, 51 Atl. 824; *Long v. Hawken*, 114 Md. 240, 79 Atl. 190; *Coulbourn v. Fleming*, 78 Md. 210, 27 Atl. 1041; *Palmenberg v. Turk*, 116 Md. 8, 81 Atl. 221.

The judgment in the case was entered on the 4th day of June, 1910, and the motion to strike out was not made until the 15th of September, 1910, long after the expiration of the term at which it had been rendered, and after the judgment had become enrolled.

[2] It is well settled that when a motion is made to set aside a judgment after the term at which it was rendered the proof of fraud, deceit, surprise, or mistake must be clear and satisfactory, and it must appear that the party making the application has acted in good faith and with ordinary diligence. *Abell v. Simon*, 49 Md. 318; *Smith v. Black*, 51 Md. 247; *Poe's Pleading and Practice*, vol. 2, § 392. There is nothing in the case appearing from the record or docket entries that shows error in the ruling of the court in overruling the motion to strike out

this judgment. The verdict and judgment were entered in the regular manner, and there is an absence of proof of any ground, the existence of which would warrant the vacation of the judgment.

[3] The only ground relied upon by the appellant to strike out the judgment is because the prayers were lost, and no record could be made up for this court. Assuming this to be true, the mere fact alone of the loss of the prayers would be no sufficient ground or reason for striking out the judgment on the facts before us. It appears, however, from the bill of exception presented to Judge Pattison on the 27th of July, 1910, nearly two months before the motion to strike out the judgment (15th of September) had been entered, that the appellant did not rely upon the rulings of the court upon the prayers to sustain his appeal, but solely upon the ruling of the court in the exclusion of certain testimony offered upon the part of the defendant. This bill of exception the court declined to sign because of its insufficiency in the statement of the evidence offered at the trial. Subsequently the time for preparing bills of exception in the case was extended by the court until and including October 17, 1911, and no steps were taken to have the prayers restored, or supplied or incorporated in a bill of exception.

[4] This court cannot presume that the court below committed an error in its rulings on the prayers; but, on the contrary, in the absence of error disclosed, we must presume, as in other cases, that the court decided properly.

In *Hollowell v. Miller*, 17 Md. 305, it was said: "A judgment below, coming up by appeal, is prima facie correct, and cannot be reversed by the appellate court, unless they are convinced it is erroneous." *Alexander v. Macauley*, 6 Md. 375; *Burtles v. State*, 4 Md. 278.

[5] In *Visher v. Webster*, 13 Cal. 60, it is distinctly held that the mere fact of the loss of instructions or prayers is no ground for a reversal of the judgment appealed from. *Zweibel v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84; *State v. Jefferson*, 77 Mo. 139; *Birney v. Sharp*, 78 Mo. 73; *Addams v. Suver*, 89 Ill. 484; *Saxton v. Harrington*, 68 Neb. 450, 94 N. W. 605.

We find in the record no sufficient grounds for reversing the order appealed from, and for the reasons given it will be affirmed.

Order affirmed, with costs.

LORD v. PEARSON et al.

(Supreme Judicial Court of Maine. March 1, 1912.)

1. WILLS (§§ 600, 610*)—REPUGNANT PROVISIONS.

An absolute estate passes under an unlimited bequest and devise, with an unqualified and unrestricted power of disposition in the bene-

ficiary; and any attempted limitation over of such part as may remain unexpended at the beneficiary's death is repugnant and void.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1335-1339, 1379-1385; Dec. Dig. §§ 600, 610.*]

2. WILLS (§§ 600, 610*)—CONSTRUCTION—ESTATE DEVISED.

Under a will giving the residue of the estate to a nephew, reciting a desire that he use as much of it as "he needs or wishes to, even if he spends the whole of it," but directing that, if at his death the principal should remain unexpended, it should be distributed in a specified manner, an absolute estate passed to the nephew.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1335-1339, 1379-1385; Dec. Dig. §§ 600, 610.*]

Report from Supreme Judicial Court. Penobscot County.

Bill by Henry Lord, executor, against: Mary W. Pearson and others for the construction of the will of Sarah C. Barker, deceased. On report. Decree directed.

E. C. Ryder, for plaintiff. Hugh R. Chaplin, for Clarissa A. Battles and for himself, as executor of the last will of Paul A. Battles. Matthew Laughlin, for all other defendants.

PER CURIAM. [1] 1. Where a testator makes an unlimited bequest and devise of property to one, with an unqualified and unrestricted power of disposal thereof in the donee, an absolute estate passes to the donee; and any attempted limitation over of such portion thereof as may remain unexpended at the donee's death is repugnant and void. *Bradley v. Warren*, 104 Me. 423, 72 Atl. 173.

[2] 2. The will of Sarah C. Barker, after appropriating \$300 for the perpetual care of certain cemetery lots, contained this clause:

"All the rest of my property, I give, bequeath and devise to my beloved nephew, Paul Amory Battles, of Bangor, and I desire that he use as much of it as he needs or wishes to, even if he spends the whole of it. I do not wish to restrict him, in any way, in the use of it, but if, at the time of his decease, the principal remains unexpended, I wish it to be distributed in the following manner:

"To Miss Nancy W. Stacey, \$1,000.

(Then follows the names of various persons, and against each name a specified amount of money in figures.)

"There may be some remainder after these bequests are paid; if so I desire it to be given in trust to Mrs. Geo. H. Fox and her daughter, Miss Madeline S. Fox, to be used in the ways I have indicated to them."

The will was duly approved and allowed March 15, 1911. Paul A. Battles died March 29, 1911.

Held that, under the provisions of the

clause of the will quoted, an absolute estate passed to Paul A. Battles in and to all the "rest" of the property of the testatrix, as therein referred to. Decree accordingly.

PIERCE v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. March 1, 1912.)

DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVENESS.

Verdict for \$3,000 for personal injury to an employé while unloading freight from a car, caused by cases overturning upon him, was excessive by \$1,500, though his right leg was crushed, ligaments thereof were dislocated, the arch of his ankle was broken, sinews were bruised, and tissues lacerated.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Action by Clarence Lee Pierce against the Maine Central Railroad Company. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled conditionally.

F. W. Halliday, for plaintiff. Forrest Goodwin and John Wilson, for defendant.

PER CURIAM. Action on the case to recover damages for personal injuries sustained by the plaintiff and caused by the alleged negligence of the defendant. The plaintiff was injured while in the employ of the Borden Condensed Milk Company, in a freight car of the defendant, which was standing on a side track next to the factory of the milk company, and while he was in the act of removing cases of condensed milk from a truck which had been run into the car. The accident was caused by the defendant running other cars against the car in which the plaintiff was working with such force that he was thrown down and the cases of milk overturned upon him. In his writ he alleges that his right leg was crushed betwixt said cases and the floor, leaving no chance for escape, dislocating the ligaments, breaking the arch of the ankle, bruising the sinews, and lacerating the tissues. At the trial the plaintiff claimed that he was more or less bruised on different parts of his body, and that occasionally he had "dizzy spells," which he attributed to the accident; but the chief injury, on account of which he claimed substantial damages, was a hurt to his right foot or ankle. The only issue at the trial was the amount of damages. Verdict for plaintiff for \$3,000. Defendant moved for a new trial, on the ground that the damages awarded were excessive. The rescript says: "After a careful examination and critical study of all the evidence in the case, the court is clearly of the opinion that the sum of \$3,000, which the jury awarded the plaintiff as damages, is manifestly excessive, and that for that reason the defendant is entitled to a new trial. If the

plaintiff, within 30 days after the filing of the rescript in this case, shall remit all of the damages awarded in the verdict in excess of \$1,500, the entry will be: Motion overruled. Otherwise motion sustained, and verdict set aside."

THOMPSON v. SOULE.

(Supreme Judicial Court of Maine. June 7, 1912.)

1. BROKERS (§ 88*)—ACTION FOR COMPENSATION—JURY QUESTION.

In an action by a real estate broker for compensation for services, *held*, under the evidence, a jury question whether defendant promised to pay him for the services rendered.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

2. BROKERS (§ 88*)—ACTION FOR COMPENSATION—INSTRUCTIONS.

In an action for compensation for assisting in finding a purchaser for land, it was proper to instruct that the jury should make plaintiff whole as near as they could; that it appeared that plaintiff did more or less work; and that, in arriving at the amount to which he was entitled, if anything, the jury should consider the value of the property and the effort he made, according to the evidence, and determine what would be a fair, reasonable price for services performed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

Exceptions from Supreme Judicial Court, Franklin County.

Action by M. D. P. Thompson against James B. Soule. Verdict for plaintiff, and defendant moves for a new trial and brings exceptions. Motion and exceptions overruled.

1. The plaintiff had two written options, given by the defendant, authorizing him to sell certain timber land at commission of 5 per cent. within a specified time and at a price named. The time named in both options had expired, and no sale had been effected and no customer obtained ready and willing to pay the price named. The plaintiff claimed that, in addition to the written options, the defendant promised to pay him for his services in trying to find a customer for the property, even if the property should be sold to other parties by the defendant. Whether there was such a contract as the plaintiff claimed, in addition to the options, was an issue of fact for the determination of the jury.

2. The following instructions to the jury on the question of damages were held to be correct: "You are to make the plaintiff whole as near as you can. I don't know how you will figure it. It appears that the plaintiff did more or less work. It seems impossible for him to state what he did; but, in arriving at the amount which he is entitled to, if entitled to anything, you will consider the value of the property and the

effort he made, according to the evidence, and determine what would be a fair, a reasonable, price for the services performed." On motion and exceptions. Motion and exceptions overruled.

This is an action of assumpsit. In the declaration are two counts. The first count is an account annexed to the writ for \$6,000 as commissions upon the sale of 12,800 acres of timber land. The second count alleges that, at the request of defendant, the plaintiff performed certain labor and services for him in selling and assisting in finding a customer for said land, and that said services were reasonably worth \$6,000; that, in consideration of said services, the defendant promised to pay the plaintiff so much as he reasonably deserved. The jury rendered a verdict for the plaintiff for \$1,425.

Case stated in the opinion.

Argued before WHITEHOUSE, C. J., and CORNISH, KING, BIRD, and HANSON, JJ.

H. S. Wing and E. B. Richards, for plaintiff. A. Simmons, for defendant.

KING, J. This cause is before the law court on defendant's motion and exceptions. It is an action of assumpsit containing two counts. In the first the plaintiff alleges that the defendant is indebted to him, according to an account annexed, for \$6,000 as commissions upon the sale of 12,800 acres of timber land.

In the second count he alleges that, at the defendant's request, he performed certain labor and services for him in selling and assisting to find a customer for said land; and that, in consideration thereof, the defendant promised to pay him so much money as he reasonably deserved to have therefor, which he avers is the sum of \$6,000. There was also the common money count, with specifications thereunder.

The land was sold for \$115,000, and it was admitted that if the plaintiff was entitled to recover under the first count for commissions the damages would be 5 per cent. on the selling price, or \$5,750. The verdict was \$1,425, showing that the jury did not find the plaintiff entitled to recover the commissions sued for, but that he was entitled to recover that sum for his labor and services sued for under the second count in his writ.

1. The motion. Two written options, or contracts, given by the defendant to the plaintiff, were put in evidence, under which the plaintiff was authorized to sell the land on commission at 5 per cent. within a specified time, and at a price named. The first option was dated March 15, 1905, and continued up to May 1st following. The other option was given February 18, 1908, for 30 days, with the privilege of an extension for 30 days more. The plaintiff contended that between the time when the first option expired and February 18, 1908, two other options were given him. This the defendant denied.

The property was not sold during the life of either of the written options, but was conveyed by the defendant to the Great Northern Paper Company by deed, dated September 1, 1909.

[1] The plaintiff contended and introduced evidence tending to show that from the time the first option was given to the time of the sale of the property he was acting as the defendant's broker and agent in an effort to find a customer for the land, notwithstanding the fact that during a considerable part of that time he had no written option in actual force. And the evidence does show that during that time the plaintiff corresponded with many persons in relation to a sale of the land, and showed the property to several parties whom he had interested in it. It appears that a Mr. Record, representing himself and others, became interested in the property through the plaintiff's efforts, and had it examined and estimated by Prof. Austin Carey, the then state forester. After that exploration the plaintiff and defendant met Mr. Record in an effort to close a sale with him, which was not done. This interview was after the option of February 15, 1908, had run out. The plaintiff testified that at that time the defendant said to him, "It is for your interest for me to sell this property to this party on account of your commission," and that he replied: "Mr. Soule, lay that right one side; work for your own interest. I have other parties, and if we can't sell these parties we will work at the other parties, and see if we can't get your price." To which the defendant replied: "Mr. Thompson, I will see that you have your pay for your trouble, if your party don't buy." The plaintiff also testified that at another time the defendant said, in a conversation concerning his right to sell the property himself free from the plaintiff: "But if I do sell it free from you, I will satisfy you for your trouble you have been to."

In answer to questions on cross-examination, the plaintiff further stated that before the time of the Record conference, and soon after the option of March 15, 1905, was given, the defendant promised him that he would pay him for his services in trying to find a customer for the property, even if the property should be sold to other parties by the defendant. On the other hand, the defendant testified that he never at any time promised to pay the plaintiff anything for his services in case he did not sell the property under the written options, or produce a customer for it able and willing to buy it under the terms of the options. Whether there was such a contract, as the plaintiff claimed, in addition to the options, was an issue of fact submitted to the jury. The presiding justice gave the jury explicit instructions as to this precise issue. Among other things he said: "But the plaintiff says that after or at about the time of this

meeting of the plaintiff and defendant and Record, when they tried to carry through this deal, where \$93,000 had been offered, they had some talk in regard to the commission, and that he gave certain advice to Mr. Soule, and that at practically the same time the defendant told him to continue, and to keep his parties interested—that is in substance what he said—and if he didn't procure a customer, and the defendant got no return for the work he had done and would do, if he continued in advertising and forcing the property upon the market, he would pay him for his services and disbursements. Now the defendant denies that. That is a contract the plaintiff sets up, and he must prove it by a greater weight of evidence. There must be a preponderance of the evidence in his favor upon that branch of the case." And the jury were further instructed: "If you find that the plaintiff is not entitled to his commission, because he has not sustained the burden of proof upon that branch of the case, and you do find that the other contract or agreement that is claimed was made after the Record deal fell through, then you will come to the question of damages upon that branch of the case."

That issue was stoutly contested, with the testimony of the plaintiff and defendant sharply in conflict, and the jury found the issue in the plaintiff's favor. If they believed him and accepted his testimony as against the defendant's, their finding in his favor on this branch of the case was justified. After a careful examination of all the evidence in the case, the court does not find that the jury's conclusion was unmistakably wrong.

The defendant complains further that the damages awarded are so excessive that a new trial should be granted. It is to be borne in mind that the plaintiff contended, and the jury may have so found, that the defendant had promised to pay him (in case he should not be entitled to commissions under the options) for all his services and disbursements in trying to find a customer for the land during the whole period from the time of the first option in March, 1905, to the time of the sale of the property in September 1909, a period of 4½ years. The extent and character of the plaintiff's services during that period, and the amount he should receive therefor, were matters of fact to be determined by the jury. The parties were entitled to their judgment on those matters, and the jury awarded the plaintiff \$1,425. The court might not have awarded as much. Difference of opinion and judgment is, perhaps, to be expected in such matters. But a careful reading of the evidence in the case does not show that the damages awarded by the jury are so manifestly excessive that they ought not to stand.

[2] The exception. The defendant excepted to the following instructions to the jury as to

the damages the plaintiff might recover under his claim for services as sued for in the second count in the writ: "You are to make the plaintiff whole as near as you can. I don't know how you will figure it. It appears that the plaintiff did more or less work. It seems impossible for him to state what he did; but, in arriving at the amount which he is entitled to, if entitled to anything, you will consider the value of the property and the efforts which he made, according to the evidence, and determine what would be a fair, a reasonable, price for the services performed."

The defendant contends that the instructions excepted to were erroneous, because the jury were told to consider the value of the property. We think the value of the property was a proper element for the jury to consider. It was material to the question whether the services claimed to have been rendered were reasonable in kind and extent; for what would be a reasonable service and expense in an effort to sell a tract of land valued at \$100,000 might be grossly unreasonable concerning a tract worth only \$100. The plaintiff claimed that he was employed by the defendant to continue his efforts to find a purchaser for the property, and keep it upon the market, under an express promise that, even if he did not make a sale of the property, so as to be entitled to commissions, he should nevertheless be paid for his services and expenses.

That employment, if it existed as the plaintiff claimed, was confidential and responsible, and what would be a reasonable compensation for the services rendered under that employment would depend somewhat, at least, upon the extent of the responsibility.

In *Kentucky Bank v. Combs*, 7 Pa. 543, Combs claimed compensation for his services in ineffectually endeavoring to procure the return of one Lewis from Texas, so that the bank might use him as a witness in support of a claim for which it had brought suit. The court instructed the jury that, as to the amount of their verdict, they might consider the importance of the business intrusted to Combs, and might "consider the extent of the claim of the Kentucky Bank on the Schuylkill Bank." In sustaining the instruction, Gibson, C. J., said: "It is not to be doubted that responsibility, in a confidential employment, is a legitimate subject of compensation, and in proportion to the magnitude of the interests committed to the agent."

In the case at bar, a fair and reasonable compensation for plaintiff's services in trying to sell the defendant's land, recoverable under the special promise of payment therefor as claimed by the plaintiff, might not be fully ascertainable from the mere fact of the number of letters the plaintiff wrote concerning the land, or the number of conferences he had with prospective purchasers, or

the precise number of days actually employed in the service, but also from a consideration of the responsibility imposed upon the plaintiff by the employment; and that responsibility was determinable, to some extent, by the value of the property.

It is therefore the opinion of the court that the instructions complained of were not erroneous.

Motion and exceptions overruled.

STATE v. HOULEHAN (two cases).

(Supreme Judicial Court of Maine. July 26, 1912.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 260*)—APPEAL—EFFECT OF TRANSFER OF CAUSE.

Upon the imposition of sentence, the taking of an appeal, and filing an appeal bond, the jurisdiction of a magistrate or judge of a municipal court is at an end, and he has no further jurisdiction of the case, unless the appellant withdraws his appeal as, and in the manner, authorized by R. S. c. 133, § 19.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

2. CRIMINAL LAW (§ 260*)—APPEAL—WITHDRAWAL.

When a motion is made by an appellant, under R. S. c. 133, § 19, to withdraw his appeal, the powers of the magistrate are those only which are conferred by that section of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

3. COURTS (§ 112*)—"RECORD."

A "record" is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment; and only the records of magistrates which are made in the course of judicial duty are of force.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. § 112.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6008-6014; vol. 8, p. 7781.]

4. CRIMINAL LAW (§ 292*)—PLEAS—PRIOR CONVICTIONS.

Even when the record of prior conviction is in the same court, an attempt to set up a prior conviction by way of motion, instead of by plea, is not to be encouraged, nor departures from the requirements of such a plea favored.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 668-671; Dec. Dig. § 292.*]

5. CRIMINAL LAW (§ 1114*)—EXCEPTIONS—SUFFICIENCY.

Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 233; Dec. Dig. § 1114.*]

6. CRIMINAL LAW (§ 972*)—ARREST OF JUDGMENT—DETERMINATION OF MOTION.

Like a demurrer, a motion in arrest of judgment is addressed only to the record, and can introduce no facts not appearing therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2423; Dec. Dig. § 972.*]

7. CRIMINAL LAW (§ 922*)—REVIEW—PREJUDICE FROM ERROR.

It should be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210-2218; Dec. Dig. § 922.*]

Spear and Cornish, JJ., dissenting.

Exceptions from Supreme Judicial Court, Kennebec County.

Peter A. Houlehan was convicted of maintaining a nuisance, and excepts (two cases). Exceptions sustained, and new trial ordered in both cases.

In these cases the respondent was indicted at the September term, 1909, of the superior court for Kennebec county for keeping and maintaining a common nuisance. The material parts of the indictments are as follows: "That Peter A. Houlehan, of Farmingdale, in the county of Kennebec, at Gardiner, in said county of Kennebec, on the 1st day of January, A. D. 1907, and on diverse other days between said day and the day of finding this indictment, a certain tenement, occupied by the said Peter A. Houlehan as a storehouse, situated in said Gardiner, unlawfully did use for the illegal keeping and illegal sale of intoxicating liquors.

Argued before WHITEHOUSE, C. J., and SAVAGE, SPEAR, CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Joseph Williamson, County Atty., for the State. George W. Hesselton, for defendant.

BIRD, J. These two cases against the same defendant, upon identical indictments for nuisance between the 1st day of January, 1907, and the day of the finding of the indictment, are before us upon exceptions. The defendant was tried upon one of the indictments (No. 33) and found guilty, and was immediately tried upon the other indictment (No. 32) with like result.

In the case first tried, it is necessary to consider but one of the exceptions. The state offered, as tending to prove the crime set forth in the indictment, the docket entries of the Gardiner municipal court, as follows: "State v. Peter Houlehan. Charge, search and seizure. Complainant, Frank E. Andrews. Plea, not guilty. August 26 continued to August 27 at 10 a. m. Found guilty August 27, 1909. Sentence, \$100 and costs, \$15.82, and 60 days in jail. Appealed, and furnished sureties in the sum of \$200 for appearance at the superior court. Sept. 6th jail sentenced nol prossed, paid fine and costs. Paid \$117.32 Sept. 6, 1909."

[1] Upon the imposition of sentence, the taking of the appeal, and filing of the appeal bond, the jurisdiction of the magistrate was at an end, and he had no further jurisdiction of the case (*Tuttle v. Lang*, 100 Me. 123, 127, 60 Atl. 892), unless appellant withdrew his appeal as, and in the manner, au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thorized in R. S. c. 133, § 19, which, so far as pertinent, is as follows: "The appellant may, at any time before such copy has been sent to the appellate court, come personally before such magistrate, who may permit him, on motion, to withdraw his appeal and abide by the sentence appealed from; whereupon he shall be ordered to comply with said sentence and the sureties taken upon the recognizance upon such appeal shall be discharged."

[2, 3] Whether or not, on September 6, 1909 the copy, "of the whole process, and of all writings before the magistrate" (R. S. c. 133, § 18), had then been sent to the appellate court does not appear; but, assuming that it had not, and that the appellant personally came before the magistrate, there is no entry showing that he moved, either in writing or otherwise, to withdraw his appeal and abide by the sentence appealed from. Assuming, also, that this was done, the action of the magistrate was wholly unauthorized. The record shows neither withdrawal of the appeal, nor an order to abide by the sentence. On the contrary, instead of making an entry of "appeal withdrawn," without which he could make no further entry, he proceeds to modify the sentence, although his only authority in the premises was to order compliance with the sentence already imposed. If then, the judge of the municipal court has no power after imposition of sentence, save in strict accordance with statute in matters of appeal, any entry he may make upon his docket or cause to appear, as of record, of an act respecting the person and case, not within his statutory powers regarding appeal, is as much beyond his power as the act itself. A record is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment. *Sayles v. Briggs*, 4 Metc. (Mass.) 421. It is only records of magistrates which are made in the course of judicial duty which are of force. *Wells v. Stevens*, 2 Gray (Mass.) 115, 118. It is the duty of every justice to insert in the record of each cause before him a full narrative of everything which is necessary to exhibit its progress and the final determination of it, *so far as he has any official connection with it*. *Wells v. Stevens*, 2 Gray (Mass.) 117. The entry of September 6, 1909, is a mere personal memorandum—has no judicial effect—and, if given effect, would result in modifying a record by parol. *Kendall v. Powers*, 4 Metc. (Mass.) 553. The entry in the present case was beyond the power of the judge to make, and is not admissible as evidence to contradict the record. It was a nullity, as was the similar entry in *Houlehan v. County*, 108 Me. 397, 81 Atl. 449.

The appeal was not withdrawn, and the judgment of conviction, at the time the docket entries were offered, was vacated by ap-

peal. *Campbell v. Howard*, 5 Mass. 376, 378; *State v. Quinn*, 96 Me. 496, 498, 52 Atl. 1009; *Willett v. Clark*, 103 Me. 22, 23, 67 Atl. 566; *Com. v. Richards*, 17 Pick. (Mass.) 295, 298.

The exceptions must be sustained.

[4, 5] In the second case, it appears that before the opening argument defendant "filed a motion, in substance, that this case had been covered by the case just tried, No. 33." The overruling of this motion constitutes the ground of the first exception. An examination of the motion reveals an attempt to plead a prior conviction by way of motion. The practice is not to be encouraged; and, while strictness of pleading may be somewhat relaxed when the record of the prior conviction is in the same court in which the plea is filed, we may doubt if the motion complies with all the requirements of a plea of *autrefois convict*. This, however, it is unnecessary to determine. The bill of exceptions does not show the character of the reply of the state to the plea—whether an issue of law or an issue of fact was presented, nor whether, upon the overruling of the motion, any or what judgment was entered. Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law. *Fletcher v. Clarke*, 29 Me. 485; *Verona v. Bridges*, 98 Me. 491, 57 Atl. 797; *Lenfest v. Robbins*, 101 Me. 176, 63 Atl. 729; *Hix v. Giles*, 103 Me. 439, 69 Atl. 692. The exception is overruled.

[6] After verdict defendant filed a motion in arrest of judgment, which is in substantially the usual form, with the additional matter: "And the said indictment is bad, because it alleges an offense covering the same period of time and the same alleged offense upon which respondent has heretofore been found guilty by a verdict of the jury, and said verdict is still in force and has never been reversed." The denial of the motion is the ground of the second exception. As a demurrer in a criminal case reaches the indictment as the same may be recorded, so a motion in arrest of judgment reaches the whole record of the cause as made up to the time of filing the motion. Each can reach only errors of record; neither can plead facts not of record. Another difficulty is that the record is not before us. The indictment is set out in full; but neither the plea of the defendant, nor the motion above referred to, nor the pleadings subsequent thereto, appear of record; and, while the nature of the motion is apparent from the bill of exceptions, this, however, is not part of the record nor could have been of record before the overruling of the motion in arrest. This exception, also, is overruled.

In the charge of the presiding justice, he said, among other things: "In my judgment—and this is matter for me to give you instructions upon—in my judgment, this action may be maintained against this respondent for maintaining a common nuisance in his saloon, provided you find by the evidence

presented in this case that during the period covered by this indictment he has kept intoxicating liquors in his saloon for sale, or has sold intoxicating liquors illegally; and if he has sold at all it is illegally, because there is no contention that he was licensed to sell."

[7] To this portion of the charge defendant seasonably objected and had exceptions. We think the exceptions must be sustained. The evidence of the government was directed to proof of the maintenance of a nuisance in the defendant's saloon. The charge required evidence of keeping intoxicating liquors in the saloon; but the evidence of sales required is not so limited or restricted, and might be understood to refer to sales anywhere, while he occupied the saloon, and especially in view of the words immediately following, "and if he has sold at all it is illegally." The jury may have misunderstood. *King v. Ward*, 74 Me. 349, 351; *Gilmore v. McNeil*, 45 Me. 599, 601; *Hopkins v. Fowler*, 39 Me. 568, 570.

This exception is therefore sustained.

The entry will be, in each case: Exceptions sustained, and new trial ordered.

SPEAR and CORNISH, JJ., dissenting.

GROLLIMUND v. GERMANIA FIRE INS. CO.

(Court of Errors and Appeals of New Jersey.
June 20, 1912.)

(*Syllabus by the Court.*)

1. INSURANCE (§ 166*)—CONSTRUCTION OF CONTRACT—BLANKET POLICY.

A policy of insurance for \$2,000 on "two three-story frame building tin roof, and its additions and foundation walls, while occupied as a dwellings, Nos. 69 and 71 East Twelfth street, Paterson, New Jersey, and being \$1,000.00 on each building," is in its legal effect a specific policy of \$1,000 on No. 69 East Twelfth street and \$1,000 on No. 71 East Twelfth street, and is not a blanket policy on both Nos. 69 and 71.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 353; Dec. Dig. § 166.*]

2. INSURANCE (§ 166*)—CONSTRUCTION OF CONTRACT—BLANKET POLICY.

A policy of insurance for "\$2000.00 upon the three-story frame building, and its additions adjoining and communicating, including gas and water pipes, heating apparatus and all permanent fixtures, while occupied as a dwelling house and situated Nos. 69 and 71 East Twelfth Street, Paterson, New Jersey," is not a specific policy on No. 69 and No. 71, but is a blanket policy on both, and covers to its full amount of \$2,000 both Nos. 69 and 71.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 353; Dec. Dig. § 166.*]

3. INSURANCE (§ 504*)—PROCEEDS—DISTRIBUTION.

In distributing the loss upon two parts of a building under one roof, and each part capable of being described and insured by street

numbers, between an insurance policy covering both parts for a gross sum and a policy specifically liable on each part, both of which policies grant permission to "effect other insurance" and provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policy should be regarded as insuring each part to the entire amount unappropriated when it is reached, making the adjustment part by part in the order of the greater loss, if that will work substantial equity and justice to all concerned, and deducting the sum appropriated to the part as it is adjusted and passed.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1285-1290; Dec. Dig. § 504.*]

Error to Supreme Court.

Action by August Grollmund against the Germania Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, and venire de novo awarded.

John R. Hardin, of Newark, for plaintiff in error. Hunziker, Randall & Cunningham, of Paterson, and Edward A. Day, of Newark, for defendant in error.

TRENCHARD, J. [1] August Grollmund sued to recover the amount claimed as indemnity under a contract of insurance issued to him December 2, 1907, by the Germania Fire Insurance Company. The insurance was against loss or damage by fire for the term of three years from the date of the policy, in the amount of \$2,000, "on two three-story frame building, tin roof, and its additions and foundation walls, while occupied as a dwellings Nos. 69 and 71 East Twelfth street, Paterson, New Jersey, and being \$1,000.00 on each building." The policy was on the standard form, and contained the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or loss by the expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon or attached or appended hereto."

To the policy in question, pursuant to the terms of the standard clause just quoted, there was attached a rider, granting privilege "to effect other insurance" and containing, with reference to such other insurance, the following paragraph: "Provided, however, that if there shall be any other insurance on said building, this company shall be liable only for such proportion of any loss as the amount issued hereby shall bear to the whole insurance on the property hereby insured, whether such insurance applies in the same manner or not."

The property insured was damaged by fire March 23, 1909, the total damage being \$1-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The trial, at the Passaic circuit, before the judge sitting without a jury, resulted in a judgment for the plaintiff against the company for \$880.47, with interest, being one-half of the total loss, and the company sued out this writ of error. The defendant at the trial, conceded that it was liable for \$633.13, and requested the court to find that amount to be its total liability. The assignments of error center on the effect of other insurance on the same property upon the extent of the liability of the defendant upon the policy in suit.

The description of the property as contained in this policy, when literally copied, reads rather strangely, but so reads because it is partly written on a printed blank, and, as often happens in filling blanks, singulars and plurals are slightly mixed, but without detriment to the evident meaning. It is in legal effect a specific policy of \$1,000 on No. 69 East Twelfth street and \$1,000 on No. 71 East Twelfth street, and is not a blanket policy on both Nos. 69 and 71. It was so declared on, and the court below properly so held.

If there were no other insurance on the property described in this policy, the whole amount of the specific insurance on No. 69 would be insufficient to meet the loss on that number, while on No. 71 the specific insurance would exceed the loss. The insured would in that case, therefore, have been entitled to recover \$1,000 on 69 and \$283.20 on 71, or \$1,283.20 in all.

[2] But on June 8, 1907, several months prior to the taking out of the defendant's policy, the insured secured from the Rochester German Insurance Company a three-year policy, which, however, was not specific on No. 69 and No. 71, but was a blanket policy and covered, to its full amount of \$2,000, both numbers 69 to 71. The court below properly so held. In the Rochester policy, the insurance was "\$2,000.00 on the three-story frame building, and its additions adjoining and communicating, including gas and water pipes, heating apparatus and all permanent fixtures, while occupied as a dwelling house and situated Nos. 69 and 71 East Twelfth street, Paterson, New Jersey." This policy was also on the standard form, and contained permission for other insurance without notice.

At this point we pause to remark that Grolimund, the plaintiff in this case, has recovered a judgment in like amount against the Rochester German Insurance Company on the policy last referred to, and has sued out a writ of error in that case, so that the judgments entered against both the Germania and the Rochester are now before this court, and have been argued together.

single building (such description being, without doubt, not strictly accurate). He later took out specific insurance on the two parts of the same building in the specific amount of \$1,000 each, having been permitted so to do by the leave given in the earlier policy to take out further insurance without notice. He has thus created a situation which leads to embarrassment in determining the liabilities of the insurance companies under the two contracts.

[3] Now, the insured's rights as against the defendant in this case (and in the other case also) must be determined from the contract made between the insured and the company, and not by an adjustment of equities between insurance companies, *requiring the court to rewrite the contract* so sued upon and make a new and different contract. Questions of contribution between coinsurers have caused much trouble to the courts, a large part of which has arisen through efforts to equalize equities outside of the contract. This trouble is lessened if the parties are left with their contracts as they themselves have made them.

That the judgment against the Germania Company in the present case is manifestly unjust and contrary to its contract is, we think, demonstrable. The contention that the insurance, in respect to both policies, was concurrent, and that therefore both companies, having insured for equal amounts, should pay in equal proportions the loss, is not supported by the contracts. In the Rochester policy, the insurance was \$2,000, covering both numbers. Any structure under one roof, with two separate entrances, is, in a general sense, one building; and, if the Rochester company chose to insure in blanket form, it elected to take all the loss that was coming on either building. At the time the Rochester policy was taken out, there was no other insurance; and, if the fire had taken place before the option to take other insurance had been exercised, the loss of the Rochester Company would have been, inasmuch as the loss did not equal the total insurance, the whole amount of \$1,760.93, and it would have made no difference in the liability of the Rochester Company whether the loss was all on 69, or all on 71, or equally divided between 69 and 71.

The permission in the Rochester policy to take out other insurance did not limit the insured to other insurance on both 69 and 71, but permitted him to take out specific insurance on 69 and 71, or on either, if he so preferred. He did elect to take out specific insurance of \$1,000 on each number, and, in doing so, he exhausted the amount insured under the policy. It is entitled to the benefit of the insurance.

represented by the Rochester policy, and is liable only for such proportion of the total loss occasioned by the fire at No. 69 as the sum of \$1,000 shall bear to the whole insurance on that number, and on No. 71 as the sum of \$1,000 shall bear to the whole insurance on that number.

The loss on 69 was \$1,477.73. If the insured had taken out no specific insurance on No. 69 and \$1,000 on No. 71, the Rochester Company would have been called upon to pay \$1,477.73, the entire loss on No. 69, and, as to No. 71, the balance of its policy, or \$633.13, would have prorated with the specific Germania insurance policy of \$1,000. So, if the insured had taken out \$1,000 of specific insurance in the Germania on No. 69 and no specific insurance on No. 71, the Rochester Company would have been called upon to pay on No. 71 the loss on that number of \$283.20; the remaining amount of its policy, not needed to satisfy that loss (that is to say, \$1,716.80), would have prorated with the Germania specific insurance of \$1,000 in paying the loss of \$1,477.73 on No. 69.

If we now consider that the insured had no policy in the Rochester and had \$1,000 on No. 69 in the Germania and \$1,000 on No. 71 in the Germania, the Germania's loss would be, on No. 69, \$1,000, and on No. 71 \$283.20, or \$1,283.20 in all. The assumption, therefore, that the situation as to the two companies—the Rochester with a blanket policy of \$2,000 on both numbers, and the Germania with \$1,000 on each number—is the same is shown groundless, because, without consideration of the other, the liability of the Rochester under the blanket policy is \$1,760.93, and of the Germania under the two specific policies is \$1,283.20. Under the policies issued by both companies, neither company is liable under the policy for a greater proportion of any loss on the property described therein than the amount thereby insured shall bear to the whole insurance covering such property.

This clause for prorating is a limitation upon the contract to indemnify the assured to the extent of his loss. The assured has not taken from either company an unqualified obligation to indemnify him to the extent of his loss, or to the extent of his loss limited to the amount of his policy. He has made with both companies contracts which give them, as against him, a benefit arising from coinsurance. The liability of each company to the assured is limited, depending upon the existence of the amount of the coinsurance of the other. Each company is liable only for the proportion of the loss on the described property in its policy that the amount insured shall bear to the whole insurance on such property.

It is true that the insured is entitled to have from the two companies, if his loss did not exceed the total amount of insurance

available to meet the loss, the amount of such loss. But, in the present case, to divide the loss equally between the two companies would compel a contribution from the Germania to the Rochester of \$880.47, or only \$402.73 less than the total liability of the Germania on its policy on both numbers, without reference to the Rochester; and the Rochester, with a total liability on its policy of \$1,760.93, without reference to the existence of the Germania policy, would be relieved of exactly half of its responsibility, or \$880.46. This method of dividing the loss would work to the advantage of the Rochester Company by the difference between \$880.46, of which it would be relieved, and \$402.73, of which the Germania would be relieved; such difference being \$477.73. By this method the blanket policy on both numbers, carrying naturally the greater loss, would derive from the prorating clause a greater benefit than the specific risks on each number of lesser amount.

Such a result is manifestly wrong, and writes a new contract for the Germania, in that it deprives it of proper contribution from its coinsurer, but more markedly writes a new contract for the Rochester, in that it converts its blanket policy into a specific policy of \$1,000 on each number. By this method there is absolutely no difference between the two contracts, and blanket insurance and specific insurance involve exactly the same risk on the part of the two companies; and this notwithstanding that, if the blanket policy alone had been on the property, the loss under it would have been \$1,760.93, and if the policy, with specific risks on the two numbers, had been alone, its loss could have been only \$1,283.20. It is axiomatic that a blanket policy is a greater risk than the specific, and in natural equity the assumption of the greater risk is not inequitably attended by larger loss.

It is true that in a general sense the amount of the Germania policy was equal to the amount of the Rochester policy, inasmuch as the ultimate possibility of loss on each policy was \$2,000. But under the Rochester policy \$2,000 could be lost on either No. 69 or No. 71, while under the Germania policy only \$1,000 could be lost on No. 69 and only \$1,000 could be lost on No. 71.

There is but little, if any, conflict of law, text-book or case, on the general principle that blanket insurance covers every item included in the property described in the policy to its whole amount, and the destruction of any item so covered, even though all other items should remain entirely uninjured, demands an indemnity from the insurer, if the loss be so great, to the entire amount of the policy.

Of course, policies are sometimes issued blanket in form, with limitation of loss to a specific amount of any one item, as, for in-

Policies also sometimes contain what are called "distribution" clauses, by which the amount insured attaches in proportion of the value of the property contained in individual parcels to the value of the property as an entirety. But the blanket policy in the present case contains nothing by way of limitation or distribution, and its full amount is fully applicable at all times to every part and parcel of the property described in the policy. To forget this is to make the policy specific and a different thing than what it was, and was intended to be. To remember this is to leave the contract as the parties made it.

It has been said that questions arising out of the application of blanket insurance and specific insurance are among the most troublesome in the law of insurance, and it must be conceded that there is considerable difference of opinion evidenced by the authorities. It must also be conceded that every rule that has been worked out has been the subject of criticism, and no rule has been as yet formulated which absolutely commends itself in all supposable cases. The function of the court, however, is not safely discharged in the endeavor to lay down a rule which will meet all supposable cases. Contracts and facts are seldom exactly identical in even two cases. The contract and the facts before the court in the given case are the safest guide to a correct conclusion.

The learned trial judge adopted the Vermont rule, so-called, applied in the case of *Chandler v. Insurance Co. of North America*, 70 Vt. 562, 41 Atl. 502. The reason advanced by the court for this rule is as follows: "As, by the terms of the specific policies, they cannot be converted into blanket policies, it necessarily follows that the only way by which the loss can be adjusted is to turn the blanket policies into specific ones, i. e., determine how much of the full amount of a blanket policy shall be apportioned to each of the three respective items, according to their respective values." But this seems to us without justification in any blanket contract of insurance considered by itself, and inequitable in relation to specific insurance on items covered by the blanket policies, inasmuch as it puts blanket and specific contracts on a level of liability, when, in the very nature of the two contracts, there is great difference in the risk assumed.

In the *Chandler Case*, the court arrived at the amounts of the specific policies into which it converted the blanket policy by taking the amount of the loss as to each item as the representative of its value, because in that case the loss was the full value and less than the total amount of insurance. The rule as announced by the court calls for an apportionment according to sound value.

lectible under a contract of insurance is not perceivable, except in so far as indemnity is sometimes limited in amount by sound value or some proportion thereof. Moreover, it is admitted that the application of this rule, which is also sometimes called the "Reading Rule," may lead, under some conditions, to results violative of the principle that the assured should receive full indemnity. To this principle every rule should bend.

In the present case, however, the insured cannot apply the Vermont rule, under the evidence. No proof has been offered by the plaintiff of sound value, and the court cannot assume that Nos. 69 and 71 are of equal sound value.

The effect of the Vermont or Reading rule is exactly the same as though the policy had originally contained a distributive clause, applying its blanket amount to different items in proportion to value. This clause is sometimes put in policies, and, if so, the rule is, no doubt, properly applied. In the absence of such a clause, the application of the rule makes a new contract.

The rule which we think should be applied to the present case is that which is called the Connecticut rule, of which the case of *Schmaelzle v. London & L. Fire Ins. Co.*, 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233, is an application. This rule is sometimes styled by text-writers the "Gradual Reduction Rule." Like other rules, it has been the subject of criticism; but its reasoning is, when applied to the trial of an issue in a court of law, much more satisfactory than can be found in the cases supporting the other rules. It proceeds on the validity of the contract of insurance as made between the assured and the company, and enforces the contract as it is found.

In the *Schmaelzle Case*, the plaintiff was the owner of premises upon which stood a brewery and a shed. In the brewery were machinery and stock, upon which buildings, machinery, and stock the plaintiff carried, in 34 different companies, insurance against fire, aggregating \$60,000 in amount. These policies were all of the standard form, and contained a provision as to prorating found in the policy of the Germania Company in this case and also in the Rochester policy. Thirty-one of the policies, covering insurance for \$55,000, were "blanket" policies; that is, they covered buildings, machinery, and stock as a whole, and without distributing the amount of the insurance among several items. The remaining policies, containing insurance for \$5,000, were of the kind known as "specific" policies; that is, the amount insured thereby was divided among a specified number of items, each of which was covered by one of the policies.

precisely the same property as did the compound insurance, but distributively. This distribution was uniform among the specific policies, and was among four separate items—the main or brewery building, stock, machinery, and a shed. The loss was distributed without friction, and the question was as to the apportionment between the blanket and specific policies. The court held that in distributing the loss upon the building, machinery, and stock between the insurance policies covering all the items for a gross sum and those specifically liable on each item, all of which provided that the liability shall not be greater “than the amount hereby insured shall bear to the whole insurance,” the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached, making the adjustment item by item in the order of the greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed.

That case is on all fours with the case now before the court, in that the items mentioned in the specific policies comprised in the aggregate the property described in the blanket policies. It is an exact authority from a court of high reputation, and the principles on which it rests are strongly presented. When applied to the facts of this case, the opinion itself contains an answer to every criticism that has been advanced against it. True it has been criticised as penalizing the blanket policy. It is not clear that the criticism is well founded; but it is clear that such criticism ought not to be given undue weight in the enforcement of a contract in a court of law. If parties are not to be left to make their own contracts in matters of insurance, it is for the Legislature, which has already established the standard form, to go further and prescribe a clause covering the apportionment of blanket and specific insurance.

It is said that the Schmaelzle Case works an interference with the modern 80 per cent. coinsurance clause; but in the present case there is no such difficulty, as there is no such clause or other limitation of like character in the policies.

The only criticism against the Connecticut rule (which is free from attack on many of the grounds to which the others are open), not fully answered by an appeal to the contract itself, is its arbitrary application of the order in which the blanket insurance shall be applied in the course of “gradual reduction” to the items covered by it. The Connecticut court as to this said: “One other point remains to be considered. As the existence of the specific policies compels the adjustment of the loss by items, these items must be taken up in some order. This

order might very materially affect the result, both as respects the companies and the insured, since that portion of a blanket policy which is exhausted in the settlement upon the first item no longer remains to be applied to the second item, and so on through the list. This matter of order is one upon which the policies in suit and policies ordinarily are silent. Evidently nothing remains but some arbitrary method of selection, in which the considerations influencing a choice should be what, on the whole, under the conditions, best satisfies the ends of fairness and justice as between the companies; the assured being given his rightful amount of indemnity. A little study of the peculiar situations which may arise may convince one that no rule of universal and unvarying application can be safely laid down. Whether one suggests the order of the greatest losses, or of the least losses, or the order of the enumeration in the special insurance, or an order to be determined by lot, two at least of which methods appear to have been used, or some other order, he will quite likely be met with an assumed situation in which his system seems to fail to fully accomplish equity and justice. Fortunately we have no need to search for a universal rule. In the present case, it matters not to the assured, and little to the insurers, what order of adjustment is adopted. The order first indicated, to wit, that of the greatest losses, is one which, as a general rule, has some consideration in its favor. In this case it works substantial equity and justice to all concerned. We therefore select it for the purposes of this case as on the whole the best.” That language is applicable to the case now before the court.

Our conclusion therefore is that the problem now before the court should be solved by the application of the following rule: In distributing the loss upon two parts of a building under one roof, and each part capable of being described and insured by street numbers, between an insurance policy covering both parts for a gross sum and a policy specifically liable on each part, both of which policies permit of other insurance and provide that the liability shall not be greater “than the amount hereby insured shall bear to the whole insurance,” the blanket policy should be regarded as insuring each part to the entire amount unappropriated when it is reached, making the adjustment part by part in the order of greater loss, if that will work substantial equity and justice to all concerned, and deducting the sum appropriated to the part as it is adjusted and passed.

The application of that rule to the present case results as follows: The loss on No. 69 is \$1,477.73. The Rochester blanket policy of \$2,000 being first applied on No. 69

of \$3,000, which would prorate the loss between the Rochester and the Germania \$985.16 to the Rochester and \$492.37 to the Germania. The payment of the Rochester's \$985.16, being its share of the loss on No. 69, would reduce the face value of its policy to \$1,014.84, leaving that amount still applicable on No. 71 to prorate with the specific policy of \$1,000 on that number. The loss on that number was \$283.20, which would be apportioned between the two companies as follows: \$142.64 to the Rochester and \$140.56 to the Germania. The Rochester's total loss would be on both numbers \$1,127.80, and the Germania's total loss on both numbers would be \$633.13, together aggregating \$1,760.93, the total loss of the assured. This would call for a judgment against the defendant in favor of the plaintiff in the present case for \$633.13, with interest from May 23, 1909.

The result is that the judgment of the court below will be reversed and a venire de novo awarded.

GROLLIMUND v. ROCHESTER GERMAN INS. CO.

(Court of Errors and Appeals of New Jersey. June 20, 1912.)

Error to Supreme Court.

Action by August Grollimund against the Rochester German Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed, and venire de novo awarded.

Gustav A. Hunziker, of Paterson, for plaintiff in error. Edward A. & William T. Day, of Newark, for defendant in error.

PER CURIAM. The decision of this case is controlled by the rule laid down in *Grollimund v. Germania Fire Insurance Co.*, 83 Atl. 1108, argued herewith, and decided at the present term.

The judgment of the court below will be reversed and a venire de novo awarded.

BECKWITH v. COWLES et al.

(Supreme Court of Errors of Connecticut. July 19, 1912.)

1. WILLS (§ 747*)—SPECIFIC DEVISE—RIGHT TO RECOVER PROPERTY.

Where a decedent had, at the time of his death, property sufficient to fully settle his estate, in addition to a parcel specifically devised to his son, an action to have a conveyance of such property, made before the decedent's death, set aside was properly brought by such son, rather than by the executor, as such a devise carried with it the right of immediate possession.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1918-1933; Dec. Dig. § 747.*]

Where a demurrer to a complaint, which seeks to have a conveyance of realty set aside and decreed to the plaintiff, goes merely to the objection that the prayer for relief demands a reconveyance, instead of a conveyance, it is purely technical, and would not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

3. CANCELLATION OF INSTRUMENTS (§ 24*)—RECONVEYANCE OF LAND—NECESSITY OF TENDERING CONSIDERATION.

The rule that one who seeks to have a reconveyance of property should not be permitted to retain the consideration received is applicable only where the grantee acted in good faith and without knowledge of the grantor's incapacity; and, where a grantee knew of the grantor's mental incapacity when she secured a conveyance, and did not make moneys, due for his care, the basis of any claimed consideration, the plaintiff, in an action to have the conveyance set aside properly failed to make a tender.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.*]

4. APPEAL AND ERROR (§ 219*)—REVIEW—REQUEST FOR FINDING—NECESSITY.

Though, in an action to set aside a conveyance of land, an issue was raised by the defendant's answer and plaintiff's denial that the plaintiff, by his conduct as to the performance of a contract made by the defendant with the grantor, was estopped to maintain the action, a failure of the judgment to dispose of it will not constitute ground for a reversal, where there was no insistence by the defendant upon any such claim on the trial, or intimation that she desired such question reviewed, as required by Gen. St. 1902, § 793, which provides that, as one of the conditions precedent to the right to have a finding at the hands of the trial judge, the party desiring to appeal shall present a written request therefor, stating the questions of law which it is desired to have reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317-1320, 1322, 1323; Dec. Dig. § 219.*]

Appeal from Superior Court, New London County; Gardiner Greene and Ralph Wheeler, Judges.

Action by Giles A. Beckwith against Rebecca Cowles and another. From a judgment for the plaintiff on overruling a demurrer to the complaint, defendant Rebecca Cowles appeals. No error.

The action was to obtain a conveyance of real estate and the release of a mortgage and damages. No error.

Hull, McGuire & Hull, of New London, for appellant. C. L. Avery, of New London, and Charles A. Gallup, for appellee.

RORABACK, J. The following facts, among others, appeared in the complaint or were found by the superior court: Isaac B. Beckwith died April 23, 1899, leaving a will, dated December 4, 1895, by which he devised to his son, the plaintiff, a portion of his real estate. This action was brought by the plaintiff, claiming that the will was duly probated, and that he was entitled to the real estate. The defendant claims that the will was not duly probated, and that she is entitled to the real estate. The court found in favor of the plaintiff, and the defendant appeals.

*For other cases see same topic and section NUMBER in Dec. Dig.

Beckwith homestead, situated in the town of Waterford, in New London county. The Beckwith homestead, so devised, was of the value of \$1,700. After the death of his wife in 1892, Mr. Beckwith never engaged in any business, but lived with his children (the plaintiff, his daughters Mrs. Charles Lamphier and Mrs. Freeman Brown) until October, 1908. During this period he was cared for under an arrangement entered into between his children. On the 21st day of October, 1908, he went to live with the defendant Rebecca Cowles, under an arrangement with the plaintiff and his sister, Mrs. Brown, whereby Mrs. Cowles agreed to board, lodge, and care for Jason during the winter of 1908 and 1909 for \$5 per week. It was also provided that Mrs. Cowles' compensation should be increased if Mr. Beckwith's condition changed, so as to require greater care. From the 21st of October, 1908, until the 10th day of March, 1909, the sum of \$5 per week was paid in advance, as agreed. On the 16th day of March, 1909, Jason Beckwith executed and delivered a warranty deed to the defendant Cowles of the homestead, which had been specifically devised to the plaintiff by his father in the will of 1905. This deed was immediately recorded. This deed was given upon the verbal promise that Mrs. Cowles should care for Mr. Beckwith during the remainder of his life. About six weeks after the death of Mr. Beckwith, Mrs. Cowles gave a mortgage for \$600 upon the property in question to the defendant Nelson S. Rogers, which mortgage was thereafter recorded. The deed to Mrs. Cowles was given substantially under the following circumstances: Jason B. Beckwith at this time was about 87 years of age, in poor health, of unsound mind, and incapable of attending to business affairs. Mrs. Cowles, with full knowledge of his condition, by various means clearly constituting undue influence, induced him to make the deed and contract in question.

The finding also discloses that \$450 is a reasonable allowance for all the services rendered and expenditures made by Mrs. Cowles under the arrangement which she made with Jason Beckwith when she obtained a conveyance of his real property.

The mortgage to the defendant Rogers was taken by him in good faith and for the consideration of \$600 loaned by him to the defendant Cowles.

The plaintiff, prior to the institution of this action, never offered to pay the defendant for board and care of Jason B. Beckwith after the 16th day of March, 1909; nor did he offer to repay her for any money disbursed by her since that date; nor did he acquiesce in the defendant's obtaining the aforesaid deed, or in any expenditures made by the defendant on the security of such deed. Within one week after March 16, 1909, application for a conservator over Ja-

son B. Beckwith was duly made by Giles A. Beckwith, for the purpose of setting aside the deed of Jason B. Beckwith to Rebecca Cowles, and a copy of this application was duly served upon Rebecca Cowles, which application was pending at the time of the death of Jason B. Beckwith.

The superior court, from facts set forth at length in the finding, reached the conclusion that an unconscionable advantage was taken of Mr. Beckwith in the conveyance of this property. Judgment was rendered for the plaintiff that the defendant Cowles convey to the plaintiff the equity in the real estate in controversy; that she pay the plaintiff \$150; that the plaintiff pay the defendant Rogers the principal of the mortgage note and interest; and that upon such payment Rogers release to the plaintiff the mortgage given by Mrs. Cowles.

Numerous errors are assigned, only five of which are pursued in argument.

[1] The complaint is attacked by demurrer upon several grounds; the main one being that the superior court erred in ruling that the action should not have been brought by the executor. It appears from the complaint that at the time of his death Jason Beckwith had other property, sufficient to fully settle his estate without resorting to the realty now in controversy. The defendant, by demurrer, admitted these alleged facts to be true. The devise to the plaintiff being a specific one, and of the character described, carried with it the right of immediate possession. *Foot v. Brown*, 81 Conn. 218, 224, 225, 70 Atl. 699. The plaintiff's title and right of possession were sufficient to maintain this action.

[2] The defendant demurred because the plaintiff, in his prayer for relief, demanded a reconveyance, instead of a conveyance, of the real estate in question. A demurrer for such a cause is purely technical, and does not concern the substantial rights of the parties.

[3] The defendant contends that the court erred in rendering judgment for the plaintiff, because he never offered to reimburse the defendant for moneys disbursed by her in the performance of her agreement with Jason Beckwith. It is the general rule that, where one seeks the advantage of a rescission of a contract, or reconveyance, he should not be permitted to retain the consideration received by him. In other words, he who seeks equity must first do equity. But this rule has no application, except in cases where the grantee acted in good faith and without knowledge of the grantor's incapacity. *Coburn v. Raymond*, 76 Conn. 484, 489, 57 Atl. 116, 100 Am. St. Rep. 1000.

In the present case, the court has found that the defendant acted in bad faith, with full knowledge of the grantor's mental condition. Upon the facts found, the plaintiff

was not required to reimburse the defendant. The defendant entered into no agreement in any form with the plaintiff, except the one of October, 1908, which was not made the basis of any claim in the transaction of March, 1909, upon which the defendant relied. The defendant's acquisition of this real estate was not in the good faith that enabled her, in relinquishing the property acquired, to demand from any one that she be restored to her former status. She was at fault in entering into the contract under which she expended money and rendered services. The decree of the court, that she be fully reimbursed for these claims from the money which she obtained from Mr. Rogers by placing a mortgage upon the premises in controversy, certainly went as far in her behalf as the circumstances set forth in the record would permit.

[4] The defendant, in her second defense, in substance alleged that the plaintiff, by his course of conduct with reference to the performance of the contract made with Jason Beckwith, was estopped from maintaining this action. These allegations were denied by the plaintiff.

The defendant now contends that the court erred in omitting to determine this question. The record does not show that this question was directly disposed of by the judgment. But it does not necessarily follow that there should be a new trial on that account. Except for the defendant's answer, it nowhere appears that the defendant insisted upon any such claim in the trial of the case below, or intimated to the trial court that she desired this question reviewed by us.

By statute it is made one of the conditions precedent to the right to have a finding at the hands of a trial judge that the party desiring to appeal present a written request therefor, which shall embody a statement of the questions of law which it is desired to have reviewed. General Statutes, § 793. The advantages to be gained and the dangers to be avoided by a compliance with the requirements of this statute, that the proposed finding of facts must contain "a statement of the questions of law arising thereon which it is desired to have reviewed," are so obvious and so important to the orderly and intelligent administration of justice that the requirement ought to be enforced, not only in its letter, but in its spirit. "Otherwise unnecessary burdens will be imposed upon trial judges, who, being compelled to prepare their findings in ignorance of appealing counsel's grievances, will be driven to make every finding comprehensive of all facts which might become pertinent to possible questions of law, or whose omission might create an opportunity for such questions. Otherwise the records of this court will be unnecessarily incumbered with

immaterial matter. Otherwise the door would be open to surprise and unfair attack. The statute has attempted to prevent these results by a simple treatment which can be a hardship upon nobody." Clark's Application, 79 Conn. 136, 139, 64 Atl. 12, 13.

Upon the assumption that this question is involved and decided by the trial court in its judgment, it is evident from the finding that there is no error in this connection. It fairly appears that the plaintiff never waived any right to obtain a cancellation of this deed.

The same considerations are a complete answer to the defendant's claim that the court erred in failing to rule, as a matter of law, that the conduct of the plaintiff, as set forth in the finding, constituted a confirmation or ratification of the conveyance and agreement between Jason B. Beckwith and the defendant and an estoppel of the plaintiff from maintaining this action.

There is no error. The other Judges concurred.

CHURCH v. SPICER.

(Supreme Court of Errors of Connecticut.
July 19, 1912.)

1. TRIAL (§ 253*)—ACTION FOR INJURIES—INSTRUCTIONS—NEGLIGENCE.

In an action for personal injuries, caused by defendant's team in negligently knocking plaintiff down while he was walking on the highway, a requested instruction that all persons have a right to walk on a public highway, and that if plaintiff was walking along the highway in the exercise of ordinary care, and defendant's team traveling in the same direction drove against him and knocked him down, he was entitled to recover, was properly refused as ignoring the question of defendant's negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

2. HIGHWAYS (§ 184*)—ACTION FOR INJURIES—QUESTION FOR JURY—NEGLIGENCE.

On evidence in an action for personal injuries, alleged to have been caused by defendant's team negligently driving against plaintiff while he was walking on the highway, *held*, that the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

3. RELEASE (§ 13*)—CONSIDERATION—UNLIQUIDATED CLAIMS.

Any sum paid by defendant and received by the plaintiff in full satisfaction of an unliquidated claim for personal injuries is a valid consideration for the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 21-27, 29; Dec. Dig. § 13.*]

4. RELEASE (§ 52*)—SETTING ASIDE—PLEADING—FRAUD.

Plaintiff, in an action for personal injuries, who, in his reply to defendant's answer setting up a payment to plaintiff and his release of his claim for injuries, did not allege any fraud or undue advantage by defendant in obtaining the release, could not claim that the release was

not binding on him, since fraud must be specially pleaded.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92; Dec. Dig. § 52.*]

5. HIGHWAYS (§ 184*)—ACTION FOR INJURIES—QUESTION FOR JURY.

One walking on the highway is not bound, as a matter of law, to look back and see whether he is in danger of being run into by teams going in the same direction; but the question whether he ought to look back and see such danger is for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

Appeal from Superior Court, New London County; Joel H. Reed, Judge.

Action by Nathan M. Church against Edward Spicer. Judgment for defendant, and plaintiff appeals. No error.

Action to recover damages for personal injuries, alleged to have been caused to the plaintiff by the defendant's team in negligently knocking him down while he was walking in the highway.

C. W. Comstock and Lee R. Robbins, both of Norwich, for appellant. Hull, McGuire & Hull, of New London, for appellee.

RORABACK, J. On December 22, 1903, the plaintiff was walking on the west side of the highway leading past the property of the Eastern Ship Building Company in the town of Groton. At this point there was a downgrade in the highway in the direction in which the plaintiff was walking. The defendant and his servants at this time were operating six omnibuses transporting passengers, all of which were going in the same direction as the plaintiff. The plaintiff claimed and offered evidence to show that he did not hear the approach of the defendant's team, which knocked him down when he was on the left-hand side of the highway, although there was ample room and opportunity to pass without interfering with him.

The defendant claimed and offered evidence to prove that at the time the accident occurred his teams were all on the right-hand side of the highway to avoid a large number of men, who were coming into and passing along the other side of the street, and when the plaintiff was within about six feet of the rear team he attempted to cross the street so abruptly that it was impossible to slacken the speed of the team and avoid striking the plaintiff.

The defendant in his answer averred that: "(2) On December 23, 1903, after the occurrences alleged in the plaintiff's complaint and before this action was commenced, the defendant paid and delivered to plaintiff, and the plaintiff accepted and received from the defendant, the sum of \$25 in full satisfaction of the damages mentioned in the plaintiff's complaint, and of all damages sustained by the plaintiff in consequence of the injuries received by him as set out in his complaint."

The following reply was filed: "(1) The plaintiff denies the truth of the matters contained in paragraph 2 of the defendant's answer. (2) The plaintiff admits that on the 23d day of February, 1903, he received from the defendant the sum of twenty-five (25) dollars, which was given to the plaintiff by the defendant to aid in defraying the expenses resulting from the injuries described in the plaintiff's complaint, and that the defendant never offered, nor did the plaintiff receive, the same in full satisfaction of the damages mentioned in the plaintiff's complaint, as stated in paragraph 2 of the defendant's answer." To this a rejoinder was filed, denying the truth of the allegations contained in the second paragraph of the plaintiff's reply.

The defendant offered evidence to show that the day after the accident he agreed with the plaintiff to pay him the sum of \$25 in full discharge of any claim that the plaintiff might have against him, and also to pay the plaintiff's bills at the hospital; that the defendant, in pursuance of this agreement, paid the plaintiff \$25 in full settlement of any claim which the plaintiff might have because of his injuries; that the plaintiff, to consummate this arrangement, executed and delivered to the defendant a receipt in full satisfaction of his claim for damages which he had sustained in consequence of the accident. The defendant afterwards paid the plaintiff's bill in full at the hospital. The plaintiff admitted that he signed the receipt for \$25, but stated that he did not hear the paper read; that he did not know or understand its contents, or that the paper which he signed was a receipt in full. The assignments of error question the refusal of the court to charge as requested and the charge of the court as given.

[1, 2] The court was asked to instruct the jury that "all persons have a right to walk in the public highway and are entitled to the exercise of reasonable care on the part of the persons driving teams along the highway; and if the jury find that the plaintiff was walking along the highway in the exercise of ordinary care, and that a team traveling in the same direction drives against him and knocks him down, the plaintiff is entitled to recovery." The court did not so charge. This request was properly refused. It ignored one of the essential questions in the case, namely, the negligence of the defendant. This was a question of fact, which, under suitable instructions, was for the jury to determine. It is obvious that the court could not properly have decided that the circumstances were such as to warrant the court in holding that there was a want of due care on the part of the defendant, without encroaching on the rights of the jury.

[3] One of these requests was to the effect that the inadequacy of the consideration

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

paid by the defendant in settlement of the plaintiff's claim for damages was a proper matter for the consideration of the jury. The court might well have been excused from paying any attention to this request, since the claim which it was intended to convey was immaterial. The amount paid by the defendant was of no consequence, if the demand for damages was wholly unliquidated. See *Allen v. Ruland*, 79 Conn. 412, 413, 65 Atl. 138, 118 Am. St. Rep. 146, 8 Ann. Cas. 344. The court gave sufficient instructions upon this point when it said, "Any sum given by the defendant and received by the plaintiff, or any article of value given and received, in full satisfaction of the injury, would be a consideration for the receipt, and would be binding upon the party receiving it under those circumstances."

[4] Another request sought from the court was that, "if the jury find that the receipt in full was signed by the plaintiff, and that he was induced by the fraud of the defendant to sign and execute the same, or that the plaintiff signed the same by mistake and believed it was a receipt for twenty-five dollars only, the receipt is not binding on the plaintiff, and would not be binding upon him in this action." There is nothing, either in the pleadings or the statement of what the defendant claimed to have been proven, which suggests that the plaintiff was induced by fraud to sign and execute the receipt in question. Fraud should be specially pleaded. Practice Book 1908, p. 250, § 160. The plaintiff did not allege in his reply to the defendant's answer, or claim to have proven, that any fraud, imposition, or undue advantage was taken of him by the defendant in the making and executing of the receipt, which he admits that he signed.

The special finding of facts made, for the purpose of the appeal, does not disclose that any claim was made that there had been a mutual mistake between the parties as to the meaning and effect of this receipt. Under such circumstances, the plaintiff could not justly claim that the receipt would not be binding upon him. *McCusker v. Spicer*, 72 Conn. 628, 633, 45 Atl. 1011; *Allen v. Ruland*, 79 Conn. 412, 413, 65 Atl. 138, 118 Am. St. Rep. 146, 8 Ann. Cas. 344.

[5] The court was asked to charge that "one is not obliged, as a matter of law, to look back to see whether he is in danger of being run into by teams going in the direction he is traveling, and such traveler has a right to assume that the driver of such teams will exercise due care to avoid an injury to such traveler." The court properly complied with this request, when it said in substance: Of course, one is not obliged, as a matter of law, under ordinary circumstances, to look back and see whether he is in danger of being run into by teams going in the same direction that he is traveling; but it is for you to consider whether, as a matter of fact, under the circumstances of this case, a man in his senses ought not to look back and see whether he is about to be run into by a team traveling in the same direction on the highway. This is not a question of law; it is a question of fact for you to decide.

The remaining assignments of error do not demand attention, as they relate to the question of contributory negligence, which has already been considered in the discussion of the first assignment of error.

There is no error.

The other Judges concurred.

MEMORANDUM DECISIONS

MARION v. CONNECTICUT CO. (Supreme Court of Errors of Connecticut. June 13, 1912.) Appeal from Superior Court, New London County; Joel H. Reed, Judge. Action by Frederick W. Marion, administrator, against the Connecticut Company. From a judgment on a directed verdict for defendant, plaintiff appeals. No error. Action to recover for injuries caused, as claimed, by the defendant's negligence, resulting in the death of the plaintiff's intestate. Donald G. Perkins, and Edmund W. Perkins, both of Norwich, for appellant. Michael Kenealy of Stanford, Ky., and Charles B. Whittlesey, of New London, for appellee.

PER CURIAM. The verdict was properly directed. The evidence would not warrant a finding by the jury of negligence on the part of the defendant causing the injury complained of. While the plaintiff's intestate previous to his injury had been a passenger upon the defendant's car, he had been lawfully ejected at a regular stopping place of the car for refusing to pay his fare, and the contractual relation between the parties then ceased. Upon the evidence the jury would have been left to surmise how it happened that the intestate was struck by a later car passing along the defendant's track, and thus no logical basis for a finding of actionable negligence on the defendant's part was afforded. If, as now claimed by the plaintiff, the complaint states a cause of action for an assault and battery for ejecting the intestate from the car when he was so intoxicated as to be unable to help himself, the direction of the verdict was still correct. The evidence shows that he was not helpless or incapable of caring for himself, and that he was ejected, without unnecessary force, for refusing to pay his fare. There is no error.

MITCHELL v. BLAKE. (Court of Appeals of Maryland. Jan. 11, 1911.) Appeal from Court of Common Pleas; Heusler, Judge. Action by Margaret Elizabeth Mitchell, by her father and next friend, Warren Mitchell, against Dr. John D. Blake. From a judgment withdrawing the case from the jury, plaintiff appeals. Affirmed. Argued before BOYD, C. J., and BRISCOE, PEARCE, BURKE, THOMAS, SCHMUCKER, PATTISON, and URNER, JJ. Edwin L. Ward and William Colton, for appellant. James Upshur Dennis and S. S. Field, for appellee.

PEARCE, J. Affirming the judgment below, with costs to appellee.

ALLMAN et al. v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA et al. (Court of Errors and Appeals of New Jersey. March 21, 1912.) Appeal from Court of Chancery. Suit by Michael Allman and others against the United Brotherhood of Carpenters and Joiners of America and others. From an order of the Court of Chancery (81 Atl. 116) denying a preliminary injunction, complainants appeal. Affirmed. Lowy, Lowenstein & Leber, of Newark, for ap-

pellants. Henry Carless, of Newark, for respondents.

PER CURIAM. The order appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Walker.

COFFIN v. WATSON et al. (Court of Errors and Appeals of New Jersey. March 21, 1912.) Appeal from Court of Chancery. Suit by Anna P. Coffin against William W. Watson and others to construe a will. From the decree of the Court of Chancery (78 N. J. Eq. 307, 79 Atl. 275) construing the will, complainant appeals. Affirmed. Lum, Tambllyn & Colyer, of Newark, for appellant. Riker & Riker, of Newark, for respondents.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Emery.

DODD v. CENTRAL R. CO. OF NEW JERSEY. (Court of Errors and Appeals of New Jersey. April 19, 1912.) Error to Supreme Court. Action by Richard Dodd against the Central Railroad Company of New Jersey. A judgment for plaintiff was reversed by the Supreme Court (80 N. J. Law, 58, 78 Atl. 541) and plaintiff brings error. Affirmed. Ziegner & Lane, of Jersey City, for plaintiff in error. McDermott & Enright, of Jersey City, for defendant in error.

PER CURIAM. The judgment under review will be affirmed for the reasons set forth in the opinion delivered in the Supreme Court by Mr. Justice Swayze.

RENNEBAUM et al. v. RENNEBAUM. (Court of Errors and Appeals of New Jersey. March 21, 1912.) Appeal from Court of Chancery. Suit by Charles E. Rennebaum and others against Catharine N. Rennebaum to set aside a deed. From a decree of the Court of Chancery (78 N. J. Eq. 427, 79 Atl. 309) for complainants, defendant appeals. Affirmed. Carrow & Kraft, of Camden, for appellant. John Boyd Avis, of Woodbury, for respondents.

PER CURIAM. The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

ROSS et al. v. SPARKS et al. (Court of Errors and Appeals of New Jersey. March 21, 1912.) Appeal from Court of Chancery. Suit to quiet title by Amelia R. Sparks and others against Charles S. Ross and others. From an order of the Court of Chancery (80 Atl. 932) granting a motion to set aside a verdict for defendants (plaintiffs in the issue), defendants appeal. Affirmed. J. J. Crandall, of Atlantic City, for appellants. French & Richards, of Camden, for respondents.

PER CURIAM. The order appealed from will be affirmed for the reasons stated in the

opinion filed in the court below by Vice Chancellor Leaming.

STOUT v. EDISON PORTLAND CEMENT CO. (Court of Errors and Appeals of New Jersey. June 20, 1912.) Error to Supreme Court. Action between Mattie Stout and the Edison Portland Cement Company. Mattie Stout brings error. Affirmed. See, 81 Atl. 737. William H. Morrow, of Belvidere, and Robert H. McCarter, of Newark, for plaintiff in error. William C. Gebhardt, of Jersey City, for defendant in error.

PER CURIAM. The judgment of the Supreme Court is affirmed for the reasons given in the opinion of Mr. Justice Voorhees in that court. 81 Atl. 737.

In re **BURN'S ESTATE.** Appeal of **BASSETT.** (Supreme Court of Pennsylvania. Feb. 19, 1912.) Appeal from Orphans' Court, Philadelphia County. In the matter of the estate of William H. Burns. From a decree confirming an adjudication, Annie R. Wain Bassett appeals. Affirmed. In this case, which was presented by the appellant, Annie R. Wain Bassett, in person, the paper book did not contain the names of the parties, statement of question involved, history of the case, adjudication, assignments of error, or appendix. The appeal was apparently from a decree dismissing exceptions to an adjudication. Argued before **BROWN, MESTREZAT, POTTER, ELKIN,** and **MOSCHZISKER, JJ.** Allen M. Stearnes, for appellee.

PER CURIAM. The appellant was patiently heard by the court below, but she utterly failed to show anything as a basis of a claim against the decedent's estate, and her appeal is therefore dismissed, with costs.

CITIZENS' NAT. BANK OF NEW CASTLE v. HILEMAN et al. (Supreme Court of Pennsylvania. Feb. 5, 1912.) Appeal from Court of Common Pleas, Lawrence County. Action by the Citizens' National Bank of New Castle against E. E. Hileman and others. From a judgment discharging a rule to strike

off judgment, defendants appeal. Reversed, and judgment ordered stricken off. Argued before **FELL, C. J.,** and **BROWN, MESTREZAT, POTTER, ELKIN, STEWART,** and **MOSCHZISKER, JJ.** Robert K. Aiken and Akens, Wilkinson, Lockhart & Chambers, for appellants. James A. Gardner and E. T. Kurtz, for appellee.

POTTER, J. The question involved in this appeal is precisely the same as that at No. 139 October term, 1911 (233 Pa. 432, 82 Atl. 770), in which an opinion has been handed down. For the reasons therein set forth, the order of the court below in this case is reversed, and it is ordered that the judgment be stricken off.

DUNN WORSTED MILLS v. ALLENDALE WORSTED MILLS. (Supreme Court of Rhode Island. June 11, 1912.) Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice. Action by the Dunn Worsted Mills against the Allendale Worsted Mills. There was a verdict for plaintiff, and defendant brings exceptions. Overruled, and case remitted, with directions to enter judgment. John J. Heffernan and James H. Rickard, Jr., both of Woonsocket, for plaintiff. Bassett & Raymond, of Providence, for defendant.

PER CURIAM. The conclusions of the justice of the Superior Court are fully sustained by the law and the evidence. The defendant's exceptions are overruled and the case is remitted to the Superior Court, with direction to enter judgment on the decision.

SHERMAN v. COONEY. (Supreme Court of Rhode Island. July 6, 1912.) Action by Mary W. Sherman, executrix, against Thomas F. Cooney, executor. Motion to dismiss bill of exceptions granted. Bill dismissed, and case remitted. Thomas F. Farrell, of Providence, for appellant. Cooney & Cahill, of Providence, for appellee.

PER CURIAM. Appellee's motion to dismiss appellant's bill of exceptions is granted. The bill of exceptions is dismissed, and the case is remitted to the Superior Court for further proceedings.

END OF CASES IN VOL. 83

*

INDEX-DIGEST



THIS IS A KEY-NUMBER INDEX

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§ 45 (R.I.) In assumpsit, *held*, that counts sounding in damages for breach of a contract might properly be joined with those in indebitatus assumpsit for the value of an option and compensation for work and labor.—*Eastman v. Dunn*, 83 A. 1067.

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In an action for death of horse hired by defendant of plaintiffs, and drowned in a hole cut in ice on a lake used as a public highway, whether plaintiffs were guilty of contributory negligence held, under the evidence, a jury question.—*Id.*

§ 67 (N.J.Sup.) Where defendant undertook to unhitch a gentle team in the yard adjoining plaintiff's house, and a horse still attached to the wagon started to the barn, and the wagon pole was driven through the wall of plaintiff's building and against her person, injuring her, and it appeared that the horse had never attempted to go to the barn before it was entirely released from the wagon during the six years it had been used by the defendant, plaintiff's injuries were the result of the lawful act of the defendant done without negligence, and the defendant was not liable.—*Beale v. McAlister Coal Co.*, 83 A. 178.

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§ 5 (N.J.) A writ of error was the proper remedy to review the action of the Supreme Court in discharging a rule to show cause why judgments should not be vacated.—*Knight v. Cape May Sand Co.*, 83 A. 964.

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§ 70 (R.I.) Under Gen. Laws 1909, c. 298, § 24, an order sustaining a demurrer to one of the counts of the declaration only held not reviewable on exceptions prior to trial and final decision on the merits.—*Sanitary Oyster Carrier & Commission Co. v. Wm. M. Merwin & Sons Co.*, 83 A. 753.

§ 73 (R.I.) Decrees in equity, which are in a strict sense interlocutory, will be held to have elements of finality, so as to permit an immediate appeal, where by reason of possible injurious consequences an immediate review is necessary.—*McAuslan v. McAuslan*, 83 A. 837.

§ 78 (Md.) Under Code, art. 75, §§ 12, 13, and article 26, § 17, where by reason of the partial allowance of defendants' set-off, plaintiff recovered less than the amount required to establish the court's jurisdiction, and was therefore granted a judgment of non pros., such judgment was final and appealable.—*Baer v. Robbins*, 83 A. 341.

§ 78 (N.J.) An order striking out as frivolous a plea or demurrer is not final, and is not reviewable on writ of error.—*Negy v. Kwalick*, 83 A. 899.

§ 79 (R.I.) An equity decree as to one of several defendants, whose interests are not connected with a direction for the payment of costs as to that defendant, is final, although the case is still pending as to the other defendants.—*McAuslan v. McAuslan*, 83 A. 837.

§ 80 (R.I.) A decree, to be final within the statute authorizing appeals from final decrees in equity cases, must terminate the litigation on the merits, so that in case of affirmance the court below will have nothing to do but execute the decree already rendered.—*McAuslan v. McAuslan*, 83 A. 837.

§ 80 (Vt.) An order appointing a master to ascertain and report injunction damages, and restraining orators from hindering defendants from taking and holding possession of certain premises until further order of court, held not final or appealable.—*McArthur v. Blondin*, 83 A. 468.

§ 82 (R.I.) A supplemental decree or order for the execution of a final decree in equity is so far final as to support an appeal; but on such appeal only matters arising subsequent to the final decree can be reviewed.—*McAuslan v. McAuslan*, 83 A. 837.

(E) Nature, Scope, and Effect of Decision.

§ 103 (Pa.) Act April, 1894 (P. L. 64), allowing an appeal from order discharging rule for judgment for want of a sufficient affidavit of defense, was intended to reach only clear cases of error in law.—*Beck v. Schekter*, 83 A. 829.

§ 113 (R.I.) Under Const. Amend. art. 12, § 1, giving the Supreme Court final revisory and appellate jurisdiction, and Gen. Laws 1909, c. 272, § 2, giving such court general supervision of all inferior courts and jurisdiction to entertain bills of exception to correct errors or abuses in the superior court, a judgment of the superior court vacating a nil dicit judgment for plaintiff within six months from its rendition was reviewable by the Supreme Court.—*Fox v. Artesian Well & Supply Co.*, 83 A. 115.

(F) Mode of Rendition, Form, and Entry of Judgment or Order.

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IV. RIGHT OF REVIEW.

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§ 151 (Md.) Where defendants filed a set-off which was allowed in part only, and plaintiff was granted a non pros. because judgment in his favor was less than the court's jurisdiction, defendants were entitled to appeal.—*Baer v. Robbins*, 83 A. 341.

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§ 203 (Vt.) A ruling on evidence cannot be reviewed in the absence of an objection taken at the time.—*Paige v. McCarty*, 83 A. 659.

§ 209 (R.I.) Objection relating solely to the weight of defendant's evidence as to a certain issue, not made the subject of any request to charge, will not be considered on exceptions from the granting of defendant's motion for a new trial.—*Oldham v. Oldham*, 83 A. 265.

§ 215 (Md.) Under Code, art. 5, § 9, the error in an instruction submitting questions of law to the jury cannot be corrected on appeal, where no objection appears from the record to have been made to the instruction.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 219 (Conn.) Under Gen. St. 1902, § 798, a failure of a judgment to determine an issue raised by pleadings held not reversible, in the absence of a request for a finding.—*Beckwith v. Cowles*, 83 A. 1113.

§ 220 (R.I.) Where the report of a master in equity was not objected to, and no exceptions were taken, his findings were conclusive on the parties, and could not be reopened on appeal.—*McAuslan v. McAuslan*, 83 A. 837.

§ 231 (Pa.) Where a party only files a general objection to a statement filed by his opponent in assumpsit, to be sent out with the jury, he cannot on appeal dispute the items therein.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

§ 232 (Vt.) Where an objection below, that a witness was not qualified as an expert, is abandoned on appeal, and an objection not made below is urged, that the matter about which he was examined was not a proper subject of expert testimony, neither objection will be considered.—*Duggan v. Heaphy*, 83 A. 726.

§ 237 (Pa.) Where, after refusal to withdraw juror and continue cause because of improper statement by witness, counsel does not request the court to warn the jury to disregard the answer, the judgment will not be reversed for failure to strike the answer.—*Joynes v. Pennsylvania R. Co.*, 83 A. 318.

(C) Exceptions.

§ 254 (R.I.) Where a demurrer is sustained to a plea, the proper method of presenting the ruling for review is to reserve an exception to the ruling on the demurrer.—*Trainor v. Lee*, 83 A. 847.

§ 273 (Md.) Where prayers given announced correct principles of law and there are no special exceptions filed to them, the Court of Appeals cannot decide whether there was in the case any legally sufficient evidence to support the hypotheses of facts stated in the prayers.—*Mullen v. Brydon*, 83 A. 1025.

§ 273 (Vt.) A general exception to the refusal of the court to charge each and every request by defendant and to the charge given in respect to each and every request is insufficient to present the requested instructions for review, where some were given and some were properly denied.—*Duggan v. Heaphy*, 83 A. 726.

§ 274 (N.J.) A question of law not fairly within the scope of an exception taken does not present ground for reversal.—*McCloud v. Illinois Surety Co.*, 83 A. 908.

(E) Cases and Questions Reserved or Certified.

§ 308 (N.H.) The superior court, on a petition for the construction of a will, and for advice as to the validity of certain provisions and the right to receive property disposed of thereby, held empowered to transfer, without ruling, questions raised by a demurrer to the bill denying plaintiff's right to sue, and also to transfer the question whether the bill was maintainable, and upon what grounds, in case such question was not raised by the demurrer.—*Glover v. Baker*, 83 A. 916.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

§ 345 (R.I.) Where a motion for a new trial, when filed, was on the ground of newly discovered evidence, the fact that plaintiff did not support it by affidavit did not affect the filing of notice of his intention to prosecute exceptions under Gen. Laws 1909, c. 298, § 17.—*Murad v. New York, N. H. & H. R. Co.*, 83 A. 436.

§ 353 (R.I.) Under Gen. Laws 1909, c. 297, § 3, the Supreme Court cannot, on petition, allow an appeal to affect a decree appointing an administrator, entered more than a year before the petition.—*Sayles v. Steere*, 83 A. 83.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

§ 362 (Conn.) Allegations that the conclusions of the trial court were not justified by the evidence and that the court erred in finding facts and in refusing to find other facts, and each of the paragraphs of the finding or request to find contained but a single question, was a sufficient specification of the reasons of appeal.—*Davidson v. Max Rippis Co.*, 83 A. 532.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 374 (N.J.Sup.) On appeal by the board of tenement house supervision from a judgment for defendant, in an action for penalty under the Tenement House Act, the board need not enter into an appeal bond.—*Board of Tenement House Supervision of New Jersey v. Schlechter*, 83 A. 783.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(B) Scope and Contents of Record.

§ 543 (Md.) The mere loss of instructions or prayers is no ground for reversal of the judgment appealed from.—*Jones v. State*, 83 A. 1100.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 548 (Md.) The evidence must be presented on appeal, either by a bill of exceptions or an agreed statement of facts.—*Gross v. Wood*, 83 A. 337; *Wood v. Rosenheim*, Id. 341.

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 567 (N.J.Sup.) The extension of time to agree upon or settle state of the case on appeal from district courts under District Court Act, § 213d, need not necessarily be granted by the judge that tried the case.—*Board of Tenement House Supervision of New Jersey v. Schlechter*, 83 A. 783.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 628 (Md.) The failure to transmit transcript of the record within the time prescribed by Code Pub. Gen. Laws 1904, art. 5, § 40, held not to justify dismissal.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 664 (Vt.) A transcript referred to and made a part of the bill of exceptions may be used to supplement the statements in the bill, but it is not controlling.—*Woodville Guaranty Savings Bank v. Rogers*, 83 A. 537.

(K) Questions Presented for Review.

§ 671 (Md.) In the absence of bills of exceptions or petition designating the rulings objected to, such rulings, not shown by the record, could not be reviewed.—*Jones v. State*, 83 A. 1100.

XI. ASSIGNMENT OF ERRORS.

§ 722 (Pa.) Assignments of error should be limited to the important and controlling questions involved in the controversy.—*Steinberg v. Eagan*, 83 A. 272.

§ 724 (R.I.) Statement of reasons of appeal held sufficient to comply with Gen. Laws 1909, c. 289, governing appeals in equity cases from the superior court to the Supreme Court, and to present for review the errors complained of.—*Vaill v. McPhail*, 83 A. 1075.

§ 730 (Md.) Exceptions taken to the rejection of prayers will not be considered on appeal in the absence of reasons stated in the court on appeal or in the appellant's brief.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 730 (Pa.) Where appellant assigns an entire charge as inadequate, he should indicate in specifications wherein it is deficient.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

§ 742 (R.I.) While the statement of reasons of appeal in equity cases must clearly, separately, and specifically set out the errors, it need not state the reasons upon which appellant bases his claim of error.—*Vaill v. McPhail*, 83 A. 1075.

XII. BRIEFS.

§ 761 (Vt.) Under the statute, questions of law arising on the trial and duly raised by exceptions come directly to the Supreme Court on a bill of exceptions showing the rulings, objections thereto, and the exceptions.—*Woodville Guaranty Savings Bank v. Rogers*, 83 A. 537.

XV. HEARING AND REHEARING.

§ 817 (N.J.Sup.) If the time for settlement of the state of the case on appeal be so extended as to make it impracticable to bring on the appeal at the next term, the requirement of District Court Act, § 213d, therefor is not applicable.—*Board of Tenement House Supervision of New Jersey v. Schlechter*, 83 A. 783.

§ 832 (Vt.) Pub. Stat. §§ 1313-1316, relating to rehearings in the Supreme Court, do not au-

thorize a rehearing for the purpose of giving opportunity to present new questions.—Cunningham v. Blanchard, 83 A. 469.

As a rule, failure to present a case fully on the original hearing is not ground for granting a rehearing in the Supreme Court.—Id.

A rehearing may be had on appeal, if a material mistake of law is made in the decision on the original hearing.—Id.

§ 835 (Vt.) Where, in an action for an accounting for the value of lots, defendant admitted that he must account, if his objections to accounting were not sustained, and that the accounting would be as of the time of the hearing before the master, he cannot complain on rehearing that the value of the lots at the commencement of the suit was taken as the time of the accounting, where they had increased in value.—Cunningham v. Blanchard, 83 A. 469.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 842 (Vt.) Where a party having the burden to show that corporate stock was acquired by the adverse party with notice of equities, or without paying value, failed to meet the burden of proof, the court's disposition of the issue was a conclusion of law, and not an inference of fact, and reviewable on appeal.—Roberts v. W. H. Hughes Co., 83 A. 807.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 870 (R.I.) In a suit to remove a testamentary trustee and for an accounting, a decree confirming the master's report was not a final decree; and hence proceedings prior thereto could be reviewed on an appeal from a subsequent decree removing the trustee, fixing the amount due the trust estate, and directing payment of such amount.—McAuslan v. McAuslan, 83 A. 837.

§ 875 (Md.) On appeal from an order ratifying a judicial sale, questions of the jurisdiction of the court to pass the decree and irregularity in the proceedings cannot be reviewed; such questions being matters for consideration on appeal from the decree.—Vollum v. Beall, 83 A. 1095.

§ 875 (R.I.) On appeal from a supplemental decree or order for the execution of a final decree in equity only matters arising subsequent to the final decree can be reviewed.—McAuslan v. McAuslan, 83 A. 837.

(C) Parties Entitled to Allege Error.

§ 882 (Md.) A party cannot complain of instructions requested by him.—Cushwa v. Burgess & Commissioners of Williamsport, 83 A. 389.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

§ 893 (R.I.) Under Gen. Laws 1909, c. 289, providing for equity appeals, an appeal in an equity case does not remove the cause to the Supreme Court for a retrial, but only brings up for review the error stated in the appellant's reasons for appeals.—Vail v. McPhail, 83 A. 1075.

(E) Presumptions.

§ 926 (Vt.) It is presumed on appeal that evidence was offered and received on the ground on which it was admissible, in the absence of a showing that it was admitted on other ground.—Lynch's Adm'r v. Murray, 83 A. 746.

§ 927 (Md.) The court on appeal from an order entered on a directed verdict for defendant must assume as true plaintiff's evidence.—Frizzell v. Sullivan, 83 A. 651.

§ 927 (N.J.) In reviewing a refusal to nonsuit or direct a verdict, the testimony will be considered in the aspect which is favorable to de-

fendant in error.—Broome v. New Jersey Conference Camp Meeting Ass'n, 83 A. 901.

§ 928 (Md.) In the absence of error disclosed, the Court of Appeals will presume that the court properly disposed of the prayers.—Jones v. State, 83 A. 1100.

§ 931 (Vt.) Where the facts found by the master in an administration suit to set aside a fraudulent conveyance by decedent to make up a deficiency in assets only permitted the conclusion that the conveyance was with fraudulent intent, it will be presumed on defendant's appeal that the court drew that conclusion.—Lynch's Adm'r v. Murray, 83 A. 746.

In absence of a showing to the contrary, it may be fairly presumed that the master used evidence only for the purpose for which it was properly admissible.—Id.

§ 933 (Conn.) Where the trial court conditioned the setting aside of a verdict on the failure of the plaintiff to file a remittitur of a part thereof, it will be presumed that it was set aside for excessiveness, and not because against the evidence.—Allen v. City of New London, 83 A. 1021.

§ 934 (Vt.) The Supreme Court will presume in favor of the judgment that the trial court inferred such facts from those certified up as it ought to have inferred, or as it fairly might have inferred.—Roberts v. W. H. Hughes Co., 83 A. 807.

(F) Discretion of Lower Court.

§ 956 (Pa.) A ruling on an application for an extension of time to plead or answer will not be reversed in the absence of gross abuse of discretion.—Moore v. Thomas Moore Distilling Co., 83 A. 281.

§ 968 (Vt.) The trial court has a large discretion in impaneling a jury, and its proceedings will not be reviewed in absence of prejudice or violation of some statutory requirement.—State v. Bosworth, 83 A. 657.

§ 969 (Conn.) Error cannot be predicated upon the court's ruling permitting one of the parties to begin the introduction of evidence and open and close the argument, where there is not a clear abuse of discretion.—Howe v. Raymond, 83 A. 627.

§ 970 (Md.) Where the trial court admitted evidence of collateral facts, the court on appeal will not disturb the ruling in the absence of an abuse of discretion.—Maryland Electric Rys. Co. v. Beasley, 83 A. 157.

§ 970 (N.H.) Exclusion of declaration of intestate as to how she caught fire, made an hour after the accident, held to present no question for review on exceptions.—Madden v. Boston & M. R. R., 83 A. 129.

§ 971 (R.I.) The trial court's discretion in determining the competency of an expert witness is not reversible, unless palpably wrong.—Eastman v. Dunn, 83 A. 1057.

§ 977 (Pa.) Where a judgment non obstante verdicto is reversed and a procedendo awarded, so that the court may consider and dispose of the pending motion for a new trial, the grant of a new trial without assigning any reason therefor is not an abuse of discretion which will be reviewed by the Supreme Court.—Duffy v. York Haven Water & Power Co., 83 A. 709.

§ 979 (Conn.) Vacation of a verdict because the damages awarded were excessive will not be interfered with on appeal, in the absence of abuse of discretion.—Allen v. New York, N. H. & H. R. Co., 83 A. 530.

§ 979 (Conn.) Where the action of the trial court in setting aside a verdict as excessive was not unreasonably exercised, it will not be disturbed.—Allen v. City of New London, 83 A. 1021.

§ 979 (Vt.) A motion to set aside a verdict as against the evidence or as against the weight of the evidence held not revisable in the Supreme Court on exceptions.—*Woodsville Guaranty Savings Bank v. Rogers*, 83 A. 537.

§ 982 (Pa.) The question on appeal from an order on application to open a judgment entered on warrant of attorney is whether there has been a proper exercise of judicial discretion.—*Boyd v. Kirch*, 83 A. 366.

(G) Questions of Fact, Verdicts, and Findings.

§ 991 (Pa.) In an action by a city against a street railway for cost of cleaning streets, the fact that the cost was not as large as set forth in an exhibit attached to statement or that the cleaning system was alleged to be extravagant, was not ground for reversal; these being questions of fact for the jury.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

§ 1005 (Md.) In a case properly submitted to a jury under suitable instructions and approved by the trial court, upon motion for a new trial, the verdict is conclusive as to the amount of recovery.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 1005 (R.I.) A verdict, approved by the trial judge, based on conflicting evidence, submitted under proper instructions, will not be interfered with.—*Annis v. Saugy*, 83 A. 19.

§ 1005 (R.I.) Where a verdict on conflicting evidence has been sustained by the judge who presided at the trial, it will not be disturbed on appeal.—*Evans v. Munro*, 83 A. 82.

§ 1005 (R.I.) An approved verdict under suitable instructions on conflicting evidence will not be disturbed, in the absence of a showing of improper motive or error in the approval.—*Shaw v. Streicher*, 83 A. 83.

§ 1005 (R.I.) A verdict supported by evidence and approved by the trial court, who heard the evidence, will not be disturbed by the Supreme Court on exceptions.—*Carey v. Davidson*, 83 A. 753.

§ 1006 (N.J.Sup.) Where the law of the case as settled has been correctly applied, verdict on a third trial will not be set aside, unless without any support in the evidence.—*Anderson v. Public Service Corporation of New Jersey*, 83 A. 769.

§ 1009 (Pa.) Where issue on an accounting turns on an alleged oral agreement, finding of the chancellor on sufficient evidence that there was no such agreement will not be reversed.—*Gibson v. Johnson*, 83 A. 575.

§ 1010 (Conn.) A finding on conflicting evidence and sustained by the testimony of the successful party corroborated by admissions will not be disturbed on appeal.—*Davidson v. Max Ripps Co.*, 83 A. 532.

§ 1010 (N.J.) Findings by the court where a jury has been waived will be sustained if there was evidence supporting them.—*Dreisbach v. Eckelkamp*, 83 A. 175.

§ 1011 (Conn.) Findings of the trial court based on conflicting evidence will not be disturbed on appeal.—*Davidson v. Max Ripps Co.*, 83 A. 532.

§ 1015 (R.I.) The action of the trial judge in granting a new trial on the ground that the verdict was against the evidence, where it does not clearly appear to be erroneous, will not be disturbed.—*Oldham v. Oldham*, 83 A. 265.

§ 1017 (Vt.) In a suit by an administrator to set aside an alleged fraudulent conveyance by decedent, the finding of a master that there was a deficiency of assets when the suit was brought was conclusive, unless reached through a misconception of law.—*Lynch's Adm'r v. Murray*, 83 A. 746.

§ 1022 (Pa.) Where findings of fact by an auditor of the account of a receiver have been approved by the trial court and are without

manifest error, they will not be disturbed by the appellate court.—*Oil Well Supply Co. v. Ulrich Stewart Mfg. Co.*, 83 A. 208.

(H) Harmless Error.

§ 1033 (Md.) A party cannot complain of modifications in instructions requested by him lessening the burden of proof placed on him in the instructions.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 1048 (Md.) In an action for negligence causing the running away of plaintiff's mules and his consequent injury, cross-examination of the driver of the defendant's wagon from which the bales of paper which caused the fright fell onto the public highway, as to his duty in regard to such bales, and his reply that he went after them if his employer sent him, would not prejudice the cause of the defendant and was harmless though not touched on in chief.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 1048 (R.I.) The refusal of the trial court to allow a witness' memory to be refreshed so as to correct his testimony which was confusing as to an immaterial detail is not error.—*Eastman v. Dunn*, 83 A. 1057.

§ 1050 (N.J.) Testimony by plaintiff as to his willingness to finish a contract with the general contractor of defendant on the credit of the general contractor, where plaintiff had previously testified that he refused to perform the work, was not prejudicial to the defendant.—*Mulholland v. Jones*, 83 A. 875.

§ 1050 (R.I.) In assumpsit for work and materials consumed in building steps on defendant's estate, the erroneous admission of a question as to whether defendant ultimately intended to have steps built was harmless, though erroneous.—*Clary v. Wolf*, 83 A. 115.

§ 1051 (Pa.) In view of admissions of defendant street railway in action by city for cost of cleaning streets that it had assumed such expense, admission in evidence of charters of underlying companies imposing such charge was not harmful to defendant.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

§ 1051 (Pa.) In an action for overcharge of freight rates, where there is other ample testimony to sustain a finding that it would have been practicable to have weighed the potatoes shipped, the error in admitting testimony as to the contents of record showing that some cars had been actually weighed was harmless.—*Joynes v. Pennsylvania R. Co.*, 83 A. 318.

§ 1053 (Conn.) Instructions in action for personal injuries held to limit plaintiff's recovery as to future damages to those which were reasonably probable, and therefore cured the erroneous admission of evidence of possible injuries.—*Johnson v. Connecticut Co.*, 83 A. 530.

§ 1056 (Md.) In an action for the death of a person by a train, the exclusion of evidence held not prejudicial.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

§ 1062 (N.J.) Under pleadings in an action for the price of a printing press, submission to jury of question whether defendant waived performance of condition by plaintiff held not harmful to defendant.—*Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co.*, 83 A. 969.

§ 1064 (N.J.) An instruction on the measure of damages in an action for death held not prejudicial where, under any rational interpretation, the result would be to award plaintiff less than she was entitled to.—*Danskin v. Pennsylvania R. Co.*, 83 A. 1006.

§ 1066 (Pa.) It is harmless error for the trial judge to refer to the "weight" and "preponderance" of the evidence where defendant introduced no testimony.—*Joynes v. Pennsylvania R. Co.*, 83 A. 318.

§ 1068 (Md.) Where plaintiff recovered a verdict for one cent, the court on defendant's appeal would not review the instructions on the

measure of damages.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 1071 (Conn.) Where the court properly held that there was a sufficient written memorandum of a contract for one year's employment to satisfy the statute of frauds, a finding, unsupported by the evidence, that the oral agreement made before the employment commenced was orally renewed the day it commenced, was harmless.—*Grant v. New Department Mfg. Co.*, 83 A. 212.

In an action by an employé for wrongful discharge, the burden being on defendant to show in mitigation of damages that plaintiff did or could not have obtained other employment, a finding that defendant was not able to obtain other employment, though not supported by any evidence offered by either party, was harmless error.—*Id.*

(I) Error Waived in Appellate Court.

§ 1078 (Md.) An exception to the direction of a verdict in favor of one of the defendants, which is not questioned on appeal, will be regarded as having been waived.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 1078 (Md.) An exception to the court's ruling on evidence, not adverted to in the argument or in the brief, and which does not present any matter of importance, may be treated as abandoned.—*Mullen v. Brydon*, 83 A. 1025.

§ 1078 (Vt.) Exceptions shown by the transcript or bill of exceptions, but not relied upon by the appellant in his brief, will not be reviewed.—*Duggan v. Heaphy*, 83 A. 726.

§ 1078 (Vt.) Only the grounds of objection and the admission of evidence made and relied on in appellant's brief may be considered.—*Lynch's Adm'r v. Murray*, 83 A. 746.

(K) Subsequent Appeals.

§ 1099 (Pa.) Where the trial court ordered a new trial unconditionally after reversal of a judgment non obstante veredicto, the Supreme Court on another appeal will assume that this was done in the exercise of a sound discretion with a view to accomplish the ends of justice, and will not review such action.—*Sloan v. Philadelphia & R. Ry. Co.*, 83 A. 604.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1144 (Pa.) Where trial court in partition fails to determine indebtedness to be charged against one share, the appellate court will, on affirming, remit the cause to have such indebtedness ascertained.—*Dunshee v. Dunshee*, 83 A. 422.

(C) Modification.

§ 1154 (R.I.) A motion by plaintiff, in the Supreme Court, to increase its ad damnum will not be entertained on a hearing to show cause why judgment should not be entered for it.—*J. P. Morgan & Co. v. Hall & Lyon Co.*, 83 A. 401.

(D) Reversal.

§ 1170 (Md.) Code Pub. Gen. Laws 1904, art. 5, § 17, forbidding reversal if there is one good count, will not prevent the reversal of a judgment clearly based upon a bad count for damages of a declaration containing good counts for debt.—*Parks v. Griffith & Boyd Co.*, 83 A. 559.

§ 1173 (Md.) An order granting a new trial as to two defendants will not be treated as a judgment of a court of law which could not be reversed as to one and affirmed as to the other.—*Gross v. Wood*, 83 A. 337; *Wood v. Rosenheim*, *Id.* 341.

§ 1175 (Pa.) In the absence of an assignment of error complaining of judgment for plaintiff

appealed from, final judgment on reversal would not be rendered for defendant, though plaintiff had produced no evidence sufficient to sustain the verdict.—*Sulzner v. Cappeau-Lemley & Miller Co.*, 83 A. 103.

§ 1178 (Pa.) In an action for detention of a shipment, where the court entered a judgment for defendant non obstante veredicto, the judgment will be reversed and venire facias de novo awarded to secure a trial on issues involved.—*Joynes v. Pennsylvania R. Co.*, 83 A. 1016.

(F) Mandate and Proceedings in Lower Court.

§ 1197 (Pa.) On reversal of judgment non obstante veredicto and remittitur with directions to enter such judgment as law and right require, the trial court held authorized to take such action as in its judgment law and right require.—*Sloan v. Philadelphia & R. Ry. Co.*, 83 A. 604.

§ 1198 (Del.Super.) The Superior Court had no power, after the Supreme Court had directed the issuance of peremptory writ of mandamus, except to issue the writ.—*State v. Jessup & Moore Paper Co.*, 83 A. 30.

Under mandate of the Supreme Court, directing issuance of peremptory writ of mandamus requiring corporation to permit the stockholder to examine and make copies of such books, papers, and writings as under direction of the Superior Court might be found essential to furnish information as to the value of the stock, the writ would require the corporation to permit the stockholder to examine and make copies of the company's general ledgers and balance sheets, submitted by the company to the directors, but not to inspect the directors' minutes, or make copies of the names of customers.—*Id.*

§ 1214 (N.H.) The reversal of former verdict for plaintiff on the ground that direction of a verdict for plaintiff only in the amount of a carrier's limited liability contract was erroneous does not, on retrial, entitle plaintiff to recover merely on proof of the amount of his damage.—*L. T. & J. E. Lovell v. Boston & M. R. R.*, 83 A. 97.

APPLIANCES.

See Carriers, § 292; Master and Servant, §§ 101-103, 107, 123, 125, 127, 187, 189, 203, 205, 217, 221, 236, 265, 286.

APPLICATION.

See Executors and Administrators, § 339; Insurance, §§ 379, 646, 665; Payment, § 39.

APPRAISEMENT.

See Insurance, § 574.

ARBITRATION AND AWARD.

See Eminent Domain, § 238.

ARGUMENT OF COUNSEL.

See Trial, § 121.

ARREST.

See Assault and Battery, § 29; Bankruptcy, § 392; False Imprisonment; Witnesses, § 414.

ARREST OF JUDGMENT.

See Criminal Law, § 972.

ASSAULT AND BATTERY.

See Criminal Law, §§ 419, 420, 1169; Trial, § 252.

I. CIVIL LIABILITY.**(A) Acts Constituting Assault or Battery and Liability Thereof.**

§ 3 (R.I.) An action for assault and battery is based on willful and intentional acts and not upon negligence.—Baran v. Silverman, 83 A. 263.

(B) Actions.

§ 29 (N.J.) In an action for assault committed in arresting plaintiff, where defendant pleads justification and no element of malice is involved, evidence as to reputation of defendant as to peacefulness is inadmissible.—Rittenhoffer v. Cutter, 83 A. 873.

II. CRIMINAL RESPONSIBILITY.**(B) Prosecution and Punishment.**

§ 92 (Del.Gen.Sess.) In a prosecution for wife beating, proof by the prosecutrix of her marriage to the defendant *held* sufficient to go to the jury on the question of defendant's guilt.—State v. Adams, 83 A. 936.

ASSESSMENT.

See Damages, § 216; Taxation, §§ 441-499.

ASSETS.

See Executors and Administrators, § 57; Partnership, § 330.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 722-742; Criminal Law, § 1129.

ASSIGNMENTS.

See Assignments for Benefit of Creditors; Corporations, § 114; Covenants, § 57; Dower, § 55; Evidence, § 353; Mechanics' Liens, § 113; Mortgages, §§ 119, 593; Municipal Corporations, § 347; Sales, § 405.

I. REQUISITES AND VALIDITY.**(B) Mode and Sufficiency of Assignment.**

§ 48 (Md.) Any words or transactions which show intention on one side to assign and on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment.—Kretzer v. Lorshbaugh, 83 A. 1027.

III. RIGHTS AND LIABILITIES OF PARTIES.

§ 94 (Pa.) The right of an assignee of damages resulting from the vacation of a street can rise no higher than that of his assignor.—In re Pulaski Ave., 83 A. 687.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy; Insolvency; Mortgages, § 61.

I. REQUISITES AND VALIDITY.**(E) Fraud.**

§ 145 (Md.) A mortgage executed by a husband to his wife, to be by her assigned to a trustee for the benefit of certain of the husband's creditors, *held* void if treated as an assignment for the benefit of creditors as fraudulent.—Ressmeyer v. Norwood, 83 A. 347.

ASSOCIATIONS.

See Charities, §§ 20, 39, 48; Insurance, §§ 770, 784; Quo Warranto.

ASSUMPSIT, ACTION OF.

See Action, §§ 44, 45; Appeal and Error, §§ 231, 1050; Contracts, §§ 28, 349, 350; Money Received; Trial, §§ 252, 307; Work and Labor.

§ 23 (N.H.) Where plaintiff's good faith was not questioned, the exclusion of evidence on such subject was not error.—Fellows v. Champion International Co., 83 A. 1091.

ASSUMPTION.

Of risk, see Master and Servant, §§ 203-224, 236.

ATTACHMENT.

See Bankruptcy, § 195; Beneficial Associations; Execution; Garnishment.

II. PROPERTY SUBJECT TO ATTACHMENT.

§ 50 (R.I.) Under Gen. Laws 1909, c. 246, §§ 1, 8, 12, an estate of tenancy by the curtesy initiate is not attachable, and a creditor who attaches it and purchases, the interest becoming curtesy consummate, acquires no title.—Carroll v. Sanford, 83 A. 855.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

§ 178 (R.I.) Rights of attaching creditors must be determined by the state of the title at the time of the attachment, and in the absence of fraud and statutory regulation they only obtain the rights which the debtor had in the property at such time.—Carroll v. Ryder, 83 A. 845.

IX. RETURN.

§ 322 (Md.) An officer's return of an attachment levied on certain land *held* not fatally defective for want of a sufficient description.—Ressmeyer v. Norwood, 83 A. 347.

ATTORNEY AND CLIENT.

See Criminal Law, § 706; Executors and Administrators, § 456; Husband and Wife, § 19, 295; Malicious Prosecution, § 25; Municipal Corporations, § 1026; Pleading, § 348; Stipulations; Towns, § 29; Trial, § 121; Witnesses, § 199.

II. RETAINER AND AUTHORITY.

§ 86 (R.I.) Retainer of an attorney for defendant gives him no implied authority to waive the prosecution of a claim against defendant according to law.—Andrews v. O'Reilly, 83 A. 119.

ATTORNEY GENERAL.

See Quo Warranto.

AUTHORITY.

See Attorney and Client, § 86.

AUTOMOBILES.

See Highways, § 184; Insane Persons, § 80; Negligence, § 92; New Trial, § 70; Railroads, § 327.

BAGGAGE.

See Carriers, §§ 397½, 413.

BAILMENT.

See Banks and Banking, §§ 133, 136; Carriers, §§ 94-202.

§ 18 (Me.) Defendant *held* to have no common-law lien for charges for storing plaintiff's hay.—Lewis v. Gray, 83 A. 1.

BALLOTS.

See Elections, §§ 126-194, 314, 321, 329.

BANKRUPTCY.

See Assignments for Benefit of Creditors; Bills and Notes, § 97; Contracts, § 310; False Imprisonment, § 8; Insolvency.

II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

(C) Involuntary Proceedings.

§ 57 (R.I.) Under Bankr. Act. July 1, 1898, § 1, subd. 15, whether a person was insolvent at the time of a mortgage and assignment of debts to his wife *held* to be determined by the market value of his property, rather than its value to him.—Ziegler v. Thayer, 83 A. 266.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 142 (Pa.) Under Act Cong. June 25, 1910, amending Bankrupt Act, § 47, trustee in bankruptcy of borrower *held* entitled to take possession of automobiles taken by bank under agreement to take title as security for loan.—Bank of North America v. Penn Motor Car Co., 83 A. 622.

Trustee in bankruptcy *held* to have same right during four months immediately preceding filing of petition in bankruptcy to possession of automobiles pledged which an unsatisfied execution creditor would have had if they had been in the possession of the pledgor.—Id.

(C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

§ 184 (R.I.) Under Gen. Laws 1909, c. 258, § 10, a mortgage and assignment of book accounts made after insolvency *held* subject to be voided by a trustee in bankruptcy.—Ziegler v. Thayer, 83 A. 266.

§ 195 (Md.) Liens under attachment proceedings obtained more than four months prior to the institution of proceedings in bankruptcy against the debtor were valid as against his trustee.—Ressmeyer v. Norwood, 83 A. 347.

§ 211 (Pa.) Where a contractor is adjudicated a bankrupt before fund paid by owner of building into court is turned over to trustee in bankruptcy, the court should pass on claims arising under the mechanic's lien act.—In re Wilkinsburg Borough School Dist., 83 A. 410.

(D) Administration of Estate.

§ 268 (Vt.) Where a trustee in bankruptcy announced at a sale of corporate stock all the facts including the existence of an unrecorded mortgage on the property of the bankrupt, which had been conveyed to the corporation to enable the bankrupt to continue his business, a purchaser acquired no better title than the bankrupt.—Roberts v. W. H. Hughes Co., 83 A. 807.

(E) Actions by or Against Trustee.

§ 304 (Pa.) In an action by a trustee in bankruptcy for value of bonds alleged to have been wrongfully taken from the bankrupt by defendant, evidence *held* to present a case for the jury.—Page v. Moore, 83 A. 580.

V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

§ 392 (Me.) Bankruptcy Act July 1, 1898, § 3, which provides that a bankrupt shall be exempt from civil arrest, should be construed to exempt from arrest made after a bankruptcy petition is filed, and not to apply to an arrest on civil process properly made before filing of the petition.—Turgeon v. Bean, 83 A. 557.

BANKS AND BANKING.

See Bankruptcy, § 142; Bills and Notes, § 366; Corporations, § 388; Frauds, Statute of, § 23; Garnishment, § 56; Husband and Wife, § 49½.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 108 (Pa.) The discounting of commercial paper cannot be delegated to a single officer of a bank, but is the function of the directors.—Mutual Trust Co. v. Stern, 83 A. 614.

§ 108 (Vt.) A director of a bank who consulted with the trustees in session as a body as to the making of a loan by the bank to a third person and who did business in the rooms of the bank had authority to act for the bank in making the loan.—Woodsville Guaranty Savings Bank v. Rogers, 83 A. 537.

(C) Deposits.

§ 133 (Pa.) Notwithstanding printed regulation in deposit book issued by bank that the deposit could only be withdrawn on four months' notice, a verdict and judgment for the bank in an action to recover the deposit *held* proper in view of agreement between bank and depositor to leave the deposit until a certain note was paid.—Thompson v. Hazelwood Savings & Trust Co., 83 A. 284.

An agreement by a depositor to permit his deposit to remain in the bank till the note of a corporation of which he was president should be paid, if the bank would grant a renewal of the note, was supported by sufficient consideration.—Id.

An agreement by a depositor to permit his deposit to remain in the bank till the note of a corporation of which he was president should be paid, the note being for a fixed period, was not void for uncertainty.—Id.

§ 136 (Pa.) An agreement that a bank deposit should remain in the bank till a note of a corporation of which the depositor was president should be paid amounted to a pledge and gave the bank a lien on the deposit till the note should be paid in full.—Thompson v. Hazelwood Savings & Trust Co., 83 A. 284.

BAR.

See Limitation of Actions.

BASTARDS.

See Contracts, § 128; Judgment, § 416.

III. PROCEEDINGS UNDER BASTARDY LAWS.

§ 35 (Del.Super.) Where a bastard child was not born in Delaware, and its mother did not reside there, it had no settlement in that state, under Rev. Code 1852, amended to 1893, p. 375, c. 48, § 12, and the courts had no jurisdiction of bastardy proceedings against the father.—State v. Bowdle, 83 A. 1084.

§ 85 (Del.Super.) The bond which the law exacts from the father when paternity of a bastard is established is to indemnify the state in the event of the child becoming a charge on it.—State v. Bowdle, 83 A. 1084.

IV. PROPERTY.

§ 102 (Md.) Under Code Pub. Gen. Laws 1904, art. 93, § 133, and article 46, §§ 27, 30, an illegitimate child whose mother was dead *held* entitled to inherit from the mother's deceased sister.—Barron v. Zimmerman, 83 A. 258.

BATTERY.

See Assault and Battery.

BELLS.

See Master and Servant, § 137; Railroads, §§ 347, 350.

BENEFICIAL ASSOCIATIONS.

See Insurance, §§ 770, 784.

§ 16 (Pa.) The majority of the members of a subordinate division of a benefit association cannot carry the division and its property over to another society against the will of the minority.—*Kayley v. McCourt*, 83 A. 830.

BEST AND SECONDARY EVIDENCE.

See Evidence, §§ 158, 185.

BIDS.

See Municipal Corporations, § 990; Schools and School Districts, § 80.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF PARTICULARS.

See Appeal and Error, § 193.

BILLS AND NOTES.

See Banks and Banking, §§ 108, 133, 136; Corporations, § 388; Estoppel, § 78; Judgment, § 68; Jury, § 95; Novation; Pleading, § 348; Principal and Surety, § 175; Trusts, § 282.

I. REQUISITES AND VALIDITY.

(B) Consideration.

§ 97 (Vt.) Where one received a note for which he agreed to procure a loan for the maker, and he procured some loans and indorsed notes therefor, the note so received was supported by a sufficient consideration, though he failed to fully perform the contract, and the failure was excused by the bankruptcy of the maker.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

II. CONSTRUCTION AND OPERATION.

§ 116 (Me.) In the absence of agreement to the contrary, the parties to a note are presumed to have contracted liability according to the legal effect of the instrument.—*Canney v. Corey*, 83 A. 662.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 242 (Vt.) Strangers to a note, who sign their names on the back thereof, become prima facie makers.—*Woodville Guaranty Savings Bank v. Rogers*, 83 A. 537.

(D) Bona Fide Purchasers.

§ 340 (Pa.) Knowledge of indorsee before maturity, for valuable consideration, that makers of note were married women *held* not to deprive him of right to rely on implied guaranty of indorser that makers were competent to contract.—*In re Young's Estate*, 83 A. 201.

§ 366 (Pa.) Where a bank discounts a note by a wife to her husband's order, which is indorsed by him, the bank having knowledge that she is a surety, and on the lunacy of the husband the bank takes from the wife a new note made by her, indorsed to her sister, and after several renewals thereof the sister dies, her administrator cannot resist payment, on the ground of the invalidity of the original note as against the wife, under Act May 16, 1901 (P. L. 202) § 57, providing that a holder in due course holds the instrument free from any defect of title of prior parties, and from defenses available to private parties among themselves, and section 66, providing that every unqualified indorsement shall be held to warrant that the instrument is genuine, that the indorser has good title, and that all prior parties had capacity to contract.—*In re Young's Estate*, 83 A. 201.

VIII. ACTIONS.

§ 483 (Pa.) An affidavit of defense in an action by a trust company on a note, that plaintiff violated its agreement to renew the note, but not alleging that plaintiff's executive officer, who was alleged to have made the agreement, had any authority to do so, *held* insufficient.—*Mutual Trust Co. v. Stern*, 83 A. 611.

§ 504 (Vt.) Testimony of one who signed his name on the back of a note that the payee told the maker that he could obtain a loan if he could get two indorsers, one of whom should be witness, and that witness signed with another as indorser, *held* admissible to show that witness assumed the liability of indorser only.—*Woodville Guaranty Savings Bank v. Rogers*, 83 A. 537.

§ 537 (Vt.) Whether persons signing their names on the back of a note were makers or indorsers *held* for the jury.—*Woodville Guaranty Savings Bank v. Rogers*, 83 A. 537.

BOARD OF HEALTH.

See Health.

BOARDS.

See Appeal and Error, § 374; Carriers, § 10; Constitutional Law, § 63; Elections, §§ 194, 321; Health; Highways, § 96; Municipal Corporations, § 48; Officers, §§ 4, 69; Schools and School Districts, §§ 69, 80, 103, 139; States; Statutes, § 126; Taxation, §§ 482, 491; Towns, § 45.

BONA FIDE PURCHASERS.

See Bills and Notes, §§ 340, 366; Vendor and Purchaser, § 230.

BONDS.

See Appeal and Error, § 374; Bankruptcy, § 304; Bastards, § 85; Contracts, §§ 113, 128; Corporations, §§ 479, 480, 685; Executors and Administrators, §§ 531-537; Husband and Wife, § 49½; Insolvency, § 83; Intoxicating Liquors, § 87; Judgment, § 67; Malicious Prosecution, § 10; Mortgages, § 218; Municipal Corporations, §§ 64, 347, 911, 918; Payment, § 65; Principal and Surety; Trusts, § 161.

V. ACTIONS.

§ 132 (N.J.Sup.) Proof by the subscribing witness of his signature to a bond is prima facie evidence of the due execution of the instrument.—*Conlon v. Hornstra*, 83 A. 183.

BOULEVARDS.

See Statutes, §§ 64, 80, 107, 113.

BOUNDARIES.

See Deeds, §§ 171, 176; Easements, § 51; Frauds, Statutes of, § 110.

BOUNTIES.

See Executors and Administrators, § 490.

BREACH.

See Contracts, §§ 810, 324-350; Sales, §§ 262½, 263, 404-428.

BREACH OF THE PEACE.

See Disorderly Conduct.

BRIBERY.

See Criminal Law, § 448; Witnesses, § 330.

§ 10 (N.J.Sup.) On the trial of accused for soliciting a bribe as the consideration of his vote for the reappointment of prosecutor as principal of a public school, evidence of the rating of the prosecutor as shown by the re-

port of the supervising principal *held* admissible on the issue of accused's motive in voting against the reappointment.—*State v. Merkle*, 83 A. 186.

BRIDGES.

See Eminent Domain, § 9; Master and Servant, §§ 185, 265.

BRIEFS.

See Appeal and Error, §§ 730, 761, 1078.

BROKERS.

See Evidence, § 545.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 33 (Me.) Payment for corporate shares to a stock brokerage firm *held* not to give the buyer priority as to his claim for return of the money on receivership proceedings against the firm before the stock could be secured elsewhere.—*Fogg v. Tyler*, 83 A. 664.

V. ACTIONS FOR COMPENSATION.

§ 88 (Me.) Under the evidence, *held* a jury question whether defendant promised to pay plaintiff for the services rendered.—*Thompson v. Soule*, 83 A. 1103.

An instruction on the method of ascertaining the amount of recovery *held* proper.—*Id.*

BUILDING CONTRACTS.

See Contracts, §§ 44, 282, 287, 322, 324, 349.

BUILDINGS.

See Counties; Frauds, Statute of, § 138; Health, § 38; Nuisance.

BUSINESS.

See Good Will.

BY-LAWS.

See Corporations, § 432.

CANCELLATION OF INSTRUMENTS.

See Pleading, § 193; Vendor and Purchaser, § 334; Wills, §§ 173, 174.

I. RIGHT OF ACTION AND DEFENSES.

§ 24 (Conn.) A person seeking a reconveyance of land conveyed with knowledge in the grantee of the grantor's incapacity *held* not obliged to make a tender of consideration.—*Beckwith v. Cowles*, 83 A. 1113.

CAPITAL.

See Life Estates, § 15.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

See Appeal and Error, §§ 1051, 1178, 1214; Evidence, §§ 67, 153; False Imprisonment, §§ 7, 15; Pleading, § 248; Railroads; Trial, § 253.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 10 (N.J.Sup.) An order by the Board of Public Utility Commissioners requiring tickets for intrastate commutation service, showing both termini and the same as to special intrastate rates, was within the jurisdiction of the Board under Public Utility Law (P. L. 1911, p. 374), if its determination as to the existence

of regulations and practices that are unjust and unreasonable and the subjection of persons and localities to prejudice and disadvantage is sustained by proof.—*Pennsylvania R. Co. v. Board of Public Utility Com'rs*, 83 A. 945.

An order of the Board of Public Utility Commissioners requiring tickets showing both termini for intrastate commutation service or where special rates are granted is within the jurisdiction of the board where the companies refuse to sell or quote rates for the commutation or special rate tickets, except school tickets, to intrastate passengers to their termini, and require the passengers to take tickets reading to and from New York City.—*Id.*

An order of the Board of Public Utility Commissioners *held* not to require the establishment of a commutation service by railroads, but merely to require that tickets shall be sold for an existing service designating specifically the termini of the journey, and that the rates be quoted and filed.—*Id.*

An order of the Board of Public Utility Commissioners *held* not to involve the exercise of the power by the state to compel railroad companies to issue commutation or other special forms of tickets, but merely the power to end unjust discrimination.—*Id.*

§ 13 (N.J.Sup.) Public Utility Law (P. L. 1911, p. 374) is not merely declaratory of the commutation law, but forbids the giving to any locality any unreasonable preference or the subjection of any locality to any prejudice.—*Pennsylvania R. Co. v. Board of Public Utility Com'rs*, 83 A. 945.

II. CARRIAGE OF GOODS.

(D) Transportation and Delivery by Carrier.

§ 94 (Pa.) Where plaintiff delivered to an initial carrier 10 cases of rugs, 1 consigned to a point on the line of the initial carrier and 18 to a point on the line of the terminal carrier, and only 17 were delivered at such point, and two employes of the initial carrier testified that 17 cases only were delivered at the point on the terminal line, and that the word "eighteen" in the bill of lading was a mistake, the question is for the jury.—*Siyufy v. Pennsylvania Co.*, 83 A. 279.

(E) Delay in Transportation or Delivery.

§ 95 (Pa.) A carrier is bound to do all that is reasonable and, use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business.—*Joynes v. Pennsylvania R. Co.*, 83 A. 1016.

§ 99 (Pa.) A carrier failing to notify shipper of probable delay in shipment by reason of its having unexpectedly received more business than it can accommodate is bound to transport the goods within reasonable time notwithstanding emergency.—*Joynes v. Pennsylvania R. Co.*, 83 A. 1016.

§ 106 (Pa.) Where a carrier seeks to excuse failure to transfer cars of potatoes to the yard where they were to be delivered because of extraordinary demands and condition of traffic, a question of fact is presented.—*Joynes v. Pennsylvania R. Co.*, 83 A. 1016.

In an action for detention of shipment of potatoes in outer yard, the question whether the railroad had done all it could to provide facilities in produce yard was for the jury, and it was error to instruct that, if plaintiff and the other dealers helped to block the produce yard after expiration of free days, plaintiff could not recover.—*Id.*

(H) Limitation of Liability.

§ 165 (N.J.Sup.) Where there was no evidence that limitation of a carrier's liability was called to the shipper's attention, and there was evidence that neither the shipper's attention nor that of her agent was called to it, the common-

law liability of the carrier prevailed, and it was not qualified by the limitation in the receipt.—*Wichern v. United States Express Co.*, 83 A. 778.

(D) Connecting Carriers.

§ 187 (Pa.) Whether a contract for through transportation was made with defendant terminal company, or a contract for line terminal transportation with the initial carrier, *held* for the jury, in an action for loss of perishable freight.—*Catanzaro v. Pennsylvania R. Co.*, 83 A. 64.

Plaintiff, having contracted for the transportation of fruit with defendant terminal carrier, gave the initial carrier orders on its blanks for the shipment of the goods routed over defendant's line, and thereafter accepting receipts or bills of lading which plaintiff's agent testified was a mere matter of form, and given, as he supposed, pursuant to the contract with defendant. *Held*, that the contract with defendant was not thereby abandoned or modified as a matter of law, so as to preclude recovery against the terminal company for loss of the fruit.—*Id.*

(K) Discrimination and Overcharge.

§ 202 (Pa.) In an action against a railroad for overcharge of freight rates on potatoes, where the official tariff of rates stated that, when it was "practicable" for the potatoes to be weighed, they should be charged for at the actual weight, but when it was not "practical" to weigh them, estimated weights should govern, and the evidence shows that the railroad had ample facilities at various points to weigh the potatoes either by hand scales or track scales, a verdict and judgment for plaintiff will be sustained.—*Joynes v. Pennsylvania R. Co.*, 83 A. 818.

IV. CARRIAGE OF PASSENGERS.

(A) Relation Between Carrier and Passenger.

§ 238 (Pa.) Decedent killed while forcing his way on car from wrong side *held* not a passenger.—*Geiger v. Pittsburgh Rys. Co.*, 83 A. 367.

(C) Performance of Contract of Transportation.

§ 269 (N.J.) The Public Service Railway Company is not required under the ordinance of the city of Newark to give retransfers.—*Public Service Ry. Co. v. Board of Public Utility Com'rs*, 83 A. 903.

(D) Personal Injuries.

§ 280 (N.J.) A common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate.—*Rivers v. Pennsylvania R. Co.*, 83 A. 883.

By foresight is meant not foreknowledge absolute nor that exactly such an accident was apprehended, but that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care cannot prevent.—*Id.*

§ 290 (N.J.) A railroad company is under no legal obligation to provide vestibuled trains for its passengers, but, having done so, it is its duty to use reasonable care to maintain them in a safe condition.—*Rivers v. Pennsylvania R. Co.*, 83 A. 883.

When a railroad has assumed to safeguard passengers using the vestibule between cars by providing a trapdoor, it is bound to use reasonable care to maintain it in proper position.—*Id.*

§ 292 (Conn.) Where injuries to a passenger, caused by the breaking of a brake rod, were due to the carrier's failure to properly inspect and maintain the brakes of the car, it was liable for the injuries.—*De Cecco v. Connecticut Co.*, 83 A. 215.

§ 314 (R.I.) Plaintiff's declaration alleging that defendant was the owner of an electric railroad, that plaintiff in the exercise of due care was being carried as a passenger in a wagon driven by a driver over whom plaintiff had no control, and that defendant suddenly, without notice, operated one of its cars approaching the wagon from the rear, and so negligently managed the car that it struck the wagon, so that plaintiff was thrown therefrom with great violence and injured, sufficiently charged actionable negligence in that defendant so operated its car without notice or warning as to come into collision with the vehicle in which plaintiff was riding.—*Galvin v. Rhode Island Co.*, 83 A. 330.

§ 320 (N.J.) In an action for injuries to a passenger thrown to the ground because the trapdoor in the vestibule platform was left open, the negligence of the defendant *held* a question for the jury.—*Rivers v. Pennsylvania R. Co.*, 83 A. 883.

Whether a railroad could have anticipated that a passenger would, when within four-fifths of a mile from the end of his journey, attempt to pass to another car of the vestibuled train to look for another seat, *held* a question for the jury.—*Id.*

§ 321 (Pa.) In action for death of a beer wagon driver attempting to board street car for the alleged purpose of lodging a complaint at the car barns, the outcome of an altercation, submission of question whether decedent was an actual or intending passenger, without instructions as to what constituted such, *held* error.—*Geiger v. Pittsburgh Rys. Co.*, 83 A. 367.

In an action for death of an alleged passenger, it was error to leave it to the jury to say whether decedent's injury resulted from his being struck by the motorman without giving instructions as to the scope of the motorman's employment.—*Id.*

(E) Contributory Negligence of Person Injured.

§ 324 (N.J.) General Railroad Law, § 39, does not preclude recovery for an injury to a passenger using the platform of a vestibuled train to go to the next car to obtain a seat.—*Rivers v. Pennsylvania R. Co.*, 83 A. 883.

§ 331 (Pa.) A passenger who stood in the doorway of a crowded passenger car when the adjoining coach was empty could not recover for injuries from being thrown by a jolt.—*Shive v. Philadelphia & R. Ry. Co.*, 83 A. 707.

(F) Ejection of Passengers and Intruders.

§ 356 (N.H.) Where a passenger was ejected, first, because his ticket had expired, and, second, because he refused to pay fare, except with a ticket from the point of junction to destination, he was entitled to recover, if he thought his original ticket was good, but not if he knew it was worthless.—*Whittemore v. Boston & M. R. R.*, 83 A. 125.

(G) Passengers' Effects.

§ 397½ (Pa.) A carrier is an insurer of baggage delivered into its possession against all losses, save those from the act of God or public enemy.—*Springer v. Pullman Co.*, 83 A. 98.

(H) Palace Cars and Sleeping Cars.

§ 413 (Pa.) For the loss of personal effects which the passenger retains in his possession while occupying a berth in a sleeping car the carrier is only liable for negligence.—*Springer v. Pullman Co.*, 83 A. 98.

§ 417 (Pa.) Evidence *held* insufficient to establish actionable negligence on the part of the sleeping car employes as a matter of law.—*Springer v. Pullman Co.*, 83 A. 98.

CAUSE OF ACTION.

See Action; Malicious Prosecution, § 25.

CAVEATS.

See Injunction, § 28.

CERTAINTY.

See Damages, § 6; Injunction, §§ 58, 134, 137.

CERTIFICATE.

See Contracts, § 287; Corporations, §§ 642, 657, 661, 685; Justices of the Peace, § 164.

CERTIORARI.

See Municipal Corporations, § 192; Newspapers.

I. NATURE AND GROUNDS.

§ 26 (N.J.Sup.) The review by certiorari of a resolution of a city council directing payment of a claim is not defeated by the fact that the warrant for such claim has been cashed, as it is possible that the city can recover back the money.—Fagan v. City of Hoboken, 83 A. 772.

II. PROCEEDINGS AND DETERMINATION.

§ 45 (N.J.Sup.) In certiorari to review municipal action, the names of parties other than the municipality should appear not in the body of the writ, but only on its indorsement.—Zeller v. Town of Guttenberg, 83 A. 466.

§ 56 (Me.) Where the record fails to show the grounds alleged therein for attack upon the record sought to be affected and the grounds for the denial of the writ, the petitioner is not estopped from collaterally attacking the record for want of jurisdiction.—Ford v. Erskine, 83 A. 455.

§ 69 (Me.) Under Rev. St. c. 104, §§ 14, 15, on denial of a petition for certiorari, it is improper to affirm the record sought to be quashed; issuance of a writ being essential to any judgment affirming, modifying, or quashing the record.—Ford v. Erskine, 83 A. 455.

CHANCERY.

See Equity.

CHANGE OF GRADE.

See Highways, §§ 115, 118.

CHANGE OF VENUE.

See Venue, § 70.

CHARACTER.

See Libel and Slander, § 16.

CHARGE.

To jury, see Criminal Law, §§ 751-834, 922; Trial, §§ 187-296.

CHARITIES.

See Taxation, § 241.

I. CREATION, EXISTENCE, AND VALIDITY.

§ 1 (Pa.) A charity is a gift to be applied for the benefit of an indefinite number of persons.—In re Centennial and Memorial Ass'n of Valley Forge, 83 A. 683.

§ 4 (N.H.) It is no objection to the validity of a charitable gift that it is made up of several parts which are to be administered together, the income to be divided in the discretion of the trustee.—Glover v. Baker, 83 A. 916.

Gift to trustees of a Christian Science church for the promotion of the doctrines of Christian Science held not illegal, as a violation of Laws 1901, c. 16, § 2, or Laws 1897, c. 63, section 11

of which expressly excludes from its restriction persons practicing "Christian Science so-called."—Id.

§ 10 (N.H.) A gift for the benefit of the public generally is valid.—Glover v. Baker, 83 A. 916.

A gift to a Christian Science church in trust for the promotion of Christian Science held valid as a gift for a general public use.—Id.

§ 12 (N.H.) One interested in an educational scheme that might be legally published and promoted in his lifetime held entitled to extend and promote it by publishing his writings or other lawful means after his death.—Glover v. Baker, 83 A. 916.

§ 13 (N.H.) A gift in trust for the repair of a church and for the repair of church buildings held valid.—Glover v. Baker, 83 A. 916.

In determining the validity of a charity, there is no distinction between the promotion of "piety" and of "religion"; the two words being synonymous.—Id.

A gift to trustees of a Christian Science church for the promotion of the doctrines of Christian Science held not invalid as a charity, because the promotion of Christian Science was in some sense a business owned and carried on by the church.—Id.

Where the necessary effect of a gift in trust to a Christian Science church for the promotion of Christian Science would be to enrich any private owners thereof, the gift could not be sustained as a charity.—Id.

§ 19 (Md.) In an action to declare a charitable trust, a trustee held sufficiently designated.—Book Depository of Baltimore Annual Conference of Methodist Episcopal Church v. Trustees of Church Rooms Fund of Methodist Episcopal Church, 83 A. 50.

A trustee need not be specified by name or the word "trustee" used.—Id.

§ 20 (Md.) That beneficiaries are unincorporated held not to prevent the establishment of a charitable trust.—Book Depository of Baltimore Annual Conference of Methodist Episcopal Church v. Trustees of Church Rooms Fund of Methodist Episcopal Church, 83 A. 50.

A corporation held capable of acting as trustee of a meeting room fund.—Id.

§ 20 (N.H.) Gifts in trust to an unincorporated association are sustained in equity.—Glover v. Baker, 83 A. 916.

Towns, like other corporations, may act as trustees for purposes not incompatible with the objects of their organization.—Id.

Under legislation relating to religious societies, and especially under Pub. St. 1901, c. 152, § 2, held, that such societies might act as trustees for purposes not incompatible with the objects of their organization.—Id.

Pub. St. 1901, c. 152, entitled religious societies, held not intended to limit or destroy gifts for pious uses, but to promote and effectuate them.—Id.

§ 21 (Me.) A will empowering executors to designate any needy relatives of testator as heirs to a trust fund, the residue "to be given to an institution or institutions for the relief of suffering humanity as may be deemed by" the executors most worthy of it, held to constitute a valid bequest for charitable uses.—Dunn v. Morse, 83 A. 795.

§ 22 (N.H.) A gift in trust to "the First Church of Christ, Scientist," for the promotion of the "religion of Christian Science as taught by me," construed in connection with the term "church" and the allegations of a bill, admitted by demurrer, that the church existed with a large membership and was organized by testatrix for the promotion of Christian Science doctrines, ascertainable from books published by testatrix, held not indefinite as to its object.—Glover v. Baker, 83 A. 916.

The fact that a charitable gift is to trustees,

whose discretion the donor intended should determine the manner in which the gift should be applied to effect their charitable purpose, relieves the gift of uncertainty which might otherwise defeat it.—Id.

§ 24 (N.H.) On the creation of a valid testamentary trust, the refusal of the trustee to act will not avoid the trust, since equity never allows a legal and valid trust to fail for want of a trustee, except when a personal trust was intended.—Glover v. Baker, 83 A. 916.

§ 29 (N.H.) Under a charitable trust for the repair of a church and church buildings, *held*, that the purchase of material therefor in open market would not be an application of the trust fund to a purpose not charitable, so as to avoid the gift.—Glover v. Baker, 83 A. 916.

Where the object of a gift to trustees for charitable purposes, leaving to their discretion the means to be employed, is itself lawful, it will not be inferred that unlawful means were intended to be employed.—Id.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 33 (N.H.) A gift in trust to a religious association for repair of the church, etc., and to promote Christian Science, *held* intended to be executed by the persons who from time to time might constitute the association, and not limited to the discretion of any particular person.—Glover v. Baker, 83 A. 916.

§ 36 (N.H.) A gift in trust to a charitable or religious organization, without more, is in trust for the purposes of the organization.—Glover v. Baker, 83 A. 916.

§ 39 (Pa.) That the Centennial and Memorial Association of Valley Forge had issued so-called shares of stock which lacked the essential features of shares of stock did not affect the public character of the association's work and funds.—In re Centennial and Memorial Ass'n of Valley Forge, 83 A. 683.

§ 47 (N.H.) Where testatrix intended a gift in trust to a religious association, to be administered by persons professing the belief she desired to promote, it would be the duty of the court, in appointing a trustee, not to appoint any one in hostility to such purpose.—Glover v. Baker, 83 A. 916.

§ 48 (Pa.) Centennial and Memorial Association of Valley Forge, incorporated under Act April 29, 1874 (P. L. 73), was engaged in a public work, and its funds, derived in part from payments by the state in condemnation proceedings under Act April 7, 1905 (P. L. 117), were properly awarded on formal dissolution of the association to the commissioners of Valley Forge Park, appointed under Act May 30, 1893 (P. L. 183).—In re Centennial and Memorial Ass'n of Valley Forge, 83 A. 683.

On dissolution of charitable association, the property *held* not to revert to donors, nor to be divided among members, but appropriated to purposes most nearly akin to the intent of the donors.—Id.

§ 49 (Md.) At the instance of a corporation, subscriptions were made to a fund for a home for general Methodist Church purposes, and as the sum needed was not secured, that actually received in cash was subsequently converted into shares of the corporation, and the corporation supplied the room for meetings, etc., but thereafter attempted to go into voluntary dissolution and distribute among its shareholders, other than the meeting house fund, the proceeds of the liquidation. *Held*, that the contributors to the fund were entitled to establish in equity a trust in regard to the shares in question.—Book Depository of Baltimore Annual Conference of Methodist Episcopal Church v. Trustees of Church Rooms Fund of Methodist Episcopal Church, 83 A. 50.

§ 49 (N.H.) Where a valid charitable trust is created, an heir of the creator has no concern

as to the manner in which or the persons by whom the trust is carried into effect.—Glover v. Baker, 83 A. 916.

CHARTER.

See Municipal Corporations, § 48.

CHECKS.

See Bills and Notes.

CHILDREN.

See Bastards; Infants; Trial, § 140.

CHRISTIAN SCIENCE.

See Charities, §§ 4, 10, 13, 22, 33; Wills, § 15.

CHURCHES.

See Religious Societies.

CIRCUIT COURTS.

See Courts, § 514.

CITIES.

See Municipal Corporations.

CITIZENS.

See Constitutional Law, §§ 209-237.

CIVIL RIGHTS.

See Constitutional Law, §§ 209-237.

CLAIMS.

See Eminent Domain, § 277; Executors and Administrators, §§ 281, 431; Limitation of Actions, § 175; Municipal Corporations, §§ 373, 1007; Receivers, § 153.

CLASSIFICATION.

See Statutes, §§ 77, 93.

CLERKS.

See Officers, § 4.

CLERKS OF COURTS.

See Jury, § 25.

COASTING.

See Street Railroads, §§ 100, 102, 117.

CODICIL

See Wills, § 578.

COLLATERAL ATTACK.

See Taxation, § 692; Wills, § 421.

COLLECTION.

See Taxation, §§ 549, 571.

COLOR OF TITLE.

See Adverse Possession.

COMBINATIONS.

See Municipal Corporations, § 990.

COMMERCE.

III. MEANS AND METHODS OF REGULATION.

§ 58 (N.J.Sup.) An order of the Public Utility Commissioners *held* not to involve any interference with, nor impose any burden upon any statutory commerce.—Pennsylvania R. Co. v. Board of Public Utility Com'rs, 83 A. 945.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Constitutional Law, §§ 63, 232, 289; Depositions; Municipal Corporations, §§ 48, 124, 216; Statutes, § 235.

COMMISSIONERS.

See Carriers, § 10; Charities, § 48; Commerce, § 58; Counties; Dedication, § 18; Eminent Domain, §§ 2, 198, 238; Highways, §§ 72, 96; Jury, § 19; Taxation, § 40.

COMMISSIONS.

See Brokers, § 88; Executors and Administrators, §§ 490, 495, 501.

COMMITTEE.

See Eminent Domain, § 9.

COMMON CARRIERS.

See Carriers.

COMMON LAW.

See Action, § 41; Deeds, §§ 93, 97; Eminent Domain, § 119; Malicious Prosecution, § 10; Wills, § 858.

§ 8 (Md.) A decision of the English High Court of Chancery, rendered in 1798, is not binding on the Maryland courts as authority.—*Dudrow v. King*, 83 A. 34.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUTATION.

See Carriers, §§ 10, 13.

COMPARATIVE NEGLIGENCE.

See Negligence, § 98.

COMPENSATION.

See Brokers, § 88; Eminent Domain, §§ 84-152; Executors and Administrators, §§ 490-501.

COMPENSATORY DAMAGES.

See Damages, § 24.

COMPETENCY.

See Evidence, §§ 151, 156; Jury, § 95; Master and Servant, § 152; Witnesses, §§ 37-199.

COMPETITION.

See Trade-Marks and Trade-Names, §§ 68-93.

COMPLAINT.

See Pleading.

COMPROMISE AND SETTLEMENT.

See Contracts, § 128.

COMPUTATION.

See Limitation of Actions, §§ 124-127; Time.

CONCLUSION.

See Pleading, § 8.

CONCLUSIVENESS.

See Judgment, §§ 540, 622, 656, 720.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Deeds, § 6.

CONDITIONS.

See Deeds, §§ 171-176; Insurance, §§ 376, 612, 665; Wills, §§ 647, 664.

CONDONATION.

See Divorce, §§ 49, 109, 135.

CONDUCT.

See Divorce, § 54.

CONFESSION.

See Appeal and Error, § 124; Judgment, §§ 46-68.

CONFIDENTIAL RELATIONS.

See Fraudulent Conveyances, § 104.

CONFLICT OF LAWS.

See Powers.

CONNECTING CARRIERS.

See Carriers, § 187.

CONSIDERATION.

See Assignments, § 48; Bills and Notes, § 97; Contracts, §§ 75, 186; Fraudulent Conveyances, § 84; Money Received; Mortgages, § 309; Release, § 13.

CONSTITUTIONAL LAW.

See Appeal and Error, § 113; Courts, §§ 42, 160; Descent and Distribution, § 53; Elections, §§ 1, 7, 9; Eminent Domain, §§ 2, 17, 19; Judges, § 42; Jury, § 19; Mandamus, § 187; Municipal Corporations, § 64; Schools and School Districts, § 99; Statutes, §§ 73, 80, 93, 101, 107-125, 141, 285; Taxation, § 40; Wills, § 801.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ ½ (N. J. Sup.) Const. 1844, having been submitted to the vote of the people and adopted, is the fundamental law of the state until supplemented either by a new Constitution adopted in the same manner, or by amendment in the manner therein provided.—*Carpenter v. Cornish*, 83 A. 31.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 14 (Pa.) The language of a Constitution is to be interpreted in a plain and natural sense as understood by the people who adopted it.—*Gottschall v. Campbell*, 83 A. 286, 293.

§ 48 (Del. Sup.) While statutes delegating the power of eminent domain are strictly construed, and restricted to their clear expression and intention, the usual presumptions apply in favor of their constitutionality, and the court should construe them, if possible, so as to sustain their constitutionality.—*Clendaniel v. Conrad*, 83 A. 1036.

§ 48 (Me.) A legislative act should be held constitutional, unless the Constitution positively invalidates it.—*Sawyer v. Gilmore*, 83 A. 673.

§ 48 (Pa.) One who asks to have a law declared unconstitutional assumes the burden of proving beyond all doubt that it is so.—*Gottschall v. Campbell*, 83 A. 286, 293.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 50 (Me.) The executive and the judicial departments of the state can exercise only the powers conferred by the Constitution, and such as are necessarily implied therefrom, while the powers of the Legislature, broadly speaking, are absolute, except as limited by the Constitution.—Sawyer v. Gilmore, 83 A. 673.

§ 50 (N.H.) The lawmaking power of the state is alone invested with the authority to determine its public policy.—Glover v. Baker, 83 A. 916.

§ 63 (Md.) Acts 1910, c. 693, providing for a board of examining moving picture machine operators with power to issue and revoke licenses, is not contrary to Const. Bill of Rights, art. 8.—State v. Loden, 83 A. 564.

§ 63 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, creating the Metropolitan park commission, etc., held not unconstitutional by the appointment of commissioners to determine the amounts to be repaid to the state, under Const. art. 4, § 2, vesting legislative power in two houses, concurrence of which is necessary to the enactment of law.—In re Opinion of the Justices, 83 A. 3.

§ 64 (Del.Sup.) 26 Del. Laws, c. 189, held not invalid as delegating to a corporation the power of determining whether a state highway shall be constructed.—Clendaniel v. Conrad, 83 A. 1036.

That a boulevard is to be used in part as a road for vehicles does not preclude the state from delegating to corporations the right to condemn lands therefor.—Id.

26 Del. Laws, c. 189, held not to authorize boulevard corporations to transfer their power of eminent domain, and hence not to be invalid as a delegation of the state's sovereign power.—Id.

Provisions of 26 Del. Laws, c. 189, authorizing boulevard corporations to institute actions against the state to require it to repair a portion of a boulevard used for vehicles, held not invalid as a delegation of the state's sovereign power.—Id.

(B) Judicial Powers and Functions.

§ 70 (Me.) The particular method of distributing the proceeds of taxation rests in the wise discretion of the Legislature.—Sawyer v. Gilmore, 83 A. 673.

§ 70 (N.H.) Courts have no power to inaugurate or determine the public policy of the state. It is for them to ascertain and apply the legislative policy.—Glover v. Baker, 83 A. 916.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 83 (N.J.) An allowance of alimony is not a debt, within the constitutional provisions prohibiting imprisonment for debt.—Adams v. Adams, 83 A. 190.

§ 84 (N.H.) Under Bill of Rights, art. 5, recognizing the right of religious freedom, held, that one had the constitutional right to entertain such opinions as he chose, to make a religion of them, and to teach them to others.—Glover v. Baker, 83 A. 916.

X. EQUAL PROTECTION OF LAWS.

§ 209 (Me.) Const. U. S. Amend. 14, which provides that no state shall deny any person within its jurisdiction the equal protection of the laws, was designed to prohibit discriminatory legislation, but so long as all persons subjected to a particular law are treated alike, under like circumstances and conditions, there is no violation of the amendment.—Sawyer v. Gilmore, 83 A. 673.

§ 229 (Me.) Pub. Laws 1909, c. 177, authorizing general state taxation for common school purposes, held not to violate Const. U. S. Amend. 14, which provides that no state shall deny any person within its jurisdiction the equal protection of the laws.—Sawyer v. Gilmore, 83 A. 673.

§ 232 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, creating the Metropolitan park commission, etc., held not violative of the fourteenth amendment to the United States Constitution, declaring that no state shall deny to any one within its jurisdiction the equal protection of the laws.—In re Opinion of the Justices, 83 A. 3.

§ 237 (N.J.Sup.) A city ordinance providing that every owner of an animal which shall die or be killed for any purpose except for food within the city must give notice to the board of health, and that no one except the health officer or the board shall transport any such animal from the place where it died without permission of the board of health, and that if the health officer considers such dead animal to be a nuisance or likely to be dangerous, or the owner fails to apply for permission to remove it, the board shall order its removal, does not deny to citizens the equal protection of the laws.—Schwarz Bros. Co. v. Board of Health of Jersey City, 83 A. 762.

XI. DUE PROCESS OF LAW.

§ 270 (Vt.) Where an accused was convicted of two offenses and given cumulative sentences, and before the expiration of those sentences was convicted of another offense and given a sentence which was limited to begin upon the expiration of the second, he was not denied due process of law.—Ex parte Sargood, 83 A. 718.

§ 287 (Md.) Acts 1910, c. 693, licensing operators of moving picture machines, held not in conflict with the fourteenth amendment to the federal Constitution and state Constitution Bill of Rights, art. 23.—State v. Loden, 83 A. 564.

§ 289 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, creating the Metropolitan park commission, etc., held not violative of Const. U. S. Amend. 14, declaring that no state shall deprive any person of life, liberty, or property without due process of law.—In re Opinion of the Justices, 83 A. 3.

§ 314 (R.I.) Where a reference in an equity suit was in accordance with the long-established practice in equity, it did not violate Const. U. S. Amend. 14, as denying the parties due process of law.—McAuslan v. McAuslan, 83 A. 837.

CONSTRUCTION.

See Bills and Notes, § 116; Constitutional Law, §§ 14, 48; Contracts, §§ 147-176; Covenants, §§ 49-84; Deeds, §§ 90-100; Evidence, §§ 458, 461, 518; Guaranty, § 38; Insurance, § 166; Pleading, § 34; Powers; Sales, §§ 71, 72; Statutes, §§ 181-235; Wills, §§ 439-706.

CONSTRUCTIVE TRUSTS.

See Trusts, §§ 109, 110.

CONTEMPT.

See Husband and Wife, § 299.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR.

§ 66 (N.J.) An order directing defendant to show cause why he should not be attached for contempt is not appealable.—Adams v. Adams, 83 A. 190.

CONTEST.

See Elections, §§ 295, 299.

CONTINGENT ESTATES.

See Wills, §§ 629-634.

CONTINGENT REMAINDERS.

See Remainders.

CONTINUANCE.

See Jury, § 95.

CONTRACTS.

See Account, § 8; Action, § 45; Appeal and Error, §§ 1009, 1050, 1071; Assignments; Assumpsit, Action of; Bailment; Banks and Banking, §§ 133, 136; Bills and Notes; Bonds; Brokers; Cancellation of Instruments; Carriers, § 187; Corporations, §§ 291, 416, 432, 479-487, 519, 642, 657, 661; Covenants; Damages, §§ 74, 120, 124; Deeds; Easements, § 29; Election of Remedies; Electricity; Evidence, §§ 151, 201, 441, 442, 518, 534; Frauds, Statute of; Guaranty; Injunction, §§ 58-62; Insane Persons, § 5; Insurance; Interpleader, §§ 12, 23; Landlord and Tenant; Licenses, § 63; Master and Servant; Mechanics' Liens; Money Received; Mortgages; Municipal Corporations, §§ 218, 347, 373, 990; Novation; Partnership, §§ 21, 102; Pleading, §§ 204, 348; Principal and Agent; Principal and Surety; Reformation of Instruments; Release; Sales; Schools and School Districts, § 80; Specific Performance; Stipulations; Theaters and Shows; Trial, § 252; Use and Occupation, § 9; Vendor and Purchaser; Waters and Water Courses, § 203; Work and Labor.

I. REQUISITES AND VALIDITY.**(B) Parties, Proposals, and Acceptance.**

§ 28 (R.I.) In assumpsit for work and labor claimed to have been performed under a contract, evidence held insufficient to establish any contract, not showing any meeting of minds.—Clary v. Wolf, 83 A. 115.

(C) Formal Requisites.

§ 44 (N.J.) A building contract includes all matters agreed on by the parties and may include within itself the specifications, and, when that is done, the filing of the contract is a filing of the specifications within the statute contemplating that specifications accompanying a contract shall be filed.—Keupler v. Elisele, 83 A. 999.

(D) Consideration.

§ 75 (Pa.) A promise cannot be conditioned on a promise to do a thing to which a party is already bound.—Erny v. Sauer, 83 A. 206.

(E) Validity of Assent.

§ 95 (Pa.) A contract produced by actual intimidation is void, whether the intimidation arises as a result of mere personal infirmity or circumstances which might produce a like effect on persons of ordinary firmness.—Sulzner v. Cappeau-Lemley & Miller Co., 83 A. 103.

A person is supposed to possess ordinary firmness, and not to be subject to duress, unless it is shown that, by reason of age or other sufficient cause, he is weak or infirm.—Id.

Ordinarily, threats of prosecution do not constitute legal duress, unless made under circumstances sufficient to excite a fear of imminent and immediate imprisonment.—Id.

(F) Legality of Object and of Consideration.

§ 113 (Pa.) An agreement by a contractor to pay bonds to an architect for services in overseeing his work, or for securing the award, would be illegal.—Page v. Moore, 83 A. 580.

§ 128 (Del.Ch.) A bond to compromise a prosecution for using a female under 18 for sexual

intercourse is invalid.—Meredith v. Knox, 83 A. 703.

A bond executed to the father of a woman for the payment of money in consideration of the abandonment of bastardy proceedings against the obligor's son, but not the abandonment of a criminal charge, held valid, in the absence of fraud or conspiracy.—Id.

II. CONSTRUCTION AND OPERATION.**(A) General Rules of Construction.**

§ 147 (R.I.) In construing a contract, the instrument should be considered in its entirety, in order to ascertain the full scope of its operation and the general plan and intention of the parties.—Newport Waterworks v. Taylor, 83 A. 833.

§ 156 (R.I.) In the construction of contracts, general terms are restricted and limited by particular recitals in connection therewith.—Newport Waterworks v. Taylor, 83 A. 833.

§ 176 (Pa.) As a general rule, the court is the judge of the meaning of a written instrument, except where it is not to be understood without reference to extrinsic facts.—Standiford v. Kloman, 83 A. 311.

(B) Parties.

§ 186 (Del.Ch.) A person, to recover on a contract, must be one from whom the consideration of the contract actually moved. A stranger to the consideration cannot sue on the contract.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

§ 187 (Del.Ch.) To give a third party an action on a promise, there must be an intent by the promisee to secure some benefit to the third party, and also some privity between the promisee and the third party, and some obligation of the promisee to the third party which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from the promisee.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

(D) Place and Time.

§ 217 (N.J.) Under a contract for the furnishing of electric current for three years, providing that the party furnishing it agrees to renew the contract for another three years at the election of the other party, the party furnishing the current was not bound to renew unless the desire for renewal was given on or before the last day of the original term.—Monmouth County Electric Co. v. Consolidated Gas Co. of New Jersey, 83 A. 900.

V. PERFORMANCE OR BREACH.

§ 232 (N.J.) Where a building contract provided that the builder should erect a house in a good workmanlike and substantial manner to be testified by a certificate of an architect, and that the last payment should be made when all the work was completed to the satisfaction of the owner or his representative, the architect was not the representative of the owner.—Gerisch v. Herold, 83 A. 892.

Contracts requiring work to be satisfactory to the employer are valid.—Id.

§ 287 (N.J.) Under the terms of a building contract, duty of architect held limited to certifying whether house was finished in a good workmanlike and substantial manner, and to deciding upon the true construction of the drawings and specifications, and not to extend to the sufficiency of the materials, so that his certificate that the builder was entitled to the final payment was not conclusive upon the owner.—Gerisch v. Herold, 83 A. 892.

§ 295 (Pa.) An instruction that while plaintiff, suing for the price of a monument, was bound to furnish the kind of granite specified in order to recover, if he furnished the kind, and the workmanship, though not perfect, substantially complied with the contract, he might recover the contract price, less an abatement for minor defects, was proper.—*Gessler v. Graham*, 83 A. 429.

§ 310 (Vt.) Nonperformance of a contract by one party is excused by the supervening bankruptcy of the other party.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 322 (N.J.) It was incumbent on the builder, in an action on a building contract, to show that the building was completed to the satisfaction of the owner or his representative as required by the contract.—*Gerisch v. Herold*, 83 A. 892.

§ 322 (N.J.Sup.) In an action on a building contract, where plaintiff claims default in payment was the cause of the failure of plaintiff to finish the building in time, it is error to exclude evidence that stop notices were served on the owner by materialmen under Mechanics' Lien Act, § 3.—*Westicraft v. Barry*, 83 A. 501.

VI. ACTIONS FOR BREACH.

§ 324 (N.J.) A builder contracting to take part payment in land on performance, and default by the other party, cannot recover under the common counts for reasonable value of his services, but must sue on the special contract.—*Osterling v. Cape May Hotel Co.*, 83 A. 887.

§ 349 (N.J.) On a contract to pay a percentage of the cost of a building, in land to be selected by the builder, on performance by the builder, and failure by defendant to make payment as specified, the special agreement was not admissible in evidence under the common counts to fix the price stipulated as it did not call for payment in money.—*Osterling v. Cape May Hotel Co.*, 83 A. 887.

§ 349 (R.I.) In assumpsit for breach of a contract whereby defendants were to, within a year, erect a theater on certain land and after deducting certain advances, were to make plaintiff a partner, evidence of a notice served by the plaintiff a short time before the year expired, *held* admissible to show that they had abandoned the project and demonstrate that the action which was commenced a day before the time for the expiration of the year was not premature.—*Eastman v. Dunn*, 83 A. 1057.

In assumpsit for breach of a contract, where plaintiff as a consideration on his part delivered an option for a lease to defendants, evidence that after defendants had obtained the lease in their own names they made attempts to sell it was admissible to show their bad faith.—*Id.*

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants as his part of a consideration, evidence as to whether he paid anything for the option is immaterial.—*Id.*

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he had as a part of the consideration delivered to defendants, evidence as to his statements to the owner of the land when he tried to obtain an extension of the option was immaterial; the option having been accepted and exercised before its expiration.—*Id.*

In assumpsit for breach of contract, where the plaintiff sought to recover the value of an option which he had and which he surrendered to defendants, evidence as to the reason why the owner extended the option for one day, the parties having availed themselves of such extension, *held* immaterial.—*Id.*

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants under

which they obtained a lease, evidence as to whether the owner of the property would have refused to allow plaintiff to accept the option if he had not had satisfactory sureties was immaterial.—*Id.*

§ 350 (R.I.) In assumpsit for damages for breach of a contract, evidence *held* sufficient to support judgment for plaintiff.—*Eastman v. Dunn*, 83 A. 1057.

CONTRADICTION.

See Witnesses, §§ 311-414.

CONTRIBUTION.

See Principal and Surety, § 194.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 92, 98, 122.

CONVERSION.

See Trover and Conversion.

§ 6 (Pa.) Fund created by sale of real estate under proceedings commenced under Price Act *held* real estate for purposes of distribution.—*In re Murray's Estate*, 83 A. 473.

§ 15 (Conn.) A will, which directs the executor to sell real estate described and to give specified parts to beneficiaries named, equitably converts the real estate into personalty, and the gift must be deemed one of personalty.—*Weed v. Hoge*, 83 A. 638.

§ 15 (Pa.) A will, directing the residue of the estate, real, personal, and mixed, to be divided into shares by trustees for the respective parties, *held* not to blend the realty and personalty, so as to convert the realty.—*In re Murray's Estate*, 83 A. 473.

§ 15 (Pa.) Mere failure of testator to distinguish between realty and personalty in directing division of estate *held* not a blending of realty and personalty authorizing inference of intention to convert.—*Martin v. Provident Life & Trust Co.*, 83 A. 713.

Provision of a will leaving an estate to trustees to pay one third of the income to the wife for life and two thirds to his children and on the wife's death her share to be held for the children and on the death of the children to go to those whom they might designate by will or to the heirs if they died intestate, *held* not to show intention to convert real and personal property into common fund, but to permit person entitled to real estate on death of testator's child, to maintain partition.—*Id.*

§ 16 (Pa.) Testamentary directions that executors may sell testator's real estate, or divide the same among the heirs, do not convert the realty into personalty.—*Dunshie v. Dunshie*, 83 A. 422.

A provision in a will, directing the balance of the estate to be divided into seven shares, one of which shall go to each of testator's children, and that the executors may sell real estate, or divide the whole, or what remains, between the heirs, does not disclose an intent to blend real and personal estate.—*Id.*

§ 16 (Pa.) A will, giving authority to trustees to make such investments or changes in the investments as might become necessary or as they might deem advisable, *held* not to convert the realty into personalty.—*In re Murray's Estate*, 83 A. 473.

CONVEYANCES.

See Assignments; Assignments for Benefit of Creditors; Deeds; Descent and Distribution § 12; Fraudulent Conveyances; Husband and Wife, § 15; Mines and Minerals, § 55; Mortgages.

COPY.

See Indictment and Information, § 14.

CORPORATIONS.

See Appeal and Error, §§ 842, 1198; Bankruptcy, § 268; Banks and Banking; Beneficial Associations; Brokers, § 33; Carriers; Charities, §§ 20, 49; Constitutional Law, § 64; Courts, § 14; Eminent Domain, §§ 10, 35, 55, 66, 67, 84; Equity, § 150; Fraudulent Conveyances, § 187; Insurance, § 38; Judgment, § 822; Life Estates, § 15; Mortgages, § 183; Municipal Corporations; Physicians and Surgeons, § 9; Railroads; Religious Societies; Specific Performance, § 29; Statutes, §§ 64, 80, 107, 113; Street Railroads; Taxation, §§ 145, 376; Telegraphs and Telephones; Wills, § 684.

I. INCORPORATION AND ORGANIZATION.

§ 29 (N.J.) The question whether an action is maintainable by a corporation depends on the de facto existence of the corporation at the time of the bringing of the suit, as its right to exist can only be questioned by the state.—Belvidere Water Co. v. Town of Belvidere, 83 A. 241.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

§ 67 (Conn.) Capital may not be impaired by distribution to shareholders, although a corporation's surplus may be so impaired.—Union & New Haven Trust Co. v. Taintor, 83 A. 697.

(D) Transfer of Shares.

§ 114 (Pa.) That plaintiff assigned certain corporate stock to avoid the arrest of his son, plaintiff having been afforded ample time to consult an attorney, did not constitute duress.—Sulzner v. Cappeau-Lemley & Miller Co., 83 A. 103.

§ 149 (Pa.) A bona fide purchaser for value and without notice of stock issued by a corporation as paid up is not liable thereon, either to the corporation, corporate creditors, or other persons, though the stock was not actually paid up as represented.—French v. Harding, 83 A. 586.

One who in good faith and without notice purchases corporate stock in open market held a bona fide purchaser, though the certificates do not state on their face that they are paid up.—Id.

§ 149 (Vt.) A purchaser of stock with notice of an unrecorded mortgage on property conveyed to the corporation from one having no notice is a bona fide purchaser, and succeeds to all the rights of his vendor.—Roberts v. W. H. Hughes Co., 83 A. 807.

A finding that a certificate of stock was taken by a bank to secure an overdraft is a finding that it was taken to secure an existing indebtedness, and the bank is not a holder for value.—Id.

A finding that a certificate of stock was taken by a bank as collateral security on notes indorsed by the owner is a finding that the certificate was taken at the time of the discounting of the notes, making the bank a holder for value.—Id.

(E) Interest, Dividends, and New Stock.

§ 152 (Conn.) Dividend on the capital stock of a corporation payable in stock of another corporation which the first corporation had purchased from its earnings held a "cash dividend."—Union & New Haven Trust Co. v. Taintor, 83 A. 697.

§ 152 (N.J.) Powers of directors of corporation, in good faith deferring the distribution of dividends to stockholders, held final and not

subject to judicial revision.—Blanchard v. Prudential Ins. Co. of America, 83 A. 220.

§ 157 (Conn.) A stock dividend is an issue by a corporation of new shares of its own stock to its shareholders.—Union & New Haven Trust Co. v. Taintor, 83 A. 697.

V. MEMBERS AND STOCKHOLDERS.

(A) Rights and Liabilities as to Corporation.

§ 174 (Vt.) A corporation is a legal entity distinct from its stockholders, though all the stock is owned by one person, but in case of fraud the law may treat the corporation and the owners of the stock as identical.—Roberts v. W. H. Hughes Co., 83 A. 807.

(C) Suing or Defending on Behalf of Corporation.

§ 210 (N.J.Ch.) Defendant, in a suit by stockholders on a cause of action in favor of the corporation, may question the standing of other stockholders admitted as complainants after the making up of the issues between the original parties, and the omission in the order admitting such other stockholders as complainants to give such right does not prevent defendant from questioning their qualifications by way of amendment to the answer.—Goodbody v. Delaney, 83 A. 988.

§ 211 (N.J.Ch.) Where the disqualification of a stockholder suing on his own behalf and on behalf of all other stockholders similarly situated on a cause of action in favor of the corporation appears on the face of the record, the question may be raised by demurrer, but, where it does not so appear, it can only be raised by answer or by a proper amendment to an answer already filed.—Goodbody v. Delaney, 83 A. 988.

Where defendant in a suit by stockholders on a cause of action in favor of the corporation answered the bill and claimed the benefit of the facts as if demurred to, and thereafter other stockholders were admitted as complainants, a demurrer to the bill as prosecuted by the newly-admitted stockholders must be suppressed for irregularity.—Id.

§ 213 (N.J.Ch.) A suit by stockholders on their own behalf and on behalf of all other stockholders similarly situated on a cause of action in favor of the corporation is a suit on behalf of the corporation, and a decree adjudges its rights.—Goodbody v. Delaney, 83 A. 988.

(D) Liability for Corporate Debts and Acts.

§ 252 (Md.) Under Acts 1908, c. 240, §§ 41, 54, a receiver of a corporation may not enforce the stockholders' liability for the amount unpaid on the stock held by them until the tangible assets have been exhausted.—Hughes v. Hall, 83 A. 1023.

VI. OFFICERS AND AGENTS.

(A) Election or Appointment, Qualification, and Tenure.

§ 291 (R.I.) A corporation's covenant under seal that the other party to the agreement should be a member of its board of directors during the term of the agreement was ultra vires and void.—Sowter v. Seekonk Lace Co., 83 A. 437.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 320 (Pa.) Where a bill in equity against officers and directors of a corporation shows that no demand was made that the corporation sue, its presence as a party to the record is indispensable.—Kelly v. Thomas, 83 A. 807.

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 370 (Del.Sup.) That 26 Del. Laws, c. 189, grants to boulevard corporations franchises ordinarily exercised by separate and distinct corporations, does not render it invalid.—*Clen-daniel v. Conrad*, 83 A. 1036.

§ 388 (Pa.) In an action by a trust company on a note which the company had discounted, defendant, having received the proceeds of the discount, cannot set up that the act of the bank in discounting the note was ultra vires.—*Mutual Trust Co. v. Stern*, 83 A. 614.

§ 388 (Vt.) Where a corporation is estopped from asserting the invalidity of a transaction, a director participating in the transaction is also estopped.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

(B) Representation of Corporation by Officers and Agents.

§ 416 (Md.) A contract of guaranty by a corporation, executed by its president and manager, *held* within his implied authority, and binding.—*Hagerstown Brewing Co. v. Gates*, 83 A. 570.

§ 426 (Conn.) A corporation *held* liable for services of a physician to injured employé where the services were rendered under circumstances which were known to the corporation's officers, and justified the physician in believing that the corporation would pay for the same.—*Taylor v. C. M. Robertson Co.*, 83 A. 534.

§ 428 (Vt.) The rule that notice to the president or managing official of a corporation is notice to it does not apply where the transaction is one in which the official is dealing with the corporation on his own account, such as the execution of a deed to it.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 432 (Conn.) In a physician's action for services rendered at request of a corporation's bookkeeper, evidence of the conversation between plaintiff and the bookkeeper, of interviews between him and the defendant's president, and of the contents of a letter written by the bookkeeper, under the direction of defendant's managing officer, acknowledging liability, *held* admissible to establish liability.—*Taylor v. C. M. Robertson Co.*, 83 A. 534.

§ 432 (Md.) In an action against a corporation on a contract executed in its name by its president and manager, the by-laws of the corporation defining the powers of the president and manager are inadmissible as against plaintiff having no knowledge of the by-laws.—*Hagerstown Brewing Co. v. Gates*, 83 A. 570.

(C) Contracts and Indebtedness.

§ 479 (Vt.) The delivery of mortgage bonds of a corporation as collateral to certificates of the receiver of the corporation *held* sufficient to charge the transferee with knowledge of the facts connected with the issuance of the bonds, whether the delivery is by the receiver or the attorney for the corporation.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

A bank receiving mortgage bonds as collateral security for debts evidenced by receiver's certificates is not a bona fide holder, where it was charged with knowledge of the order under which the certificates were issued, and of the fact that the bonds were pledged by the corporation for a debt covered by the certificate, and where the bonds were void because issued after the appointment of the receiver.—*Id.*

§ 480 (Vt.) The mortgage bonds of a corporation legally issued and received without actual notice of incumbrances created subsequent to the mortgage are a lien prior to such incumbrances, though issued subsequently thereto.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 484 (R.I.) A corporation may make a contract of guaranty for the benefit of third parties in furtherance of the object of its creation, or when reasonably necessary in the conduct of its business.—*J. P. Morgan & Co. v. Hall & Lyon Co.*, 83 A. 113.

Where the act of the treasurer of a corporation in guaranteeing the payment of all money drawn on a letter of credit issued to a woman was an act which might have been reasonably necessary to carry out the purposes of the incorporation, the company issuing the letter was not put upon notice that the transaction was one of accommodation, and that the act of the treasurer was ultra vires.—*Id.*

§ 487 (Vt.) Where one provides money for the legitimate uses of a corporation, though under arrangement which it has no authority to make, equity will award him proper relief in case his remedy at law is ineffectual.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

(F) Civil Actions.

§ 499 (N.J.) Where there could not be a de jure corporation at the time an alleged corporation brought suit, the corporation could be a de facto one, and hence entitled to sue.—*Belvidere Water Co. v. Town of Belvidere*, 83 A. 241.

§ 518 (N.J.) A plea of nul tiel corporation is met by proof that the corporation existed at any time.—*Belvidere Water Co. v. Town of Belvidere*, 83 A. 241.

The question raised under a plea of nul tiel corporation is the ability of plaintiff to sue; and the plea is one in bar.—*Id.*

§ 519 (Md.) The court, in view of the pleadings in an action against a corporation, *held* required to presume, in the absence of proof to the contrary, that a contract was not ultra vires.—*Hagerstown Brewing Co. v. Gates*, 83 A. 570.

In an action against a corporation on a contract executed in its name by its president and general manager, evidence of a proposition by plaintiff to release the corporation from liability on specified conditions *held* inadmissible.—*Id.*

VIII. INSOLVENCY AND RECEIVERS.

§ 562 (Md.) Under Acts 1908, c. 240, § 41, a receiver of a corporation may sue stockholders in equity for the amount unpaid on the stock held by them.—*Hughes v. Hall*, 83 A. 1023.

§ 568 (N.J.) Annulment of a mortgage by a corporation given for the benefit of assenting creditors, on the ground that it was a fraudulent conveyance as to nonassenting creditors, does not deprive the assenting creditors of their right to share pro rata with the nonassenting creditors in the proceeds of the mortgaged property.—*Van Clief v. Melville*, 83 A. 967.

Where complainant, who was made a trustee of a mortgage given by a corporation for the benefit of assenting creditors, was induced by the assenting creditors to advance money in reliance upon the mortgage, he is entitled to subrogation to the rights of the assenting creditors, to the extent required to repay his advances, on distribution of the proceeds of the mortgaged property after the mortgage was declared void as constituting a fraudulent conveyance as to nonassenting creditors.—*Id.*

XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

§ 621 (Vt.) An order appointing a receiver of a corporation on petition for dissolution suspends corporate action, and deprives corporate officers of authority over corporate property.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 629 (Me.) On dissolution of a corporation, the stock of which was equally owned by plaintiff and defendant, and to which they had as

signed theater leases with the agreement that on dissolution the lease should be retransferred to the parties assigning them, plaintiff *held* properly awarded a lease on a particular theater which he had assigned, but which had been purchased and terminated by a corporation controlled by defendant.—Proctor v. Keith & Proctor Amusement Co., 83 A. 449.

XII. FOREIGN CORPORATIONS.

§ 642 (N.J.) A contract by an agent of a foreign corporation, subject to approval at its home offices, is not "transacting business in this state," requiring the obtaining of a certificate from the Secretary of State before action could be brought thereon under P. L. 1896, c. 185, p. 277, § 98.—Low v. Davy, 83 A. 869.

§ 657 (Vt.) P. S. 774, 776, prohibiting foreign corporations from doing business in the state without procuring a certificate, and from maintaining actions on contracts made in the state without such certificate, does not render void executed contracts made by the company without compliance with the statute.—Roberts v. W. H. Hughes Co., 83 A. 807.

§ 661 (Vt.) A foreign corporation which has not complied with P. S. 774, 776, prohibiting a foreign corporation from doing business in the state without procuring a certificate, and from maintaining any action in the state on any contract made by it in the state unless it has procured such certificate, may maintain or defend actions concerning contracts fully executed, and may defend the validity of a deed conveying property to it.—Roberts v. W. H. Hughes Co., 83 A. 807.

§ 683 (Pa.) A court of equity in this state *held* to have no jurisdiction over a bill by a stockholder of a foreign corporation against officers and directors for an accounting, nor to review a judgment against the company in the state of its domicile.—Kelly v. Thomas, 83 A. 307.

§ 685 (Vt.) An order of the court of a sister state appointing a receiver of a corporation of that state and authorizing the issuance of receiver's certificates does not impose a lien on real estate of the corporation situated in Vermont as against an unrecorded mortgage.—Roberts v. W. H. Hughes Co., 83 A. 807.

Where the court of a sister state appoints a receiver of a foreign corporation on the petition of its directors, and thereby acquires jurisdiction over the corporation and directors, it may compel a transfer to the receiver of real estate of the corporation situated in Vermont, and hence such appointment will prevent corporate action incumbering such real estate in Vermont.—Id.

That the statutes of a sister state in which a corporation was organized made the wages of employes of the corporation a preferred claim on the appointment of a receiver did not make the bonds of the corporation to secure certificates of the receiver appointed in such state valid if unlawfully issued, nor create a lien on mortgaged property in Vermont.—Id.

CORROBORATION.

See Criminal Law, §§ 507, 510; Witnesses, §§ 311-414.

COSTS.

See Appeal and Error, § 79; Executors and Administrators, § 456; States.

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREOF.

§ 245 (R.I.) The Supreme Court, in view of defendant's admissions as to an amount due on a hearing to show cause why the case should not be remitted with direction to enter judgment for defendant for costs, will remit the case to the superior court, with direction to enter judgment for plaintiff without costs, the amount being insufficient to carry costs.—Blake v. Atlantic Nat. Bank, 83 A. 261.

CO-TENANCY.

See Tenancy in Common.

COUNCIL.

See Municipal Corporations, § 951.

COUNTIES.

See Highways; Officers, § 4; Statutes, § 125.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 196 (Md.) A taxpayer not peculiarly injured is not entitled to an injunction to prevent county commissioners from allowing the erection of a private building in the courthouse square.—Turner v. King, 83 A. 649.

COUNTY COURTS.

See Courts, §§ 42, 160, 168.

COURTS.

See Appeal and Error, §§ 113, 875, 1198; Bastards, § 35; Common Law; Constitutional Law, §§ 50, 70; Contempt; Contracts, § 176; Corporations; Criminal Law, § 260; Divorce, §§ 62, 76; Eminent Domain, § 66; Executors and Administrators, § 138; Judges; Justices of the Peace; Mandamus, § 76; Prohibition; Religious Societies; Schools and School Districts, § 69; Specific Performance, §§ 75, 127; States, § 215; Statutes, § 73; Trial, §§ 186-194; Trusts, § 158; Wills, §§ 222, 253.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 14 (Md.) Under Acts 1908, c. 240, § 67, a nonresident may sue a foreign corporation in the courts of the state on any cause of action, and is not limited by Code Pub. Gen. Laws 1904, art. 23, § 411.—Hagerstown Brewing Co. v. Gates, 83 A. 570.

Acts 1908, c. 240, § 67, authorizing suit against foreign corporation was not repealed or modified by Acts 1908, c. 309.—Id.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 42 (Pa.) Const. art. 5, § 1, *held* to authorize the establishment of courts, not only similar to those enumerated, but also of a different grade and character.—Gottschall v. Campbell, 83 A. 286, 293.

Act May 5, 1911 (P. L. 198), establishing a county court in Allegheny county, *held* not violative of Const. art. 5, § 26, preventing the General Assembly from creating other courts to exercise powers vested by the Constitution in judges of the courts of common pleas and orphans' courts.—Id.

The provision of Act May 5, 1911 (P. L. p. 198), establishing a county court in Allegheny county for the service of writs of summons, is constitutional.—Id.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 112 (Me.) A record is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and ending with the judgment; and only the records which

are made in the course of judicial duty are of force.—State v. Houlehan, 83 A. 1106.

§ 113 (Me.) At common law and independent of any statute, courts have inherent power to preserve their own records and to substitute copies of lost records.—State v. Ireland, 83 A. 453.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 160 (Pa.) Act May 5, 1911 (P. L. p. 202) § 10, relating to set-off in the county court of Allegheny county, is constitutional.—Gottschall v. Campbell, 83 A. 286, 293.

Act May 5, 1911 (P. L. p. 203) § 11, authorizing liens by entering judgments of the county court of Allegheny county in the common pleas, is constitutional.—Id.

§ 168 (Pa.) Act May 5, 1911 (P. L. p. 199) § 6 (a), held not to give county court of Allegheny county jurisdiction in all civil actions without limit as to amount.—Gottschall v. Campbell, 83 A. 286, 293.

§ 189 (Md.) A dilatory plea in an action tried under the Rule Day Act of Baltimore city, to which was attached an affidavit which did not state the amount of plaintiff's demand, if any, admitted to be due or owing, and the amount disputed, was insufficient to prevent plaintiff taking judgment by default.—Hyson v. General Fireproofing Co., 83 A. 244.

V. COURTS OF PROBATE JURISDICTION.

§ 200 (N.H.) The superior court has no power to require an executor to account for his administration upon a bill in equity or to revise proceedings in the probate court, except on appeal.—Glover v. Baker, 83 A. 916.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 472 (Md.) Under Code art. 93, §§ 331-339, 341, 342, held, that the jurisdiction of the orphans' court over the probate of wills was exclusive.—Bradley v. Bradley, 83 A. 446.

§ 472 (N.H.) Under Const. pt. 2, art. 79 [80], and Pub. St. 1901, c. 182, § 2, the probate court has exclusive original jurisdiction of the probate of wills and the settlement and distribution of the estates of deceased persons.—Glover v. Baker, 83 A. 916.

Until the settlement of an executor's account, the probate court has entire jurisdiction of the necessary procedure.—Id.

(C) Courts of Different States or Countries.

§ 514 (Md.) A circuit court held not to have exclusive jurisdiction of the administration of the affairs of a lunatic in view of a bill previously filed in a foreign state, and another circuit court at the time had continuing jurisdiction to administer the trust of which the lunatic was the beneficiary.—Gerke v. Colonial Trust Co., 83 A. 1092.

COVENANTS.

See Action, §§ 41, 44, 45; Corporations, § 291; Deeds, §§ 174, 176; Injunction, §§ 23, 58, 62, 113; Judgment, § 958; Pleading, § 204.

II. CONSTRUCTION AND OPERATION.

(C) Covenants as to Use of Real Property.

§ 49 (N.J.Ch.) Restrictive covenants are strictly construed against the person seeking to enforce them.—Meanev v. Stork, 83 A. 492.

The meaning of a restrictive covenant must be ascertained not only from its language, but also from the circumstances of its creation and its obvious purpose.—Id.

§ 51 (N.J.Ch.) The term "building," as used in a restrictive covenant prohibiting the construction of a building nearer than three feet from the line of an adjoining lot, held to include overhanging bay windows and eaves.—Supplee v. Cohen, 83 A. 373.

Complainants' right to enforce a building restriction held not affected by a popular construction given to a similar restriction, concerning a separate tract some distance from the tract in question, of which construction it was not shown that the parties had knowledge.—Id.

§ 51 (N.J.Ch.) A restrictive covenant, providing that no building should be erected upon the lot within 10 feet of the street line, and that the 10-foot strip should be kept open and unincumbered, except that light open fences not more than six feet in height might be built to inclose a yard, did not prohibit the projection of steps from the front of the house over upon the 10-foot strip.—Meanev v. Stork, 83 A. 492.

§ 51 (N.J.Ch.) A restrictive covenant in a deed held to preclude the building of a side line of a house within 60 feet of the street on which the grantee's house fronted.—Howland v. Andrus, 83 A. 982.

(D) Covenants Running with the Land.

§ 57 (Del.Ch.) Covenants running with land contained in mortgage under which the mortgagee had no title or estate, held not binding upon a lessee of the mortgagor's assignee.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

§ 72 (N.J.Ch.) Where a contract for the sale of a city lot contained a restrictive covenant with reference to an adjoining lot, the purchasers were entitled to rely thereon without any new engagement being made at the time of the passing of the title, in the absence of any evidence that at the time of settlement either party understood that the covenant was waived.—Supplee v. Cohen, 83 A. 373.

§ 72 (N.J.Ch.) Exceeding the limits set by a restrictive covenant with the consent of his grantor held to preclude an adjoining purchaser from questioning a property owner's right so to do.—Howland v. Andrus, 83 A. 982.

§ 78 (N.J.) A restrictive covenant in a conveyance of a part of a tract of land, beneficial to the remainder, will be enforced in favor of the covenantee, who owns the remaining part, against the covenantor's grantee, with notice of the covenant.—Sanford v. Keer, 83 A. 225.

The right of a covenantee to enforce the unmodified portion of a covenant is not defeated by the fact that it forms a part of a general or neighborhood scheme, which has been modified without destroying the essential mutual benefit from the scheme.—Id.

§ 79 (N.J.) Where a tract is divided into building lots and a plan exhibited, showing purchasers the streets and lots, and the purchasers are induced to buy by representations that conveyances would contain protective restrictions, the restrictive covenants inserted in accordance with these representations constituted a general or neighborhood scheme, and may be enforced between the purchasers.—Sanford v. Keer, 83 A. 225.

§ 84 (Del.Ch.) Covenants by the mortgagor for the payment of interest and for the payment to the mortgagee of a percentage of net earnings are not restrictive in their character and not enforceable by mortgagee against a lessee from a purchaser from mortgagor.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

III. PERFORMANCE OR BREACH.

§ 103 (N.J.) In a general or neighborhood scheme, where the benefit to property owners affected is totally or partially destroyed, the

accompanying burden of restrictive covenants undergoes a corresponding modification.—*Sanford v. Keer*, 83 A. 225.

§ 103 (N.J.Ch.) A covenant, in a contract for the sale of a city lot, that the vendors would "provide" that no building should be erected on the next west adjoining lot nearer than three feet from the party line, could not be fulfilled by a deed of the property sold containing a like covenant.—*Supplee v. Cohen*, 83 A. 373.

IV. ACTIONS FOR BREACH.

§ 114 (R.I.) A count in an action of covenant against a corporation *held* not demurrable.—*Sowter v. Seekonk Lace Co.*, 83 A. 437.

§ 121 (N.J.) In a suit by the party for whose benefit a covenant was made upon the covenant to pay all damages from the operation of the covenantee's business, if the covenantee had authorized appearance and defense to suit against her, a judgment rendered therein was conclusive in the present suit against the covenantor.—*Chambers v. Philadelphia Pickling Co.*, 83 A. 890.

CREDIBILITY.

See Trial, § 48; Witnesses, §§ 311-414.

CREDITORS.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Fraudulent Conveyances; Novation.

CRIMINAL LAW.

See Assault and Battery, § 92; Bribery; Constitutional Law, § 270; Contempt; Disorderly Conduct; Elections, §§ 314-329; Grand Jury; Homicide; Indictment and Information; Intoxicating Liquors; Jury, §§ 31, 72; Rape; Taxation, § 571; Witnesses, §§ 57, 306, 330, 392.

VII. FORMER JEOPARDY.

§ 182 (N.J.Sup.) The discharge of a jury before verdict, although over the objection of accused, does not constitute former jeopardy.—*State v. Van Ness*, 83 A. 195.

§ 185 (N.J.Sup.) In a criminal prosecution, where the deputy clerk, without warrant of law and instead of receiving the verdict as he was authorized by Act March 22, 1899 (2 Comp. St. 1910, p. 1844) § 74a, and Act April 3, 1902 (2 Comp. St. 1910, p. 1523) § 29, discharged the jury upon being told that they could not agree, that act does not bar further prosecution.—*State v. Van Ness*, 83 A. 195.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 260 (Me.) Upon the imposition of sentence, the taking of an appeal, and filing an appeal bond, the jurisdiction of a magistrate or judge of a municipal court is at an end, unless the appellant withdraws his appeal as authorized by Rev. St. c. 133, § 19.—*State v. Houlehan*, 83 A. 1106.

When a motion is made by an appellant, under Rev. St. c. 133, § 19, to withdraw his appeal, the powers of the magistrate are those only which are conferred by that section.—*Id.*

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 274 (Conn.) Where defendant was illiterate, and did not understand the English language perfectly, and answered in the negative to the question as to whether he wanted counsel, and pleaded guilty, *held*, after conviction and sentence, that he was entitled to have the judg-

ment opened to withdraw his plea of guilty and enter a plea of not guilty.—*State v. Maresca*, 83 A. 635.

§ 292 (Me.) Even when the record of prior conviction is in the same court, an attempt to set it up by way of motion, instead of by plea, is not to be encouraged.—*State v. Houlehan*, 83 A. 1106.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 364 (Vt.) In a prosecution for adultery committed with D., evidence that he escaped through a window at the time accused was arrested *held* admissible as *res gestæ*.—*State v. Comstock*, 83 A. 539.

(C) Other Offenses, and Character of Accused.

§ 369 (Md.) Evidence that accused told witness that he had performed similar abortions on other girls *held* inadmissible to show familiarity with the methods of abortion.—*Meno v. State*, 83 A. 759.

§ 369 (Md.) Evidence that accused sold intoxicating liquors at her home to others than the persons named in the indictment *held* admissible.—*Curry v. State*, 83 A. 1030.

§ 371 (Pa.) Where the alleged motive of a homicide was to prevent deceased from testifying as to embezzlement by defendant, it was only necessary to show the charge of embezzlement and that decedent had testified against the defendant, and it was error to introduce evidence tending to show defendant's actual guilt of embezzlement.—*Commonwealth v. Andrews*, 83 A. 412.

(E) Best and Secondary and Demonstrative Evidence.

§ 404 (N.J.Sup.) Where an exhibit contains more than one external appearance relevant to the issue, a part only of such exhibit containing but one of such marks selected for the purpose by the party offering it is inadmissible.—*State v. Strong*, 83 A. 506.

(F) Admissions, Declarations, and Hearsay.

§ 407 (N.J.) The truth of oral statements made to a person may be admitted by his silence, but failure to reply to a statement in a letter, or the absence of proof of reply, is not an admission of its truth.—*State v. MacFarland*, 83 A. 993.

§§ 419, 420 (Me.) In a trial for uxoricide, testimony as to a conversation witness had with decedent the day before the killing, and as to what decedent said about accused's manner, was properly excluded as being hearsay.—*State v. Albanes*, 83 A. 548.

§§ 419, 420 (N.J.Sup.) In a prosecution for felonious assault, testimony by the officer who arrested accused that he did so on information from codefendants *held* inadmissible as hearsay.—*State v. Niesbalski*, 83 A. 179.

§ 421 (N.J.Sup.) The prosecutrix, upon the trial of an indictment for rape, when it is essential to prove that she is under the age of consent, may testify to her own age.—*State v. Huggins*, 83 A. 495.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 446 (N.J.) Letters written to a person, though evidence against him for some purposes, are not evidence of the truth of their contents unless there is other evidence from which acquiescence in the truth can be inferred.—*State v. MacFarland*, 83 A. 993.

(I) Opinion Evidence.

§ 448 (N.J.Sup.) On trial of a member of the board of education for soliciting a bribe

for voting for reappointment of the principal, cross-examination of prosecutor as to the effect which would have been produced on the mind of another member of an alleged combination of members of the board to solicit bribes for their votes by the communication to him of accused's statement that such other member demanded money for his vote was properly excluded as calling for an opinion.—*State v. Merkle*, 83 A. 186.

(J) Testimony of Accomplices and Codefendants.

§ 507 (Md.) A woman on whom an abortion has been performed is not an accomplice, so that her evidence requires corroboration to establish sufficient proof of guilt.—*Meno v. State*, 83 A. 759.

§ 510 (Pa.) There may be a conviction on the uncorroborated testimony of an accomplice.—*Commonwealth v. De Masi*, 83 A. 430.

(M) Weight and Sufficiency.

§ 553 (Del.O.&T.) Where evidence is conflicting, if the jury cannot reconcile it, they should accept that which, under the circumstances, they think most worthy of credit and belief.—*State v. Brown*, 83 A. 1083.

§ 561 (Del.O.&T.) A person accused of crime is presumed innocent until proven guilty beyond a reasonable doubt, and, if the jury have a reasonable doubt of his guilt, the doubt should inure to his benefit, and they should acquit.—*State v. Brown*, 83 A. 1083.

Reasonable doubt defined.—*Id.*

§ 572 (Pa.) The measure of proof required to establish an alibi is simply that it shall be satisfactory; it not being necessary that it be beyond doubt.—*Commonwealth v. Andrews*, 83 A. 412.

Proof tending to establish alibi, though not clear, may with other facts of the case raise doubt enough to produce an acquittal.—*Id.*

XII. TRIAL.

(B) Course and Conduct of Trial in General.

§ 656 (Pa.) In prosecution for murder, contention that trial judge erred in quoting to jury testimony as to threats without telling the jury that the testimony was specifically denied by defendant *held* not sustainable.—*Commonwealth v. Reed*, 83 A. 601.

(C) Reception of Evidence.

§ 667 (Me.) The question of relevancy or irrelevancy of testimony on the ground of remoteness in time is a preliminary question, to be determined by the presiding justice in his discretion.—*State v. Albanes*, 83 A. 548.

§ 673 (N.J.) In a prosecution for uxoricide, it is improper to permit letters written by a third person and found in defendant's possession, which are admissible to show motive, to be used as evidence that defendant had said he would soon divorce his wife.—*State v. MacFarland*, 83 A. 993.

§ 676 (Me.) The trial court can reasonably limit the number of witnesses on an issue of accused's character.—*State v. Albanes*, 83 A. 548.

(D) Objections to Evidence. Motions to Strike Out, and Exceptions.

§ 696 (Md.) A motion to strike all the evidence against accused was properly denied, where any part of it was admissible.—*Jessup v. State*, 83 A. 140, 143.

A motion by a defendant to strike out all the evidence in favor of the state was properly denied, as in the nature of a demurrer to the evidence.—*Id.*

On a trial without a jury, where a motion to strike out all the state's evidence was properly overruled, and the court made findings

against accused, a judgment of conviction was properly rendered thereon.—*Id.*

§ 696 (Md.) Refusal to sustain a motion to strike an improper answer of witness prompted by an improper remark of the state's attorney *held* error.—*Meno v. State*, 83 A. 759.

(E) Arguments and Conduct of Counsel.

§ 706 (Md.) In a prosecution for homicide by abortion, a statement interjected by the prosecuting attorney during the examination of a witness *held* improper and prejudicial error.—*Meno v. State*, 83 A. 759.

(F) Province of Court and Jury in General.

§ 751 (N.J.Sup.) The court in a criminal case in its discretion can withdraw a juror in extraordinary circumstances to prevent the failure of justice.—*State v. Lewis*, 83 A. 692.

§§ 763, 764 (Pa.) On trial for murder, charging jury to understand that they are to scrutinize more closely evidence showing absence of defendant than that showing his presence *held* error, where evidence of guilt was circumstantial.—*Commonwealth v. Andrews*, 83 A. 412.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 783 (Pa.) Where the main but not the only purpose of defendant's evidence in a murder trial is to establish an alibi, it is error in the charge to confine the effect of the evidence to that one purpose.—*Commonwealth v. Andrews*, 83 A. 412.

§ 789 (N.J.Sup.) Where there was evidence to prove an alibi, and defendant requested a charge that, if the reasonable doubt of guilt is raised even by inconclusive evidence of the alibi, defendant is entitled to the benefit of it, and the court answered, "I will charge you that the evidence must satisfy you of the defendant's guilt beyond a reasonable doubt," it was not a compliance with the request and is ground for reversal.—*State v. De Germalmo*, 83 A. 643.

§ 789 (Pa.) The court, in a murder trial, explaining the meaning of reasonable doubt, should charge that the juror ought not to condemn unless he is convinced by the evidence, and that he would venture to act upon the conviction in matters of the highest concern and importance to the juror's interest.—*Commonwealth v. Andrews*, 83 A. 412.

§ 823 (Pa.) The charge that some 20 witnesses were called by defendant to testify as to his good character as a peaceable and law-abiding citizen is inadequate, and is not cured by a further instruction, asked by defendant, that the evidence of his character is to be considered with other evidence in the case, and if all combined creates a reasonable doubt, defendant is entitled to acquittal.—*Commonwealth v. Andrews*, 83 A. 412.

(H) Requests for Instructions.

§ 834 (N.J.Sup.) Where request to charge calls for a correct legal principle, is applicable to the testimony, and is clearly material, defendant is entitled to have it so charged as not to leave room for mistake by the jury.—*State v. De Germalmo*, 83 A. 643.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 922 (Me.) It should be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial.—*State v. Houlehan*, 83 A. 1106.

§ 972 (Me.) Like a demurrer, a motion in arrest of judgment is addressed only to the record, and can introduce no facts not appearing therein.—*State v. Houlehan*, 83 A. 1106.

XV. APPEAL AND ERROR, AND CERTIORARI.

B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1032 (N.J.Sup.) Under Criminal Procedure Act (2 Comp. St. 1910, p. 1834) § 44, an objection to an indictment *held* not available when raised for the first time in a court of review.—State v. Merkle, 83 A. 186.

§ 1036 (N.J.Sup.) Where evidence, reviewed only under Criminal Procedure Act, § 136, is tricken out without objection by defendant, a judgment against defendant will not be reversed.—State v. Lockman, 83 A. 689.

§ 1036 (Vt.) An objection to evidence not made at the trial will not be considered on exceptions.—State v. Comstock, 83 A. 539.

§ 1037 (N.J.Sup.) A judgment will not be reversed for error in the address of counsel to the jury, where there is not prompt objection at the time the injurious comments are made.—State v. Lockman, 83 A. 689.

§ 1037 (N.J.Sup.) Where counsel transcend the proper comment on the evidence, the complaining party should object promptly; otherwise it is no ground for reversal.—State v. Parer, 83 A. 690.

§ 1043 (Vt.) Where evidence is admitted over objection stating no ground, the ruling is not available on exceptions, unless the evidence was inadmissible under any state of the case.—State v. Comstock, 83 A. 539.

(D) Record and Proceedings Not in Record.

§ 1114 (Me.) Exceptions will be sustained only when it appears from the exceptions themselves that the court mistook the law.—State v. Houlehan, 83 A. 1106.

(E) Assignment of Errors and Briefs.

§ 1129 (Pa.) It is bad practice in an assignment of error to quote two distinct sentences in the charge separated by a page and a half of printed matter.—Commonwealth v. Reed, 83 A. 601.

Assignments of error criticising the charge in general terms, but quoting no part of the *passimis* verbis in the specifications, will be disregarded.—Id.

(G) Review.

§ 1134 (Pa.) Where the murder of which a prisoner was convicted was committed in the perpetration of a robbery, the duty imposed on the Supreme Court by Act Feb. 15, 1870 (P. L. 15), is limited to ascertaining whether there was competent evidence to sustain a verdict of guilty.—Commonwealth v. De Masi, 83 A. 430.

§ 1149 (Md.) The court's ruling on an application to require the prosecutor to elect for which of two misdemeanors charged he will prosecute or to quash the indictment, being discretionary cannot be the subject of an appeal.—Curry v. State, 83 A. 1030.

§ 1153 (Me.) On an issue as to accused's good reputation, the question of relevancy or irrelevancy of testimony on the ground of remoteness in time is a preliminary question to be determined by the presiding justice in his discretion, exercise of which will be disturbed only for gross abuse.—State v. Albanes, 83 A. 548.

§ 1153 (N.J.Sup.) The trial court has discretionary power to allow leading questions, and its rulings do not constitute grounds for reversal.—State v. Van Ness, 83 A. 195.

§ 1159 (N.J.Sup.) A court of review in a case brought up under Criminal Procedure Act (2 Comp. St. 1910, p. 1863) § 136, may not reverse the conviction on the ground that the

verdict is not supported by a preponderance of the evidence.—State v. Merkle, 83 A. 186.

§ 1166 (N.J.Sup.) A defendant has no ground of complaint that a grand jury, which might consider a complaint against him, was discharged by the court.—State v. Egan, 83 A. 235.

§ 1168 (Me.) In a trial for uxoricide, any error in a ruling that evidence tending to show commission of adultery by decedent must be confined to facts occurring within four days before the homicide was harmless, where it appeared that accused had been informed of his wife's illicit relations long before, and that on that information he had brought a libel for divorce.—State v. Albanes, 83 A. 548.

§ 1169 (N.J.Sup.) In a prosecution for felonious assault, the admission of evidence that accused was arrested on information obtained from codefendants *held* prejudicial, when the only witness who identified accused did not select him from a crowd.—State v. Niesbalski, 83 A. 179.

§ 1169 (N.J.Sup.) On a trial for rape, permission to the prosecutor of the pleas to ask if the girl made a complaint against the defendant did not do any manifest wrong or injury to the defendant.—State v. Huggins, 83 A. 495.

§ 1170 (N.J.Sup.) The error in excluding evidence of a fact proved by other evidence, and not contradicted by the state, is not prejudicial.—State v. Merkle, 83 A. 186.

The exclusion of oral evidence of the existence of a report is harmless error where the report itself is subsequently put in evidence.—Id.

(H) Determination and Disposition of Cause.

§ 1186 (N.J.Sup.) Where accused availed himself of Criminal Procedure Act (2 Comp. St. 1910, p. 1863) § 136, he was not entitled to a reversal, unless he suffered manifest wrong from the rulings complained of.—State v. Merkle, 83 A. 186.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1210 (Vt.) At common law a convict might be given cumulative sentences, and so P. S. 2362, was merely declarative of the common law.—Ex parte Sargood, 83 A. 718.

P. S. 2362, providing for cumulative sentences, *held* not to limit the power of the courts to impose cumulative sentences to the same term of court at which the first sentence was imposed; the common law allowing the imposition of such sentences at subsequent terms.—Id.

CROPS.

See Landlord and Tenant, § 277.

CROSS-EXAMINATION.

See Witnesses, §§ 269, 323, 392.

CROSSINGS.

See Railroads, §§ 327-350.

CUMULATIVE SENTENCE.

See Criminal Law, § 1210.

CURTESY.

See Attachment, § 50; Dower.

CUSTOMS AND USAGES.

See Common Law; Elections, § 329; Master and Servant, §§ 137, 141.

§ 19 (Me.) Evidence of a custom is inadmissible, in the absence of proof of its common prevalence in the community and of the adverse party's knowledge thereof.—*Ireland v. Clark*, 83 A. 667.

DAMAGES.

See Action, § 53; Appeal and Error, §§ 933, 979, 1053, 1064, 1068, 1214; Assignments, § 94; Death, § 95; Dedication, § 18; Eminent Domain, §§ 84-152, 271; Evidence, § 534; Highways, §§ 115, 118; Injunction, § 62; Justices of the Peace, § 37; Libel and Slander, §§ 120, 126; Master and Servant, §§ 39, 41, 42; Mortgages, § 207; Municipal Corporations, §§ 399, 402; Physicians and Surgeons, § 18; Pleading, § 250; Sales, § 418; Trial, § 165; Vendor and Purchaser, § 330.

I. NATURE AND GROUNDS IN GENERAL.

§ 6 (Conn.) "Certainty," as applied to damages, means freedom from doubt.—*Johnson v. Connecticut Co.*, 83 A. 530.

§ 6 (Md.) Where the seller, under a contract for the exclusive sale of agricultural implements in certain territory for a fixed period, violates the contract by refusing to sell a sufficient number of implements to satisfy the requirements of the buyer's business in such territory for such period, the buyer can recover only such resulting loss of profits as can be proved with reasonable certainty.—*Rawlings v. Duane H. Nash*, 83 A. 646.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective Consequences or Losses.

§ 24 (Conn.) Injuries in tort actions which are merely possible, are speculative, and can furnish no basis for damages.—*Johnson v. Connecticut Co.*, 83 A. 530.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 74 (N.J.Ch.) A penalty stipulated for in a contract, for a breach thereof, is often construed as liquidated damages agreed to be paid in lieu of ascertainment and award of damages.—*Baerenklau v. Peerless Realty Co.*, 83 A. 375.

Where it is difficult to ascertain the damages for a breach of contract, the parties may stipulate for the payment of a specified sum as liquidated damages.—*Id.*

VI. MEASURE OF DAMAGES.

(A) Injuries to the Person.

§ 95 (Del.Super.) The measure of damages for injury to a servant is such sum as will reasonably compensate him for his injury, including his pain in the past and such as may result in the future, as well as for lost time and wages and impairment of earning capacity.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 95 (Del.Super.) An injured servant is entitled to recover money expended for medical services owing to the injury, for suffering due to the injury and such as he may endure in the future, and for loss of wages and impairment of earning power.—*Spahn v. People's Ry. Co.*, 83 A. 27.

(B) Injuries to Property.

§ 112 (Del.Super.) In an action for loss of timber by the escape of fire from defendant's land, plaintiff's measure of damages is the difference between the value of his property immediately before the fire, including timber, young and old, and its value thereafter.—*Layton v. Hudson*, 83 A. 134.

(C) Breach of Contract.

§ 120 (N.J.) A contract to pay a stipulated percentage of the cost of a building in land to be selected at "schedule prices and on the terms adopted by" the other party is a contract to pay a specific thing, and, in case of performance and nonpayment, the measure of damages is the reasonable value of the lots.—*Osterling v. Cape May Hotel Co.*, 83 A. 887.

§ 120 (R.I.) Where plaintiff, in pursuance of a contract, surrendered an option and performed certain services, *held* that, on breach, he was entitled to recover the value of the option and of the services.—*Eastman v. Dunn*, 83 A. 1057.

§ 124 (N.J.Sup.) In an action by a builder against an owner upon a building contract which plaintiff was wrongfully prevented from performing, it is error in calculating the damage to consider a schedule of payment provided in the contract, where the schedule was not in proportion to the cost incurred during the progress of the work.—*Westlecraft v. Barry*, 83 A. 501.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Me.) Verdict for \$3,000 for personal injury *held* excessive by \$1,500, though plaintiff's right leg was crushed, ligaments thereof were dislocated, the arch of his ankle was broken, sinews were bruised, and tissues lacerated.—*Pierce v. Maine Cent. R. Co.*, 83 A. 1103.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 173 (Pa.) In an action for personal injuries, testimony showing wages paid by plaintiff to a servant for services formerly performed by plaintiff for herself is admissible.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

§ 185 (Conn.) Plaintiff, in an action for personal injuries, while entitled to recover for such future suffering and injury as she proves to be reasonably probable, is not required to prove such future injuries and suffering by testimony reasonably certain or free from doubt.—*Johnson v. Connecticut Co.*, 83 A. 530.

(C) Proceedings for Assessment.

§ 216 (Pa.) In an action for personal injuries, an instruction that plaintiff was entitled to compensation for damages for delay which might be less than 6 per cent. or might be any per cent. the jury would say was right was error.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

(D) Computation and Amount, Double and Treble Damages, and Remission.

§ 225 (Pa.) Damages in a personal injury case are assessed as of the date of the trial, and there can be no general compensation for delay.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

DATE.

See Intoxicating Liquors, § 223.

DEAD BODIES.

See Health.

DEATH.

See Abatement and Revival, § 69; Appeal and Error, §§ 1066, 1064; Carriers, §§ 238, 321; Charities, § 12; Evidence, §§ 44, 194; Insurance, § 559; Master and Servant, §§ 113, 129, 243, 258, 265, 278, 279, 293, 332; New Trial, § 93; Railroads, §§ 275, 278, 347, 350, 400, 453, 482; Street Railroads, §§ 112, 114; Trial, § 260.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 24 (Me.) A mother was not guilty of contributory negligence in leaving a five year old child with a nine year old daughter on the sidewalk, telling the latter to watch the child, which she promised to do, during the brief absence of the mother.—*Grant v. Bangor Ry. & Electric Co.*, 83 A. 121.

(D) Pleading and Evidence.

§ 48 (Del.Super.) A declaration for death, alleging that a statute of Pennsylvania then and still in force provided that, when death was caused by negligence and no action was brought by deceased, his widow might maintain an action for damages for his death, sufficiently set out the statute.—*Daniels v. Philadelphia & R. Ry. Co.*, 83 A. 19.

§ 67 (Pa.) Where deceased received a salary as manager of a firm or a percentage of the profits for such services, such salary may be shown in establishing his earning capacity, and if he was engaged alone in a business requiring little capital, the profits of such business could be shown.—*Bogges v. Baltimore & O. R. Co.*, 83 A. 356.

Where a husband engaged in a business with a nominal capital gives his wife a monthly allowance, proof thereof is admissible to show his earning capacity.—*Id.*

(E) Damages, Forfeiture, or Fine.

§ 95 (Del.Super.) In an action for death of a child, the measure of damages is such a sum as the deceased would probably have earned and saved for the benefit of her next of kin.—*Gismondi v. People's Ry. Co.*, 83 A. 136.

§ 95 (Del.Super.) In a widow's action for wrongful killing of her husband, her measure of damages was such an amount as would compensate her for the pecuniary loss sustained during his life expectancy.—*Gatta v. Philadelphia B. & W. R. Co.*, 83 A. 788.

§ 95 (N.J.) In an action for wrongful death, plaintiff held entitled to recover the present worth of a sum, which, paid in annual installments for the term of decedent's life expectancy, would give the beneficiaries the annual amount of decedent's contribution to their maintenance, and also the several amounts of such annual contributions, with interest, for the time between the death and the date of trial.—*Dan-skin v. Pennsylvania R. Co.*, 83 A. 1006.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Attachment; Bankruptcy; Fraudulent Conveyances; Novation.

DECEDENTS.

See Descent and Distribution; Witnesses, §§ 159, 178.

DECLARATION.

See Pleading.

DECLARATIONS.

See Evidence, §§ 266, 313.

DEDICATION.

See Adverse Possession, § 8; Evidence, § 461; Municipal Corporations, §§ 654, 665.

I. NATURE AND REQUISITES.

§ 18 (Md.) A plat of lands into lots, streets, and alleys in a public square made by commissioners appointed by Acts 1786, c. 11, followed by a recognition thereof by the owner who leased a lot described by number on the plat

and as bounded on the public square, held a dedication of the public square.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 18 (Pa.) A subsequent grantee of a lot described as diminished by the widening of the street held not entitled to damages for the widening when he rebuilt according to the new building line; the deed having the effect of a dedication.—*Kaufmann v. City of Philadelphia*, 83 A. 708.

That the coping and steps of a building extended onto the strip of land included in the widening of a street is unimportant as affecting the rights of the parties.—*Id.*

§ 19 (N.J.) Where the owner of land after subdividing it into lots platted part of it as a street, that platting constituted a dedication to the public.—*Schmidt v. Spaeth*, 83 A. 242.

§ 19 (Pa.) Sale of lots according to plan showing them to be on a street implies a covenant to the purchaser that the street shall be forever open, and to constitute a dedication to public use.—*O'Donnell v. City of Pittsburgh*, 83 A. 314.

The rights in dedicated streets acquired by a purchaser of lots by a deed referring to a plat, being private contract rights, are not affected by the failure of the municipality to act on the dedication.—*Id.*

As between parties claiming under original proprietor and having notice of plan of lots, it was immaterial whether the plan was signed, sealed, or recorded.—*Id.*

§ 19 (R.I.) The owners of adjoining land on platting the same may agree on a scheme providing for a street between the two plats.—*Brown v. Curran*, 83 A. 515.

Ordinarily the filing of a plat showing lots and streets and the sale of a single lot with reference to the plat will complete the dedication so far as the owner is concerned.—*Id.*

§ 29 (R.I.) Easement in a street never opened as originally contemplated by the platters of city additions held abandoned and extinguished.—*Brown v. Curran*, 83 A. 515.

A dedication of land for a street may be revoked by the dedicator and his grantees before acceptance by the public either by user or by action of the public authorities.—*Id.*

§ 31 (N.J.) Land dedicated for a public highway does not become a public thoroughfare without acceptance by the public, indicated by formal action by the proper representatives, or by public user.—*Schmidt v. Spaeth*, 83 A. 242.

§ 37 (Md.) Where a plat of a town authorized by the Legislature was recorded in 1787, and the first charter of the town granted in 1823 contained no description of the limits of the town, but the limits and a public square were distinctly shown on the plat, and there was evidence that the public square was used as a common as early as 1854, and the plat in evidence did not show that the square had been dedicated for any particular purpose, an acceptance of the dedication was shown.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 39 (Md.) Where a dedication of a square to the public by a plat was accepted by the town, and individuals maintained buildings on the square, and there was nothing to show that the town had abandoned the square, or that certain companies which maintained structures thereon had not lawfully acquired the right so to do, and the individuals or those under whom they claimed never had a deed to any part of the square, nor were they induced to expend money by action of the town, the town was not estopped from suing the individuals for trespass.—*Cushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 43 (R.I.) Evidence as to acts of the filers of a plat and their successors in title concern-

ing the use of land shown on the plat to have been left for street purposes *held* admissible on the issue of their agreement to dedicate the strip for a street.—*Brown v. Curran*, 83 A. 515.

§ 44 (R.I.) Evidence *held* insufficient to show an acceptance by the public of land alleged to have been dedicated for street purposes.—*Brown v. Curran*, 83 A. 515.

§ 45 (Md.) While the jury must pass on the facts of dedication or acceptance, the court must determine what constitutes dedication and acceptance.—*Oushwa v. Burgess & Commissioners of Williamsport*, 83 A. 389.

§ 45 (N.J.) In trespass *quare clausum fregit*, where defendant confessed and avoided on the ground that the locus in quo was a public street, the question of acceptance of a dedication should have been submitted to the jury.—*Schmidt v. Spaeth*, 83 A. 242.

II. OPERATION AND EFFECT.

§ 48 (Pa.) The owner of any lot who has purchased with knowledge of a plan is not entitled to obstruct or deny public right to use any of the streets or alleys shown on the plan; the easement being appurtenant to every lot.—*O'Donnell v. City of Pittsburgh*, 83 A. 314.

§ 51 (Pa.) That the original proprietor of a plan of lots dedicated only 20 feet of a 40-foot wide street does not defeat a purchaser's right to insist that the 20 feet be kept open.—*O'Donnell v. City of Pittsburgh*, 83 A. 314.

DEEDS.

See Corporations, §§ 428, 661; Covenants; Easements, § 44; Injunction, § 62; Mines and Minerals, § 55; Mortgages; Municipal Corporations, § 654; Pleading, § 848; Reformation of Instruments, §§ 19, 32; Vendor and Purchaser, § 230.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances in General.

§ 6 (Md.) Where an owner by a deed absolute in form and reciting a valuable consideration conveyed certain land in fee simple, and the purchaser from such grantee agreed orally for consideration with the original owner that he might repurchase the land at any time, the deed to the second grantee cannot be held to be a conditional sale.—*Riggin v. Robinson*, 83 A. 148.

III. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 90 (Vt.) Rules for construing deeds must be treated as subordinate, and not as rules of positive law.—*Johnson v. Barden*, 83 A. 721.

§ 93 (Vt.) The common-law rule in the construction of deeds was that effect will be given to the intention of the parties as drawn from the instrument, if such effect can be given without violating some rule of law.—*Johnson v. Barden*, 83 A. 721.

§ 97 (Vt.) It was a rule at common law that, if the habendum or any later clause in a deed was repugnant to the granting clause, the granting clause would control.—*Johnson v. Barden*, 83 A. 721.

The common-law rule that the granting clause of a deed controls in case of a conflict between it and the other clauses is merely a rule of construction in Vermont, and is not a rule of positive law, and it must yield to the rule that the intention of the parties as drawn from the whole deed governs.—Id.

§ 100 (Pa.) The words of a grant are to receive a reasonable construction, according to the intention of the parties; but, in ascertaining their intention, courts will look into the

circumstances under which the grant was made.—*Mercantile Library Co. of Philadelphia v. Fidelity Trust Co.*, 83 A. 592.

(B) Property Conveyed.

§ 114 (R.I.) Where a deed described land and gave the grantee the right to land, load, and unload his boat on certain mentioned land, which was not included in the description, it did not include the land over which he was given the easement.—*Dodge v. Lavin*, 83 A. 1009.

(C) Estates and Interests Created.

§ 129 (Vt.) A deed indicating by the habendum, covenant, and a clause which was wholly written that the conveyance was to the grantees for their lifetime, and from which the words "heirs and assigns" appearing in the printed form had been stricken out, *held* to convey a life estate only, although there had been a failure to strike the words from the granting clause.—*Johnson v. Barden*, 83 A. 721.

At common law, when the word "heirs" in the granting clause was not accompanied by a pronoun, the deed was not, by the use of the word "heirs," in the granting clause, construed to make a grant of inheritance contrary to that indicated by the other clauses, though the grantees were husband and wife.—Id.

The use of the word "forever" in the habendum of a deed to the grantees, "their lifetime, to them and their own use, benefit and behoof forever," did not prevent the grant being of an estate for life.—Id.

(E) Conditions and Restrictions.

§ 171 (N.J.) A grantee in a deed containing an interlineation referring to an agreement not in existence at the time is not bound by a subsequent restriction fixing a building line, to which he did not assent.—*Clevenger v. Quinn*, 83 A. 771.

§ 174 (N.J.Ch.) Under P. L. 1903, p. 489, §§ 1, 2, and Conveyance Act, § 53, a purchaser of a lot *held* chargeable with notice of a restrictive covenant in the deed to another lot sold by her grantor.—*Howland v. Andrus*, 83 A. 982.

§ 176 (N.J.) A restrictive covenant in a deed *held* not enforceable against the grantee because similar covenants had been disregarded by other persons in interest.—*Clevenger v. Quinn*, 83 A. 771.

§ 176 (N.J.Ch.) The location of a house four feet over a building line established by a restrictive covenant *held* not so substantial an infraction as to preclude the owner from enforcing the covenant as against other purchasers.—*Howland v. Andrus*, 83 A. 982.

DEFAMATION.

See Libel and Slander.

DEFAULT.

See Judgment, §§ 101, 162.

DELAY.

See Carriers, §§ 95-106; Damages, § 225; Sales, § 181.

DELEGATION OF DUTY.

See Master and Servant, §§ 103, 151, 187.

DELEGATION OF POWER.

See Constitutional Law, § 64.

DELIVERY.

See Gifts, § 19; Sales, § 418.

DEMAND.

See Landlord and Tenant, § 108; Specific Performance, § 91.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404; Evidence, § 194.

DEMURRER.

See Equity, §§ 232, 237, 263; Pleading, §§ 192-221.

DENTISTS.

See Physicians and Surgeons, § 9.

DEPOSITIONS.

See Witnesses, § 178.

§ 2 (N.J.Sup.) The power of the court to appoint, on the application of plaintiff residing in a foreign country, a commissioner to take his testimony *de bene esse* under P. L. 1900, pp. 375, 376, §§ 45, 46, is not limited by P. L. 1902, p. 459, and the court may not impose terms.—*Baelde v. San Domingo Improvement Co.*, 83 A. 485.

P. L. 1900, p. 372, § 35, *held* to refer to depositions of witnesses within the state and is not in conflict with section 46 authorizing the taking of depositions of nonresident witnesses.—*Id.*

§ 9 (N.J.Sup.) The procuring of a deposition of a foreign witness either by a commission or on notice under 2 Gen. St. 1895, p. 1403 et seq., was a matter of right and not a matter resting in the discretion of the court.—*Baelde v. San Domingo Improvement Co.*, 83 A. 485.

§ 86 (N.H.) Waiver by plaintiff's counsel of defendant's obligation to file deposition, as required by Pub. St. 1901, c. 225, § 11, *held* not to deprive plaintiff of right to use the deposition at the trial.—*Clark v. Clark*, 83 A. 515.

DEPOSITS.

See Banks and Banking, §§ 133, 136; Garnishment, § 56.

DEPOSITS IN COURT.

See Interpleader, § 12.

DESCENT AND DISTRIBUTION.

See Bastards, § 102; Charities, § 49; Dower; Executors and Administrators; Statutes, § 115; Wills.

I. NATURE AND COURSE IN GENERAL.

§ 12 (Md.) Where, upon the death of E.'s father intestate, one-eighth of the estate descended to E., subject to dower, as one of eight children, some of whom, including E., were by a second wife, and E. became administrator, and agreed with the widow and other children to purchase their interest under an understanding that he should not dispose of it, and that it would descend at his death to the brothers and sisters then living or their descendants per stirpes, and the children, on being erroneously advised that E., because he was administrator, could not purchase directly, conveyed to another with an understanding that he should immediately convey to E., and conveyance was made, E. paying the entire consideration, such conveyance to the third person and his conveyance to E. did not change E.'s title from one of descent to one by purchase, so that on E.'s death it would descend in the same manner as though the conveyances had not been executed.—*Dudrow v. King*, 83 A. 34.

As a rule, one who holding by descent conveys his title away holds by purchase, and not descent upon a reconveyance to him.—*Id.*

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.**(B) Surviving Husband or Wife.**

§ 53 (Pa.) Act April 1, 1909 (P. L. 87), giving to widows a preference of \$5,000 in distribution of intestate estates, is constitutional.—*In re Guenthoer's Estate*, 83 A. 617; *In re Mercer's Estate*, *Id.* 707.

DESCRIPTION.

See Attachment, § 322; Mortgages, § 529; Names.

DEVISAVIT VEL NON.

See Wills, §§ 166, 302, 316.

DILIGENCE.

See Judgment, § 386.

DIRECTING VERDICT.

See Appeal and Error, §§ 927, 1078; Trial, § 143.

DIRECTORS.

See Banks and Banking, § 108; Corporations, §§ 152, 320, 388; Schools and School Districts, § 69.

DISCHARGE.

See Insolvency, § 33; Master and Servant, §§ 31-43; Municipal Corporations, §§ 192, 218; Release; Trusts, § 162.

DISCONTINUANCE.

See Dismissal and Nonsuit.

DISCRETION OF COURT.

See Appeal and Error, §§ 956-982; Criminal Law, § 1153; Depositions; Divorce, § 240; Evidence, § 546; Indictment and Information, § 182; Mortgages, §§ 529, 578; New Trial, §§ 6, 68, 72; Trial, § 33; Witnesses, §§ 37, 240.

DISMISSAL AND NONSUIT.

See Abatement and Revival, § 15; Appeal and Error, §§ 628, 927; Justices of the Peace, § 164; Master and Servant, §§ 285, 288; Municipal Corporations, §§ 665, 1026; New Trial, § 21; Street Railroads, § 98; Trial, § 165; Trusts, § 372; Wills, §§ 371½, 706.

II. INVOLUNTARY.

§ 58 (Me.) A motion to dismiss a writ lies only to some defect which can be seen on inspection of the writ alone, and not where proof is necessary de hors the writ to support or resist it.—*Hubbard v. Limerick Water & Electric Co.*, 83 A. 793.

DISORDERLY CONDUCT.

§ 1 (Del.Super.) "Public place," as used in Act Gen. Assem. March 26, 1909 (25 Del. Laws, c. 247), prohibiting disorderly conduct, *held* to include all places within cities or towns which are not private.—*Lofland v. State*, 83 A. 1033.

§ 7 (Del.Super.) In a prosecution for disorderly conduct, in violation of Act Gen. Assem. March 26, 1909 (25 Del. Laws, c. 247), a complaint failing to allege that the misconduct was committed by defendant in a public place within the state, and outside the limits of an incorporated city or town, *held* fatally defective.—*Lofland v. State*, 83 A. 1033.

DISQUALIFICATION.

See Judges, § 42; Jury, § 95.

DISSOLUTION.

See Corporations, §§ 621, 629; Partnership, § 330.

DISTRIBUTION.

See Descent and Distribution.

DIVIDENDS.

See Corporations, §§ 152, 157; Wills, § 684.

DIVORCE.

See Constitutional Law, § 83; Marriage; Wills, § 647.

III. DEFENSES.

§ 49 (N.J.) A husband condones his wife's adultery by continuing intercourse with her after knowing of it.—Greims v. Greims, 83 A. 1001.

§ 54 (N.J.Ch.) Bad conduct by husband other than cruelty and infidelity cannot be set up as a bar to his suit for divorce for adultery.—Seibert v. Seibert, 83 A. 230.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.**(A) Jurisdiction. Venue. and Limitations.**

§ 62 (N.H.) Under Pub. St. 1901, c. 175, §§ 3, 4, libellant in a divorce suit must be a resident of the state at the time the libel is filed, and that defendant is such a resident, and that the cause of action arose in this state, *held* not sufficient to give jurisdiction.—Shatney v. Shatney, 83 A. 124.

Where a husband, who has resided for more than a year in this state, files a libel for divorce, and the wife, though a resident of another state, files a libel in answer thereto, asking for a divorce, the residence of the husband gives the court jurisdiction.—Id.

Under Pub. St. 1901, c. 175, § 5, providing for a decree of divorce in favor of the innocent party for certain causes, *held*, that the court, having jurisdiction of the husband's libel for divorce, in which the nonresident wife answered by libel for divorce, was required to grant divorce to the innocent party.—Id.

(B) Parties, Process, and Incidental Proceedings.

§ 76 (Del.Super.) Under Act Gen. Assem. March 29, 1907 (24 Del. Laws, c. 221), the court does not acquire jurisdiction of an action for divorce, where the service of the original writ was insufficient, and the alias was personally served, instead of by publication.—Morris v. Morris, 83 A. 934.

(D) Evidence.

§ 109 (N.J.) On a bill for divorce for adultery, condonation is a conclusion of fact, and not of law, and must be proved by defendant, upon whom lies the burden of proof.—Greims v. Greims, 83 A. 1001.

§ 129 (N.J.Ch.) Evidence in a suit by a wife for maintenance in which defendant filed a cross-bill for divorce *held* to show that the wife had committed adultery.—Seibert v. Seibert, 83 A. 230.

Evidence in a suit by a wife for maintenance in which defendant filed a cross-bill for divorce *held* not to show that defendant had committed adultery.—Id.

§ 135 (N.J.) Evidence *held* insufficient to show condonation of a wife's adultery.—Greims v. Greims, 83 A. 1001.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 240 (Conn.) The amount of alimony to be awarded a wife, obtaining a divorce, is within the discretion of the court within the limit prescribed by Gen. St. 1902, § 4556, taking in-

to consideration the amount of the husband's estate, his income, age, health, and earning capacity and the age, health, station, and separate estate of the wife.—Olmstead v. Olmstead, 83 A. 628.

An award to a divorced wife of \$3,500 on a husband's estate of \$11,000 *held* not to be disturbed on appeal, in absence of showing that the court did not properly consider all facts, including that the husband had previously given the wife \$8,000.—Id.

DOCUMENTS.

See Criminal Law, § 446; Evidence, §§ 353, 359.

DOING BUSINESS.

See Corporations, §§ 642, 657.

DOMICILE.

See Divorce, § 62.

DONATIONS.

See Gifts.

DOWER.

See Quieting Title.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 55 (Conn.) A widow owning an unassigned dower interest in land of her husband is a tenant in common to the extent of such interest with the husband's heirs, their grantees, and other owners of the property, and is entitled to possession and a proper share of the income.—Humphrey v. Gerard, 83 A. 210.

A widow's dower vests immediately without assignment or setting out on the death of her husband.—Id.

DRAINS.

See Injunction, § 172.

DRAMSHOPS.

See Intoxicating Liquors.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 270-314.

DUES.

See Insurance, § 770.

DUPLICITY.

See Indictment and Information, § 125.

DURESS.

See Contracts, § 95; Money Received.

DYING DECLARATIONS.

See Homicide, §§ 203, 218.

EASEMENTS.

See Dedication; Deeds, § 114; Ejectment, §§ 9, 23; Municipal Corporations, §§ 425, 450; Taxation, § 81; Trial, § 165.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 1 (N.J.Sup.) Ordinarily an easement is a right in fee, but it may be for an estate less than a fee or for a term of years.—Goldman v. Beach Front Realty Co., 83 A. 777.

§ 3 (N.J.Sup.) Under a written instrument giving grantee privilege of renting rolling chairs at the entrance of a merry-go-round at times when that was not running, the grantee acquired an easement in gross.—Goldman v. Beach Front Realty Co., 83 A. 777.

§ 6 (N.J.Ch.) A use of a way by one under a claim of right at such times as his convenience and business needs require is such a continuous use as will in time ripen into a precriptive right.—*Jarman v. Freeman*, 83 A. 372.

§ 26 (N.J.Sup.) Under a written instrument giving grantee privilege of renting rolling chairs at the entrance of a merry-go-round at times when that was not running, the grantee acquired an easement in gross which was not discontinued by the discontinuance of the merry-go-round and the transfer of the fee.—*Goldman v. Beach Front Realty Co.*, 83 A. 777.

§ 29 (Pa.) A conveyance to the owner of an adjoining tract of a strip of land provided that he strip should be used as an addition to the width of a passageway belonging to the grantee and for no other purpose, and that it should be used at all times as an open thoroughfare. Years later the grantor's successors agreed with the grantee's successors to permit the latter to build over the grantor's line two feet for a certain distance; the grantor's successors to have the use of the wall on paying half its cost, with an agreement to keep a passageway open through the building for the use of the owner. The building so erected was burned, and in the course of reconstruction the subsequent owner attempted to close the passage. *Held*, that the easement created by the original deed was not extinguished by the subsequent agreement, and the closing should be enjoined.—*Ebert v. Mishler*, 83 A. 596.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 44 (N.J.Ch.) Where a deed grants the use in common of a passageway, extending on one side of the lot granted between the lot granted and the land of the grantor, as a private way for travel and drainage, and the grantor reserves the fee, the grantee cannot enlarge the easement to accommodate land other than that to which it is appurtenant, and has only the right to enjoy the estate granted, while the grantor, who owns the fee in the way, and whose rights are not founded in grant, may use his property for any purpose consistent with the full enjoyment of the easement, but he cannot extend the use of his way to other lands, so as to impair the easement which he has granted.—*Jarman v. Freeman*, 83 A. 372.

§ 44 (Pa.) One who grants a right of way over his land conveys nothing but the right of passage, and reserves all incidents of ownership not granted.—*Mercantile Library Co. of Philadelphia v. Fidelity Trust Co.*, 83 A. 592.

§ 51 (Pa.) Where adjoining owners opened a passageway along the boundary line and used the same in common, one of the owners would not be compelled to remove grating, doors, etc., in the pavement, which did not obstruct its use; such grating being on his side of the boundary line.—*Mercantile Library Co. of Philadelphia v. Fidelity Trust Co.*, 83 A. 592.

§ 58 (Del.Ch.) Where one's legal title to land is subject to an easement of its use as a passage to a certain width, he could not erect a gate so as to materially narrow such width.—*Williamson v. McMonagle*, 83 A. 139.

Where one's title to land is subject to an easement of passage to a certain height, he cannot, by the erection of a wind-break, so decrease the height that it is not sufficient and reasonable for the passageway.—*Id.*

§ 58 (Pa.) Where a market company maintained a passageway, 21 feet wide, on the north side of which was an elevated pavement, 5 feet wide, and an adjoining owner, in order to widen the cartway, contributed 10 feet of his own land thereto, and the cartway as thus widened was used in common for 40 years, a successor in title to such adjoining owner could not convert such 10-foot strip to an elevated pave-

ment, thus destroying its use as a cartway, though he had theretofore been permitted to construct a pavement on such strip on a level with the other portion of the cartway.—*Mercantile Library Co. of Philadelphia v. Fidelity Trust Co.*, 83 A. 592.

§ 63 (N.J.Sup.) The remedy for disturbance of an easement is an action on the case.—*Goldman v. Beach Front Realty Co.*, 83 A. 777.

EJECTION.

See Carriers, § 356; Theaters and Shows.

EJECTMENT.

See Trial, § 253.

I. RIGHT OF ACTION AND DEFENSES.

§ 9 (Md.) Plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not by reason of any defect in the defendant's title; and if defendant has a good legal title, or the plaintiff has no legal title, no recovery can be had.—*Mullen v. Brydon*, 83 A. 1025.

§ 9 (N.J.) Ejectment cannot be maintained for a right of way over lands, the fee of which is in another, the appropriate remedy being an action for damages or for injunction, nor can the easement be established in favor of the tenant thereof in ejectment by the owner of the fee.—*Jacobson v. Hayday*, 83 A. 902.

§ 23 (N.J.) An easement of a right of way is no defense to ejectment by the owner of the fee where defendant admits that he has ousted plaintiff and claims exclusive possession.—*Jacobson v. Hayday*, 83 A. 902.

III. PLEADING AND EVIDENCE.

§ 81 (Md.) Under the express provision of Code 1904, art. 75, § 71, the plea of not guilty in ejectment is in legal effect a confession of possession and ejectment, and puts in issue the plaintiff's legal title to the premises, the right of possession, and the amount of damages.—*Mullen v. Brydon*, 83 A. 1025.

§ 81 (N.J.) The defendant, by pleading the general issue in ejectment, admits possession amounting to an ouster of plaintiff, and, if plaintiff shows title against which an exclusive possession of defendant would be wrongful, he will be entitled to judgment.—*Jacobson v. Hayday*, 83 A. 902.

ELECTION.

See Criminal Law, § 1149; Indictment and Information, § 132; Wills, § 801.

ELECTION OF REMEDIES.

§ 11 (Vt.) The bringing of a suit by a discharged employé for constructive services, wherein judgment was rendered against him, was not an election of remedies, which would be a bar to a subsequent action for breach of the employment contract, where the employé mistook his remedy in the first suit.—*Derosia v. Ferland*, 83 A. 271.

ELECTIONS.

See Municipal Corporations, § 64; Officers, § 83.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 1 (N.J.Sup.) Prior to the adoption of Const. 1776 women had no legal claim to vote.—*Carpenter v. Cornish*, 83 A. 31.

§ 7 (N.J.Sup.) No right to vote was conferred on females by Const. 1776.—*Carpenter v. Cornish*, 83 A. 31.

In Const. 1776, art. 4, conferring the right to vote on "all inhabitants" having certain quali-

sifications, the quoted phrase is limited to those having the right to vote before the adoption of the Constitution.—Id.

In Const. 1776, art. 4, relating to qualifications of voters, the phrase "claim a vote" *held* to refer to a lawful claim to vote at the time of the adoption of the Constitution.—Id.

§ 9 (N.J.Sup.) Act 1807 (Bloomfield's Laws, p. 33), and subsequent statutes excluding females from the right to vote, are not in contravention with Const. 1776.—Carpenter v. Cornish, 83 A. 31.

Act Feb. 23, 1844 (P. L. p. 111), calling for a constitutional convention and excluding women from voting for delegates, was not violative of Const. 1776.—Id.

§ 10 (N.J.Sup.) Even if Act 1797 (Pater-son's Laws, p. 231) permitted females to vote, it was subsequently repealed by Act 1807 (Bloomfield's Laws, p. 33).—Carpenter v. Cornish, 83 A. 31.

VI. NOMINATIONS AND PRIMARY ELECTIONS.

§ 126 (Pa.) Under Primary Election Act Feb. 17, 1890, the only proper method of voting for persons whose names are not printed on the ballot is to insert their names in the blank spaces prepared therefor.—In re Rodgers' Contested Election, 83 A. 476.

Vote by sticker affixed so as to obliterate name of opposing candidate *held* void.—Id.

Where a ballot is marked with two X's, one printed on a sticker attached to the ballot and the other made with pencil opposite the name printed on the ballot covered by the sticker, the intention of the voter is not shown with sufficient definiteness.—Id.

VII. BALLOTS.

§ 180 (R.I.) A so-called "hook" and a Y shaped mark, made by voters on ballots, *held* legal within the statute.—Clarke v. Joslin, 83 A. 843.

§ 194 (Vt.) Under P. S. 181, providing that, the board of civil authority deciding that any double or irregular marking of a ballot was made to identify it, it may be rejected, the inspectors might count a ballot marked with double or irregular markings, where it was not impossible to determine the intent.—Morgan v. Deverannes, 83 A. 660.

X. CONTESTS.

§ 295 (R.I.) Evidence on a petition to contest an election *held* to warrant a finding that 23 or 24 votes cast for petitioners were not counted.—Clarke v. Joslin, 83 A. 843.

§ 299 (R.I.) Upon facts in an election contest, *held*, that the court would not open packages and recount ballots, although it would examine them if they could be identified.—Clarke v. Joslin, 83 A. 843.

On a petition in the nature of a quo warranto to contest an election, alleging that the town council, in making its official count, refused to count certain legal ballots in favor of petitioners, the court cannot assume the functions of the town council, and recount the whole number of votes cast at such election.—Id.

XI. VIOLATIONS OF ELECTION LAWS.

§ 314 (N.J.Sup.) A judge of election is a public officer under Revision 1898 (2 Comp. St. 1910, p. 2073), on whom a duty is imposed, and the deposit by him of a ballot of a voter who has been challenged, before the board has decided to receive the ballot, makes him guilty of a misdemeanor under section 197 (2 Comp. St. 1910, p. 2137).—State v. Lockman, 83 A. 689.

§ 321 (N.J.Sup.) A judge of election, under an indictment charging him with illegally depositing a ballot in the box, cannot question the status of a member of the board serving, with-

out objection, and who voted against the reception of the ballot.—State v. Parker, 83 A. 689.

§ 329 (N.J.Sup.) The court, under an indictment against a judge of election, charging him with illegally depositing a ballot before the election board had voted to receive it, properly refused to allow defendant to show a custom to permit a voter to swear in his vote, where the board was evenly divided.—State v. Parker, 83 A. 690.

ELECTRICITY.

See Contracts, § 217; Master and Servant, §§ 243, 278.

§ 4 (Pa.) Under Act March 19, 1903 (P. L. 34), giving electric companies power to contract with each other for the use of the same poles, wires, and conduits, etc., a borough cannot enjoin an electric railway company from stringing its wires on the poles of a light, heat, and power company, under contract with the latter, on streets not part of the railway route.—Borough of Houston v. Washington & C. Ry. Co., 83 A. 108.

§ 19 (Pa.) In an action against an electric light company for injuries from an electric shock caused by a broken electric wire hanging from the fuse box and imbedded in a pile of coal in which plaintiff was shoveling, evidence *held* to present a case for the jury.—Berstein v. Philadelphia Electric Co., 83 A. 612.

ELEVATORS.

See Landlord and Tenant, § 169; Negligence, § 134.

EMBEZZLEMENT.

See Indictment and Information, § 125.

EMERGENCIES.

See Carriers, § 99.

EMINENT DOMAIN.

See Constitutional Law, §§ 48, 64; Statutes, § 64.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, providing for the appointment of commissioners to determine the appropriation which each city in the Metropolitan park district shall pay for interest and sinking fund requirements, and that the amount required each year from each city shall be assessed as part of its annual tax, *held* not violative of Const. art. 1, § 16, prohibiting taking of private property without compensation.—In re Opinion of the Justices, 83 A. 3.

§ 2 (Vt.) There is analogy between the powers of regulation and eminent domain to the extent that in both distinction between public and private uses lies in the character of the use.—Rutland Ry., Light & Power Co. v. Clarendon Power Co., 83 A. 332.

§ 9 (Conn.) 16 Sp. Laws, p. 490, which gives a committee power to construct a bridge in the town of Norwalk and to acquire the necessary lands, etc., gives the committee power to institute a proceeding as agents of the town to condemn the necessary land.—Town of Norwalk v. Podmore, 83 A. 629.

§ 10 (Del.Sup.) 26 Del. Laws, c. 189, authorizing boulevard corporations to exercise the power of eminent domain, *held* not invalid because it does not expressly state that the public shall have the use of the land taken.—Clendaniel v. Conrad, 83 A. 1036.

§ 13 (Vt.) Existence of a public use is a prerequisite to the right to exercise the right of eminent domain.—Rutland Ry., Light & Power Co. v. Clarendon Power Co., 83 A. 332.
The public use, essential to exercise of the

right of eminent domain, appears from the character of the business and is to be safeguarded.—Id.

Though the Legislature cannot make that public which is in essence private as affecting the right to condemn property, it can, by charter restrictions and provisions, make that private which would otherwise be public.—Id.

§ 17 (N.J.Ch.) The cutting of fire lines under authority of Laws 1909, p. 102, made necessary because of the establishment and operation, under public authority, of a railroad, *held* an invasion of the landowner's constitutional property rights.—*Vreeland v. Erie R. Co.*, 83 A. 384.

§ 19 (Del.Sup.) Land taken for construction of a boulevard, under 26 Del. Laws, c. 189, *held* to be taken for a public use, and hence that act does not violate Const. art. 1, § 8.—*Clendaniel v. Conrad*, 83 A. 1036.

The provisions of 26 Del. Laws, c. 189, authorizing boulevard corporations to use that portion of a strip of land acquired under that act for a boulevard not devoted to a road for vehicles or any other lawful purpose, only authorizes its use for other public purposes, and not for a private purpose.—Id.

§ 35 (Vt.) A corporation engaged in generating and distributing electric current for power purposes *held* entitled to exercise the right of eminent domain.—*Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 A. 332.

§ 47 (N.J.) A city may open a street to cross railroad tracks where there were two sidings used to store empty cars, where the street will not deprive the railroad company of the beneficial use of the sidings.—*Paterson & R. R. Co. v. Mayor and Aldermen of City of Paterson*, 83 A. 886.

§ 47 (Vt.) Property already devoted to a public use cannot be taken for another public use without legislative authority, whether it was acquired by condemnation or purchase.—*Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 A. 332.

The term "public use," as applied to condemnation of property already devoted to public use, is employed in the sense in which it is used in the law of eminent domain.—Id.

Acts 1910, No. 347, § 5, *held* not to authorize a power corporation to condemn water power and rights held by another corporation with a purpose to devote them to a public use.—Id.

§ 55 (Del.Sup.) Under 26 Del. Laws, c. 189, §§ 142, 158, 161, 168, boulevard corporations are required to devote strips of land acquired for boulevard purposes to a public use within a reasonable time, and the courts may enforce the devotion of the land to such use.—*Clendaniel v. Conrad*, 83 A. 1036.

The power of eminent domain cannot be exercised, unless the property taken is to be devoted to a public use within a reasonable time thereafter.—Id.

§ 66 (Vt.) Whether a given locality shows a sufficient demand for electric current to warrant grant of the power of eminent domain to a corporation is a legislative and not a judicial question.—*Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 A. 332.

§ 67 (Del.Sup.) 26 Del. Laws, c. 189, authorizing boulevard corporations to acquire land by condemnation for boulevard purposes, *held* not invalid, as authorizing the acquisition of more property than is necessary; that being a question for legislative determination.—*Clendaniel v. Conrad*, 83 A. 1036.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 84 (Me.) The right of a lower millowner to the natural flow of a river is a property right

which can be condemned by a private corporation only in the manner required in condemning other property.—*Hubbard v. Limerick Water & Electric Co.*, 83 A. 793.

§ 119 (Conn.) Where an abutting owner has title to the fee of the highway, an improper use of the highway is an additional servitude on his property constituting a trespass for which he may recover damages.—*Cadwell v. Connecticut Co.*, 83 A. 215, 444.

That a street railway is constructed with T-rails, and that poles and wires are used to transmit the power, is insufficient to show any additional servitude.—Id.

§ 119 (N.J.Ch.) At common law an owner may prevent the stringing of wires over the highway, in which he owns the fee; and a statute should not be construed as taking away this right, unless it does so clearly.—*Blanchard v. Eastern Pennsylvania Power Co.*, 83 A. 505.

(D) Persons Entitled and Payment.

§ 152 (N.J.) In condemnation proceedings, the proper issue is the value of the land as a whole regardless of particular estates, liens, or easements thereon.—*Herr v. Board of Education of Newark*, 83 A. 173.

The owner of a tract not taken by condemnation proceedings cannot be allowed damages for the condemnation of land of another owner that is restricted by covenants for the benefit of the tract not taken.—Id.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 191 (N.J.Sup.) Where the statutes require that a township committee consent to the erection of a telephone line or the designation of a route through the township, that fact must appear on the face of a telephone company's petition to condemn.—*Wray v. Mott*, 83 A. 866.

Allegations of a telephone company's petition for the condemnation of the right to put telephones in front of private property in a road *held* sufficient.—Id.

§ 198 (N.J.Sup.) Where railroad applies for commissioners to condemn lands, the justice to whom the application is made cannot inquire into the motives of the incorporators of the railroad, and by refusing to appoint the commissioners determine that the franchises are non-existent.—*Sisters of Charity of St. Elizabeth v. Morris R. Co.*, 83 A. 487.

§ 198 (Vt.) The question of public necessity in a condemnation proceeding is one of fact.—*Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 A. 332.

§ 238 (N.J.) Under Act 1900 (2 Comp. St. 1910, p. 2182), the owner of any property right in land to be condemned may appeal from the award of the commissioners.—*Herr v. Board of Education of Newark*, 83 A. 173.

Where the petition in condemnation proceedings makes parties the owners of land not taken who claim a right by reason of restrictive covenants such owners may appeal.—Id.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 271 (Me.) In an action for damages for building a railroad across plaintiff's land, plaintiff must show possession, that defendant committed the alleged acts of trespass, and resulting damages.—*Cilley v. Limerock R. Co.*, 83 A. 120.

§ 274 (Vt.) An injunction against condemnation proceedings does not lie when the matter relied upon for the injunction may be urged as a defense to the proceedings themselves.—*Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 A. 332.

One hydroelectric company *held* entitled to

sue to enjoin another from prosecuting proceedings to condemn the former's water power and rights held with a purpose to devote them to public use.—Id.

§ 277 (Me.) Under Priv. and Sp. Laws 1907, c. 159, as amended by Priv. and Sp. Laws 1909, c. 117, an owner of riparian land damaged by construction of a dam above by a water and electric company *held* not required to submit a claim for damages under the statute, where the company had filed no plan affecting his property as required by the statute.—Hubbard v. Limerick Water & Electric Co., 83 A. 793.

§ 293 (Conn.) Where a complaint in trespass by an abutting owner against a street railway for imposing an additional servitude on the fee of the highway in front of plaintiff's premises, by transporting freight, failed to show that defendant had any right to occupy the highway, and its charter did not show such right, a demurrer was improperly sustained notwithstanding Gen. St. 1902, § 3840, permitting street railways to carry baggage.—Cadwell v. Connecticut Co., 83 A. 215, 444.

A complaint against a street railway company for trespass on a highway in front of plaintiff's property constituting an additional servitude on his fee in the bed of the highway, which alleges that defendant is operating its railway to carrying freight exclusively, and runs its cars from terminus to terminus without stopping, shows the imposition of an additional servitude as against a demurrer.—Id.

V. TITLE OR RIGHTS ACQUIRED.

§ 318 (N.J.Sup.) A telephone company, on compensation therefor to an abutting owner, may, in building its line along a public highway, trim the branches of trees where reasonably essential to the proper operation of its line, without unnecessarily interfering with, or destroying, the trees.—Wray v. Mott, 83 A. 866.

§ 320 (N.J.Ch.) Under Eminent Domain Act (P. L. 1900, pp. 80–82, 85) §§ 3, 6, 7, 14, and supplements thereto, Act April 2, 1906 (P. L. p. 99), and the Constitution, *held* that title to condemned land as between the owner and others than petitioner remained in the owner until tender of compensation, and hence until that time is subject to voluntary or involuntary liens against him.—In re Essex County Park Commission, 83 A. 462.

EMPLOYÉS.

See Master and Servant.

ENTIRETY, ESTATE BY.

See Husband and Wife, §§ 14, 15.

ENTRY.

See Jury, § 25.

ENTRY, WRIT OF.

See Ejectment.

EQUITY.

See Account; Appeal and Error, §§ 79, 80, 82, 220, 724, 742, 875, 893, 931; Cancellation of Instruments; Charities, §§ 20, 24; Constitutional Law, § 314; Conversion; Corporations, §§ 487, 683; Estoppel, §§ 52, 58; Injunction; Insurance, § 38; Judgment, § 416; Municipal Corporations, § 665; Partition; Quietening Title; Reformation of Instruments; Specific Performance; Trusts; Wills, §§ 222, 253.

I. JURISDICTION. PRINCIPLES, AND MAXIMS.

(C) Principles and Maxims of Equity.

§ 57 (N.J.) Equity looks upon that as done which ought to be done.—Ogden v. Delaware River & A. R. Co., 83 A. 991.

III. PARTIES AND PROCESS.

§ 117 (Vt.) A defendant held to have waived any misjoinder of parties defendant in the bill by not demurring or raising the question in his answer.—Cunningham v. Blanchard, 83 A. 469.

IV. PLEADING.

(A) Original Bill.

§ 148 (Pa.) A bill, though containing various matter, is not multifarious, if the subject-matter of each claim is substantially the same, so that they may be conveniently considered together.—City of Pittsburgh v. Pittsburgh Rys. Co., 83 A. 67.

§ 150 (Pa.) A bill in equity by a stockholder against directors and officers for accounting, and for an accounting against another company and directors for a loss sustained, is multifarious.—Kelly v. Thomas, 83 A. 307.

(D) Replication.

§ 212 (N.J.Ch.) Where a replication is filed without objection to the answer, it will be assumed that defendant answered fully all of the allegations of the bill in accordance with the course and practice of equity.—Goodbody v. Delaney, 83 A. 988.

(E) Demurrer, Exceptions, and Motions.

§ 232 (N.J.) A demurrer will not lie to the whole bill when the prayer is too broad, but should be restricted to that part of the relief prayed to which plaintiff is not entitled.—Schulz v. Ziegler, 83 A. 968.

§ 237 (N.J.Ch.) Where defendant fully answered the bill and claimed the benefit of the facts as if demurred to, the demurrer must be considered as overruled by the answer, and the questions of law raised by it must be determined at the final hearing on the facts disclosed by the evidence in support of the answer.—Goodbody v. Delaney, 83 A. 988.

§ 263 (N.J.) A motion to strike out a bill under chancery rule 213 is in the nature of a demurrer.—Schulz v. Ziegler, 83 A. 968.

§ 263 (N.J.Ch.) A bill will not be stricken for multifariousness unless it appears on its face that the court would be embarrassed in making a decree that would do justice to all the parties on the facts.—City of Morristown v. Morris & Somerset Co., 83 A. 178.

Under Rules 209 and 213, a motion to strike a bill because it did not set out an equitable cause of action is insufficient, where the defect does not plainly appear on the face of the bill.—Id.

§ 264 (N.J.Ch.) A motion to strike an answer, under rule 213, takes the place of exceptions, and may be based on scandal, impertinence, or insufficiency.—Synnot v. Kobbe, 83 A. 193.

In a suit to foreclose a mortgage, an answer, alleging in one part that defendants were not in default and in another admitting default, but pleading a waiver, was not subject to a motion to strike for scandal, impertinence, or insufficiency.—Id.

Where a bill to foreclose merely alleged that the premises were conveyed subsequent to the mortgage, and with full knowledge thereof, and that the interest so granted was subject to the lien of the mortgage, an answer, admitting that the conveyance to defendant was subject to a mortgage of \$24,100, and denying that it was subject to an indebtedness of \$26,600, was not subject to motion to strike, but raised an issue for trial as to the amount of the indebtedness.—Id.

An objection that the facts stated in an answer do not make out a defense to a bill cannot be taken advantage of on motion to strike.—Id.

(F) Amended and Supplemental Pleadings and Revivor.

§ 288 (Vt.) Equity will permit amendments of pleadings to correspond with the case as tried, and, where a feature of estoppel is within the issues as tried, an amendment of the answer setting up estoppel to conform to the proof may be had.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

V. EVIDENCE.

§ 339 (Md.) The court, in a proceeding for the recovery of delinquency tax penalties, where case is heard on petition and answer, must consider the allegations of the answer as true.—*Blakistone v. State*, 83 A. 151.

IX. MASTERS AND COMMISSIONERS, AND PROCEEDINGS BEFORE THEM.

§ 399 (R.I.) Under Gen. Laws 1909, c. 289, § 17, a reference to a master, in a suit to remove a trustee and for an accounting, to state the trustee's accounts and report particulars regarding the estate and the trustee's dealings therewith, *held* not objectionable as a delegation of the court's powers to the master.—*McAuslan v. McAuslan*, 83 A. 837.

§ 401 (R.I.) In a suit to remove a testamentary trustee for mismanagement, and for an accounting, where the answer admitted losses, but sought to explain them, the court *held* to have properly directed reference to a master to state the trustee's accounts and report his dealings with the trust fund, without first determining any of the issues.—*McAuslan v. McAuslan*, 83 A. 837.

§ 402 (R.I.) Where an order of reference, entered after notice and hearing, particularly defined the scope of the reference, it was not objectionable as referring the cause before the issues were framed.—*McAuslan v. McAuslan*, 83 A. 837.

§ 410 (R.I.) Exceptions to a master's report cannot be considered, unless based on objections made before the master.—*McAuslan v. McAuslan*, 83 A. 837.

X. DECREE AND ENFORCEMENT THEREOF.

§ 420 (Vt.) A final decree on the merits of a suit in equity determines the rights of the defaulted defendants as if no decree pro confesso had been entered.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 427 (Md.) A specific prayer *held* not necessary to warrant equity in establishing a trust.—*Book Depository of Baltimore Annual Conference of Methodist Episcopal Church v. Trustees of Church Rooms Fund of Methodist Episcopal Church*, 83 A. 50.

ERASURE.

See Wills, §§ 196, 306.

ERROR, WRIT OF.

See Appeal and Error; Criminal Law, §§ 1032-1186.

ESTABLISHMENT.

See Highways, § 44.

ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Husband and Wife, §§ 14, 15; Landlord and Tenant; Life Estates; New Trial, § 143; Remainders; Tenancy in Common; Wills.

ESTOPPEL.

See Certiorari, § 56; Corporations, § 388; Dedication, § 39; Equity, § 288; Executors and

Administrators, § 148; Husband and Wife, § 129; Injunction, § 113; Insurance, § 770; Judgment, §§ 540-720, 950; Mortgages, § 183.

III. EQUITABLE ESTOPPEL.**(A) Nature and Essentials in General.**

§ 52 (N.J.) A person by his inequitable conduct may deprive himself of a right he might otherwise lawfully claim.—*Snyder Pasteurized Milk Co. v. Burton*, 83 A. 907.

§ 58 (N.J.) A buyer merely informing the seller that he had assigned the contract of sale *held* not estopped as against the seller from asserting that he had not assigned it, but had merely resold the goods bought; the seller not having been prejudiced by the representation.—*Pope v. Ferguson*, 83 A. 353.

(B) Grounds of Estoppel.

§ 78 (Me.) Defendant, an indorser of a note, who induced plaintiff to indorse by deceiving her into believing that by indorsing below his name she would become merely a surety for him, is estopped to deny that he assumed the relation of principal to plaintiff.—*Canney v. Corey*, 83 A. 602.

(E) Pleading, Evidence, Trial, and Review.

§ 115 (Vt.) The fact that a defendant claims a larger estoppel against plaintiff than the court will allow does not prevent defendant receiving such benefit from his claim of estoppel as the case warrants.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

EVIDENCE.

See Adverse Possession, § 88; Appeal and Error, §§ 203, 209, 237, 273, 345, 362, 548, 842, 926-934, 969, 970, 979, 1006, 1010, 1011, 1035, 1048, 1050, 1051, 1053, 1056, 1066, 1071, 1078, 1175, 1214; Assault and Battery, §§ 29, 92; Assumpsit, Action of; Bankruptcy, § 304; Bills and Notes, §§ 116, 504; Bonds, § 132; Bribery; Carriers, §§ 165, 417; Constitutional Law, § 48; Contracts, §§ 28, 322, 349, 350; Corporations, §§ 432, 519; Criminal Law, §§ 364-572, 667-676, 763, 764, 783, 823, 1036, 1043, 1134, 1153, 1159, 1168-1170; Customs and Usages; Damages, §§ 173, 185; Death, § 67; Dedication, §§ 43, 44; Depositions; Divorce, §§ 109-135; Elections, §§ 295, 329; Electricity; Eminent Domain, § 271; Equity, § 339; Exceptions, Bill of, § 24; Executors and Administrators, §§ 450, 510; Frauds, Statute of, § 76; Gifts, §§ 47, 49; Guaranty, § 89; Highways, § 184; Homicide, §§ 152-253; Husband and Wife, § 49½; Indictment and Information, § 14; Insurance, §§ 646, 665; Judgment, § 68; Judicial Sales, § 31; Landlord and Tenant, § 169; Life Estates, § 15; Master and Servant, §§ 40, 43, 155, 222, 264, 265, 270, 276-286, 332; Mortgages, § 578; Municipal Corporations, §§ 654, 819; Negligence, §§ 98, 121-134, 136; New Trial, §§ 21, 68, 72, 93, 143; Partnership, § 54; Payment, § 65; Penalties; Physicians and Surgeons, § 18; Pleading, § 11; Principal and Surety, § 159; Railroads, §§ 347, 348, 442; Rape, §§ 36, 51; Sales, §§ 181, 182, 428; Schools and School Districts, § 80; Specific Performance, § 39; Statutes, § 217; Street Railroads, §§ 57, 112, 114, 117; Taxation, § 499; Trade-Marks and Trade-Names, § 93; Trial, §§ 33, 48, 139, 186, 194, 206, 252; Trover and Conversion, § 40; Trusts, §§ 110, 372; Use and Occupation, § 9; Vendor and Purchaser, § 130; Wills, §§ 54, 166, 302, 306, 440, 447; Witnesses.

I. JUDICIAL NOTICE.

§ 44 (Md.) The Supreme Court will take judicial notice of the fact that a judge of a low-

er court of record died on a particular date.—*Gross v. Wood*, 83 A. 337; *Wood v. Rosenheim*, Id. 341.

II. PRESUMPTIONS.

§ 67 (N.J.Sup.) The value of a trunk when delivered to an initial carrier having been fixed, that value will persist when delivered to an express company, in the absence of testimony to the contrary.—*Wichern v. United States Express Co.*, 83 A. 776.

§ 77 (Conn.) The circumstance that a witness who was equally within the control of both parties was not called in a hearing on the probate of a will raised no presumption against the party offering the will and having the burden of proof that, if called, the witness' testimony would have been unfavorable.—*Cullum v. Colwell*, 83 A. 695.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 99 (Conn.) One fact is relevant to another when according to the common course of events the existence of the one taken alone, or in connection with the other, renders the existence of the other certain or more probable.—*Locke v. Kraut*, 83 A. 626.

§ 112 (Conn.) On an issue as to what price was agreed upon for masonry work, testimony as to the reasonable value of the work was properly admitted to enable the court to determine which contention was probably true.—*Locke v. Kraut*, 83 A. 626.

§ 113 (R.I.) In assumpsit for breach of a contract, where plaintiff seeks to recover the value of a real estate option, which he delivered to defendants, evidence as to the value of the property covered by the option and its increase in value during the ten years preceding the trial and the reasons for such increase is admissible.—*Eastman v. Dunn*, 83 A. 1057.

In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he had transferred to defendants, evidence as to what plaintiff might have obtained from other parties for the option is immaterial.—Id.

In assumpsit for breach of contract, evidence that the owner of the land involved had previously given an option for a less amount held immaterial.—Id.

§ 114 (Conn.) It has no tendency to prove validity of plaintiff's claim against the defendants that a third person, as part consideration of defendant's transfer of property, agreed to pay the claim, if it should be established.—*Lander v. Persky*, 83 A. 209.

§ 116 (R.I.) Evidence of a notice served by plaintiff on defendants when referred to by them in subsequent conversations had with plaintiff held admissible to explain such conversations.—*Eastman v. Dunn*, 83 A. 1057.

(B) Res Gestæ.

§ 121 (Pa.) On an issue as to the character of defendant's occupancy of certain land, his declarations while in possession accompanying his acts and the understanding of his neighbors held admissible as res gestæ.—*Greenwich Coal & Coke Co. v. Learn*, 83 A. 74.

§ 122 (Md.) In an action for negligence causing the fright and running away of the plaintiff's mules, and his injury, the declaration of the driver of the wagon from which bales of paper, which caused the fright, had fallen, made near where the bales fell off and just before they did so, were admissible where there was evidence that the driver was the agent of the defendant, as declarations in the course of his employment, as part of the res gestæ.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 126 (Md.) A declaration as to the cause of an accident, made by the injured person after

removal to a hospital, was not admissible as a part of the res gestæ.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

(D) Materiality.

§ 145 (Md.) The rule admitting proof of collateral facts when they illustrate the question in issue, held subject to the qualification that the time must not be too remote.—*Maryland Electric Rys. Co. v. Beasley*, 83 A. 157.

(E) Competency.

§ 151 (R.I.) In assumpsit for breach of a contract, where the consideration moving from plaintiff was a lease obtained under an option held by plaintiff, evidence as to why plaintiff did not accept the option before making the agreement with defendants held inadmissible.—*Eastman v. Dunn*, 83 A. 1057.

§ 156 (Del.Super.) A question as to whether there was any hidden or obscure danger about a machine on which an employé was working when injured was properly excluded, where plaintiff was not permitted to show that the machine was dangerous.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

V. BEST AND SECONDARY EVIDENCE.

§ 158 (Pa.) In an action against a railroad for overcharge of freight rates, it was error to permit testimony as to the contents of record cards indicating that some cars had been actually weighed; the cards themselves being the best evidence.—*Joynes v. Pennsylvania R. Co.*, 83 A. 318.

§ 158 (R.I.) The records of the town were the best evidence of the fact that no appropriation had been made to pay salary and fees of the town sergeant, chief of police, and dog officer.—*Trainor v. Lee*, 83 A. 847.

§ 185 (R.I.) A notice when served in duplicate may be proven by the production of the duplicate by the one giving the notice, even though he does not request those served to produce the original.—*Eastman v. Dunn*, 83 A. 1057.

VI. DEMONSTRATIVE EVIDENCE.

§ 194 (Md.) In an action for the death of a person struck by an engine, a shoe worn by decedent at the time of the injury held inadmissible in evidence.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

§ 200 (Vt.) Evidence of defendant's admissions, whether in a former trial or out of court, are admissible against him.—*Lynch's Adm'r v. Murray*, 83 A. 746.

§ 201 (R.I.) In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option under which defendants had obtained a lease, evidence of the price at which defendants held the lease was admissible as an admission.—*Eastman v. Dunn*, 83 A. 1057.

(B) By Parties or Others Interested in Event.

§ 222 (Pa.) Admissions by a party against interest, whether verbal or written, including admissions in affidavits of defense, are admissible to sustain or defeat the cause of action.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

(D) By Agents or Other Representatives.

§ 242 (R.I.) Defendants held joint agents for one another in certain matters, and so evidence of acts done by plaintiff at the request of one of them was admissible.—*Eastman v. Dunn*, 83 A. 1057.

VIII. DECLARATIONS.**(A) Nature, Form, and Incidents in General.**

§ 266 (R.I.) Evidence that defendants to prevent plaintiff from bringing suit told him he had no chance to win because they had rehearsed their story, and would swear him out of the courthouse if necessary, *held* admissible on the grounds of public policy.—*Eastman v. Dunn*, 83 A. 1057.

(E) Proof and Effect.

§ 313 (Pa.) The delivery of a gift may be proved by the declarations of the donor.—*Leitch v. Diamond Nat. Bank of Pittsburgh*, 83 A. 416.

X. DOCUMENTARY EVIDENCE.**(C) Private Writings and Publications.**

§ 353 (R.I.) An assignment, purporting to have been made and signed by plaintiff, who refused to admit his signature thereto, *held* admissible as tending to show his signature.—*Oldham v. Oldham*, 83 A. 265.

§ 359 (Md.) The admission in evidence of photographs *held* not ground for reversal, though there had been some change in the subject before they were taken.—*Maryland Electric Rys. Co. v. Beasley*, 83 A. 157.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**(A) Contradicting, Varying, or Adding to Terms of Written Instrument.**

§ 423 (Vt.) Persons signing their names on the back of a note may show that they are indorsers, and liable only as such.—*Woodsville Guaranty Savings Bank v. Rogers*, 83 A. 537.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Pa.) Affidavit of defense in action on a written contract for goods sold, setting up a prior parol agreement, differing from the written contract without any offer to prove that the parol terms were omitted by fraud or mistake, simply averring that defendant was too busy to read and took the clerk's word, and not averring that the clerk misrepresented the facts, was insufficient.—*Leuten Brick Co. v. Killen*, 83 A. 576.

§ 442 (Vt.) A written agreement that the balance of the proceeds of a foreclosure sale should be applied on the note secured, and that whatever should be collected on a note owned by the maker and delivered to the payee should also be indorsed, *held* a complete agreement, which could not be contradicted by a contemporaneous oral agreement of a discharge of the maker from liability.—*Woodsville Guaranty Savings Bank v. Rogers*, 83 A. 537.

(D) Construction or Application of Language of Written Instrument.

§ 458 (Conn.) Oral negotiations between parties before letters constituting a contract were written are competent to show the circumstances under which they were written as an aid to their interpretation.—*Grant v. New Departure Mfg. Co.*, 83 A. 212.

§ 461 (R.I.) Evidence as to the intention of persons filing a plat to dedicate land appearing thereon to have been set aside for street purposes is inadmissible.—*Brown v. Curran*, 83 A. 515.

XII. OPINION EVIDENCE.**(A) Conclusions and Opinions of Witnesses in General.**

§ 471 (Del.Super.) A question in an employé's action for personal injuries, "Was or was not that machine on the day of the accident a dangerous machine?" will be excluded

as calling for an opinion.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 472 (Del.Super.) A question as to whether one could work at a machine without knowing that there was a knife in the machine was properly excluded as calling for a matter which was for the jury to determine.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

A question as to whether an employé could have been warned or instructed was properly excluded, as calling for a matter which was for the jury.—*Id.*

§ 474½ (Md.) In an action for negligence causing the fright and running away of plaintiff's mules, evidence as to how mules will act when approaching an object calculated to frighten them, whether the witness had ever observed a mule to frighten at an object, and as to what was their conduct under the circumstances, was properly refused as evidence of matters occurring in the common business of life, concerning which the jury was competent to draw inferences from the facts without hearing opinions of witnesses.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 501 (Md.) The testimony of experienced engineers familiar with the tracks and a switch where a person was struck by an engine *held* properly excluded where the testimony was not confined to the conditions existing at time of accident, as described by engineer.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

(B) Subjects of Expert Testimony.

§ 505 (R.I.) Expert witnesses cannot testify as to the value of the opinions of other experts.—*Eastman v. Dunn*, 83 A. 1057.

§ 518 (R.I.) In assumpsit for the breach of a contract, where plaintiff sought to recover the value of an option which he had delivered to defendants as his part of a consideration and under which a lease was taken, a witness' opinion of the differences between the option and the lease was properly excluded, for such a course would make the witness a judge of the materiality of the variations.—*Eastman v. Dunn*, 83 A. 1057.

§ 534 (R.I.) In assumpsit for breach of a contract, where plaintiff sought to recover the value of an option which he delivered to defendants as his part of the consideration, it was proper to refuse to allow a real estate expert to testify as to whether he had ever known of an option being sold for a considerable sum.—*Eastman v. Dunn*, 83 A. 1057.

(C) Competency of Experts.

§ 535 (Md.) In an action for negligence causing the running away of the plaintiff's mules and his consequent injury, expert evidence as to the characteristics of mules was properly refused in the absence of any foundation establishing the witness' claim to expert knowledge.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 545 (R.I.) Where a real estate broker is testifying as to the value of an option, evidence showing his familiarity with the property and its increase in value in the past is admissible to show his competency as an expert.—*Eastman v. Dunn*, 83 A. 1057.

§ 546 (N.J.Sup.) The competency of a witness to give expert testimony being a question for the court, the overruling of question calling for an opinion by the court on its own motion, where the opposite party had interposed no objection, did not deprive the person offering the evidence of any substantial right.—*Electric Park Amusement Co. v. Psichos*, 83 A. 766.

Where a witness is called as an expert, the question whether he is qualified is for the court, and counsel cannot, by express or implied waiver of proof of such qualification, deprive the court of its right to pass on the competency of the witness.—*Id.*

§ 546 (R.I.) The determination of the competency of expert witnesses rests largely in the discretion of the trial court.—*Eastman v. Dunn*, 83 A. 1057.

(D) Examination of Experts.

§ 553 (R.I.) A hypothetical question which includes statements of fact not in accord with the testimony is rightfully excluded.—*Eastman v. Dunn*, 83 A. 1057.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 578 (Vt.) In an administrator's action to set aside a fraudulent conveyance by decedent because of an alleged deficiency of assets, evidence as to the testimony of decedent in a former suit by him against the same defendant to set aside the conveyance *held* admissible; there having been adequate cross-examination.—*Lynch's Adm'r v. Murray*, 83 A. 746.

It is sufficient to admit in evidence testimony taken at a former trial, where the witness is dead at the subsequent trial, that the issues were substantially the same so that the cross-examination was adequate in the former trial.—*Id.*

XIV. WEIGHT AND SUFFICIENCY.

§ 588 (Del.Super.) In determining the weight of the testimony and credibility of witnesses, the jury should consider the apparent fairness and interest or bias of the witnesses, together with their opportunity to see and know of the accident.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 588 (Md.) The testimony of a witness *held* unworthy of credit.—*Maryland Electric Ry. Co. v. Beasley*, 83 A. 157.

§ 598 (Del.Super.) It is the duty of the jury, where the evidence is conflicting, to reconcile it, if possible, but if impossible, to decide in favor of that party whose evidence preponderates.—*Spahn v. People's Ry. Co.*, 83 A. 27.

EXAMINATION.

See Witnesses, §§ 240-306.

EXCEPTIONS.

See Appeal and Error, §§ 70, 254-274, 730, 761, 970, 979, 1005, 1078; Equity, § 410.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 548, 664, 671, 761, 1078.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 24 (Md.) Each ruling on evidence must be presented by a separate bill of exceptions.—*Hagerstown Brewing Co. v. Gates*, 83 A. 570.

II. SETTLEMENT, SIGNING, AND FILING.

§ 38 (Md.) Under rule 32 of the circuit court for Howard county, an appeal *held* properly dismissed for appellant's failure to have the bills of exception submitted or signed during the trial term.—*Sieling v. Brunner*, 83 A. 1032.

§ 39 (Me.) Petitioner's right to writ of review is not lost by laches in delaying presentation of a bill of exceptions before trial judge died, where he had five days left within which to present the bill under an allowance of time.—*McDonough v. Blossom*, 83 A. 323.

§ 40 (Md.) An order extending the time to file a bill of exceptions *held* to take effect immediately, and to extend the time to a specified date without reference to the terms employed in designating the day to which the time was extended.—*Gross v. Wood*, 83 A. 337; *Wood v. Rosenheim*, *Id.* 341.

§ 40 (Md.) Where the time for filing a bill of exceptions was extended until 80 days after

the motion for a new trial was heard and determined by the court, an entry reciting "new trial to be granted unless plaintiff agree to a reduction of the verdict" was not a complete determination, and the 30 days did not begin to run until the motion for new trial was actually overruled.—*H. J. McGrath Co. v. Marchant*, 83 A. 912.

§ 51 (Md.) The correctness of a bill of exceptions must be determined by the trial judge, where the parties are unable to agree.—*Gross v. Wood*, 83 A. 337; *Wood v. Rosenheim*, *Id.* 341.

EXCESSIVE DAMAGES.

See Damages, § 132.

EXECUTION.

See Garnishment; Justices of the Peace, § 135; Mortgages, § 529.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

§ 76 (Pa.) Writ of execution on judgment entered on warrant of attorney accompanying bond and mortgage after the mortgagor has parted with title *held* not a writ within Act April 23, 1903 (P. L. 261), requiring filing with the præcipe of affidavit of ownership.—*Keene Home v. Startzell*, 83 A. 584.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

§ 112 (Del.Super.) Where a sheriff made an actual levy under an execution, and on the same day received notice of the issuance of a prior execution under another judgment, and the prior execution was delivered to him by the officer receiving it, the sheriff could not make a levy under the prior execution.—*In re J. R. Richardson Co.*, 83 A. 1034.

XI. EXECUTION AGAINST THE PERSON.

§ 451 (R.I.) Poor debtors *held* not entitled to prevail on a second petition for discharge, where they fail to show on the second petition that, after their first petition was denied on the ground that they had fraudulently conveyed their property, they restored the property to an assignee for creditors, to whom the debtors transferred their property subsequent to such decision.—*Santangini v. Bliss*, 83 A. 118.

EXECUTIVE POWER.

See Constitutional Law, § 50.

EXECUTORS AND ADMINISTRATORS.

See Appeal and Error, §§ 353, 931, 1017; Bills and Notes, § 366; Charities, § 21; Courts; Descent and Distribution; Limitation of Actions, §§ 125, 175; Mortgages, § 292; Trusts, §§ 38, 162; Wills; Witnesses, § 178.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 57 (Vt.) The amount of debts against decedent's estate is not the only item to be considered in determining whether there was a deficiency of assets so as to authorize the administrator to sue to set aside a fraudulent conveyance, in view of the statute providing for allowance of administration expenses before determination of the amount available for debt.—*Lynch's Adm'r v. Murray*, 83 A. 746.

An administrator may sue under P. S. 2863, to set aside a fraudulent conveyance by decedent, if there be a deficiency of assets any time during his administration.—*Id.*

P. S. 2863, authorizing an administrator in case of a deficiency of assets to maintain a suit to set aside a fraudulent conveyance by decedent, should be liberally construed.—*Id.*

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(B) Real Property and Interests Therein.

§ 138 (N.J.Ch.) Though an executor be entitled under a will to exercise a power of sale without judicial approval, a substituted administrator must procure approval.—Randall v. Gray, 83 A. 482.

§ 138 (Pa.) Orphans' Court *held* authorized under Act April 13, 1854 (P. L. 368), to confirm the sale of realty by executors for payment of debts, made without order of court.—Donnelly v. Byers, 83 A. 296.

§ 148 (Pa.) A purchaser of real estate from executors and trustees, on sale without order of court, after ratification by orphans' court, when all persons interested appeared, and the fund from the sale having been distributed and a dividend paid creditors, *held* not entitled to question the validity of the sale in an action on bond for the price.—Donnelly v. Byers, 83 A. 296.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.

(D) Priorities and Payment.

§ 281 (R.I.) Under Court and Practice Act 1905, § 891, an executor *held* not warranted in paying a claim disallowed and sued on where the action was made one against the estate by amendment more than six months after disallowance.—Carney v. Hawkins, 83 A. 327.

VII. DISTRIBUTION OF ESTATE.

§ 291 (Md.) An admission by an executor in an account that the estate was subject to distribution *held* an admission that all debts of testator were paid and was an assent to the bequest.—Sloan v. Sloan, 83 A. 38.

§ 314 (Md.) After assent to legacy by executor, legatees *held* entitled to sue the executor at law, without further action by the orphans' court, making it improper to submit issue to the superior court as to the indebtedness of the executor to the estate.—Sloan v. Sloan, 83 A. 38.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

(B) Application and Order.

§ 339 (N.J.Ch.) On application to sell land under a testamentary power, parties interested have a right to be heard, either before the application is made or afterwards, when the court fixes a time to hear them.—Randall v. Gray, 83 A. 482.

(C) Sale.

§ 386 (Pa.) A daughter of a decedent, who acquiesced in the purchase by her mother of land of the deceased and received an annuity from such property under her mother's will for 10 years, *held* not entitled to claim as an heir interest in the land.—George v. Safe Deposit & Trust Co. of Pittsburgh, 83 A. 294.

X. ACTIONS.

§ 431 (R.I.) Filing a claim in the probate court, as required by Gen. Laws 1909, c. 314, § 3, and Court and Practice Act 1905, § 883, is a condition precedent to plaintiff's maintenance of action against an administrator.—Andrews v. O'Reilly, 83 A. 119.

Where a claim was not filed in the probate court, it was the right and duty of the court, on motion by defendant's administrator, brought to the action by process, to dismiss the action.—Id.

§ 432 (Vt.) The fact that if decedent's executor had accounted for personalty coming into his possession, or if his bondsmen had been

sued for failure to do so, there would have been no deficiency of assets, is not a defense to an action by decedent's administrator de bonis non to set aside a fraudulent conveyance by decedent to replenish a deficiency of assets.—Lynch's Adm'r v. Murray, 83 A. 746.

§ 450 (Vt.) In an administrator's action to set aside a fraudulent conveyance by decedent based on a claim of deficiency of assets, evidence of the files in a former action brought by decedent and continued by his executor and administrator to set aside the conveyance *held* admissible as showing the extent of the litigation and the amount of fees and charges.—Lynch's Adm'r v. Murray, 83 A. 746.

§ 451 (Vt.) In an administrator's suit to set aside a fraudulent conveyance by decedent, it was not necessary for the master to audit the various bills upon which he reported on the question of deficiency of assets; he having reported bills for administration expenses to double the amount of assets.—Lynch's Adm'r v. Murray, 83 A. 746.

§ 456 (Vt.) The expenses of litigation including attorney's fees brought by an administrator under P. S. 2863, to set aside a fraudulent conveyance by decedent in case of a deficiency of assets, may be set aside out of the property fraudulently conveyed.—Lynch's Adm'r v. Murray, 83 A. 746.

XI. ACCOUNTING AND SETTLEMENT.

(D) Compensation.

§ 490 (Pa.) A bequest to one named as executor is presumably a bounty, and not compensation for services to be rendered, unless it appears, expressly or by clear implication, that the testator intended that the legacy should be in lieu of commissions.—In re Fox's Estate, 83 A. 613.

Executors *held* not entitled to commissions or compensation for administering an estate of \$800,000, in addition to legacies of \$5,000 to each of them who should enter upon their duties as executors.—Id.

§ 495 (N.J.Ch.) That the beneficiaries of an estate have instituted litigation, and have made unfair and unjust charges against him, *held* not to entitle an administrator to commissions in the face of an agreement that no commissions should be allowed.—Randall v. Gray, 83 A. 482.

Refusal of beneficiaries of an estate to assist an administrator *held* not to entitle him to commissions agreed not to be paid, in the absence of proof that he asked for the assistance and was refused, and that notice thereof was given to parties interested.—Id.

§ 501 (Md.) The right of an executor to commissions on an indebtedness due from him to the estate of testatrix *held* proper for determination in an action by the legatees for their share of the indebtedness.—Sloan v. Sloan, 83 A. 38.

(E) Stating, Settling, Opening, and Review.

§ 506 (R.I.) A personal judgment against an executor without other evidence is insufficient to sustain an item of account charged as "paid on execution."—Carney v. Hawkins, 83 A. 327.

§ 509 (Pa.) Where a partner was indebted to the firm, and on his death notice of his indebtedness was sent to his widow and his administrators, to which they paid no attention, and after a lapse of 26 years the widow and children brought a bill of review to open a decree confirming the final settlement of the estate of the deceased surviving partner, the bill would be dismissed for laches, especially in view of evidence tending to show that the partnership was dissolved prior to the death of

petitioner's decedent.—Appeal of Borland, 83 A. 110.

A petition by the widow and children for such review was barred by limitations, where it was not filed until four years and nine months after confirmation of the report of the auditor.—Id.

§ 510 (R.I.) Under rule 14 (law rules) of the superior court, a mere sworn copy of an executor's account held insufficient to establish his burden of proof on an appeal to the superior court from an allowance of such account.—Carney v. Hawkins, 83 A. 327.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

§ 531 (Vt.) The surety of an executor who was also the residuary legatee's executor held not discharged by a probate decree ordering him in his first-mentioned capacity to pay funds over to himself in the other capacity.—Story's Adm'r v. Hall, 83 A. 653.

§ 532 (N.H.) Where an executor, on settlement of his account, refuses to pay to any person sums to which he may be legally entitled, such person has a complete remedy upon the administration bond.—Glover v. Baker, 83 A. 916.

§ 537 (Vt.) That funds were used by an executor to pay his individual debts may be found from the fact that, shortly after withdrawing such odd sums as \$1,617.31 and \$1,368.87, those precise sums were applied to his personal obligations, though he had co-obligors.—Story's Adm'r v. Hall, 83 A. 653.

EXEMPTIONS.

See Taxation, §§ 241, 441.

EXPERT TESTIMONY.

See Evidence, §§ 505-578.

EXPLOSIVES.

See Master and Servant, §§ 129, 258.

EXPRESS COMPANIES.

See Licenses, § 7.

EXPRESS TRUSTS.

See Trusts, §§ 21-38.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

See Malicious Prosecution.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (N.J.Sup.) A street railway conductor may eject a passenger who refuses to pay his fare, though he is a policeman, whom the company was required to carry free of charge, and such ejection did not justify the arrest of the conductor.—Ervin v. Burke, 83 A. 772.

§ 8 (Me.) Release of a bankrupt from civil arrest, made before a petition in bankruptcy was filed, on habeas corpus proceedings before the United States District Court, is conclusive, in a subsequent action for false imprisonment, on the question of illegality of bankrupt's imprisonment while the bankruptcy proceedings were pending, where notice of the habeas corpus hearing was served on defendant creditor and his attorney of record, and the release was resisted, but no appeal was taken.—Turgeon v. Bean, 83 A. 557.

§ 15 (N.J.) Where plaintiff had paid his fare on defendant's ferryboat when he was wrongfully

arrested by an employé, defendant was liable, though the employé was not acting in the course of his employment.—Elliott v. Philadelphia & Camden Ferry Co., 83 A. 899.

FEES.

See Jury, § 31.

FEE SIMPLE.

See Wills, § 597.

FELLOW SERVANTS.

See Master and Servant, §§ 159-201, 279.

FEMALES.

See Elections, §§ 1, 7, 9, 10.

FERRIES.

See False Imprisonment, § 15.

FILING.

See Appeal and Error, §§ 70, 231; Bankruptcy, § 392; Contracts, § 44; Depositions; Equity, § 212; Exceptions, Bill of, § 40; Execution, § 76; Jury, § 25; Municipal Corporations, § 373; New Trial, § 117.

FINAL JUDGMENT.

See Appeal and Error, §§ 70-82, 870-875.

FINDINGS.

See Appeal and Error, §§ 219, 220, 362, 1009-1011, 1017, 1071, 1072.

FIRE INSURANCE.

See Insurance.

FIREMEN.

See Municipal Corporations, § 192; Statutes, § 101.

FIRES.

See Appeal and Error, § 970; Damages, § 112; Landlord and Tenant, § 233; Negligence, §§ 21, 121; Railroads, §§ 453, 482.

FIXTURES.

§ 15 (Vt.) Where a mining lessee erected buildings and placed machinery therein to carry on mining operations fit for no other purpose, and their removal would not injure the freehold, they were trade fixtures and subject to removal.—Snow v. Smith, 83 A. 269.

Where a mining lease made no provision that at its expiration the shaft should be covered, the lessor cannot complain of the removal of buildings which would leave the shaft uncovered, the buildings being trade-fixtures.—Id.

As no landlord's lien exists, a lessor cannot prevent the removal of trade fixtures on the ground that he will otherwise be unable to collect the rent.—Id.

A lessor of mining property having no equitable lien for rent could not prevent the lessee from removing trade fixtures.—Id.

FOOD.

§ 25 (Conn.) Where, in an action for selling unwholesome meat which made plaintiff and his family ill, he pleaded a particular sale, recovery could not be based on other sales on other days.—Askam v. Platt, 83 A. 529.

FORECLOSURE.

See Mortgages, §§ 218, 292, 338-578.

FOREIGN CORPORATIONS.

See Corporations, §§ 642-685; Courts, § 14; Judgment, § 822.

FOREIGN JUDGMENTS.

See Judgment, § 822.

FORFEITURES.

See Specific Performance, § 101.

FORMER ADJUDICATION.

See Judgment, §§ 540-720, 950.

FORMER JEOPARDY.

See Criminal Law, §§ 182, 185.

FRANCHISES.

See Corporations, § 370.

FRATERNAL INSURANCE.

See Insurance, §§ 770, 784.

FRAUD.

See Account, § 8; Assignments for Benefit of Creditors, § 145; Attachment, § 178; Corporations, § 114; Fraudulent Conveyances; Insurance, §§ 297, 379, 646, 665; Judgment, § 392; Release, § 52; Sales, § 72; Specific Performance, § 39; Taxation, § 571; Trusts, § 110; Wills, §§ 225, 421.

FRAUDS, STATUTE OF.

See Appeal and Error, § 1071.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISARRIAGE OF ANOTHER.

§ 23 (N.J.) Whether the expression, "I will see that you are paid," is a collateral promise depends on circumstances surrounding its making; the real test being to whom credit was given.—Mulholland v. Jones, 83 A. 875.

§ 23 (N.J.Sup.) Where the rector of a Catholic church promised to pay a subcontractor of a contractor to erect a rectory for the church the entire lumber bill, if he would furnish the materials required for the completion of the contract, made after the contractor had failed to pay for materials delivered and the refusal of the subcontractor to supply more materials until he had received something on his account, the promise of the rector was personal, and was an original engagement by him to pay his own debt, and not the debt of the contractor, so far as related to materials delivered for the building after the promise, and it was not within the statute of frauds.—Fitzgerald Spear Co. v. Kelly, 83 A. 491.

§ 23 (Pa.) An oral agreement by a bank depositor to permit his deposit to remain till a corporation of which he was president should pay its note in full was not within the statute of frauds.—Thompson v. Hazelwood Savings & Trust Co., 83 A. 284.

V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.

§ 50 (Md.) An oral contract for personal service for more than a year provided defendant should remain in business for that length of time is not within the statute of frauds.—H. J. McGrath Co. v. Marchant, 83 A. 912.

§ 53 (Conn.) An oral agreement of employment for one year, commencing February 1st, made before that day, would be void under the statute of frauds.—Grant v. New Departure Mfg. Co., 83 A. 212.

VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

§ 76 (R.I.) A partnership agreement for the buying and selling of lands need not be evidenced by writing, but may be proven by parol.—Moran v. McDevitt, 83 A. 1013.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 103 (R.I.) Unless an option contract provides for acceptance in writing, an oral acceptance is sufficient, or the acceptance may be shown by the acts of the parties.—Eastman v. Dunn, 83 A. 1057.

§ 106 (Pa.) Under the statute of frauds (Act April 22, 1856, Pub. Laws 532), a contract for the sale of land held required to state the consideration and subject-matter definitely, and describe the land so that it can be identified without the aid of parol testimony or the future action of the same or other parties.—Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., 83 A. 54.

§ 110 (Pa.) An agreement for the sale of coal lands, which fails to definitely describe any of the boundaries, is void and unenforceable under the statute of frauds.—Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., 83 A. 54.

§ 118 (Conn.) Plaintiff wrote defendant accepting an offer by defendant to take charge of a department of its business "for \$2,500 per annum for the first year" and asked that a contract for the first year be sent. Defendant, in reply, expressed satisfaction at his acceptance; stated that the salary for the first year would be \$2,500, and that no one in its employ had a contract, and they thought it better not to depart from this custom. Held, that the letters constituted a sufficient memorandum to satisfy the statute of frauds.—Grant v. New Departure Mfg. Co., 83 A. 212.

IX. OPERATION AND EFFECT OF STATUTE.

§ 119 (Pa.) The statute of frauds is not a mere rule of evidence, but a limitation of judicial authority to afford remedy.—Safe Deposit & Trust Co. of Pittsburg v. Diamond Coal & Coke Co., 83 A. 54.

§ 125 (Me.) A parol lease of land for more than a year is merely voidable, and not absolutely void, under the statute of frauds.—Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801.

§ 129 (Pa.) A parol gift of coal land by a father to a son, followed by exclusive possession and the making of improvements, held not within the statute of frauds.—Greenwich Coal & Coke Co. v. Learn, 83 A. 74.

§ 138 (R.I.) Plaintiff who, in pursuance of a contract whereby defendants were to erect a theater upon land on which he had an option and after deducting the amount of their advances were to form a partnership, delivered his option to defendants and performed all the services possible, has a right of action, though the contract was not enforceable because of the statute of frauds.—Eastman v. Dunn, 83 A. 1057.

X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 152 (Vt.) An oral contract relating to land is enforceable as if in writing, if the statute of frauds is not pleaded.—Cunningham v. Blanchard, 83 A. 469.

FRAUDULENT CONVEYANCES.

See Appeal and Error, §§ 931, 1017; Corporations, § 568; Evidence, § 578; Executors and Administrators, §§ 57, 432, 450, 451, 456.

I. TRANSFERS AND TRANSACTIONS INVALID.

(A) Grounds of Invalidity in General.

§ 9 (Vt.) The fraud of which creditors may complain may be merely the fraud which the law imputes from the condition of the grantor's estate and the necessary consequences of the conveyances.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

(D) Indebtedness, Insolvency, and Intent of Grantor.

§ 64 (Vt.) A conveyance made in order to defeat a prospective claim against the grantor held fraudulent as against the grantor's creditors, though he believed in good faith that the claim against him was unfounded.—*Lynch's Adm'r v. Murray*, 83 A. 746.

(E) Consideration.

§ 84 (Vt.) That the grantee of a farm worth \$1,800 assumed a mortgage thereon of \$600 did not prevent the conveyance from being fraudulent as to grantor's creditors; the conveyance being made pending settlement of a claim, and with an agreement for reconveyance after the settlement.—*Lynch's Adm'r v. Murray*, 83 A. 746.

(F) Confidential Relations of Parties.

§ 104 (Md.) A conveyance by a husband to the wife in prejudice of the husband's subsisting creditors is invalid.—*Ressmeyer v. Norwood*, 83 A. 347.

(I) Retention of Possession or Apparent Title by Grantor.

§ 132 (Pa.) A vendee or pledgee, who takes title to personalty without taking possession, takes the risk of the solvency of his vendor or pledgor as against levying creditors.—*Bank of North America v. Penn Motor Car Co.*, 83 A. 622.

§ 133 (Pa.) A vendee or pledgee, who takes title to personalty without taking possession, takes the risk of the solvency of his vendor or pledgor as against bona fide purchasers.—*Bank of North America v. Penn Motor Car Co.*, 83 A. 622.

(J) Knowledge and Intent of Grantee.

§ 162 (Vt.) The creditors of a grantor may avoid a voluntary conveyance for the fraud of the grantor alone.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

§ 163 (Vt.) An actual fraudulent intention by both grantor and grantee made the conveyance void as against subsequent creditors of the grantor.—*Lynch's Adm'r v. Murray*, 83 A. 746.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) Original Parties.

§ 187 (Vt.) Where an insolvent person conveyed his property to a corporation issuing stock in payment, the corporation is not a bona fide purchaser as against creditors of the insolvent.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

Where one financially embarrassed gave mortgages which were not recorded, and the parties to the mortgage formed a corporation to which the mortgaged property was conveyed in consideration of the stock, and of the five persons constituting the stockholders and directors of the corporation three of them had full knowledge of the nature of the transaction, and substantially all of the stock was issued to the mortgagor, the corporation was not a purchaser for value as against the creditors of the mortgagor and grantor.—*Id.*

III. REMEDIES OF CREDITORS AND PURCHASERS.

(I) Trial.

§ 308 (N.J.Sup.) Where a vendor executed a bill of sale for an automobile, and retained possession, and vendee failed to assert title until levy under execution by a creditor of the vendor, the inquiry whether the transaction was fraudulent because of absence of change of possession was for the jury.—*Wooley v. Crescent Automobile Co.*, 83 A. 876.

(J) Judgment or Decree and Execution.

§ 312 (Vt.) Upon setting aside a conveyance as fraudulent against creditors, defendant is not entitled to an allowance because of his disbursements for taxes, insurance, and payments as interest on a mortgage assumed by him.—*Lynch's Adm'r v. Murray*, 83 A. 746.

FREEHOLDERS.

See Statutes, § 125.

GARNISHMENT.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 56 (R.I.) A savings bank deposit, standing in the name of husband and wife, or the survivor of them, and being owned in equal amounts held subject to garnishment for the husband's debt only to the extent of his interest therein.—*Catlow v. Whipple*, 83 A. 753.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 108 (N.H.) Decision that a partnership creditor was entitled to judgment, and ordering the trustee to pay money garnished to a receiver, to hold for the use of the creditor entitled thereto, held to have appropriated the money attached to pay debtor's partnership debts, so that his individual creditors could not claim it.—*White v. Fernald-Woodward Co.*, 83 A. 458.

GIFTS.

See Adverse Possession, § 116; Charities; Conversion, § 15; Evidence, § 313; Frauds, Statute of, § 129; Husband and Wife, § 49½; Mines and Minerals, § 47; Remainders; Statutes, § 226; Wills, § 647.

I. INTER VIVOS.

§ 19 (Pa.) Clear and unambiguous language by a donor in making a gift held to aid slight and ambiguous acts constituting the act of delivery.—*Leitch v. Diamond Nat. Bank of Pittsburgh*, 83 A. 416.

§ 38 (N.J.Ch.) Where a son, who had only shortly reached his majority, conveyed all of his property, which consisted of land, by way of gift to his father, who was a masterful man, the conveyance is invalid; it appearing that the son had no competent, disinterested advice.—*Fritz v. Fritz*, 83 A. 181.

§ 47 (R.I.) Defendant who, in an action for breach of a contract, set up that plaintiff gave him an option, and relied on his generosity for reimbursement, has the burden of proving the gift.—*Eastman v. Dunn*, 83 A. 1057.

§ 49 (Pa.) Evidence held to sustain a gift of coal land by father to a son prior to a conveyance of the coal by the father to plaintiff.—*Greenwich Coal & Coke Co. v. Learn*, 83 A. 74.

§ 50 (Pa.) The nature of an arrangement between a father and son, whereby the father gave certain coal land to the son, reserving one-third of the grain grown on the land, where the evidence was conflicting, held for the

jury.—Greenwich Coal & Coke Co. v. Learn, 83 A. 74.

Whether a payment of one-third of the grain grown on certain land by defendant under an alleged gift was for rent or for services rendered by the donor *held* for the jury.—Id.

GOOD FAITH.

See Bills and Notes, §§ 340, 366; Fraudulent Conveyances, § 64; Judgment, § 386.

GOOD WILL.

§ 6 (N.J.) The seller of the good will of his business may, unless he has otherwise covenanted, set up a rival business, but may not solicit former customers.—Snyder Pasteurized Milk Co. v. Burton, 83 A. 907.

GRAND JURY.

See Criminal Law, § 1166.

§ 9 (N.J.Sup.) P. L. 1876, p. 362, § 8, providing that a grand jury shall be summoned by the coroners or elisors when the venire is sent to them, a grand jury summoned by elisors, when the venire is sent to them, is lawfully constituted.—State v. Egan, 83 A. 235.

GUARANTY.

See Corporations, §§ 416, 484; Principal and Surety.

I. REQUISITES AND VALIDITY.

§ 1 (N.J.) To "guarantee the payment" of money imports a direct undertaking to pay the sum in a given event, and not a mere promise to become answerable for the default of another.—Perkins-Goodwin Co. v. Hart, 83 A. 877.

§ 6 (Me.) In the case of a continuing guaranty for debts to be created, and uncertain in their amount, the guarantor is not liable, unless the guaranty is accepted.—American Agricultural Chemical Co. v. Ellsworth, 83 A. 546.

§ 7 (Me.) In the case of a continuing guaranty of debts to be created, and uncertain in their amount, the guarantor is not liable, unless notice of acceptance is given within a reasonable time.—American Agricultural Chemical Co. v. Ellsworth, 83 A. 546.

Notice of acceptance of guaranty of performance of his obligations by an agent, given to the guarantors 11 months after its signature, and several months after the agent had received and appropriated funds to his own use, was not given within a reasonable time.—Id.

A guaranty of performance of obligations by an agent *held* not within the exceptions to the rule, requiring notice of acceptance, that the consideration was a valuable one moving to the guarantor from the creditor, or that the guaranty was made at the request of the creditor, or was contemporaneous with the contract of guaranty.—Id.

§ 16 (R.I.) It was a sufficient consideration for a contract guaranteeing the paying of amounts drawn upon a letter of credit issued to the third party that the money stated in the letter was made available to the third party.—J. P. Morgan & Co. v. Hall & Lyon Co., 83 A. 113.

II. CONSTRUCTION AND OPERATION.

§ 38 (Me.) A guaranty of the faithful performance of his obligations by an agent appointed to sell fertilizers on commission was a continuing one.—American Agricultural Chemical Co. v. Ellsworth, 83 A. 546.

IV. REMEDIES OF CREDITORS.

§ 89 (R.I.) Where, in an action to recover upon a contract guaranteeing the payment of

the amounts drawn against a letter of credit, it appeared that the party to whom the letter was issued had drawn the full amount for which it called, the presumption was that she drew the money under some arrangement with its correspondents by the company issuing the letter.—J. P. Morgan & Co. v. Hall & Lyon Co., 83 A. 113.

GUARDIAN AND WARD.

See Insane Persons, § 43.

HARMLESS ERROR.

See Appeal and Error, §§ 1033-1071.

HEALTH.

See Food; Towns, § 45.

I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§ 16 (N.H.) Under Laws 1899, c. 100, §§ 1, 2, *held*, that plaintiff, whose house was quarantined, could not recover for caring for the patient, where the board of health has not declared such services to be an expenditure for the protection of the public health.—Creier v. Town of Fitzwilliam, 83 A. 128.

II. REGULATIONS AND OFFENSES.

§ 20 (N.J.Sup.) An ordinance of a board of health providing that every owner of an animal which shall die or be killed for any purpose except for food within the city must give notice to the board of health, and that no one except the health officer or the board shall transport any such animal from the place where it died without permission of the board of health, and that if the health officer considers such dead animal to be a nuisance or likely to be dangerous, or the owner fails to apply for permission to remove it, the board shall order its removal, is within the power of the board of health.—Schwarz Bros. Co. v. Board of Health of Jersey City, 83 A. 762.

§ 21 (N.J.Sup.) An ordinance of a board of health providing that every owner of an animal which shall die or be killed for any purpose except for food within the city must give notice to the board of health, and that no one except the health officer or the board shall transport any such animal from the place where it died without permission of the board of health, and that if the health officer considers such dead animal to be a nuisance or likely to be dangerous, or the owner fails to apply for permission to remove it, the board shall order its removal, is not unreasonable.—Schwarz Bros. Co. v. Board of Health of Jersey City, 83 A. 762.

§ 38 (N.J.Sup.) The question being whether the lowest floor of a tenement house should count as a "story," and this depending on whether it was more than five feet above the "curb level," but the "curb level" being susceptible of two meanings, it was incumbent on plaintiff to show facts which would require the application of the meaning rendering defendant liable.—Board of Tenement House Supervision of New Jersey v. Schlechter, 83 A. 783.

HEARING.

See Appeal and Error, § 817.

HEARSAY EVIDENCE.

See Criminal Law, §§ 419, 420.

HEIRS.

See Descent and Distribution.

HIGHWAYS.

See Animals; Constitutional Law, § 64; Dedication, §§ 18, 19, 29, 31, 43-45, 48, 51; Eminent Domain, §§ 19, 47, 119, 293, 318; Highways; Railroads, §§ 327-350; Street Railroads, § 85; Trial, § 253.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 44 (N.J.Supp.) Determination to lay out a public highway in a particular locality, and to take lands of special owners, is the exercise of a judicial, and not a legislative, function, so that the vote of a freeholder to lay out the highway, where he was interested in the location, was void.—Van Gilder v. Board of Chosen Freeholders of Cape May County, 83 A. 500.

(C) Alteration, Vacation, or Abandonment.

§ 70 (Me.) "Location" of a highway and "alteration" of a highway do not amount to the same thing.—Ford v. Erskine, 83 A. 455.

§ 72 (Me.) Where, upon petition to the county commissioners for alteration of an alleged existing highway, the return of the commissioners contains no express adjudication that the alleged highway is a highway, and shows the alteration by them of a town road, their record will be held void for want of jurisdiction.—Ford v. Erskine, 83 A. 455.

(D) Title to Fee and Rights of Abutting Owners.

§ 87 (Conn.) Though an abutting owner does not own the fee of the land in the highway, he may recover damages for any use of the highway constituting a nuisance and which is injurious to his property rights.—Cadwell v. Connecticut Co., 83 A. 215, 444.

II. HIGHWAY DISTRICTS AND OFFICERS.

§ 96 (Me.) A member of a board of county commissioners is not liable individually for trespass committed in the construction of a road across private lands under void proceedings, so far as he acted in an official capacity.—Ford v. Erskine, 83 A. 455.

The selectmen of a town and a contractor employed by them in constructing a road, made as an alteration of an existing highway by county commissioners, who were without jurisdiction, are liable in trespass.—Id.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 115 (Pa.) That proceedings for the reconstruction of a township road under Act May 1, 1905 (P. L. 318), were commenced prior to Act June 8, 1907 (P. L. 505), held not to entitle owner of land to damages for change of grade actually made after enactment of the latter statute.—Jamison v. Cumberland County, 83 A. 582.

§ 118 (Pa.) A county held not liable for damages from a change of grade of township road reconstructed by the state highway department under Act May 1, 1905 (P. L. 318), after the passage of Act June 8, 1907 (P. L. 505).—Jamison v. Cumberland County, 83 A. 582.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 184 (Conn.) On evidence in an action for personal injuries, alleged to have been caused by defendant's team negligently driving against plaintiff while he was walking on the highway, held, that the question of defendant's negli-

gence was for the jury.—Church v. Spicer, 83 A. 1115.

One walking on the highway is not bound, as a matter of law, to look back and see whether he is in danger of being run into by teams going in the same direction; but, under the circumstances of a particular case, the question whether he ought to look back and see such danger is for the jury.—Id.

§ 184 (Md.) A count of a declaration which alleged that the defendant, while engaged in hauling bales of paper stock to its mill, negligently loaded the same upon its wagon, and in consequence of the negligence the bales fell therefrom upon the public highway, and, lying there, frightened plaintiff's mules, causing them to run away to his injury, sufficiently charged the negligence of the defendant.—Cecil Paper Co. v. Nesbitt, 83 A. 254.

A count of a declaration which averred that bales of paper stock fell from defendant's wagon to the public road, and that the defendant, knowing the same had fallen from the wagon, negligently allowed them to remain thereon, and in consequence the plaintiff was injured, was sufficient as charging actionable negligence of the defendant.—Id.

A count in a declaration averring that the defendant's servant, acting within the reasonable line of his employment in hauling bales of paper stock over a public highway, discovered that a portion of the bales would not carry to the defendant's mills, but negligently proceeded with the load, and that before reaching the mills some of the bales fell from the wagon to the side of the highway, and in consequence the plaintiff's mules were frightened and ran away to the plaintiff's damage, sufficiently charged actionable negligence of the defendant.—Id.

Where in an action for negligence causing the fright and running away of the plaintiff's mules there was evidence that bales of paper stock caused to lie on the highway by defendant were responsible for the fright of the mules, evidence of a witness for the defendant as to the conduct of mules generally when frightened would not reflect on or tend to contradict the evidence that they were frightened and was properly refused.—Id.

§ 184 (Pa.) In an action against the owners of an automobile to recover damages for personal injuries from the fright of a horse, the question as to the identity of the machine held for the jury.—Bowling v. Roberts, 83 A. 600.

The burden is on plaintiff suing for injuries caused by alleged negligence of an automobile driver to establish the identity of the owner to the satisfaction of the jury.—Id.

HOMICIDE.

See Criminal Law, §§ 371, 419, 420, 763, 764, 783, 1134, 1168; Jury, § 72; Witnesses, § 392.

VII. EVIDENCE.

(A) Presumptions and Burden of Proof.

§ 152 (Pa.) Where on trial for murder a felonious homicide by the use of a deadly weapon is established, there is a presumption of murder in the second degree, and the burden is on defendant to reduce the grade of the crime.—Commonwealth v. Reed, 83 A. 601.

(B) Admissibility in General.

§ 156 (Me.) In a trial for uxoricide, accused's declarations to an undertaker the day after the homicide held admissible on an issue of malice.—State v. Albanes, 83 A. 548.

§ 163 (Me.) Where, in a trial for uxoricide, accused is permitted to show good reputation in the community in which he had lived for the preceding 10 years, it was not error to exclude testimony showing good reputation in another community where he had lived for 10 years before that time.—State v. Albanes, 83 A. 548.

§ 166 (Md.) Where defendant was charged with having caused deceased's death by an abortion, evidence of her improper relations with others held inadmissible to negative motive.—Meno v. State, 83 A. 759.

§ 166 (N.J.) On trial of a husband for murder of his wife by poison, where the evidence was circumstantial, letters found in the possession of defendant from an unmarried woman, expressing love for him and her reliance on his promise to marry her as soon as he could divorce his wife, were properly admitted to show motive for the crime.—State v. MacFarland, 83 A. 993.

§ 181 (Me.) In a trial for uxoricide, evidence tending to show that decedent had committed adultery was inadmissible, in the absence of a showing that accused had knowledge thereof.—State v. Albanes, 83 A. 548.

(C) Dying Declarations.

§ 203 (Md.) Where decedent was informed by her physician that she was going to die, and indicated that she realized her situation, her statement then made to a detective was admissible as a dying declaration.—Meno v. State, 83 A. 759.

§ 218 (Md.) Whether decedent had sufficient understanding when she made a dying declaration to entitle it to probative force held for the jury.—Meno v. State, 83 A. 759.

(E) Weight and Sufficiency.

§ 253 (Me.) Evidence held to sustain a conviction of murder with malice aforethought.—State v. Albanes, 83 A. 548.

VIII. TRIAL.

(B) Questions for Jury.

§ 282½ (Vt.) P. S. 5695, as amended by Laws 1910, No. 225, held not to create subdivisions or classifications of the crime of first degree murder, but to leave it to the jury's discretion as to whether to impose a death penalty or life imprisonment.—State v. Bosworth, 83 A. 657.

(C) Instructions.

§ 286 (Pa.) On a trial for murder, an instruction that it is not necessary to find that defendant went to the house with intent to kill, that if he formed the intent with a mind capable of forming that intent an instant before he pulled the trigger he was guilty of murder in the first degree, held not erroneous.—Commonwealth v. Reed, 83 A. 601.

HUSBAND AND WIFE.

See Assault and Battery, § 92; Assignments for Benefit of Creditors, § 145; Bankruptcy, § 57; Bills and Notes, §§ 340, 366; Death, §§ 48, 67, 95; Descent and Distribution, § 53; Divorce; Dower; Fraudulent Conveyances, § 104; Homicide, § 166; Judgment, § 958; Marriage; Mortgages, § 61; Partition, § 12; Statutes, §§ 107, 115; Trespass; Wills, §§ 219, 647, 801; Witnesses, § 57.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

§ 14 (N.J.) The right of possession of husband and wife under an estate by the entireties as modified by the married woman's act amounts to a tenancy in common for the joint lives with remainder to the survivor.—Schulz v. Ziegler, 83 A. 968.

§ 14 (Pa.) Where, in partition between a married woman and others, her share is conveyed to her and her husband, they do not hold by the entireties, but she retains her actual interest in the land.—Stoffal v. Jarvis, 83 A. 609.

§ 15 (N.J.) By a husband's conveyance of his interest in an estate by the entireties, the grantee becomes tenant in common with the

wife, but only for the joint lives of husband and wife.—Schulz v. Ziegler, 83 A. 968.

§ 19 (N.J.Ch.) In a wife's suit for maintenance, the court cannot, after the parties have become reconciled and resumed cohabitation, order the husband to pay a counsel fee to the wife's attorney on the theory that the attorney's services were necessities.—Kuntz v. Kuntz, 83 A. 787.

§ 19 (N.J.Sup.) Services rendered by a daughter in a household of which her father is the head will not raise an implied promise on the part of the stepmother to pay for them out of her own estate, to the exoneration of the husband.—Mooney v. McMahon, 83 A. 504.

III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

§ 49½ (Pa.) Evidence held to sustain a gift by a husband to his wife of bonds deposited in a safe deposit vault.—Leitch v. Diamond Nat. Bank of Pittsburgh, 83 A. 416.

Where a husband placed bonds in a safe deposit vault, and gave them to his wife, his having access to the box with her permission held not inconsistent with her ownership of the contents of the box.—Id.

IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

(E) Torts.

§ 102 (N.J.) Since the passage of married women's acts, a husband is not liable for the torts of his wife growing out of the conduct by her of her own business, or from her management of her separate property.—Harrington v. Jagmetty, 83 A. 880.

V. WIFE'S SEPARATE ESTATE.

(A) What Constitutes.

§ 129 (R.I.) A wife who allows her husband to use her money as his own to acquire title to realty in her name to defeat the rights of the husband's partner to a share of the profits therefrom held estopped from claiming that the money belonged to her.—Moran v. McDevitt, 83 A. 1013.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 294 (Pa.) Under Acts May 23, 1907 (P. L. 227), and April 27, 1909 (P. L. 182), where service is upon husband by publication only, court held to have no power to appoint receiver to take all of deserting husband's property and sell it for the benefit of creditors and support of the wife.—Erdner v. Erdner, 83 A. 420.

§ 295 (N.J.Ch.) Where, while a bill for maintenance was pending, the husband and wife were reconciled and resumed cohabitation, the cause of action was thereby abrogated, although the bill was not formally dismissed, and neither party could take any action adverse to the other, and hence a motion by the wife's counsel for counsel fee, necessarily made in her name, was not maintainable.—Kuntz v. Kuntz, 83 A. 787.

§ 299 (N.J.) A rule to show cause why defendant should not be adjudged guilty of contempt in failing to pay alimony, and why he should not be committed, was properly submitted to the Vice Chancellor for hearing, with directions to report proceedings and advise the order.—Adams v. Adams, 83 A. 190.

A decree for separate maintenance having been entered in open court, after defendant had agreed to the amount, he was estopped to claim that it was void, because it contained no adjudication that the parties were husband and wife, etc.—Id.

An allowance of alimony, not being a debt, within the constitutional provisions prohibiting imprisonment for debt is enforceable by contempt proceedings, and not alone by scire facias and sequestration.—Id.

That the amount of alimony fixed in a decree for separate maintenance was agreed on did not render the decree one for the payment of money under a contract.—Id.

A commitment for failure to pay arrears of alimony failing to specify the amount in arrears, the payment of which would purge the contempt, held fatally defective.—Id.

HYPOTHETICAL QUESTIONS.

See Evidence, § 553.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

See Witnesses, §§ 311-414.

IMPLIED CONTRACTS.

See Assumpsit, Action of; Money Received.

IMPRISONMENT.

See Constitutional Law, § 83; False Imprisonment.

IMPROVEMENTS.

See Charities, § 13; Frauds, Statute of, § 129; Highways, §§ 115, 118; Life Estates, § 17; Mechanics' Liens; Municipal Corporations, §§ 312-519.

IMPUTED NEGLIGENCE.

See Negligence, § 92.

INCOME.

See Life Estates, § 15.

INCOMPETENT PERSONS.

See Insane Persons.

INCRIMINATION.

See Witnesses, § 306.

INCUMBRANCES.

See Mortgages, § 280; Sales, § 263.

INDECENCY.

See Obscenity.

INDEMNITY.

See Guaranty; Insurance, § 124; Principal and Surety.

INDEPENDENT CONTRACTORS.

See Master and Servant, § 321; Municipal Corporations, § 821.

INDICTMENT AND INFORMATION.

See Criminal Law, § 1032; Disorderly Conduct; Intoxicating Liquors, §§ 223, 248; Municipal Corporations, § 639; Witnesses, § 414.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 11 (Me.) An indictment duly found, returned, and filed becomes a part of the records of the court.—State v. Ireland, 83 A. 453.

§ 14 (Me.) Copy of a lost or mislaid indictment may be substituted by order of the trial court as soon as the loss is discovered and before the case is submitted to the jury, but omission to do so before conviction is not

fatal; the substitution being properly made upon satisfactory evidence at a forthcoming nisi prius term.—State v. Ireland, 83 A. 453.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 110 (Md.) Under Code 1904, art. 27, § 446, an indictment in the words of the statute charging the unlawful disposition of spirituous liquors, fermented liquors, and intoxicating drink was sufficient.—Curry v. State, 83 A. 1030.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125 (N.J.Sup.) An indictment charging a county collector with embezzling money received for the county describes an offense against the Crimes Act, § 168, and is not void for duplicity, though it also charges that he converted to his own use money of the county as its servant and agent, and notwithstanding section 184.—State v. Egan, 83 A. 235.

§ 130 (Md.) Two or more offenses, either felonies or misdemeanors, may be charged in different counts of the same indictment.—Curry v. State, 83 A. 1030.

§ 132 (Md.) Where an indictment charges more than one misdemeanor, the court in its discretion may require the prosecutor to elect upon which he will prosecute or to quash the indictment.—Curry v. State, 83 A. 1030.

Requiring prosecutor to elect between charges held within court's discretion.—Id.

INDORSEMENT.

See Bills and Notes, §§ 242-366, 504, 537; Certiorari, § 45.

INEVITABLE ACCIDENT.

See Negligence, § 63.

INFANTS.

See Death, §§ 24, 95; Municipal Corporations, § 706; Negligence, §§ 134, 136; Railroads, §§ 453, 482; Street Railroads, §§ 100, 102, 114; Trial, § 140.

VII. ACTIONS.

§ 92 (N.J.Sup.) Declaration commencing that defendant was summoned to answer unto A. by J. his next friend, and thereupon the said A. by J. his next friend, the plaintiff by K. attorney of the plaintiff, etc., and concluding that said A. by J. his next friend, the plaintiffs herein, through their attorney, says that said A. has been injured, and that an action has accrued to the said A., etc., was not to be stricken under Practice Act, § 110, as alleging the next friend to be the plaintiff and concluding to the damage of the next friend and not the infant.—Karpenski v. Borough of South River, 83 A. 639.

INFORMATION.

See Indictment and Information.

INHERITANCE.

See Descent and Distribution.

INHERITANCE TAX.

See Taxation, § 897.

INJUNCTION.

See Appeal and Error, § 80; Counties; Easements, § 29; Electricity; Eminent Domain, § 274; Malicious Prosecution, §§ 10, 25, 35, 41, 72; Mortgages, §§ 205, 338; Nuisance; Schools and School Districts, § 69; Trade-Marks and Trade-Names, §§ 85, 93; Waters and Water Courses, §§ 61, 114.

I. NATURE AND GROUNDS IN GENERAL.

(B) Grounds of Relief.

§ 11 (Del.Ch.) Injunction *held* not to lie to restrain the mayor and council of a city from taking further action on a proposed ordinance providing for a sale of land, where no present action was being taken under the ordinance.—Gray v. City of Wilmington, 83 A. 321.

§ 23 (N.J.Ch.) Complainants *held* entitled to a mandatory injunction, enforcing a restrictive building covenant, notwithstanding the damages that would be suffered by defendants in complying with the injunction would be disproportionate to the benefits accruing to complainants.—Supplee v. Cohen, 83 A. 373.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) Actions and Other Legal Proceedings.

§ 28 (Md.) Equity would not enjoin proceedings on a caveat, based on mental incapacity and undue influence; it being without jurisdiction to determine the entire controversy.—Bradley v. Bradley, 83 A. 446.

(C) Contracts.

§ 58 (N.J.Ch.) Restrictive covenants will not be enforced by injunction when they are vague or uncertain, or where the right to relief is doubtful.—Meaney v. Stork, 83 A. 492.

Restrictive covenants, to be enforceable in equity, must be reasonable.—Id.

§ 62 (Del.Ch.) The right of equitable relief in favor of a grantor, who has attached to the land an agreement as to its use by his grantee, though such agreement does not run with the land, as against a purchaser with notice, is confined to agreements or covenants restricting the mode of using the land.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

§ 62 (N.J.) Where, through change of the character of a neighborhood, the enforcement of a restrictive covenant would be a burden, without conferring any benefit, equity will refuse relief; but, where the change does not conflict with the essential purpose of the covenant, a violation will be enjoined.—Sanford v. Keer, 83 A. 225.

§ 62 (N.J.Ch.) Rights of a property owner, under a restrictive building covenant prohibiting the construction of a building on adjoining premises nearer than three feet from the line, *held* enforceable by injunction, without proof of special damage.—Supplee v. Cohen, 83 A. 373.

§ 62 (N.J.Ch.) Where complainants, observing the projection of both the bay window and the eaves of defendant's house under construction, notified defendant that the projection of the bay window was a violation of his restrictive building covenant but made no mention of the eaves, he was not entitled to injunctive relief in respect to the eaves.—Meaney v. Stork, 83 A. 492.

§ 62 (N.J.Ch.) A grantor's covenants as to restrictions in deeds of adjoining lots, being a part of the consideration for the grantee's deed and intended to impose a burden on all lots for the benefit of all, its violation will be restrained against all purchasers from the grantor with notice thereof.—Howland v. Andrus, 83 A. 982.

III. ACTIONS FOR INJUNCTIONS.

§ 113 (N.J.Ch.) One who seeks to enjoin violation of a building restriction must act promptly upon being advised of that which he asserts does or will constitute the violation.—Meaney v. Stork, 83 A. 492.

§ 113 (N.J.Ch.) A property owner *held* not estopped by his laches in proceeding by injunc-

tion to enforce a restrictive building covenant where he objected to the erection of the building as soon as he had notice of its proposed location.—Howland v. Andrus, 83 A. 982.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

(A) Grounds and Proceedings to Procure.

§ 133 (Del.Ch.) A preliminary injunction will require the removal of an obstruction which effectuates the very injury to be ultimately remedied.—Williamson v. McMonagle, 83 A. 139.

§ 134 (Del.Ch.) The right of a complainant seeking a preliminary injunction should be so clear that the denial of the right must be capacious or unconscionable.—Williamson v. McMonagle, 83 A. 139.

§ 137 (N.J.Ch.) A preliminary injunction will not be granted, where the plaintiff's right, which the injunction is to protect, is doubtful.—Blanchard v. Eastern Pennsylvania Power Co., 83 A. 505.

(B) Continuing, Modifying, Vacating, or Dissolving.

§ 172 (Md.) Where the bill in a suit to enjoin a city from constructing drains showed that the city proposed to make the gutters so deep that trees were injured or destroyed, all of which was practically admitted in the answer, defendant could not, without amending the answer, have the injunction dissolved on a showing that the deepening of the gutters was a part of a general scheme to grade the street, and hence was authorized.—Mayor and Council of City of Easton v. Turner, 83 A. 42.

§ 186 (Vt.) P. S. § 1287, *held* not to apply where an injunction wrongfully obtained was dissolved by a voluntary discontinuance of the suit, since the discontinuance ended the case for all purposes except for the giving of judgment for defendant for reasonable costs as provided by section 1758.—Powell v. Woodbury, 83 A. 541.

P. S. § 1284, relates only to ascertaining damages occasioned by injunction issued to stay proceedings at law in actions of ejectment after verdict.—Id.

INUENDO.

See Libel and Slander, §§ 86, 97.

IN PAIS.

See Estoppel, §§ 52, 58.

INQUISITION.

See Insane Persons, § 10.

INSANE PERSONS.

See Courts, § 514; Receivers, § 16; Wills, § 664.

I. DISABILITIES IN GENERAL.

§ 5 (Md.) One adjudged a lunatic has no capacity during the continuance of the lunacy to contract, and may not appoint an agent.—Gillet v. Shaw, 83 A. 394.

II. INQUISITIONS.

§ 10 (Md.) A proceeding to have an adjudication in lunacy may properly be commenced by one not a member of the family of the alleged lunatic.—Gerke v. Colonial Trust Co., 83 A. 1092.

III. GUARDIANSHIP.

§ 43 (Md.) Under Code 1904, art. 16, §§ 231, 232, payment of a small sum due a lunatic as annuities to a foreign guardian *held* within

the policy of the state of Maryland.—Gerke v. Colonial Trust Co., 83 A. 1092.

That such foreign guardian was secretary of an insane hospital *held* not sufficient to render the order improper, where there was no showing that he was not a proper guardian.—Id.

VII. TORTS.

§ 80 (Md.) One adjudged a lunatic is not liable in person or property for the tort of an employe of the guardian in operating an automobile not in the presence of the lunatic.—Gillet v. Shaw, 83 A. 394.

INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Corporations, §§ 562, 568; Judgment, § 822; Railroads, § 209.

II. PROCEEDINGS FOR DECLARATION OF INSOLVENCY AND SURRENDER OR SEIZURE OF PROPERTY.

(C) Involuntary Proceedings.

§ 33 (N.J.Sup.) The words "immediately thereafter" in the statutory bond required by Insolvent Debtors' Act, § 2, providing that the debtor will, if refused a discharge, surrender himself immediately thereafter, mean "directly" or "at once" after the discharge has been refused.—Braden v. Rosenstone, 83 A. 906.

INSPECTION.

See Carriers, § 292; Master and Servant, §§ 123-125.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 751-834, 922; Trial, §§ 187-296.
To servant, see Master and Servant, §§ 150-155, 217, 276.

INSURABLE INTEREST.

See Insurance, §§ 115, 116.

INSURANCE.

See Fraudulent Conveyances, § 312; Time.

II. INSURANCE COMPANIES.

(A) Stock Companies.

§ 38 (N.J.) Increasing the amount of insurance on policies already issued without changing the premium by insurance company in good faith *held* not to constitute the doing of a participating policy business in violation of P. L. 1907, p. 140, § 12.—Blanchard v. Prudential Ins. Co. of America, 83 A. 220.

In action by stockholders of an insurance company to compel the present distribution of profits ascertained and apportioned to the stockholders under P. L. 1907, p. 132, § 1, *held*, in the absence of fraud or bad faith, that equity would not interfere.—Id.

IV. INSURABLE INTEREST.

§ 115 (Me.) Whether one has an insurable interest in property is tested by the question whether he will be directly and financially affected by loss of the property.—Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801.

Plaintiff had an insurable interest in a building occupied by him, though owned by his mother, with whom he had an oral agreement that he might occupy a room during her life, and he having expended \$1,000 in improvements.—Id.

§ 116 (Md.) Life insurance in a company operating on the mutual or co-operative plan may be made payable to one with whom insured lived illicitly on separation from his wife, though the beneficiary be designated as "wife," as well as by name, and the lawful wife sur-

vives insured.—Meinhardt v. Meinhardt, 83 A. 715.

V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

§ 124 (Me.) A contract of insurance against fire is a contract of indemnity to reimburse insured for his actual loss, not exceeding an agreed sum.—Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801.

(B) Construction and Operation.

§ 166 (N.J.) A policy for \$2,000 on "two three-story frame buildings * * * while occupied as dwellings * * * and being \$1,000 on each building," is a specific policy of \$1,000 on each of the buildings, and not a blanket policy on both.—Grollmund v. Germania Fire Ins. Co., 83 A. 1108; Same v. Rochester German Ins. Co., Id. 1113.

A policy of insurance for \$2,000 on a three-story frame building while occupied as a dwelling house, and situated Nos. 69 and 71 East Twelfth street, is not a specific policy on each part, but a blanket policy on both.—Id.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(C) Matters Relating to Person Insured.

§ 297 (Md.) Representations by an applicant for insurance that he did not use any malt liquors, wines, or spirits, and had never used malt or spirituous liquors to excess, are material to the risk as a matter of law.—Forwood v. Prudential Ins. Co. of America, 83 A. 169.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 376 (Md.) A provision of an insurance policy prohibiting any agent from changing or modifying its terms does not apply to conditions which relate to the inception of the contract.—Forwood v. Prudential Ins. Co. of America, 83 A. 169.

§ 379 (Md.) Where the application was annexed to policy, answers which applicant must have known to have been false *held* to defeat recovery, although true answers were given, and different ones copied in the application by the agent.—Forwood v. Prudential Ins. Co. of America, 83 A. 169.

§ 388 (N.J.Sup.) The refusal of insurer to accept a premium on the last day of grace allowed by the policy and its claim that the policy had lapsed was a waiver of any further tender of premiums, without notice to the insured that they would be received.—Bohles v. Prudential Ins. Co. of America, 83 A. 904.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(B) Insurance of Property and Titles.

§ 499 (Me.) Recovery of fire insurance is not defeated because the amount of loss cannot be determined without difficulty, and is to some extent a matter of estimate.—Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801.

§ 503 (Me.) Where a leasehold interest is insured, the value for the unexpired term is the measure of loss.—Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 83 A. 801.

In an action on a fire policy covering a leasehold interest, the amount of loss *held* properly ascertained by taking the present worth of the amount representing the difference between the reasonable rental value of the premises and the rental cost to plaintiff for a certain period.—Id.

§ 504 (N.J.) In distributing the loss upon two parts of a building under one roof between

a blanket policy and a policy specifically liable on each part, each providing that the liability shall not be greater than the amount insured thereby shall bear to the whole insurance, the blanket policy should be regarded as insuring each part to an entire amount unappropriated when it is reached, making the adjustment part by part in the order of the greater loss, if that will work substantial equity to all parties, and deducting a sum appropriated to the part as it is adjusted and passed.—*Grollmund v. Germania Fire Ins. Co.*, 83 A. 1108; *Same v. Rochester German Ins. Co.*, Id. 1113.

XIV. NOTICE AND PROOF OF LOSS.

§ 542 (Md.) Where the insured shows that he could not, by the use of such reasonable means as were within his power, secure bills or duplicates, it is a sufficient excuse for his failure to comply with a demand for them, made under a provision in the policy.—*Mutual Fire Ins. Co. of Montgomery County v. Pickett*, 83 A. 1097.

§ 543 (N.J.Sup.) Where an insurance company issues several policies on the life of insured and nothing contained therein requires separate proof of death to be made, such proof made under one is sufficient to make a policy under which no proof was made actionable.—*Bohles v. Prudential Ins. Co. of America*, 83 A. 904.

§ 559 (N.J.Sup.) Insurer having denied liability on a life policy on the specific ground that it had lapsed, it was unnecessary to furnish proofs of death in order that the policy might become suable.—*Bohles v. Prudential Ins. Co. of America*, 83 A. 904.

XV. ADJUSTMENT OF LOSS.

§ 574 (R.I.) A statutory fire policy provided that insurer should not be liable beyond the actual cash value of the property, and that it should be optional with the insurer to take all or any part of the articles damaged at the value ascertained by the appraisal, and to repair, rebuild, or replace the property damaged, and that insured should give immediate notice of any loss, separating the damaged and undamaged personal property, and stating the quantity and cost of each article and the amount claimed thereon, and within 60 days render a verified statement showing the cash value of each item and the amount of loss thereon. *Held*, that a report of appraisers giving the value and loss on the aggregate without itemization was insufficient.—*Sauthof v. American Cent. Ins. Co.*, 83 A. 441.

XVI. RIGHT TO PROCEEDS.

§ 585 (Vt.) Where a wife under an arrangement with her husband paid the premiums on an insurance policy on the life of her husband for over twenty years, the payment being made from her savings in keeping a boarding house, the money payable on the maturity of the policy belonged to the wife, though the earnings from the boarding business were deposited in bank in the name of the husband and by him checked out.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

XVIII. ACTIONS ON POLICIES.

§ 612 (Md.) Until compliance by the insured with a demand for books of accounts, bills, etc., made under the provisions of the policy, or until a showing that compliance was impossible, *held*, that he could not maintain an action on the policy.—*Mutual Fire Ins. Co. of Montgomery County v. Pickett*, 83 A. 1097.

§ 646 (Md.) The burden is on an insurer to show the falsity of statements and answers in the application, and that they were material

to the risk.—*Forwood v. Prudential Ins. Co. of America*, 83 A. 169.

Where an insurer has proved the falsity of representations in the application which was signed by the insured, and contained a declaration that all statements and answers were true, and an agreement that they should constitute a part of the contract, the burden is on those claiming under the policy to show that the answers contained in the application were not the answers given by the insured.—*Id.*

§ 665 (Md.) Evidence *held* insufficient to show that false answer in an insurance application was not the answer given by the insured, and that he had answered the question truly.—*Forwood v. Prudential Ins. Co. of America*, 83 A. 169.

§ 665 (Md.) Evidence, in an action on a policy of fire insurance, *held* not to sustain plaintiff's burden of showing either a compliance with the insurer's demand, under the terms of the policy, for his books of accounts, bills, etc., or that it was impossible for him to comply with such demand.—*Mutual Fire Ins. Co. of Montgomery County v. Pickett*, 83 A. 1097.

XX. MUTUAL BENEFIT INSURANCE.

(B) Beneficiaries and Benefits.

§ 770 (Md.) Under Code Pub. Gen. Laws 1904, art. 23, § 210, one with whom a member lived illicitly for 10 years on separation from his wife, who survived him, is not entitled to the benefits, though designated as wife in the certificate.—*Meinhardt v. Meinhardt*, 83 A. 715.

Under Code Pub. Gen. Laws 1904, art. 23, § 210, *held*, that a fraternal insurance society cannot be estopped to deny the right of one who lived illicitly with an insured member to the proceeds of the certificate, because it received dues from the member, where it did not know until after his death that she was not his lawful wife.—*Id.*

Where the classes of persons to whom fraternal insurance proceeds may be paid are prescribed by statute of charter, neither the society nor a member, nor both, can divert benefits to any other class.—*Id.*

§ 784 (Md.) Under Code Pub. Gen. Laws 1904, art. 23, §§ 210-223, and the by-laws of a fraternal benefit society, a member may not by will dispose of a death benefit due under a certificate of membership.—*Mineola Tribe No. 114. Improved Order of Red Men v. Lizer*, 83 A. 149.

Under Code Pub. Gen. Laws 1904, art. 23, § 210, and the by-laws of a fraternal order, a will of a member disposing of the death benefit due under his certificate of membership *held* not an "attested order," and the beneficiary in the will is not entitled to the benefit.—*Id.*

§ 793 (Md.) Under Code Pub. Gen. Laws, 1904, art. 23, § 210, where proceeds of a certificate are claimed by the member's lawful wife, from whom he was separated, and by a woman with whom he lived illicitly, who was designated as his "wife" in the certificate, and the proceeds are deposited in court by the society under interpleader, to be paid as may be determined, the proceeds *held* properly awarded to the lawful widow, in the absence of a by-law or rule to the contrary.—*Meinhardt v. Meinhardt*, 83 A. 715.

INTENT.

See Deeds, §§ 93, 97, 100; Evidence, § 461; Fraudulent Conveyances, §§ 64, 163; Powers; Statutes, § 182; Trusts, §§ 25, 270; Wills, §§ 439-441, 481, 629, 684, 753, 863.

INTEREST.

See Covenants, § 84; Insurance, §§ 115, 116; Money Received; Trusts, § 282; Wills, § 734.

II. RATE.

§ 31 (Pa.) Interest for delay in obtaining compensation for personal injuries cannot be at the rate of over six per cent.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

INTERLINEATION.

See Wills, § 107.

INTERLOCUTORY INJUNCTION.

See Injunction, §§ 133-136.

INTERLOCUTORY JUDGMENT.

See Appeal and Error, §§ 70-82, 870-875.

INTERPLEADER.**I. RIGHT TO INTERPLEADER.**

§ 4 (Conn.) The court in a suit to quiet title, having determined the title, was authorized to order the parties claiming distribution of rents and profits in the hands of a receiver to file statements of claim in the nature of an interpleader.—*Humphrey v. Gerard*, 83 A. 210.

§ 12 (N.J.) The right of the owner of a building erected by a contractor to pay into court the money due under the contract for distribution among those who have filed legal stop notices is unaffected by his failure to give notice to the contractor of the stop notices served.—*Keupler v. Eisele*, 83 A. 999.

II. PROCEEDINGS AND RELIEF.

§ 23 (N.J.) A bill of interpleader by an owner of a building erected by a contractor, which alleges that the contract was filed in accordance with the statute, sufficiently alleges as against a demurrer compliance with the statute contemplating the filing of the specifications accompanying the contract.—*Keupler v. Eisele*, 83 A. 999.

A bill of interpleader by an owner of a building erected by a contractor *held* to show sufficient uncertainty as to the rights of the several claimants to entitle the filing of the bill.—*Id.*

INTERPRETATION.

See Bills and Notes, § 116; Constitutional Law, §§ 14, 48; Contracts, §§ 147-176; Covenants, §§ 49-84; Deeds, §§ 90-100; Evidence, §§ 458, 461, 518; Guaranty, § 38; Insurance, § 166; Pleading, § 34; Powers; Sales, §§ 71, 72; Statutes, §§ 181-235.

INTERPRETERS.

See Witnesses, § 37.

INTERROGATORIES.

See Depositions.

To jury, see Trial, §§ 349, 350.

INTERSTATE COMMERCE.

See Commerce.

INTESTACY.

See Descent and Distribution; Wills, §§ 449, 801.

INTOXICATING LIQUORS.

See Criminal Law, § 369; Indictment and Information, § 110.

IV. LICENSES AND TAXES.

§ 87 (N.H.) Under Laws 1903, c. 95, § 14, *held* that sale of his stock and retirement by a licensee did not abrogate his license nor relieve him from responsibility as a licensee nor dis-

charge the sureties on his bond.—*United States Fidelity & Guaranty Co. v. Little*, 83 A. 513.

Under Laws 1903, c. 95, § 12, *held* that, where a licensee transferred his license without assent of the board of commissioners, the sureties on his bond were not discharged from liability.—*Id.*

§ 108 (N.J.Supp.) Under Comp. St. 1910, p. 2907, § 83, prescribing as a necessary consequence of revocation of a liquor license that no license shall be granted for a year thereafter to sell liquors in the premises, a judgment of forfeiture cannot stand, unless the owner of the premises is a party to the proceedings.—*Dulin-ski v. Kling*, 83 A. 863.

VI. OFFENSES.

§ 131 (Conn.) Gen. St. 1902, § 2701, as amended by Pub. Acts 1903, c. 78, and by Pub. Acts 1905, c. 19, punishing persons entering any place in which liquors are licensed to be sold or exposed for sale during prohibited hours, applies only to places licensed for the sale of liquor within section 2700.—*State v. Penner*, 83 A. 625.

§ 176 (Del.Gen.Sess.) It is no defense, in a prosecution for unlawfully selling spirituous liquor, that the liquor was sold as a medicine, where accused was not authorized to sell medicine.—*State v. Buckman*, 83 A. 938.

VIII. CRIMINAL PROSECUTIONS.

§ 223 (Md.) The state in a prosecution for the unlawful disposition of intoxicating liquor is not confined in its proof to the date alleged in the indictment.—*Curry v. State*, 83 A. 1030.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

§ 248 (Me.) A complaint under Rev. St. c. 29, § 40, to search and seize liquors, describing the place as "a certain shop and dwelling and its appurtenances," occupied by defendant as a "store and dwelling," is insufficient to show that the dwelling house is used as an inn or shop, or for purposes of traffic within the statute.—*State v. Soucie*, 83 A. 700.

INVESTMENT.

See Conversion, § 16.

ISSUES.

See Appeal and Error, §§ 170, 219.

JAILS.

See Prisons.

JEOPARDY.

See Criminal Law, §§ 182, 185.

JOINDER.

See Action, §§ 41-45.

JOINT TENANCY.

See Tenancy in Common; Wills, § 627.

JUDGES.

See Appeal and Error, § 567; Evidence, § 44; Exceptions, Bill of, § 51; Justices of the Peace; New Trial, § 93.

IV. DISQUALIFICATION TO ACT.

§ 42 (Md.) Under Code Pub. Gen. Laws 1904, art. 93, § 234, the fact that one of the judges of the orphans' court was a nephew of the decedent and a remainderman under decedent's alleged will was no ground for the transfer of jurisdiction of the estate from the orphans' to the equity court.—*Curtis v. Pierson*, 83 A. 87.

An orphans' court order, appointing a temporary administrator, *held* not defective, within Code 1904, art. 93, § 67, and Const. art. 4.

§ 7, because one of the judges was related to the decedent and was a remainderman under his will, where it did not appear that he participated in such appointment.—Id.

JUDGMENT.

See Abatement and Revival, § 69; Appeal and Error, § 982; Certiorari, § 69; Corporations, § 683; Courts, § 189; Covenants, § 121; Equity, §§ 420-427; Executors and Administrators, § 506; Justices of the Peace, §§ 130, 135; Life Estates, § 17; Mortgages, § 497; New Trial, § 109; Pleading, §§ 348, 350; Review; Wills, §§ 421, 423.

II. BY CONFESSION.

§ 46 (Pa.) Power to confess judgment by warrant of attorney is exhausted by entering judgment thereon, and a second judgment on the same warrant, after vacation of the first, is void.—Borough of Bellevue v. Hallett, 83 A. 66.

§ 67 (N.J.) Judgments on bonds and warrants of attorneys will be set aside where the debtor has subsequently given a bond and mortgage, and the mortgage has not been foreclosed.—Knight v. Cape May Sand Co., 83 A. 964.

§ 68 (Pa.) When the genuineness of a note is in dispute and the issue is that of forgery, the writing is not of weight and the burden of establishing its genuineness is on the plaintiff in the judgment.—Boyd v. Kirch, 83 A. 366.

Where defendant testifies that he did not sign the note on which judgment has been entered against him and that he was not at its date indebted to plaintiff in any amount, and he is corroborated by two witnesses who were familiar with his handwriting and knew his signature, an order opening the judgment was proper, though his testimony was contradicted by plaintiff and by experts who expressed the opinion that the note was genuine.—Id.

IV. BY DEFAULT.

(A) Requisites and Validity.

§ 101 (Del.Super.) Under Rev. Code 1852, amended to 1893, p. 789, c. 106, § 4, an instrument in writing not containing an unconditional promise to pay money held an insufficient basis for a default judgment at the same term.—Green v. Wilmington Trust Co., 83 A. 935.

(B) Opening or Setting Aside Default.

§ 162 (R.I.) On an application to open a default judgment, the court will not hear counter affidavits on the merits, or examine into the truth of the allegations of defense.—Centreville Nat. Bank of Warwick v. Inman, 83 A. 755.

§ 163 (R.I.) On an application to open a default, it was error for the court to pass on the question whether the defense pleaded would prevail on a trial.—Centreville Nat. Bank of Warwick v. Inman, 83 A. 755.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (Pa.) A judgment for defendant non obstante veredicto under Act April 22, 1905 (P. L. 286), could not be rendered in the absence of a request for binding instructions or the reservation of questions of law.—Sulzner v. Cappeau-Lemley & Miller Co., 83 A. 103.

§ 199 (Pa.) The court cannot enter a judgment non obstante veredicto, where it could not give binding instructions.—Page v. Moore, 83 A. 580.

IX. OPENING OR VACATING.

§ 338 (Md.) Loss of the prayers from the files, so that no record could be made for appeal, held not sufficient ground for a motion to strike out a judgment for plaintiff, where the

time for preparing bills of exception was extended, and no steps were taken to have the prayers restored.—Jones v. State, 83 A. 1100.

§ 386 (Md.) A motion to set aside a judgment after the term cannot be sustained, unless applicant has acted with reasonable diligence and in good faith.—Jones v. State, 83 A. 1100.

§ 392 (Md.) A motion to set aside a judgment after the term cannot be sustained, unless the proof of fraud, deceit, surprise or mistake is clear and satisfactory.—Jones v. State, 83 A. 1100.

X. EQUITABLE RELIEF.

(A) Nature of Remedy and Grounds.

§ 416 (Del.Ch.) Where defendant executed a bond, on which a judgment was subsequently entered, in favor of the father of a woman, to settle bastardy proceedings against his son, the fact that it subsequently appeared that the son was innocent was no ground for setting aside the judgment.—Meredith v. Knox, 83 A. 703.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) Judgments Operative as Bar.

§ 540 (Del.Super.) A former judgment on the merits between the same parties in a court of competent jurisdiction is conclusive as to any issue actually litigated.—Jones v. Charles Warner Co., 83 A. 131.

§ 562 (Vt.) Where a discharged servant mistakenly brought his action for constructive services, a judgment against him, not purporting to be upon the merits, is not a bar to a subsequent action for breach of the employment contract.—Derosia v. Ferland, 83 A. 271.

§ 570 (Me.) A judgment of the law court, dismissing exceptions brought from the superior court for want of prosecution, not being on the merits, cannot be urged as res adjudicata.—McDonough v. Blossom, 83 A. 323.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 619 (N.J.Ch.) Decree in suit to cancel contract for sale of land for invalidity held to estop party from defending suit for specific performance on the ground that the contract was invalid for reasons other than those specified in the first suit.—Rosenstein v. Burr, 83 A. 785.

§ 622 (Del.Super.) In an action for the price of goods sold, defendant at his election may either avail himself of any breach of the contract by plaintiff in reduction of damages or he may sue the plaintiff independently, and a judgment for the seller for the price is no bar to an action for breach.—Jones v. Charles Warner Co., 83 A. 131.

Where defendant elected to assert damages arising out of the same transaction in recoupment, he could not thereafter maintain an action for such damages, or any part thereof.—Id.

A buyer, when sued for the price, having pleaded that the material was unsatisfactory, the judgment was conclusive against his subsequent action to recover damages arising from the same defect.—Id.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(A) Judgments Conclusive in General.

§ 656 (Vt.) Where each of defendant's pleas was directed to the whole declaration, the overruling of general and special demurrers to the pleas was conclusive of the question of the sufficiency of the declaration as against a general demurrer.—Derosia v. Ferland, 83 A. 271.

(C) Matters Concluded.

§ 720 (Md.) In a suit to foreclose a mortgage, an auditor having filed an account in which taxes, without penalties, were apportioned between receivers and purchasers of the property, and the city and state having been parties to the action, *held*, that they were bound by an order ratifying the account, and could not thereafter recover delinquency tax penalties.—*Blakistone v. State*, 83 A. 151.

XV. LIEN.

§ 773 (Pa.) Judgment on bond and warrant of attorney accompanying mortgage *held* to create lien relating back to date of record of mortgage.—*Keene Home v. Startzell*, 83 A. 584.

XVII. FOREIGN JUDGMENTS.

§ 822 (Pa.) In action by receiver of foreign corporation on assessment authorized by decree of court having jurisdiction, a resident stockholder cannot question findings as to insolvency and grounds for assessment, but may set up personal defenses involving rights as bona fide holder.—*French v. Harding*, 83 A. 586.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 950 (Vt.) A defendant cannot, in aid of his plea of *res judicata*, invoke former proceedings which he has not set out.—*Derosia v. Ferland*, 83 A. 271.

§ 958 (N.J.) In a suit by the parties for whose benefit it was made upon a covenant to pay all claims for damages from the operation of the covenantee's business, including any claim by the plaintiff for which suit has already been brought, where the suit was against the business name of the covenantee only, it was a question for the jury whether the covenantee had authorized appearance and defense to the suit by her husband.—*Chambers v. Philadelphia Pickling Co.*, 83 A. 890.

JUDICIAL NOTICE.

See Evidence, § 44.

JUDICIAL POWER.

See Constitutional Law, §§ 50, 70.

JUDICIAL SALES.

See Appeal and Error, § 875; Executors and Administrators, §§ 339, 386.

§ 31 (Md.) Mere inadequacy of price is not sufficient to invalidate a judicial sale, unless so gross and unreasonable as to indicate misconduct, fraud, or unfairness, on the part of the trustee.—*Vollum v. Beall*, 83 A. 1095.

Evidence on a motion to confirm a judicial sale of real estate *held* not to show that the price for which it was sold was grossly inadequate.—*Id.*

Evidence *held* not to show that the sale was unfairly made.—*Id.*

Where a tract of land was both advertised for sale and sold by offering it first in parcels and then as a whole, and the bid for the tract as a whole was the higher and was accepted, there was nothing therein to prevent confirmation.—*Id.*

Evidence *held* to show that complainant had full knowledge of the proceedings to the date of decree, and consented to an agreement, filed by her counsel, for the sale of the property according to the decree.—*Id.*

JURISDICTION.

See Appeal and Error, §§ 113, 875, 1198; Bastards, § 35; Corporations, § 683; Courts;

Criminal Law, § 260; Divorce, §§ 62, 76; Justices of the Peace, §§ 31-37; Mandamus, § 76; Religious Societies; Schools and School Districts, § 69; Specific Performance, §§ 75, 127; Trusts, § 158.

JURY.

See Appeal and Error, §§ 237, 968; Criminal Law, §§ 182, 185, 751-834, 922; Evidence, § 598; Grand Jury; New Trial, § 143; Trial, §§ 28, 186-194, 306, 307.

II. RIGHT TO TRIAL BY JURY.

§ 19 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, providing for the appointment of commissioners to determine the proportion which each city in the Metropolitan park district shall pay to meet interest and sinking fund requirements, and that the amount required each year from each city shall be assessed as part of its annual tax, *held* under Const. art. 1, § 15, declaring that the right of trial by jury shall remain inviolate.—In re Opinion of the Justices, 83 A. 3.

§ 25 (N.J.) Where a cause is referred under Practice Act, § 155, and a party desires to reserve his right to trial by jury, a dissent filed after the reference has been suggested, but a day in advance of the formal reference, is not premature.—*Adams v. Board of Education of Montvale*, 83 A. 868.

Where a party files a dissent reserving his right to trial by jury under Practice Act, § 155, the clerk should make the proper entry in the minutes, and on failure to do so the court should order entry *nunc pro tunc*.—*Id.*

§ 25 (N.J.Supp.) Where a party to an action in the district court fails to demand a jury one day prior to the return day, as provided by P. L. 1905, p. 494, § 4, that the case on appeal has been reversed does not entitle him to demand a jury on the second trial.—*Kearns v. Simpson*, 83 A. 774.

§ 31 (Md.) Acts 1910, c. 693, relating to moving picture operators, *held* not invalid for vesting summary jurisdiction in the police magistrates and justices of the peace to try and punish violations under it.—*State v. Loden*, 83 A. 564.

§ 31 (Pa.) Act May 5, 1911 (P. L. p. 201) § 8, relating to trial by jury on request of either party and the payment of the jury fee in advance, is not an abridgment of the right to trial by jury.—*Gottschall v. Campbell*, 83 A. 286, 293.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 72 (Vt.) Additional jurors in a murder case *held* properly summoned to fill the panel for the trial of a cause, under P. S. 1480, and that the court was not bound to follow the method described in 1481.—*State v. Bosworth*, 83 A. 657.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 95 (Me.) In actions brought on notes and defended on the ground of forgery, jurors who had tried a case involving identical facts were disqualified, making it error to overrule defendant's application for a continuance.—*McDonough v. Blossom*, 83 A. 323.

JUSTICES OF THE PEACE.

See Jury, § 31.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 31 (Del.Super.) A justice's authority within his jurisdiction is as complete as that of the Superior Court.—*Jones v. Charles Warner Co.*, 83 A. 131.

§ 34 (N.J.) Under P. L. 1902, p. 500, *held*, that a justice of the peace had no jurisdiction of a prosecution under P. L. 1880, pp. 218, 222, 223 (1 Comp. St. 1910, pp. 59, 62, §§ 35, 37, 38) §§ 13, 15, 16, for cruelty to animals.—New Jersey S. P. O. A. v. Ruas, 83 A. 961.

§ 37 (Del.Super.) Damages purely consequential, arising from the use of mortar purchased by plaintiff from defendant, *held* not within the jurisdiction of a justice of the peace.—Jones v. Charles Warner Co., 83 A. 131.

IV. PROCEDURE IN CIVIL CASES.

§ 130 (Del.Super.) Where in an action within the jurisdiction of a justice of the peace, matters of account and demand or cause of action cognizable before a justice are pleaded as a set-off and entered in the justice's docket, his unreversed judgment is conclusive thereon.—Jones v. Charles Warner Co., 83 A. 131.

Rev. Code 1852, amended to 1893, p. 744 (14 Del. Laws, c. 98) § 8, requiring defendant, when sued before a justice of the peace, to bring forward as a set-off matters of account, demand, or cause of action cognizable before the justice, against plaintiff, or be barred from recovering the same, does not apply to matters in the nature of recoupment.—Id.

§ 135 (Del.Super.) Under Rev. Code 1852, amended to 1893, p. 750, c. 99, § 17, an execution issued by a justice, unaccompanied by any levy, does not bind the chattels of the judgment debtor as against an actual levy under a subsequent execution issued under another judgment.—In re J. R. Richardson Co., 83 A. 1034.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 164 (Del.Super.) On appeal from a judgment of a justice of the peace, errors and irregularities in the justice's certificate to the transcript are waived, unless a motion is made to dismiss the appeal at the earliest opportunity, and before the moving party has pleaded in the case, and a motion to dismiss, made after he has pleaded, will be denied.—Peninsula Cut Stone Co. v. Nixon, 83 A. 1081.

KNOWLEDGE.

See Bills and Notes, § 340; Carriers, § 356; Corporations, § 479; Landlord and Tenant, § 160; Master and Servant, §§ 153, 204, 205, 234, 302; Notice; Witnesses, § 330.

LACHES.

See Exceptions, Bill of, § 39; Injunction, § 113; Reformation of Instruments, § 32.

LAKES.

See Waters and Water Courses, §§ 109, 114.

LANDLORD AND TENANT.

See Contracts, § 349; Corporations, § 629; Covenants, §§ 57, 84; Dedication, § 18; Fixtures; Frauds, Statute of, § 125; Mortgages, §§ 199, 200, 207; Municipal Corporations, § 399; Trusts, § 25; Use and Occupation; Work and Labor.

IV. TERMS FOR YEARS.

(C) Extensions, Renewals, and Options to Purchase or Sell.

§ 92 (R.I.) Where an option for a lease did not fix the method of payment in case of purchase, there was no material variation in a lease which permitted payment to be partly in a mortgage.—Eastman v. Dunn, 83 A. 1057.

(D) Termination.

§ 108 (Pa.) In absence of provision in written lease as to place for payment of rent, the landlord must, before he can take advantage of a forfeiture clause, demand rent upon demised premises, notwithstanding contrary practice of parties.—Bergdoll v. A. G. Spalding & Bros., 83 A. 427.

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(A) Description, Extent, and Condition.

§ 125 (N.H.) In the ordinary contract of letting there is no warranty that the premises are reasonably safe or suitable for the uses intended.—Clark v. Sharpe, 83 A. 1090.

(B) Injuries from Dangerous or Defective Condition.

§ 162 (N.H.) In the absence of any warranty or of deceit, fraud, or concealment of defects not open to ordinary observation, on the part of the landlord, the tenant takes the risk of the condition of the premises, and the landlord is not liable for injuries from their defective condition.—Clark v. Sharpe, 83 A. 1090.

§ 165 (N.J.) In case where a landlord may not be held responsible for injuries in the absence of an agreement to repair, he is nevertheless liable where he undertakes to do work on the premises, and by negligence in such work a person in the employment of his lessee is injured.—Broome v. New Jersey Conference Camp Meeting Ass'n, 83 A. 901.

§ 169 (N.H.) Evidence of landlord's habit of examining premises to see if repairs were needed *held* not to authorize a conclusion that he knew of a defect.—Clark v. Sharpe, 83 A. 1090.

§ 169 (Pa.) In an action by a servant of a subtenant against the tenant of the entire building for injuries from a fall down an unguarded elevator shaft, it is improper to submit the case to the jury, in the absence of evidence that defendant or any of his employees left the shaft open.—Mills v. Brandes, 83 A. 710.

VIII. RENT AND ADVANCES.

(B) Actions.

§ 233 (N.J.) In an action for rent, where it was disputed whether plaintiff, under the lease, was required to restore premises after partial destruction by fire to their condition before the fire, or only to their condition when demised, and the trial court held with defendant, it was error to refuse to direct a verdict for defendant, and to submit to the jury the question whether defendant was diligent in restoring the premises.—Bierman v. Stiefel, 83 A. 870.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 277 (N.H.) The owner of land cannot lawfully enter and take crops against a tenant at will until the tenancy is legally determined.—Evans v. Watkins, 83 A. 915.

LAPSE.

See Wills, §§ 858, 863.

LATENT DEFECTS.

See Master and Servant, § 123.

LAW OF THE CASE.

See Appeal and Error, § 1099.

LEADING QUESTIONS.

See Witnesses, § 240.

LEASE.

See Landlord and Tenant.

LEGACY TAX.

See Taxation, § 897.

LEGISLATIVE POWER.

See Constitutional Law, §§ 50, 63, 70; Municipal Corporations, § 64.

LETTERS.

See Criminal Law, §§ 446, 673; Frauds, Statute of, § 118; Witnesses, § 392.

LEVY.

See Execution, § 112.

LEWDNESS.

See Obscenity.

LEX LOCI.

See Powers.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 16 (Md.) Any words imputing to a person conduct or qualities tending to injure his character or to degrade or expose him to contempt, ridicule, or public hatred, are libelous per se. —Weeks v. News Pub. Co., 83 A. 162.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 86 (Md.) The office of an innuendo is only to explain the words of the libel, and to give them their true meaning, and may not be used to introduce new matter. —Weeks v. News Pub. Co., 83 A. 162.

An article alleged to be libelous in so far as it applied to plaintiff *held* not to justify an innuendo that it intended to refer to plaintiff as one belonging to the criminal classes, associated with the keepers of disreputable saloons, gambling hells, etc.—*Id.*

§ 97 (Md.) A demurrer to a declaration for libel *held* to admit that the article was published, that it was false and malicious, but not that the words were actionable, or that they were capable of the meaning ascribed to them in the innuendo. —Weeks v. News Pub. Co., 83 A. 162.

(D) Damages.

§ 120 (N.J.Sup.) In an action for slander, if express malice is shown, punitive damages may be awarded; the amount being in the discretion of the jury. —Hulbert v. Arnold, 83 A. 497.

Punitive damages are not awarded in a slander suit, on the theory of compensation, but as punishment of the offender and warning to others.—*Id.*

(E) Trial, Judgment, and Review.

§ 126 (N.J.Sup.) A new trial will not be granted for excessive damages in an action for slander unless the excess is perverse or the result of some gross error. —Hulbert v. Arnold, 83 A. 497.

LIBRARIES.

See Municipal Corporations, § 216.

LICENSES.

See Constitutional Law, §§ 63, 287; Intoxicating Liquors, §§ 87, 106.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 7 (N.J.Sup.) A municipal ordinance imposing license fees of \$100 for express wagons or motor vehicles used in delivering express matter, and of only \$12 for light vehicles delivering goods not in the express business, is discriminatory and unreasonable as against one engaged in the express business. —Siciliano v. Neptune Tp., 83 A. 865.

II. IN RESPECT OF REAL PROPERTY.

§ 58 (N.J.Sup.) A license or privilege to use real property is revocable unless coupled with an interest. —Goldman v. Beach Front Realty Co., 83 A. 777.

§ 63 (N.J.Sup.) On the revocation of a license for the use of real property not coupled with an interest, the licensee cannot recover in tort, but only for breach of contract. —Goldman v. Beach Front Realty Co., 83 A. 777.

LIENS.

See Bailment; Bankruptcy, § 185; Banks and Banking, § 186; Corporations, §§ 480, 685; Eminent Domain, § 320; Judgment, § 773; Mechanics' Liens; Mortgages, §§ 173-183; Municipal Corporations, §§ 373, 519.

LIFE ESTATES.

See Deeds, § 129; Dower; Remainders; Wills, §§ 597, 614, 617, 693.

§ 15 (Conn.) A cash dividend is regarded as income passing to the life tenant as against the remainderman. —Union & New Haven Trust Co. v. Taintor, 83 A. 697.

A stock dividend is treated as capital, and passes to the remainderman as against the life tenant.—*Id.*

In an action to determine the respective rights of a life tenant and a remainderman in a corporation dividend, *held*, that the remainderman had the burden of showing that the ruling giving a cash dividend to the life tenant took from the capital its rightful due.—*Id.*

A railroad purchased all the stock of another railroad out of its surplus, taking a perpetual lease of the road and guaranteeing 4 per cent. dividend on the stock bought, and declared a dividend payable in the shares of such other road. *Held*, that there was no such liability against the purchasing corporation as would deprive a life tenant under a testamentary trust of the cash dividend as income.—*Id.*

That a railroad invested its earnings in permanent tracks and improvements of another road and declared a dividend payable in the stock of such other road *held* not to give the earnings so invested the character of capital so as to entitle a remainderman to dividend as against life tenant.—*Id.*

Under Gen. St. 1902, § 377, a dividend payable in shares of another corporation *held* not required to be distributed as capital to the remainderman as against the life tenant.—*Id.*

§ 17 (Pa.) Life tenant *held* entitled to modification of decree to relieve him from further application of income of improved real estate to reimbursement of principal for amount expended on improvements doubling the value of the property.—*In re Wright's Estate*, 83 A. 427.

LIFE INSURANCE.

See Insurance.

LIGHTNING.

See Municipal Corporations, §§ 733, 911.

LIMITATION OF ACTIONS.

See Adverse Possession; Executors and Administrators, § 509; Municipal Corporations, § 402; Vendor and Purchaser, § 180.

I. STATUTES OF LIMITATION.**(B) Limitations Applicable to Particular Actions.**

§ 31 (N.J.Sup.) The two-year limitation, prescribed by the amendment to "An act for the limitation of actions" approved March 24, 1896 (P. L. p. 119), applies to actions for personal injuries caused outside of this state.—Mooney v. Camden Iron Works, 83 A. 770.

II. COMPUTATION OF PERIOD OF LIMITATION.**(B) Commencement of Action or Other Proceeding.**

§ 124 (Pa.) New parties cannot be brought in after the statute of limitations has become a bar.—Bender v. Penfield, 83 A. 585.

§ 125 (Pa.) An amendment will not be allowed after a cause of action against an executor for decedent's negligence has been barred, making the executor a defendant individually as the sole devisee under decedent's will.—Bender v. Penfield, 83 A. 585.

§ 127 (Pa.) A new cause of action cannot be introduced, or new subject-matter presented, or material defects in pleadings corrected, after the statute of limitations has become a bar.—Bender v. Penfield, 83 A. 585.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 175 (R.I.) The effect of the statute of limitations against a claim against an estate held not to be waived by the executor or administrator.—Carney v. Hawkins, 83 A. 327.

LIMITATION OF LIABILITY.

See Carriers, § 165.

LIQUIDATED DAMAGES.

See Damages, § 74.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

See Abatement and Revival, § 15.

LITTORAL RIGHTS.

See Waters and Water Courses, § 109, 114.

LIVERY STABLE KEEPERS.

See Master and Servant, § 264.

LOANS.

See Bankruptcy, § 142; Banks and Banking, § 108; Bills and Notes, § 97; Mortgages, § 173.

LOCAL LAWS.

See Statutes, § 93, 101.

LOCATION.

See Highways, § 70; Schools and School Districts, § 69.

LOGS AND LOGGING.

See Animals; Constitutional Law, § 229; Damages, § 112; Eminent Domain, § 318; Municipal Corporations, § 663; Taxation, § 263.

LOSS.

See Insurance, §§ 499-504.

LOST INSTRUMENTS.

See Appeal and Error, § 548; Courts, § 113; Indictment and Information, § 14.

LUNATICS.

See Insane Persons.

MACHINERY.

See Master and Servant, §§ 106, 219, 234, 238, 264, 270, 276, 278, 295.

MAGISTRATES.

See Criminal Law, § 260.

MAINTENANCE.

See Husband and Wife, §§ 19, 294-299.

MALICE.

See Homicide, § 156; Libel and Slander, § 120.

MALICIOUS PROSECUTION.**I. NATURE AND COMMENCEMENT OF PROSECUTION.**

§ 10 (Vt.) A party sustaining damages in consequence of the wrongful issuance of an injunction may sue for malicious prosecution and is not limited to an action on the injunction bond.—Powell v. Woodbury, 83 A. 541.

An action did not lie at common law for damages caused by an injunction unless it was sued out maliciously and without probable cause, and the requirement of injunction bonds creates an additional remedy.—Id.

II. WANT OF PROBABLE CAUSE.

§ 25 (Vt.) A defendant in an action for malicious prosecution may not rely on the defense that he acted under the advice of counsel where he did not honestly and in good faith act on such advice.—Powell v. Woodbury, 83 A. 541.

One entitled to redeem from a deed of trust given for the benefit of creditors held to have obtained maliciously and without probable cause an injunction restraining the trustee from making a sale under the deed authorizing an action for malicious prosecution.—Id.

IV. TERMINATION OF PROSECUTION.

§ 35 (Vt.) A party sustaining injury in consequence of the suing out of an injunction without probable cause and maliciously may sue for malicious prosecution on a voluntary dissolution of the injunction suit.—Powell v. Woodbury, 83 A. 541.

V. ACTIONS.

§ 41 (Vt.) A trustee in a deed of trust given for the benefit of creditors held entitled to sue for damages caused by the wrongful issuance of an injunction restraining a sale by him under the deed of trust.—Powell v. Woodbury, 83 A. 541.

§ 72 (Vt.) In an action for malicious prosecution based on defendant wrongfully obtaining an injunction, an instruction held sufficiently favorable to defendant.—Powell v. Woodbury, 83 A. 541.

MALPRACTICE.

See Physicians and Surgeons, § 18.

MANDAMUS.

See Appeal and Error, § 1198.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 76 (Md.) The circuit court held to have jurisdiction in mandamus to compel the coun-

ty board of school commissioners to appoint school trustees, where the real issue involved only a purely legal question as to the repeal of Acts 1896, c. 275, §§ 16-18, by Code Pub. Gen. Laws 1904, art. 77, § 11 (Acts 1904, c. 584, § 11).—Board of School Com'rs of Anne Arundel County v. Henkel, 83 A. 89.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 187 (N.J.) The Supreme Court's refusal of a mandamus, not involving the constitutionality of a statute, is not reviewable on error.—Matlack v. Lloyd, 83 A. 371.

MANDATE.

See Appeal and Error, §§ 1197, 1198, 1214; Mandamus.

MARKETABLE TITLE.

See Vendor and Purchaser, § 130.

MARK.

See Elections, §§ 180, 194.

MARRIAGE.

See Abatement and Revival, § 69; Assault and Battery, § 92; Bills and Notes, § 340; Divorce; Husband and Wife; Wills, § 647.

§ 59 (R.I.) If petitioner was married when she attempted to marry defendant, in reliance upon an alleged invalid divorce which he showed to her, that she continued to cohabit with defendant did not put her in pari delicto, so as to prevent her having the marriage with defendant annulled.—Lynch v. Lynch, 83 A. 83.

MASTER AND SERVANT.

See Appeal and Error, § 1071; Corporations, § 426; Damages, § 173; Election of Remedies; Evidence, §§ 156, 471, 472; False Imprisonment, § 15; Frauds, Statute of, §§ 50, 53, 118; Insane Persons, § 80; Judgment, § 562; Landlord and Tenant, § 169; Municipal Corporations, §§ 216, 218; Pleading, § 348; Trial, §§ 28, 139, 194, 252, 253; Wills, § 664; Witnesses, § 37.

I. THE RELATION.

(C) Termination and Discharge.

§ 31 (Pa.) A letter written by employer to employé giving notice of election to terminate the contract at a future date held not to constitute a discharge which only occurred on the receipt of a subsequent letter refusing to pay further salary under the contract.—Coates v. Allegheny Steel Co., 83 A. 77.

§ 39 (R.I.) A count in an action for damages for breach of covenant to employ plaintiff for a certain time, alleging that by reason of entering defendant's service he lost opportunities for entering the service of others, was good on demurrer; it not being necessary to set forth the names of witnesses or evidence to show his special damages.—Sowter v. Seekonk Lace Co., 83 A. 437.

§ 39 (Vt.) A declaration, alleging that plaintiff was hired by defendant as a clerk and salesman, and was wrongfully discharged, as a result of which he sustained specified damages "on account of the said contract," claims damages for breach of the contract, and not a recovery for constructive services.—Derosia v. Ferland, 83 A. 271.

§ 40 (Conn.) An employer discharging an employé before the expiration of his term of employment held to have the burden of showing that the employé could or did obtain other employment.—Grant v. New Departure Mfg. Co., 83 A. 212.

§ 40 (Pa.) The burden of proving that a discharged servant did not make reasonable ef-

forts to obtain employment elsewhere is on the master.—Coates v. Allegheny Steel Co., 83 A. 77.

§ 41 (Md.) In an action for breach of contract of service, the servant is entitled to recover the contract price less such sums as may have been paid, and such sums as he has earned or in the exercise of due diligence might have earned in the line of his business during the period covered by the contract.—H. J. McGrath Co. v. Marchant, 83 A. 912.

The servant is entitled to the contract price for his services in the absence of evidence showing the sums he earned or might have earned during the life of the contract in his line of business.—Id.

§ 42 (Pa.) A servant who has been wrongfully discharged may recover wages for the whole term of his employment subject to his obligation to make reasonable efforts to obtain employment elsewhere.—Coates v. Allegheny Steel Co., 83 A. 77.

The duty of a discharged servant to make reasonable effort to secure other employment does not arise until final discharge.—Id.

§ 43 (Md.) In an action for breach of contract of service, evidence held sufficient to go to the jury on the question of a contract.—H. J. McGrath Co. v. Marchant, 83 A. 912.

§ 43 (Pa.) Whether cause existed for a servant's discharge when made and whether the discharge was in good faith held for the jury.—Coates v. Allegheny Steel Co., 83 A. 77.

A defense to an action on a contract of employment that the servant did not use reasonable efforts to obtain other employment and the extent to which such failure may be considered to reduce the damages are questions of fact for the jury.—Id.

II. SERVICES AND COMPENSATION.

(B) Wages and Other Remuneration.

§ 80 (Md.) In an action for the balance due plaintiff for salary and expenses in purchasing furs, it was no defense that a part of the money he had received had been paid out of the wrong fund, or that he had purchased some of the furs from his children.—Baer v. Robbins, 83 A. 341.

In an action by a servant for salary, in which he claimed he was entitled to \$700 and expenses, and defendants claimed he was entitled to only such amount without expenses, instructions given for defendant held to fully cover every aspect of the case from defendants' standpoint.—Id.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 85 (Del.Super.) A master is not an insurer of his servants.—Spahn v. People's Ry. Co., 83 A. 27.

§ 88 (Me.) Plaintiffs, whose team, sleds, and a driver, who might be one of the plaintiffs or some one engaged by them, were employed by defendants to haul logs, bore the relation of contractors and not of employes to defendants, as affecting defendants' duty to provide a safe road to travel.—Ireland v. Clark, 83 A. 667.

§ 89 (Del.Super.) An employé, acting without the scope of his employment in doing certain work, could not recover for injuries received.—Seininski v. Wilmington Leather Co., 83 A. 20.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Del.Super.) An employer is only bound to furnish an employé reasonably safe tools, machinery, and appliances, and keep them in good repair, and they need not be the safest or most approved.—Seininski v. Wilmington Leather Co., 83 A. 20.

§§ 101, 102 (Del.Super.) Negligence is the basis of an action by a servant against his

master for injuries which result from a defective appliance.—*Spahn v. People's Ry. Co.*, 83 A. 27.

The duty of a master is to use all reasonable care, proportionate to the danger, to furnish his servant with reasonably safe tools and appliances, and if he neglects this duty he is liable for injuries resulting therefrom.—*Id.*

§§ 101, 102 (Md.) A master is bound to provide a reasonably safe place for the servant to work in.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

A master is not an insurer of the servant's safety.—*Id.*

§§ 101, 102 (Md.) A master is bound to use due and reasonable diligence to provide proper materials, appliances, and instrumentalities for the accomplishment of the work assigned to the servant.—*J. S. Young Co. v. State*, 83 A. 345.

A master may not lawfully expose his servant knowingly or negligently to any extraordinary or unreasonable peril in the course of the employment against which, from want of knowledge or skill, by the use of ordinary care, he could not protect himself.—*Id.*

§§ 101, 102 (N.J.Sup.) A master is bound to take reasonable care to provide a reasonably safe place to work.—*Leuteritz v. Ice Consumers' & Supply Co.*, 83 A. 176.

§§ 101, 102 (Pa.) A master must provide safe place for work and maintain it in a reasonably safe condition.—*Barry v. Jones & Laughlin Steel Co.*, 83 A. 299.

§§ 101, 102 (Vt.) An employer is bound to furnish an employé machinery and appliances reasonably safe with reference to the character of the employment.—*Duggan v. Heaphy*, 83 A. 726.

§ 103 (Del.Super.) An employer cannot delegate his primary duties, such as that of furnishing safe appliances.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 103 (Md.) A master's duty in respect to providing the servant a safe place to work cannot be delegated.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 103 (N.H.) An employer, undertaking to furnish staging for work as a completed structure, must see that it is reasonably safe and suitable for the purpose for which intended. He cannot escape liability for the negligent performance of this duty by delegating its execution.—*Haakensen v. Burgess Sulphite Fibre Co.*, 83 A. 804.

If an employer does not undertake to furnish the staging on which employés are to work as a completed structure, but it is either expressly or impliedly agreed that the employés shall build the staging as a part of their work, the duty resting on the employer is that of using reasonable care to provide material suitable in quantity and quality, and of employing suitable men to do the work.—*Id.*

§ 106 (N.J.) Employers' Liability Act 1909, § 1, par. 1, does not make a defendant company liable to its servant for an injury from a latent defect in a machine which the company was unloading from a railroad freight car for another company that was under contract to install the machine in defendant company's plant, which machine was neither connected with nor used in the business of defendant company.—*Stassett v. Taylor Iron & Steel Co.*, 83 A. 881.

§ 107 (Pa.) A master held liable for injury caused to an employé from scull falling from the converters in a steel mill onto the roof-shield, where he fails to keep the shield clean.—*Barry v. Jones & Laughlin Steel Co.*, 83 A. 299.

§ 112 (Conn.) A railroad company is bound to exercise reasonable care to give a track repairer a reasonably safe place in which to work, in

view of its character and the dangers attendant upon it.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 113 (Md.) In an action for death of a railroad brakeman by being struck by a projecting tower platform, defendant held not negligent in locating the platform; the tower being 8 feet 1 inch from the track, and the platform extending 5 feet 10 inches from the tower.—*Northern Central Ry. Co. v. State*, 83 A. 396.

§ 123 (Del.Super.) A motorman, injured because of a defective brake, cannot recover, where the defect could not have been discovered by a reasonable inspection, or occurred while in use or after inspection.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 123 (N.J.) The general rule is that a master is not liable for injuries to a servant from latent defects of which he is ignorant, and which could not be discovered by reasonable care and diligence.—*Stassett v. Taylor Iron & Steel Co.*, 83 A. 881.

§ 124 (N.J.) In the absence of evidence that an inspection would have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the master liable.—*Stassett v. Taylor Iron & Steel Co.*, 83 A. 881.

Reasonable care in inspection, when required, requires a master to make such an examination as a reasonably prudent man would deem necessary, and he is not required, unless put upon notice as to possible defects, to employ unusual or extraordinary tests.—*Id.*

§ 125 (Del.Super.) Notice given to the foreman or person in general charge of a master's business of defective appliances is notice to the master.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 125 (Md.) A building contractor borrowing a block and tackle and using the same without inspection, thereby not discovering a defect readily discoverable by examination, held guilty of actionable negligence.—*Frizzell v. Sullivan*, 83 A. 651.

§ 127 (Del.Super.) A master is bound, not only to furnish reasonably safe appliances, but to use due care to keep them in a reasonably safe condition so long as used.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 129 (Md.) Where decedent, a fireman at defendants' works, was seen uninjured after an explosion of an exhaust pipe, which caused him to become greatly excited and run into the building, where he obtained a torch with which he again went toward the broken pipe, where the torch was extinguished, and nothing more was seen of decedent until his body was found the next morning in the waters of the harbor, which was within a few feet of the pipe, there was no casual connection between the explosion and the breaking of the pipe and decedent's death so as to sustain a recovery therefor on the theory of defendants' negligence.—*J. S. Young Co. v. State*, 83 A. 345.

(C) Methods of Work, Rules, and Orders.

§ 137 (Conn.) In action for personal injuries, a fellow servant whose duty it was to look out for trains on adjoining tracks while plaintiff, a track repairer, was at work on track No. 2, was not negligent in leaving for a few minutes after given notice of his going as to plaintiff, who was injured by an engine on resumption, without notice, of traffic on track No. 2.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

An engineer backing his engine down upon a track repairer without ringing his bell was negligent, and that this method was customary was immaterial.—*Id.*

Railroad company held negligent in failing to use reasonable care to guard against the habitual negligence of its employé known to it.—*Id.*

§ 141 (N.J.) Where the work is not extra-hazardous, and where the dangers are obvious, and are understood by the servants, the master need not impose rules on employees.—*Zebrowski v. Warner Sugar Refining Co.*, 83 A. 957.

In the absence of proof that it is the general usage of employers engaged in similar lines of business to adopt rules claimed to be necessary, a master is not chargeable with negligence for failure to make them.—*Id.*

(D) Warning and Instructing Servant.

§ 150 (Conn.) Master's failure to give notice to a track repairer of resumption of traffic held a breach of his duty to provide a reasonably safe place for work.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 150 (N.J.) A warning is incidental to the work of a master when the act constituting such warning is done as part of the work for the master, in the performance of which his servants were at the time engaged and not as performance of the master's duty to warn.—*Firth v. Pennsylvania R. Co.*, 83 A. 896, 898.

§ 151 (Conn.) The duty of warning a servant of the danger of his place of work must be performed by the master, and cannot be delegated.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 152 (Del.Super.) A master may assume, in the absence of contrary knowledge, that a servant who engages to do specific work has the knowledge, experience, and skill necessary to do it in a reasonably safe manner, especially if the servant holds himself out as being experienced in such work.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

The rule that an employer may assume that an employé, engaging to do particular work, is competent and skillful, does not apply if the servant engages to work generally, and is directed by the master to do particular work, without holding himself out as experienced thereat.—*Id.*

A master is bound to warn even an experienced servant of any special or extraordinary danger connected with the employment, if it could not have been known by the servant by the reasonable exercise of due care.—*Id.*

§ 153 (Del.Super.) If the employment is dangerous, the employer must warn and instruct as to its dangerous character, if the servant, because of his inexperience or ignorance, has no knowledge thereof.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 154 (N.J.) An adult with three years' experience working with a drying machine, given one with a new stretcher and roller, and knowing the difficulty and making complaint, could not recover for injuries because of lack of instruction.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

§ 155 (Del.Super.) An employer is not required to warn or instruct an employé as to the dangers which are matters of common knowledge, or which may be seen by common observation, or as to which the servant could not have been further enlightened.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 155 (N.J.) Where a danger is obvious and normally incidental to the work on which a servant is engaged, and no system of warning had been instituted, the absence of warning in the particular instance complained of is not evidence of negligence of the employer.—*Lauter v. Hedden Const. Co.*, 83 A. 878.

(E) Fellow Servants.

§ 159 (Conn.) The fellow-servant defense is available against the personal negligence of a fellow servant, but never against injuries resulting from a breach of the master's duty.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 185 (Md.) A railroad employing a contractor in the construction of a bridge cannot es-

cape liability for injuries to a servant, caused by the collapse of the bridge, on the ground that it relied upon a fellow servant to see that the place in which plaintiff was required to work was reasonably safe, since this was a duty owed to plaintiff, for negligence in the performance of which the master was liable.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 185 (N.J.) At common law, an omission by workmen to use or a careless use by them of safety appliances furnished by the master will not impose liability upon the master for injury to a fellow servant.—*Pappagallo v. Hyde*, 83 A. 951.

§ 187 (Md.) An employé is a vice principal, where he represents the master in the performance of the nondelegable duty to provide suitable appliances for the performance by a co-employé of the work assigned to him.—*Frizzell v. Sullivan*, 83 A. 651.

§ 189 (Md.) A foreman held a vice principal, so that his employer was liable for negligence in using a defective appliance.—*Frizzell v. Sullivan*, 83 A. 651.

§ 190 (Conn.) An employé of a railroad company and those under his charge engaged in repairing tracks are fellow servants.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 198 (Conn.) An engineer was a fellow servant of a track repairer whose contract employment included his own responsibility for the negligence of his fellow servants.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

Whether a towerman acted directly for the master or through the order of one acting for the master, the duty involved in the control of tracks and switches was that of the master.—*Id.*

§ 201 (Conn.) The master is liable for an injury resulting from the combined negligence of himself and a fellow servant of the injured servant.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

(F) Risks Assumed by Servant.

§ 203 (Conn.) A servant assumes as a part of his contract of employment the risks ordinarily incident to it; but he does not assume extraordinary risks.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 203 (Md.) The doctrine of assumption of risk cannot be invoked until the master has performed his duty of supplying his servant a reasonably safe place in which to work or with suitable appliances, taking into consideration the work to be done.—*Frizzell v. Sullivan*, 83 A. 651.

§ 203 (N.J.) A carpenter of experience, employed to repair a pitched roof, assumes the risk of injury from slipping on snow and ice which collects while he is working.—*Peterson v. American Ice Co.*, 83 A. 872.

§ 203 (N.J.Sup.) A servant does not assume risks not incident to the work.—*Leuteritz v. Ice Consumers' & Supply Co.*, 83 A. 176.

§ 204 (Vt.) An employé does not assume the risk resulting from his employer's neglect of a duty imposed by statute in the exercise of the police power, irrespective of his knowledge.—*Duggan v. Heaphy*, 83 A. 726.

§ 205 (Del.Super.) An employé may rely on the employer to furnish safe appliances without inquiry on his part, and assumes no risk of injury from the employer's failure to do so.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 205 (Del.Super.) A servant may rely on the master's furnishing of safe appliances, and assumes no risk of injury because of defects therein.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 205 (N.J.Sup.) In the absence of knowledge to the contrary, a servant can assume that his master has exercised due diligence to fulfill obligations imposed upon him by law.—*Leuteritz v. Ice Consumers' & Supply Co.*, 83 A. 176.

§ 206 (Del.Super.) A servant assumes all of the ordinary risks incident to the employment.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 213 (Del.Super.) One undertaking a dangerous employment assumes the risks ordinarily incident thereto.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 217 (Conn.) A track repairer placed at work on a track on which traffic had been suspended did not assume the risk of danger consequent upon the resumption of traffic thereon without notice to him.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 217 (Del.Super.) An employé assumes the risks incident to the employment, which may be known by the employé by the reasonable use of his senses, or the exercise of ordinary care.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

An employé assumes the risk of injury from doing something he was warned by his superiors not to do.—*Id.*

§ 217 (Del.Super.) A servant assumes all such risks as may be discovered by the ordinary use of his senses.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 217 (N.J.) Where the danger is one that a servant should reasonably have anticipated as a result of the practices customarily participated in by himself and their dangerous character was appreciated, it was reasonably known to him and assumed.—*Zebrowski v. Warner Sugar Refining Co.*, 83 A. 957.

§ 217 (Pa.) In an action for injuries to plaintiff while operating a machine at which he had worked for 15 months and which was in good condition, plaintiff *held* to have assumed the risk.—*Helfenbein v. Wohlfeld*, 83 A. 827.

§ 217 (Vt.) The risk of an injury from an employer's negligence in failing to equip a mangle with a guard rail was not assumed by an employé who knew nothing of any such an appliance as a guard rail.—*Duggan v. Heaphy*, 83 A. 726.

§ 219 (Del.Super.) An employé assumes the ordinary risks incident to the employment, which are obvious.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

One undertaking a dangerous employment assumes the risks incurred from manifest dangers.—*Id.*

An employé assumed the risk incident to the obvious dangers of a machine.—*Id.*

§ 219 (Del.Super.) A servant assumes all such risks as are patent.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 219 (N.J.Sup.) A servant does not assume risks of latent or concealed dangers.—*Lenteritz v. Ice Consumers' & Supply Co.*, 83 A. 176.

§ 221 (Del.Super.) A servant who, relying on the master's promise to repair appliances, is injured while using them for a reasonable time, may recover.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 221 (N.J.) Where an authorized employé promised on complaint to fix a defective machine, but said that he had "too much work to-day," the promise was good at least until the next day.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

§ 222 (Pa.) Evidence that a motorman injured while running a car over tracks which he told his superintendent were out of repair was directed to do as he was ordered, or he would "learn what would happen to him," that the track separated, and he was injured, justified a verdict for plaintiff as against a claim that he assumed the risk.—*Glew v. Pittsburgh Rys. Co.*, 83 A. 101.

§ 224 (Del.Super.) An employé assumes the risk of injuries received while acting without the scope of his employment, without his em-

ployer's orders.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

(G) Contributory Negligence of Servant.

§ 227 (Del.Super.) A servant guilty of contributory negligence cannot recover for injuries caused partly through his own negligence and partly through that of the master.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 229 (Del.Super.) A servant is bound to use ordinary care for his own safety.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 234 (Del.Super.) If an employé knew, or by the exercise of due diligence could have known, of the defects in a machine at which he was injured, and of the resulting dangers, he was negligent in continuing to work at it, barring a recovery.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

An employé cannot recover for injuries from a defect in a machine of which he knew, and the danger from which he appreciated, if he continued to work with such knowledge.—*Id.*

§ 235 (Del.Super.) An employé must exercise reasonable care, to learn of the dangers in the course of his employment, and cannot recover for resulting injuries, if he fails to do so.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 236 (Pa.) Where an employé, familiar with the operation of machinery in a foundry, goes on the runway of a traveling crane without giving the usual warning to the craneman, and the crane starts and injures him, he is guilty of contributory negligence.—*Parks v. Lewis Foundry & Machine Co.*, 83 A. 363.

§ 236 (Vt.) Although an employé did not assume the risk of an injury from the employer's negligence in failing to have the mangle, which she was operating, equipped with a guard rail, she was nevertheless bound to exercise the care and prudence of a careful and prudent person in the situation with reference to existing and obvious dangers, however caused.—*Duggan v. Heaphy*, 83 A. 726.

§ 238 (Del.Super.) If an employé, working in a leather factory on a hide machine, knew of two or more ways of removing the skins from a roller, one of which was safe and the other dangerous, he would be guilty of contributory negligence if he voluntarily chose the dangerous way.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 240 (Del.Super.) A motorman, who received injuries owing to his running the car at an unusual and excessive speed, letting it get from under his control, cannot recover.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 243 (Md.) In an action for death of a brakeman by his being struck by a tower platform, decedent *held* negligent as a matter of law; the undisputed evidence showing that he had an unobstructed view, but was struck while facing the rear of the train, in violation of his duty to look out for signals for the safety of the train, as well as of himself.—*Northern Central Ry. Co. v. State*, 83 A. 396.

§ 243 (R.I.) Where an electric lineman knew the company's rule requiring cessation from work during a certain period to permit testing of the wires, and did not understand that the assurance that a wire he was working on would remain dead suspended the rule, he was guilty of contributory negligence in failing to observe the rule.—*McIsaac v. Woonsocket Electric Machine & Power Co.*, 83 A. 754.

§ 245 (Del.Super.) An employé need not obey his employer's orders, directing him to go in a dangerous place of work, if by exercising reasonable care he might have known of the danger, and he cannot recover for injuries if he obeys such orders.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 247 (Del.Super.) An employé must himself have been without negligence proximately contributing to the injury, in order to recover therefor from the employer.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

(H) Actions.

§ 252 (N.J.) If the notice provided for by P. L. 1909, p. 115, § 2, fairly apprises the employer of the time, place, and cause of injury to an employé, it is sufficient.—*Pappagallo v. Hyde*, 83 A. 951.

§ 258 (Del.Super.) Declaration that defendant railroad used certain tracks for storing and shifting cars, that it negligently omitted to provide a derailling device with one of the side tracks, so that cars thereon would not pass close to the main track, such appliance being reasonable, necessary, and proper at that place, and that through such negligence a car on the side track struck a locomotive on the main track, killing plaintiff's intestate, sufficiently alleged a necessity of the derailling device.—*Daniels v. Philadelphia & R. Ry. Co.*, 83 A. 19.

§ 258 (Md.) Each of the three counts of the declaration in an action for death of a servant by the alleged explosion of a steam pipe held to state a good cause of action.—*J. S. Young Co. v. State*, 83 A. 345.

§ 264 (Del.Super.) In absence of allegations of the narr. in an employé's injury action, covering a defective design in a machine, questions as to whether the wooden cover provided for the machine was the regular cover for such machines was properly excluded.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

An employé may only recover for negligent acts alleged and proved, and cannot recover if his injuries were received from some defect in a machine other than alleged and proved.—*Id.*

§ 264 (Vt.) A declaration alleging that the floor of a livery stable in which plaintiff was working broke by reason of rottenness and other imperfections therein was supported by plaintiff's testimony that he went down through the floor, through a hole, and defendant's testimony that the hole after the accident was a little larger, if anything, than before.—*Paige v. McCarty*, 83 A. 659.

§ 265 (Conn.) Railroad towerman acting on orders from some one in charge of tracks is, in absence of contrary evidence, presumed to have acted within his orders.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 265 (Del.Super.) An employé has the burden of proving negligence in an action for personal injuries; negligence never being presumed.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

The burden of proving contributory negligence is upon the employer in an action for a servant's injury.—*Id.*

The burden of proving that an employé had knowledge of the particular defect in a machine at which he worked was upon the employer in an action for personal injuries.—*Id.*

The jury cannot infer negligence by an employer by the mere fact that an employé was injured while working at a machine; a breach of the master's duty being essential.—*Id.*

§ 265 (Del.Super.) In an action by a motor-man against his master for injuries received by reason of a defective brake on the car, the burden of proving negligence is on the motor-man.—*Spahn v. People's Ry. Co.*, 83 A. 27.

§ 265 (Md.) In an action against a railroad by an employé for injuries from the collapse of a bridge in course of construction, where the evidence showed a construction of false work for a large bridge, specially designed to bear great weight, constructed by the direction of eminent engineers and in actual use for about two months, suddenly collapsed, and in which defendant offered no adequate explanation therefor, the doctrine of *res ipsa*

loquitur did not apply, so as to make the falling of the bridge *prima facie* evidence of negligence.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 265 (Md.) In an action for death of a servant, the burden is on plaintiff to show not only that defendant was guilty of the negligence charged, but also that it caused decedent's death.—*J. S. Young Co. v. State*, 83 A. 345.

§ 270 (Del.Super.) Where a servant was injured by coming in contact with knives in a machine, the maker of the machine was properly allowed to testify whether a circular cover over the knife cylinder had any other purpose in connection with the construction and operation of the machine than to protect the operator.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 270 (Pa.) In an action for injuries to an employé caused by a cotter pin of a crane either breaking or working out of place, evidence of the general condition of the crane is irrelevant.—*Bauman v. Best Mfg. Co.*, 83 A. 293.

§ 270 (Vt.) Testimony of witness that she told defendant's superintendent about a guard rail belonging on a mangle held competent, in an action for injuries caused by the absence of the guard rail, where defendant denied knowing anything about such an appliance.—*Duggan v. Heaphy*, 83 A. 726.

§ 276 (Conn.) Evidence in an action by track repairer for personal injuries held sufficient to show that the master's failure to warn him of the danger of his place of work was either the proximate or a proximate cause of his injury.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 276 (N.J.) Evidence in a servant's action for injuries held sufficient to show that the accident was caused by a defective condition of the machine on which plaintiff worked.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

§ 278 (Del.Super.) Negligence of an employer must be proved to the satisfaction of the jury by a preponderance of the evidence.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 278 (N.J.) In an action for injuries to an employé, evidence held to make a *prima facie* case of negligence of the employer under P. L. 1909, p. 114.—*Pappagallo v. Hyde*, 83 A. 951.

§ 278 (Pa.) In an action for injuries to an employé in the operation of a machine at which he had worked for 15 months, evidence held to show no negligence of defendant.—*Helfenbein v. Wohlfeld*, 83 A. 827.

§ 278 (R.I.) In an action for the wrongful death of a lineman, evidence held insufficient to charge the master with negligence.—*McIsaac v. Woonsocket Electric Machine & Power Co.*, 83 A. 754.

§ 279 (Pa.) Evidence in an action for death of plaintiff's husband, a railroad brakeman, resulting from the negligence of defendant coal company's employé in releasing cars so that they ran down a grade and collided with cars which decedent was coupling, held to justify a finding that the act of defendant's employé was in the line of his duty as such employé and not as a volunteer employé of decedent's employer, so as to defeat recovery under the fellow-servant rule.—*McDonald v. Ellsworth Collieries Co.*, 83 A. 105.

§ 280 (N.J.) Evidence held to show that a representative of the master to whom plaintiff complained as to machine on which he was working had authority to promise repairs.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

§ 281 (Conn.) Evidence in an action for personal injuries held sufficient to show that deceased was free from contributory negligence.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 281 (Del.Super.) Contributory negligence by an employé must be proved by a preponder-

ance of the evidence.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

§ 285 (N.J.) Where a servant was injured while working in a pit under a locomotive tender, whether the tender was moved without warning, or whether it was the duty of the master to warn the servant, being disputed, the questions were for the jury.—*Firth v. Pennsylvania R. Co.*, 83 A. 896, 898.

§ 285 (Pa.) Where, in an action by an employé for injuries by the fall of a plunger from an overhead crane, caused by the breaking or working out of place of a cotter pin, there is no evidence that the pin was defective, and the uncontradicted evidence shows that the pin was in its place 3 hours before the accident, a nonsuit held properly entered.—*Bauman v. Best Mfg. Co.*, 83 A. 293.

§ 286 (Md.) In action by a servant for personal injuries, held, that the question whether the master had failed to provide a reasonably safe place for plaintiff's work was for the jury.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 286 (N.H.) Whether an employer undertakes to furnish the staging on which the employés are to work as a completed structure, or whether it was understood that the employés should construct such staging, is a question of fact, and, if the evidence is conflicting, cannot be determined as a matter of law.—*Haakensen v. Burgess Sulphite Fibre Co.*, 83 A. 804.

Evidence held sufficient to justify the submission to the jury of the question of whether an employer furnished an improper staging on which the employés were to work.—*Id.*

§ 286 (N.H.) Evidence held sufficient to warrant submission of the case to the jury upon the question of negligence of the employer in failing to equip the machine with the necessary spring.—*King v. Gardiner, Beardsell & Co.*, 83 A. 806.

§ 286 (Pa.) Evidence in an action by a night watchman against his employer for injuries resulting from falling down an unguarded hatchway at night held to present a case for the jury.—*Hennessey v. Wabash Mills Co.*, 83 A. 706.

§ 286 (Vt.) In an employé's action for injuries caused by her hand being drawn into the mangle which she was operating, evidence on the question whether the employer was negligent in not having a guard rail on the machine held to present a question for the jury.—*Dugan v. Heaphy*, 83 A. 726.

§ 288 (N.J.Sup.) Where a guard rail erected to protect a servant from falling from a slippery platform was insecurely fastened, and broke when the servant slipped and put his weight upon it, injuring him, it was error to direct a nonsuit in an action to recover for such injuries.—*Leuteritz v. Ice Consumers' & Supply Co.*, 83 A. 176.

§ 293 (Conn.) In action for personal injuries, where failure to furnish safe place to work was proximate cause of injury, instruction confining the issue to the single ground of master's negligence in that respect held proper without discussion of the fellow servant doctrine.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

An instruction in an action for the death of a track repairer that defendant was bound to provide him with a reasonably safe place to work, and that if an engine was turned on the track where he was at work without his knowledge, and his own negligence did not contribute to his injury, and the proximate cause was a failure to warn him of the approach of the engine, plaintiff could recover, was not objectionable for ambiguity.—*Id.*

The instruction was not inconsistent.—*Id.*

§ 295 (N.J.) Where the inference from a promise to repair a defective machine was that it

would not be fixed at least until the day following, and the complaining servant was injured on the same afternoon that he complained, failure to charge that he was not justified in relying on the promise if a reasonable time had elapsed was not error.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302 (Me.) While it may be that one who, having mere knowledge of a contemplated trespass, allows the use of his personal property in effecting the same may be not liable for the trespass, one who directs his employé to aid in the doing of a specific act which proves to be a trespass is liable.—*Ford v. Erskine*, 83 A. 455.

(B) Work of Independent Contractor.

§ 321 (Pa.) A general contractor is under the duty to provide a reasonably safe place to work for employés of a subcontractor engaged in the general prosecution of the work, as well as for his own employés.—*Metzger v. Cramp & Co.*, 83 A. 590.

(C) Actions.

§ 332 (Pa.) In an action against a general contractor for causing the death of an employé of a subcontractor, evidence held to present a case for the jury.—*Metzger v. Cramp & Co.*, 83 A. 590.

MASTERS IN CHANCERY.

See Equity, §§ 399-402, 410.

MEASURE OF DAMAGES.

See Damages, §§ 95-124.

MECHANICS' LIENS.

See Bankruptcy, § 211; Contracts, § 322.

II. RIGHT TO LIEN.

(E) Subcontractors, and Contractors' Workmen and Materialmen.

§ 113 (N.J.) All payments to a building contractor are proper credits to the owner as of the date of the completion of the building except as to prior stop notices, and a stop notice served subsequent to the time of the maturity of the last installment is operative only against the part of the installment remaining unappropriated at the time of the stop notice.—*Keupler v. Eisele*, 83 A. 999.

Where an owner of a building erected by a contractor guaranteed payment of an order drawn against him by the contractor for money due a third person, the order at the time of the acceptance operated as an equitable assignment as against persons who at that time had no prior rights.—*Id.*

III. PROCEEDINGS TO PERFECT.

§ 121 (N.J.Ch.) Where a stop-notice was not served under Mechanics' Lien Act (3 Comp. St. 1910, p. 3290) § 3, until after the building was completed and accepted and the architect's certificate given, nor until after the date fixed by the contract for the final installment to be due, it was not served until after the last installment was due.—*Board of Education of Riverton Borough v. Tait*, 83 A. 459.

IV. OPERATION AND EFFECT.

(O) Priority.

§ 196 (N.J.Ch.) Liens perfected by stop-notices served under Mechanics' Lien Act (3 Comp. St. 1910, p. 3290) § 3, are payable in the order of priority of service of notice and

not pro rata.—Board of Education of Riverton Borough v. Tait, 83 A. 459.

VII. ENFORCEMENT.

§ 260 (R.I.) Proceedings to establish mechanic's lien for labor and materials, under Gen. Laws 1909, c. 257, § 5, not begun within six months after the commencement of the work and delivery of materials, *held* too late.—Heck v. Casey, 83 A. 757.

MEMBERS.

See Beneficial Associations.

MEMORANDA.

See Frauds, Statute of, § 118.

MENTAL CAPACITY.

See Wills, § 54.

MERGER.

Of contract for sale of land, see Vendor and Purchaser, § 83.

MERRY-GO-ROUNDS.

See Easements, §§ 3, 26.

MINES AND MINERALS.

See Fixtures.

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) Rights and Remedies of Owners.

§ 47 (Pa.) Where, at the time of a gift of coal land to donor's son, there had been no severance, the possession of the surface included the coal as against a subsequent grantee of coal.—Greenwich Coal & Coke Co. v. Learn, 83 A. 74.

(B) Conveyances in General.

§ 55 (Pa.) Grant of coal underlying land, in absence of waiver, *held* to impose on a mineral estate the servitude of surface support.—Stilley v. Pittsburgh-Buffalo Co., 83 A. 478.

A deed conveying all the coal underlying land together with right to mine the same, "hereby waiving all damages," imports a waiver of injuries resulting from removal of surface support.—*Id.*

MINORS.

See Infants.

MISREPRESENTATION.

See Insurance, §§ 297, 379, 646, 665; Mortgages, § 544.

MISTAKE.

See Reformation of Instruments, §§ 19, 32; Specific Performance, § 39.

MODIFICATION.

See Appeal and Error, § 1154.

MONEY RECEIVED.

§ 6 (Md.) Plaintiff can maintain an action for money had and received to recover money paid by him to defendant for a consideration which has wholly failed.—Kretzer v. Lorshbaugh, 83 A. 1027.

§ 9 (N.J.Sup.) Where there was evidence that plaintiff, a policeman, had been compelled by duress to turn over the check for his salary to the chief of police, who returned it to the town by which the money was owing, plaintiff could recover the same from the town in an action for money had and received.—Mee v. Town of Montclair, 83 A. 764.

§ 19 (N.J.Sup.) Where a check from a town for the payment of a patrolman was taken from him by the chief of police by duress and returned to the town, it, in an action for money had and received, was chargeable with interest thereon from the time it received it.—Mee v. Town of Montclair, 83 A. 764.

MORTGAGES.

See Abatement and Revival, § 15; Assignments for Benefit of Creditors, § 145; Bankruptcy, §§ 57, 184, 268; Corporations, §§ 479, 480, 568, 685; Covenants, §§ 57, 84; Equity, § 264; Fraudulent Conveyances, § 312; Judgment, §§ 67, 720; Malicious Prosecution, §§ 25, 41; Principal and Surety, § 175; Trusts, § 25.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

§ 34 (Md.) Where an owner by a deed absolute in form and reciting a valuable consideration conveyed certain land in fee simple, and the purchaser from such grantee agreed orally for consideration with the original owner that he might repurchase the land at any time, the deed to the second grantee cannot be held to be a mortgage or deed of trust.—Riggin v. Robinson, 83 A. 143.

(C) Execution and Delivery.

§ 61 (Md.) Where a husband made a mortgage to his wife, and she indorsed the oath or affirmation of bona fide consideration required by Code Pub. Gen. Laws 1904, art. 21, § 30, but the mortgage was in fact made to be assigned for the benefit of the mortgagor's merchandise creditors, it was void.—Reasmeyer v. Norwood, 83 A. 347.

A mortgage invalid as to the mortgagor's creditors for violation of Code Pub. Gen. Laws 1904, art. 21, § 30, *held* invalid as to an assignee thereof.—*Id.*

A mortgage by a husband to his wife, invalid under Code Pub. Gen. Laws 1904, art. 21, § 30, *held* unsustainable as a mortgage of indemnity.—*Id.*

III. CONSTRUCTION AND OPERATION.

(C) Property Mortgaged, and Estates of Parties Therein.

§ 137 (Conn.) A mortgage interest in real estate situated in New York is personal property under the laws of Connecticut and New York.—Weed v. Hoge, 83 A. 636.

§ 137 (Del.Ch.) A mortgage on land in Pennsylvania by the law of that state vests no title or estate in the mortgagee before foreclosure, but is only security for the debt.—Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520.

(D) Lien and Priority.

§ 173 (Vt.) The mere fact that one loaning money to another relied on a third person to look after his interest in the transaction *held* not to subject him to anything beyond the consequences of a failure to procure the recording of a mortgage given to secure the loan.—Roberts v. W. H. Hughes Co., 83 A. 807.

§ 174 (Vt.) A mortgagee who does not record his mortgage may have his lien defeated by a subsequent conveyance to a purchaser for value without notice.—Roberts v. W. H. Hughes Co., 83 A. 807.

A mortgagee who does not record his mortgage does not lose his lien as against a subsequent grantee without notice, but who pays no consideration.—*Id.*

A mortgagee participating with the mortgagor in forming a corporation and conveying the mortgaged property to the corporation was not estopped to assert his claim against the mort-

gagor and the corporation, though his mortgage was unrecorded and he did not disclose his lien; the corporation having paid no value for the conveyance.—Id.

§ 183 (Vt.) A mortgagee whose mortgage was unrecorded participated with the mortgagor in forming a corporation to which the mortgaged property was conveyed, and subsequently joined in an instrument declaring that a mortgage given by the corporation to secure its bonds was a first lien, was estopped to assert that the bonds were not a lien prior to his mortgage, though the bonds were invalid because issued by the corporation after the appointment of a receiver and to secure certificates issued by the receiver, but the estoppel did not extend to a loan to meet the receiver's expenses in which the corporation took no part.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 199 (Del.Ch.) After notice and demand, a mortgagee may recover rents from a lessee who holds under a lease made prior to the mortgage; but, as against a lessee from the mortgagor subsequent to the mortgage, the mortgagee cannot recover rent, unless an authority to that effect is contained in the mortgage, because there is no privity of contract or estate between the mortgagee and the tenant.—*Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 83 A. 520.

Allegations of bill by mortgagee, in possession after foreclosure, against the lessee of the mortgagor's assignee, *held* to state no equity entitling the mortgagee to payment of any part of the rent reserved by the lease.—Id.

On bill by mortgagee, *held*, that there was no such obligation to him on the part of the mortgagor's assignee as to entitle him to recover of the assignee's lessee rent covenanted to be paid by it to its immediate lessor.—Id.

Where a mortgagor of premises containing deposit of graphite subsequently conveyed them subject to the mortgage, and the grantee leased them by a lease providing that the lessee should manufacture graphite on hand and pay lessor a royalty of 10 per cent., and that the lessee should pay taxes on the premises, and no consideration for such covenant moved from the mortgagor to the lessee, the mortgagee was not entitled to an accounting for royalties against the lessee of the mortgagor's assignee.—Id.

§ 200 (Del.Ch.) Where a mortgagor of premises containing deposit of graphite subsequently conveyed them subject to the mortgage, and the grantee leased them by a lease providing that the lessee should manufacture graphite on hand and pay lessor a royalty of 10 per cent., and that the lessee should pay taxes on the premises, and no consideration for such covenant moved from the mortgagor to the lessee, the mortgagee was not entitled to a decree for the lessee's payment of unpaid taxes.—*Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 83 A. 520.

§ 205 (Del.Ch.) A mortgagee, for the protection of his security, is entitled to enjoin the mortgagor or his grantee from waste imperiling his security.—*Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 83 A. 520.

§ 207 (Del.Ch.) Where a mortgagor of premises containing deposit of graphite subsequently conveyed them subject to the mortgage, and the grantee leased them by a lease providing that the lessee should manufacture graphite on hand and pay lessor a royalty of 10 per cent., and that the lessee should pay taxes on the premises, and no consideration for such covenant moved from the mortgagor to the lessee, the mortgagee was not entitled to damages

for waste.—*Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 83 A. 520.

§ 218 (N.J.) Where an indebtedness is secured by two separate bonds and warrants of attorneys, and is subsequently further secured by bond and mortgage for the aggregate sum of the two separate bonds, containing the usual interest, tax, and insurance clauses, the bond and mortgage are within 2 Gen. St. 1896, p. 2112, § 47, requiring all proceedings to collect a debt to be first to foreclose the mortgage.—*Knight v. Cape May Sand Co.*, 83 A. 984.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

§ 280 (Pa.) The words "under" and "subject" in a deed import that the grantee takes subject to an incumbrance against which he will protect his grantor.—*Faulkner v. McHenry*, 83 A. 827.

§ 292 (Pa.) Where grantee of mortgaged land defaults, and, on foreclosure, the land is sold for an amount insufficient to pay the mortgage, the mortgagor's administrator cannot recover the amount of the deficiency judgment against the grantee, unless he is paid the same, or sustains some loss thereby.—*Faulkner v. McHenry*, 83 A. 827.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 309 (Pa.) An agreement by defaulting mortgagor to surrender possession and make a deed on condition of release *held* void, and removal by the mortgagor to another residence was not a sufficient consideration.—*Erny v. Sauer*, 83 A. 205.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 338 (Vt.) One entitled to redeem from a deed of trust *held* not entitled to an injunction to stop a sale under the deed without at least offering to pay sufficient money to satisfy the obligations.—*Powell v. Woodbury*, 83 A. 541.

X. FORECLOSURE BY ACTION.

(E) Parties and Process.

§ 441 (Pa.) The only effect of failure of scire facias sur mortgage to serve process on the real owner is to permit him to make any defense against the purchaser at sheriff's sale that he might have made against the scire facias.—*Lyle v. Armstrong*, 83 A. 578.

(I) Judgment or Decree and Execution.

§ 497 (Conn.) A decree foreclosing a mortgage vests no interest in the premises in one, who after commencement of the action, procured himself to be made a plaintiff, though providing that, in default of redemption, possession of the premises be delivered to all the plaintiffs; he having had no interest in the premises or loan secured, and so not being a necessary or proper party.—*Lander v. Persky*, 83 A. 209.

Inclusion in a judgment of foreclosure of interest on part of the loan which had not been paid to mortgagor, while subject of complaint, is not a waiver of the condition on which such part was payable, or an unconditional acceptance of the mortgagor's assignment to another of such part of the loan.—Id.

(J) Sale.

§ 529 (Pa.) On a rule to set aside a sheriff's sale, where plaintiff in execution, who was also a mortgagee, bid in the property for \$2,500, and alleged its value at \$85,000 to \$100,000, and plaintiff admitted it to be worth

\$50,000, but alleged the total cost would be \$41,800, and there was no showing of any offer sufficient to pay the mortgage, or that any one was misled by the description in the advertisements, the trial court *held* not guilty of abuse of discretion in refusing to set aside the sale.—Lyle v. Armstrong, 83 A. 577.

§ 529 (Pa.) Objections to the validity of a sheriff's sale for inadequacy of price and insufficiency of description are not properly a defense to a petition for writ of possession, but should be made by a motion to set aside the sale.—Lyle v. Armstrong, 83 A. 578.

§ 544 (Pa.) On a petition for writ of possession by a mortgagee, a claim against him for money damages for misrepresentations *held* not available as a defense.—Lyle v. Armstrong, 83 A. 578.

(M) Review.

§ 572 (Pa.) On appeal from an order granting writ of possession for land purchased at mortgage foreclosure, under Act April 20, 1905 (P. L. 239), the contention that the court erred in entering judgment on an amended petition, without permitting additional answer, *held* not sustainable, where the amendment merely introduced the record of the foreclosure, no objection being made to its allowance and no exception being taken, and the record showing no offer to file an additional answer.—Lyle v. Armstrong, 83 A. 578.

§ 578 (Pa.) An appellate court reviewing an order refusing to set aside a sheriff's sale will not consider statements as to the value of the property, unless there is clear proof of an abuse of discretion in dealing with the question of inadequacy of price.—Lyle v. Armstrong, 83 A. 577.

XI. REDEMPTION.

§ 593 (Md.) A document whereby one having the record title to land admitted her indebtedness to another, and agreed that she would not alienate it without his consent, and, in case of her death, the property should be his, is an equitable assignment, which entitles the third person to reimbursement out of the surplus proceeds of the property against which mortgage foreclosure has been had after the owner's death.—Kretzer v. Lorshbaugh, 83 A. 1027.

MOTIONS.

See Appeal and Error, §§ 14, 1154; Criminal Law, § 292; Equity, §§ 263, 264; Mortgages, § 529; New Trial, § 109; Pleading, §§ 348-355; Trial, § 165.

MOTIVE.

See Criminal Law, § 371; Homicide, § 166.

MOVING PICTURES.

See Constitutional Law, §§ 63, 287; Jury, § 31; Statutes, § 114; Theaters and Shows.

MULTIFARIOUSNESS.

See Equity, §§ 148, 150, 263.

MUNICIPAL CORPORATIONS.

See Appeal and Error, §§ 193, 991, 1051; Assignments, § 94; Carriers, § 269; Certiorari, §§ 26, 45; Constitutional Law, § 237; Counties; Dedication, §§ 19, 29; Disorderly Conduct; Electricity; Eminent Domain, §§ 2, 47; Health; Injunction, §§ 11, 172; Jury, § 19; Newspapers; Officers, § 69; Schools and School Districts; Specific Performance, §§ 75, 91; Statutes, § 101; Street Railroads; Taxation, § 40; Towns; Waters and Water Courses, § 203.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(C) Amendment, Repeal or Forfeiture of Charter, and Dissolution.

§ 48 (N.J.Sup.) P. L. 1911, p. 462, intrusts to a board of commissioners the management of municipal affairs but largely leaves the mechanism of the adopting city's government and the provisions of its charter untouched, and it does not alter general laws or charter provisions, except when inconsistent with its provisions.—Salter v. Burk, 83 A. 973.

§ 48 (N.J.Sup.) The Commission Government Act includes a department of the city of Trenton created by the special act of March 1, 1859 (P. L. p. 38), and such department and the water commissioners were abolished as soon as the commissioners for the government of the city of Trenton organized.—Hirsch v. Burk, 83 A. 379.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 64 (R. I.) Under the Constitution of Rhode Island, a resolution, providing for the submission to the voters of the question as to the issuance of bonds for the uses of the Metropolitan park district, created by Gen. Laws 1909, c. 238, *held* not invalid as a restraint on local self-government.—In re Opinion of the Justices, 83 A. 3.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(B) Ordinances and By-Laws in General.

§ 105 (N.J.) "Ordinance," as a term of municipal law, includes the usual incidents of legislative action.—Stemmler v. Borough of Madison, 83 A. 85.

§ 115 (N.J.) As a general rule, the power to pass an ordinance includes the power to repeal it.—Stemmler v. Borough of Madison, 83 A. 85.

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§ 124 (N.J.Sup.) Where the law prescribes the term of a municipal officer, it is beyond the power of the board of commissioners to elect for a greater or less term, or for an indefinite term; and an attempt to do so will not constitute a valid appointment, but will still leave a vacancy.—Salter v. Burk, 83 A. 973.

§ 136 (N.J.Sup.) One claiming to be a city officer, but not *sue de jure*, has no legal standing to institute proceedings to review a municipal resolution appointing another to such office.—Volk v. Burk, 83 A. 978.

(B) Municipal Departments and Officers Thereof.

§ 192 (N.J.Sup.) Under P. L. 1911, p. 444, a resolution dismissing exempt fireman from position of assistant building inspector without charges and complaint was invalid.—McGrath v. City of Bayonne, 83 A. 780.

An assistant building inspector holds a position and not an office, so that certiorari, and not quo warranto, was the proper remedy to test the legality of his removal.—Id.

(C) Agents and Employees.

§ 216 (N.J.Sup.) The action of the state civil service commission in classifying under the Civil Service Act the appointees and employees of a free public library organized under P. L. 1884, p. 110, and governed by P. L. 1905, p. 273, is valid.—Trustees of Free Public Library of Newark v. Civil Service Commission of New Jersey, 83 A. 980.

§ 218 (N.J.Sup.) A mere employé of a city under contract, embodied in a resolution passed

before Civil Service Act, terminable at the pleasure of the municipality, is subject to removal, according to the terms of the contract, before the act becomes operative.—Ziegler v. Burk, 83 A. 976.

IX. PUBLIC IMPROVEMENTS.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 312 (N.J.) An ordinance for a street improvement, passed pursuant to Borough Act, § 33, *held* subject to repeal on the coming in of the report of the commissioners of assessment; no portion of the proposed street having been actually opened.—Stemmler v. Borough of Madison, 83 A. 85.

(C) Contracts.

§ 347 (Pa.) Where a city contractor gives a bond to pay for labor and materials furnished under contract and assigns the contract, the assignee cannot recover against the surety on the bond for labor and materials furnished by him.—City of Philadelphia v. Neill, 83 A. 575.

§ 373 (N.J.Ch.) Orders filed and claims under notices served pursuant to Municipal Liens' Act (3 Comp. St. 1910, p. 3315), *held* entitled to priority, in payment from the public building fund, over claims under notices subsequently served pursuant to Mechanics' Lien Act (3 Comp. St. 1910, p. 3290) § 3.—Board of Education of Riverton Borough v. Tait, 83 A. 459.

(D) Damages.

§ 399 (Pa.) Where a tenant has voluntarily removed from premises on line of street improvement, the city *held* not liable in damages for loss of his tenancy.—Ehlers v. City of Philadelphia, 83 A. 431.

§ 402 (Pa.) Limitations *held* to run against landowner's petition for appointment of viewers to assess damages arising from the vacation of a street immediately on confirmation of a new plan of streets omitting the street in question.—In re Pulaski Ave., 83 A. 687.

(E) Assessments for Benefits, and Special Taxes.

§ 425 (N.J.) The rule as to liability of unoccupied portion of railroad right of way to taxation applies to assessments for local improvements; its effect being to eliminate the enhancement of the market value of land included therein as a ground for assessment or a basis for estimation of benefits.—New York Bay R. Co. v. City of Newark, 83 A. 962.

§ 458 (N.J.) The proper rule as to assessments of railroad right of way for local improvements is not on the basis of enhancement of its market value, but that it may be assessed to the extent of actual benefits for railroad purposes.—New York Bay R. Co. v. City of Newark, 83 A. 962.

§ 519 (N.J.Ch.) Under P. L. 1903, p. 392, § 1, assessments by a town for improvements *held* to become liens as of the time of confirmation and not of the date fixed for payment of the assessment.—In re Essex County Park Commission, 83 A. 462.

Under P. L. 1908, p. 524, § 41, a city's lien for special assessment for benefits by public improvements *held* to attach from the time of delivery of the report to the collector of taxes and arise in the future for each of the 10 assessments at the periods fixed at which the assessments become due.—Id.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

§ 639 (N.J.Sup.) A complaint for violating an ordinance prohibiting the use of obscene

language *held* defective in failing to set out that the language was used in a public place.—Peer v. Dixon, 83 A. 180.

§ 641 (N.J.Sup.) A record of conviction for violating an ordinance prohibiting the use of obscene language *held* defective in failing to set out the words used, or the time or place when and where used.—Peer v. Dixon, 83 A. 180.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 649 (Pa.) Act June 16, 1836 (P. L. 749), *held* to have no application to land laid out in lots when situated in a township and subsequently becoming part of the city of Pittsburgh.—O'Donnell v. City of Pittsburgh, 83 A. 314.

§ 654 (Pa.) Where there is a plan of lots showing the streets and alleys, a reference to a street in subsequent deeds as a public highway is proper and is no evidence that it was such prior to the dedication.—O'Donnell v. City of Pittsburgh, 83 A. 314.

§ 655 (Pa.) City *held* without power to locate by ordinance a street 60 feet wide in place of an existing street 40 feet wide and alley 20 feet wide connecting therewith, being required to make such alteration in the manner provided for the widening of streets.—City Improvement Co. v. City of Pittsburgh, 83 A. 408.

§ 661 (Pa.) Under Act June 26, 1836 (P. L. 749), streets, lanes, and alleys in city of Pittsburgh, not less than 20 feet in width, laid out by private persons for public use, are under the complete jurisdiction of the city for all purposes.—Duff v. Heppenstall Forge & Knife Co., 83 A. 204.

§ 663 (Md.) The courts will restrain the unnecessary destruction by a city of trees belonging to private owners and not constituting a nuisance, though, if the general plan of street improvement requires that shade trees be destroyed, the city cannot be enjoined from destroying them.—Mayor and Council of City of Easton v. Turner, 83 A. 42.

A municipality should not unnecessarily injure shade trees in the street belonging to abutting owners, and should give the owners opportunity to remove them, or, if possible without interfering with the proper use of the highway, should protect them.—Id.

§ 665 (Pa.) Where it appeared in an equity proceeding that plaintiff was the owner of lots abutting on streets originally dedicated by a private owner of the plan of lots, which lots were subsequently incorporated in the city of Pittsburgh, and portions of these streets were vacated by ordinances duly passed, a bill by plaintiff to restrain an abutting owner from encroaching on the bed of a street so vacated was properly dismissed.—Duff v. Heppenstall Forge & Knife Co., 83 A. 204.

§ 671 (Pa.) Occupant of commercial building *held* entitled to maintain a bill to compel removal of showcase and signs erected on street by another occupant and cutting off view of plaintiff's show windows and obstructing his entrance.—Green & Green Co. v. Thresher, 83 A. 711.

§ 706 (N.J.Sup.) Where a horse and wagon were passing a steam roller in a city street, and a dense smoke was discharged, frightening the horse and causing him to back into a child in the street, the question whether discharging the smoke by defendant was calculated to frighten a gentle horse, or if it was negligently or carelessly done, was for the jury.—Wikander v. Uvalde Asphalt Paving Co., 83 A. 896.

XII. TORTS.**(A) Exercise of Governmental and Corporate Powers in General.**

§ 733 (N.J.Sup.) An action for injuries will lie against a borough maintaining a lighting plant for supplying light for private use for profit, under the permission given by 1 Comp. St. 1910, pp. 239, 244, §§ 28, 31.—Karpenski v. Incorporated Borough of South River, 83 A. 639.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 819 (Pa.) In an action against city for injuries caused by an obstruction on a street crossing in process of erection, evidence held insufficient to sustain a finding that a defined path had existed at the point in question for such a length of time that the city was bound to take notice and guard against its dangers.—MacDermott v. City of Philadelphia, 83 A. 606.

§ 821 (Pa.) Where there is evidence, in an action against a city for injuries caused by the caving in of a street, that the street was in the control of an independent contractor, it is proper to submit to the jury the question whether the city or the contractor had failed in the performance of a duty to the plaintiff.—Earley v. City of Philadelphia, 83 A. 616.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**(C) Bonds and Other Securities, and Sinking Funds.**

§ 911 (N.J.Sup.) Act March 22, 1904 (P. L. p. 86), authorizing cities to issue bonds, the proceeds to be used to retire floating or bonded indebtedness, does not authorize the issuance of bonds to build lighting plants.—Brooks v. Sea Isle City, 83 A. 779.

§ 918 (N.J.Sup.) Where a municipal charter authorizing the issuance of bonds conferred the power of appropriating the proceeds on the council, an ordinance providing for a bond issue to macadamize streets and purchase fire hose, is invalid where submitting to popular vote the issuance of bonds in specified amounts for each purpose.—Brooks v. Sea Isle City, 83 A. 779.

Under Act March 21, 1899 (P. L. p. 130) § 70, an ordinance providing for the issuance of bonds for the macadamizing of streets is invalid where submitting to popular referendum the amount of the bonds.—Id.

§ 951 (N.J.Sup.) In 1897 the common council of Atlantic City, by resolution, required by Act March 14, 1879 (P. L. p. 270), established a sinking fund. In 1912 the city council rescinded such resolution and provided for the handing over of the fund to a committee of common council. Held, that the power given by act 1879 was exhausted by its exercise, and the attempted rescission was nugatory.—Loudenslager v. Atlantic City, 83 A. 898.

(E) Rights and Remedies of Taxpayers.

§ 987 (Pa.) The city alone has any standing to demand an accounting of a contractor of moneys received by him for work called for which he has not done, and taxpayers cannot demand such an accounting.—Anders v. City of Philadelphia, 83 A. 939.

§ 990 (Pa.) Bill in equity by taxpayers against city officers and municipal contractor to declare void a contract because of an unlawful combination to prevent competitive bidding held not maintainable, where there was no improper agreement, and the bids showed competition, though the contractor failed to comply fully with the contract, which was known to the municipal officers who did not expect a literal compliance with the contract.—Anders v. City of Philadelphia, 83 A. 939.

XIV. CLAIMS AGAINST CORPORATION.

§ 1007 (N.J.Sup.) 3 Comp. St. 1910, p. 3665, § 726, requiring claims against municipalities to be verified before payment, is not applicable to a claim by plaintiff patrolman where his check for salary due by the town had been obtained from him by the chief of police and returned to the town, so that he was not precluded from a recovery without making such verification.—Mee v. Town of Montclair, 83 A. 764.

XV. ACTIONS.

§ 1026 (N.H.) Where a city council directed the dismissal of a suit brought in its name, the city solicitor had no authority to have reviewed a judgment dismissing the suit.—City of Portsmouth v. New Hampshire Nat. Bank, 83 A. 459.

MURDER.

See Homicide.

MUTUAL AID ASSOCIATIONS.

See Beneficial Associations.

MUTUAL BENEFIT INSURANCE.

See Insurance, § 793.

NAMES.

See Certiorari, § 45; Evidence, § 423; Trade-Marks and Trade-Names.

§ 4 (N.J.Sup.) The affixes "Sr." and "Jr." are not part of a name, and their presence or absence is immaterial.—State v. Lewis, 83 A. 692.

NECESSARIES.

See Husband and Wife, § 19.

NECESSITY.

See Eminent Domain, § 198.

NEGLIGENCE.

See Animals; Appeal and Error, § 1048; Assault and Battery, § 3; Carriers, §§ 165, 187, 238, 290-331, 413, 417; Death; Electricity; Highways, § 184; Landlord and Tenant, §§ 165, 169; Master and Servant, §§ 85-332; Municipal Corporations, § 706; Physicians and Surgeons, § 18; Railroads, §§ 275-400; Street Railroads, §§ 81, 98; Trial, §§ 194, 253.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.**(A) Personal Conduct in General.**

§ 1 (Del.Super.) Negligence is the want of due care; that is, of such care as an ordinarily prudent man would exercise under the same or similar circumstances.—Seininski v. Wilmington Leather Co., 83 A. 20.

§ 1 (Del.Super.) "Negligence" is the failure to observe, for the protection of the interests of another, that degree of care, prudence, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It is the want of such care as a reasonably prudent and careful person would exercise under similar circumstances.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

§ 1 (Md.) "Actionable negligence" is an act or omission of duty which is the proximate cause of an injury.—J. S. Young Co. v. State, 83 A. 345.

(B) Dangerous Substances, Machinery, and Other Instrumentalities.

§ 21 (Del.Super.) The setting of fire to brush, grass, or other substance without giving notice to an adjoining property owner, whose

timber or property may be endangered, as required by 18 Del. Laws, c. 93, § 1, *held* negligence per se.—Layton v. Hudson, 83 A. 134.

Where a property owner fails to give notice of his intention to burn brush on his land, he is liable for the damages caused by the escape of the fire, though he used reasonable care in starting and controlling the same.—Id.

Where fire started on defendant's land, and in no manner endangered plaintiff's timber or other property, and defendant exercised proper care in controlling the same, he was not liable for its escape, though he did not give notice, under 18 Del. Laws, c. 93, § 1.—Id.

II. PROXIMATE CAUSE OF INJURY.

§ 63 (Del.Super.) "Inevitable accident" is such accident as could not have been prevented by the exercise of ordinary care.—Gismondi v. People's Ry. Co., 83 A. 136.

III. CONTRIBUTORY NEGLIGENCE.

(C) Imputed Negligence.

§ 92 (N.J.) Passengers in an automobile are not chargeable with the contributory negligence of the driver.—Horandt v. Central R. Co. of New Jersey, 83 A. 511.

(D) Comparative Negligence.

§ 98 (Del.Super.) Where the evidence in an action for injury discloses mutual negligence of both parties, operative at the time of the injury complained of, there can be no recovery, as the law will not measure the proportion of blame to be attributed to either party.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

IV. ACTIONS.

(A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

§ 108 (Md.) To constitute a cause of action for negligence, there should be stated a right in the plaintiff, a duty of the defendant in respect thereto, and a breach of that duty by the defendant whereby the plaintiff has suffered.—Cecil Paper Co. v. Nesbitt, 83 A. 254.

§ 119 (Conn.) In an action for personal injuries, a ground of negligence not set out in the complaint is not in issue.—Messinger v. New York, N. H. & H. R. Co., 83 A. 631.

§ 119 (Del.Super.) Where evidence was offered to prove more than one act of negligence, the jury must find one of such acts was the proximate cause of the accident to entitle plaintiff to recover.—Gismondi v. People's Ry. Co., 83 A. 136.

(B) Evidence.

§ 121 (Del.Super.) In an action for negligence in setting fires, the negligence is not presumed, but must be proved by plaintiff to have caused the damage by a preponderance of the evidence.—Layton v. Hudson, 83 A. 134.

§ 121 (Del.Super.) Negligence is not presumed from the fact of an accident, but must be proved.—Gismondi v. People's Ry. Co., 83 A. 136.

§ 121 (Del.Super.) Ordinarily negligence will not be presumed from the mere fact that a person has been injured, but it is necessary to prove that the injury resulted from defendant's negligence.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

§ 122 (Del.Super.) Plaintiff must prove that the injury was not the result of contributory negligence.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

§ 122 (Vt.) In an action for negligence, the burden is on plaintiff to show freedom from contributory negligence; but it is not necessary that there should be evidence distinctly directed to that negative proposition.—Duggan v. Heaphy, 83 A. 728.

§ 134 (Pa.) In action for injuries to boy six years old, who climbed on the back wheel of defendant's wagon, evidence *held* to sustain verdict and judgment for defendant.—Pokras v. Pennsylvania Salt Mfg. Co., 83 A. 480.

§ 134 (Pa.) In an action for injuries by a chauffeur in the employ of a customer of a garage who fell down an elevator shaft which defendant owner had left unguarded, evidence *held* to sustain judgment for plaintiff.—Kinsey v. Locomobile Co. of America, 83 A. 682.

(C) Trial, Judgment, and Review.

§ 136 (Conn.) Where the evidence so clearly showed that plaintiff's negligence contributed to produce the injuries complained of that the jury could not reasonably find otherwise, the court was justified in directing a verdict for defendant.—Atwood v. Connecticut Co., 83 A. 211.

§ 136 (Me.) There is an age where it is a question for the jury as to the capacity of a child to exercise care for itself.—Grant v. Bangor Ry. & Electric Co., 83 A. 121.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWSPAPERS.

§ 1 (N.J.Sup.) Liability of city to a newspaper not designated as the official newspaper, as required by Act 1892 (2 Gen. St. 1895, p. 2329), *held* sufficiently doubtful to justify the review of the action of the council on such claim by certiorari.—Fagan v. City of Hoboken, 83 A. 772.

NEW TRIAL.

See Appeal and Error, §§ 70, 209, 345, 977, 1005, 1015, 1099, 1173; Criminal Law, §§ 922, 972; Libel and Slander, § 128.

I. NATURE AND SCOPE OF REMEDY.

§ 6 (Del.Super.) The granting of a new trial is a matter addressed to the discretion of the court, and will be allowed only where injustice has been done.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

§ 8 (Md.) Where, in an action for injuries against two defendants, a verdict was returned in favor of one of the defendants, it was error for the court to grant a new trial as to both, on the application of the defendant cast.—Gross v. Wood, 83 A. 337; Wood v. Rosenheim, Id. 341.

II. GROUNDS.

(A) Errors and Irregularities in General.

§ 21 (R.I.) Grounds for a motion for a new trial that the granting of defendant's nonsuit was against the evidence, was against law, and contrary to the law and the evidence and the weight of the evidence, *held* to charge errors of law occurring at the trial, and not proper grounds for a new trial under Gen. Laws 1909, c. 298, § 12.—Murad v. New York, N. H. & H. R. Co., 83 A. 436.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 68 (Vt.) A motion to set aside a verdict as against the evidence is addressed to the discretion of the court.—Woodsville Guaranty Savings Bank v. Rogers, 83 A. 537.

§ 70 (Conn.) In an action for an injury to an automobile, a verdict for plaintiffs is properly set aside where there is a clear failure to show that defendant's negligence caused the injury, and that plaintiff's negligence did not contribute to the injury.—Case v. Connecticut Co., 83 A. 1020.

§ 72 (Vt.) A motion to set aside a verdict on the ground that it is against the weight of

the evidence is addressed to the discretion of the trial court.—Woodsville Guaranty Savings Bank v. Rogers, 83 A. 537.

(G) Surprise, Accident, Inadvertence, or Mistake.

§ 93 (Md.) Evidence *held* to authorize a finding that defendant lost the benefit of his exceptions by reason of the illness and death of the trial judge, and was therefore entitled to a new trial.—Gross v. Wood, 83 A. 337; Wood v. Rosenheim, Id. 341.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 109 (Md.) A motion for a new trial, though applied for after judgment, may be properly granted without a motion to vacate the judgment.—Gross v. Wood, 83 A. 337; Wood v. Rosenheim, Id. 341.

§ 117 (Del.Super.) An affidavit for a new trial, filed subsequent to the four-day period fixed by the court rule, after the trial, *held* too late.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

§ 143 (R.I.) Where the court charged in a proceeding for the allowance of certain claims against an estate in which there had been previous trials and an appeal that all proceedings under the former decree were vacated by the appeal, that the jury were to determine whether the estate was indebted to claimant for a certain sum as if the claim was presented for the first time, that the former decree awarding claimant a certain sum was not evidence that he was entitled to any sum, and the fact that the jury disallowed a large part of the claim was not evidence that he was not entitled to receive the full amount, but that the jury would determine the case on the evidence and the law given by the court, claimant was not entitled to a new trial after verdict for the estate on the affidavits of jurors that they did not understand that the case superseded the previous decree, and that under their verdict he would not receive the amount previously awarded him.—Campbell v. Campbell, 83 A. 325.

Affidavits of jurors *held* not to show that claimant had not had a full, fair, and impartial trial, but rather that the affiants had forgotten the actual state of facts as shown by the evidence at the trial.—Id.

§ 161 (Conn.) A trial court may properly condition the setting aside of a verdict for plaintiff on the ground of excessiveness on his failure to file a remittitur of a part of the verdict.—Allen v. City of New London, 83 A. 1021.

NEXT FRIEND.

See Infants.

NEXT OF KIN.

See Descent and Distribution.

NON OBSTANTE VEREDICTO.

See Appeal and Error, §§ 977, 1099, 1178, 1197; Judgment, § 199.

NON PROSEQUITUR.

See Appeal and Error, §§ 78, 151.

NONRESIDENCE.

See Depositions; Trusts, § 359.

NONSUIT.

See Dismissal and Nonsuit, Trial, § 165.

NOTES.

See Bills and Notes.

NOTICE.

See Appeal and Error, §§ 345, 842; Banks and Banking, § 133; Carriers, § 99; Constitutional Law, § 237; Corporations, §§ 423, 479, 484; Dedication, § 19; Deeds, § 174; Evidence, § 185; Guaranty, § 7; Husband and Wife, § 294; Insurance, §§ 388, 542-559; Interpleader, § 12; Master and Servant, § 31, 125, 150, 217, 252; Mechanics' Liens, §§ 113, 121, 196; Municipal Corporations, §§ 873, 819; Negligence, § 21; Principal and Surety, § 159; Process; Street Railroads, § 24; Taxation, §§ 482, 495; Vendor and Purchaser, § 230.

§ 6 (N.J.) Whatever puts a party on inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, and would lead to a knowledge of the facts by the exercise of ordinary intelligence and understanding.—Ogden v. Delaware River & A. R. Co., 83 A. 991.

NOVATION.

§ 1 (Me.) The doctrine of novation cannot apply to an action for use and occupation of land to which plaintiff had no legal title, where neither defendant nor the lessee of the land was indebted to plaintiff, she being a stranger to the transaction, since novation implies substitution of a debtor of a creditor and of a new contract.—Pennington v. Gartley, 83 A. 701.

§ 3 (Pa.) Where, by way of novation, a new party is substituted for a former debtor, the new party's note is supported by a sufficient consideration as for his own debt.—In re Young's Estate, 83 A. 201.

NUISANCE.

See Street Railroads, § 100.

I. PRIVATE NUISANCES.

(A) Nature of Injury and Liability Therefor.

§ 3 (Md.) The owner of a hotel which he used as a dwelling house *held* not entitled to an injunction to restrain the erection of a building in the courthouse square opposite his hotel; the alleged nuisance not really injuring his property.—Turner v. King, 83 A. 649.

NUNC PRO TUNC.

See Receivers, § 133.

NUNCUPATIVE WILLS.

See Wills, § 140.

OBJECTIONS.

See Appeal and Error, §§ 203-215, 220, 232; Criminal Law, § 696; Equity, § 212.

OBLITERATION.

See Wills, §§ 173, 174.

OBSCENITY.

See Municipal Corporations, §§ 639, 641.

§ 4 (N.J.Sup.) The words "or elsewhere," in an ordinance providing that any person who shall, at any street, railroad depot, public place or "elsewhere," use obscene language, refer to the places of the same character, and do not include a private yard abutting a highway.—Peer v. Dixon, 83 A. 180.

OBSTRUCTIONS.

See Municipal Corporations, § 671; Street Railroads, § 103; Waters and Water Courses, § 61.

OFFICERS.

See Abatement and Revival, §§ 45, 47; Attachment, § 322; Bribery; Corporations, §§ 152,

291, 320, 888, 416-432, 484, 621, 683; Counties; Elections, §§ 814, 321, 329; Highways, §§ 72, 96; Injunction, § 11; Judges; Justices of the Peace; Municipal Corporations, §§ 124, 136, 192; Physicians and Surgeons, § 9; Prisons; Quo Warranto; Receivers; Schools and School Districts, § 46; Towns, §§ 29, 45.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(A) Offices, and Power to Appoint to and Remove from Office.

§ 4 (N.J.Sup.) That a clerk in the office of the board of taxation of Hudson county was in the paid service of the state, and within the protection of the Civil Service Law, did not preclude the board from abolishing the clerkship and dismissing the incumbent, when done in good faith for purpose of economy.—Paddock v. Hudson County Board of Taxation, 83 A. 185.

§ 4 (N.J.Sup.) Where a resolution of the board of freeholders abolishing a position is adopted in the exercise of economy, the incumbent of the place is not protected from removal by provisions of the Civil Service Act.—Van Horn v. Board of Freeholders of Mercer County, 83 A. 894.

(G) Resignation, Suspension, or Removal.

§ 69 (N.J.Sup.) The application of the Civil Service Act must be limited to the protection of officers de jure, and cannot be extended to keep in office de facto officers.—Salter v. Burk, 83 A. 973.

§ 69 (N.J.Sup.) A resolution by the board of commissioners of a city, dispensing with the services of a de facto commissioner of assessment of taxes, is not an interference with his rights under the civil service act.—Wilson v. Burk, 83 A. 977.

II. TITLE TO AND POSSESSION OF OFFICE.

§ 83 (N.J.Sup.) One complaining of the illegality of the election to office of another in his stead must first show that he himself has legal title to it.—Salter v. Burk, 83 A. 973.

OPENING.

See Judgment, §§ 67, 68, 162, 163, 338-392.

OPINION EVIDENCE.

See Criminal Law, § 448; Evidence, §§ 471-553.

OPTIONS.

See Contracts, § 349; Damages, § 120; Landlord and Tenant, § 92; Sales, § 3; Trial, § 252; Vendor and Purchaser, §§ 55, 81, 83.

ORDERS.

See Abatement and Revival, § 69; Appeal and Error; Contempt, § 66.

ORDINANCES.

See Health; Municipal Corporations, §§ 105, 115, 312, 639, 641, 655, 918.

ORPHANS' COURTS.

See Courts, § 472.

OVERCHARGE.

See Carriers, § 202.

PARENT AND CHILD.

See Bastards; Death, § 24; Gifts, §§ 38, 49, 50; Husband and Wife, § 19; Infants.

PAROL EVIDENCE.

See Evidence, §§ 423-461.

PARTIES.

See Contracts, §§ 186, 187; Corporations, § 320; Equity, § 117; Interpleader; Limitation of Actions, § 124; Mortgages, § 497; New Trial, § 8; Quo Warranto, § 39; Wills, §§ 371½, 747.

III. NEW PARTIES AND CHANGE OF PARTIES.

§ 59 (R.I.) Where a suit was brought against defendant personally, an amendment making it a suit against him as administrator was unauthorized.—Carney v. Hawkins, 83 A. 327.

PARTITION.

See Appeal and Error, § 1144; Conversion, § 15; Wills, § 686.

II. ACTIONS FOR PARTITION.

(A) Right of Action and Defenses.

§ 12 (N.J.) A grantee of a husband's interest in an estate by the entireties may maintain partition against the wife, but the right is limited to the joint lives of the husband and wife.—Schulz v. Ziegler, 83 A. 968.

§ 21 (Pa.) A provision of a will that the executors may sell the real estate, or may divide the same between the heirs, does not prevent partition of the real estate, though the will also directs that the indebtedness of one of testator's sons be charged against his share, as that charge can be enforced in a partition suit.—Dunshee v. Dunshee, 83 A. 422.

(B) Proceedings and Relief.

§ 39 (Md.) Where in a suit for partition the bill was in strict conformity to Code Pub. Gen. Laws 1904, art. 16, § 129, equity was not ousted of jurisdiction by denial that plaintiff had any interest in the property on the ground that he was illegitimate.—Barron v. Zimmerman, 83 A. 258.

The test of equity jurisdiction in a suit for partition is whether a demurrer will lie to the bill.—Id.

§ 83 (Pa.) Where a testator devises his real estate to his children, and charges indebtedness of a son to his share, it is the duty of the court, before decreeing partition of the realty, to ascertain the amount of the indebtedness to be charged against such share.—Dunshee v. Dunshee, 83 A. 422.

§ 107 (Pa.) In partition sale where purchaser is induced to bid on the belief that representations of auctioneer will be ratified by the trustee conducting the sale, and they are not, the sale will be set aside, but at the cost of the purchaser, where he filed no objections until three months after the sale.—In re Ham-mill's Estate, 83 A. 303.

PARTNERSHIP.

See Executors and Administrators, § 509; Frauds, Statute of, § 76; Garnishment, § 108; Husband and Wife, § 129; Trusts, § 80.

I. THE RELATION.

(A) Creation and Requisites.

§ 21 (R.I.) Where defendants agreed with plaintiff that, if he would deliver an option on certain property and perform certain services, they would take a lease on the property, erect a building, and, after advances had been deducted, would make him partner, held not to form a present partnership.—Eastman v. Dunn, 83 A. 1057.

(B) As to Third Persons.

§ 36 (Md.) A payment to a third person by an owner employing a contractor for the construction of a building *held* not binding on the contractor on the theory that he had held out such third person as a partner.—*Ratke v. Rinker*, 83 A. 251.

(C) Evidence.

§ 54 (Md.) Evidence *held* not to show the existence of a partnership for the construction of a building.—*Ratke v. Rinker*, 83 A. 251.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.**(A) Firm Property and Business.**

§ 86 (R.I.) On bill by one partner against another to recover share of profits on firm transactions in real estate, rights of the complainant as against parties defendant determined.—*Moran v. McDevitt*, 83 A. 1013.

(C) Actions Between Partners.

§ 102 (R.I.) Where under an agreement no present partnership was formed, an action for breach need not be in equity.—*Eastman v. Dunn*, 83 A. 1057.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.**(D) Actions for Dissolution and Accounting.**

§ 330 (Pa.) On a bill for partnership accounting, where it appeared that the assets were to go, on dissolution, to plaintiffs, if the defendants canceled the agreement of partnership, in awarding an accounting and referring the matter to an auditor, it was error to decree that the assets belonged to plaintiffs, as such a decree should not be made before payment of the partnership debts and costs of dissolution.—*Steinberg v. Eagan*, 83 A. 272.

PASSENGERS.

See Carriers, §§ 238-417.

PATHS.

See Railroads, § 356.

PAUPERS.

See Execution, § 451.

PAYMENT.

See Bills and Notes, § 366; Certiorari, § 26; Contracts, §§ 322, 324, 349; Guaranty, §§ 16, 89; Insurance, § 585; Landlord and Tenant, § 92; Master and Servant, § 31; Mechanics' Liens, § 196; Municipal Corporations, § 373; Partnership, § 36; Sales, § 72; Specific Performance, § 101; Time.

II. APPLICATION.

§ 39 (Vt.) Defendant's failure to protest plaintiff's application of a payment on notes *held* a waiver of his rights.—*Sawyer v. Howard*, 83 A. 535.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 65 (N.J.Sup.) A bond for the payment of money in the hands of the obligee raises the presumption that the indebtedness has not been paid, and a plaintiff suing thereon need not prove affirmatively that it has not been paid.—*Conlon v. Hornstra*, 83 A. 183.

PENALTIES.

See Damages, § 74; States.

II. ACTIONS AND OTHER PROCEEDINGS.

§ 33 (N.J.Sup.) In an action under a penal statute, the evidence should show a case clearly

within the terms of the statute.—Board of Tenement House Supervision of New Jersey v. Schlechter, 83 A. 783.

PERSONAL INJURIES.

See Animals, § 67; Appeal and Error, §§ 1048, 1053; Carriers, §§ 280-331; Damages, §§ 35, 132, 173, 185, 216, 225; Electricity; Evidence, §§ 122, 126; Highways, § 184; Insane Persons, § 80; Interest, § 31; Landlord and Tenant, §§ 165, 169; Limitation of Actions, § 31; Master and Servant, §§ 85-332; Municipal Corporations, §§ 706, 733, 819, 821; Negligence; New Trial, § 8; Railroads, §§ 273-400; Release; Street Railroads; Trial, §§ 253, 260.

PETITION.

See Pleading; Review.

PHOTOGRAPHS.

See Evidence, § 359.

PHYSICIANS AND SURGEONS.

See Corporations, §§ 426, 432; Quo Warranto, §§ 39, 48.

§ 9 (N.J.Sup.) Under Act Feb. 12, 1873 (P. L. p. 932), incorporating the New Jersey State Dental Society, and Act March 17, 1898 (P. L. p. 120, § 2) as amended by Act March 22, 1901 (P. L. p. 395, § 2), the state dental society is, in its power of appointing members of the state board of dentistry, a public corporation, and its executive officers are public officers.—*Wilson v. Thompson*, 83 A. 502.

§ 16 (N.J.Sup.) Where a person has selected a surgeon to operate upon him, the law will, by implication, constitute the surgeon the representative of the patient, and will cast upon him the responsibility of so acting that the patient shall receive the full benefit of his professional judgment and skill.—*Bennan v. Parsonnet*, 83 A. 948.

§ 18 (N.J.Sup.) Evidence in an action against a surgeon for operating on plaintiff for a rupture on the right side, discovered after he had been etherized to operate on a rupture on the left side, *held* insufficient to sustain a verdict for plaintiff.—*Bennan v. Parsonnet*, 83 A. 948.

§ 18 (R.I.) In action against a surgeon for negligence, proof that a drain was left in a wound and allowed to remain there after the wound had healed, *held* to impose on defendant the burden of showing that its presence was not due to his negligence.—*Evans v. Munro*, 83 A. 82.

In action against a surgeon for negligence, a verdict of \$1,250 *held* not excessive.—*Id.*

PICTURES.

See Evidence, § 359.

PLATS.

See Dedication, §§ 18, 19, 37; Evidence, § 461.

PLEADING.

See Action, § 41; Appeal and Error, §§ 70, 78, 193, 219, 254, 308, 362, 956, 1170; Carriers, § 314; Contracts, § 324; Corporations, §§ 210, 211, 518; Courts, § 189; Covenants, § 114; Death, § 48; Ejectment, § 61; Eminent Domain, §§ 191, 293; Equity, §§ 117, 148-288, 427; Food; Frauds, Statute of, § 152; Highways, § 184; Infants; Injunction, § 172; Interpleader, § 23; Judgment, §§ 656, 950; Libel and Slander, §§ 86, 97; Limitation of Actions, §§ 125, 127; Master and Servant, §§ 39, 258, 264; Mortgages, §§ 199, 572; Negligence, § 119; Partition, § 39; Quo Warranto, §§ 39, 48; Receivers, § 183; Release, § 52; Sales, § 428; Waters and Water Courses, § 114.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (N.J.Sup.) The legal conclusions of the pleader, where set out in a declaration, cannot be considered in determining its legal sufficiency.—*Matlack v. Public Service Corporation*, 83 A. 491.

§ 8 (Pa.) In an action on a written contract for goods sold and delivered, an averment in an affidavit of defense that the plaintiff accepted something in payment of its claim is an averment of a conclusion, and insufficient to prevent a summary judgment.—*Leuten Brick Co. v. Killen*, 83 A. 576.

§ 11 (R.I.) Evidence must not be pleaded.—*Sowter v. Seekonk Lace Co.*, 83 A. 437.

§ 18 (Md.) The facts constituting a cause of action must be averred with sufficient certainty to render them understandable by defendant, the jury, and the court.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 22 (R.I.) A count not varying substantially from a preceding count is objectionable for redundancy.—*Sowter v. Seekonk Lace Co.*, 83 A. 437.

§ 34 (Vt.) All parts of a pleading will, if the language permits, be so construed as to be consistent with each other.—*Derosia v. Ferland*, 83 A. 271.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 59 (N.J.Sup.) Where a declaration sets up a condition precedent to be performed by plaintiff, and avers nonperformance, a demurrer to the declaration will be sustained.—*Matlack v. Public Service Corporation*, 83 A. 491.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(A) Defenses in General.

§ 88 (Md.) It is not necessary that a plea, to be a plea to one count only of the declaration, shall expressly state that it is a plea to such count.—*Parks v. Griffith & Boyd Co.*, 83 A. 559.

V. DEMURRER OR EXCEPTION.

§ 192 (R.I.) Where each of two counts, substantially the same, state a good cause of action, the objection of redundancy cannot be reached by demurrer.—*Sowter v. Seekonk Lace Co.*, 83 A. 437.

§ 193 (Conn.) Where a demurrer to a complaint, which seeks to have a conveyance of realty set aside and decreed to the plaintiff, goes merely to the objection that the prayer for relief demands a reconveyance, instead of a conveyance, it is purely technical, and would not affect the substantial rights of the parties.—*Beckwith v. Cowles*, 83 A. 1113.

§ 204 (R.I.) A declaration in covenant against a corporation which alleges the breach of its agreement in a particular as to which it was ultra vires and void, and also another breach of the agreement which constituted a good cause of action, to which no objection was made, was not demurrable.—*Sowter v. Seekonk Lace Co.*, 83 A. 437.

§ 214 (N.H.) A demurrer admits all facts well pleaded, which cannot be varied or answered by allegations of fact, but not conclusions of law attempted to be drawn therefrom.—*Glover v. Baker*, 83 A. 916.

§ 217 (Md.) In passing upon a demurrer, the court will give judgment against the party committing the first material error if of substance.—*Parks v. Griffith & Boyd Co.*, 83 A. 559.

§ 221 (Md.) Defendants having filed a plea directed solely to the contract relied on in the

seventh count of a declaration, and not relied on or referred to in the other six counts of the declaration or bill of particulars, the sustaining of the demurrer to the plea was a holding that the seventh count was good.—*Parks v. Griffith & Boyd Co.*, 83 A. 559.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 248 (Pa.) In an action against a railroad for overcharge of freight rates, the allowance of a second amendment to the statement is not improper, where it merely amplifies the first, is not inconsistent with the original statement, makes no departure from the original cause of action, and adds nothing under which damages could be increased.—*Joynes v. Pennsylvania R. Co.*, 83 A. 318.

Amendments should be liberally allowed; the test of their propriety being whether they introduce a new cause of action.—Id.

§ 250 (R.I.) Where by agreement of counsel an amended declaration was filed in which the damages were laid at a specified sum, which exceeded the ad damnum in the writ, an exception that the decision was for an amount greater than the ad damnum was not sustainable.—*Duckworth v. Ferland*, 83 A. 261.

XL MOTIONS.

§ 348 (Pa.) Where, in an action for breach of contract of employment, the affidavit of defense showed that plaintiff as a matter of law was not entitled to judgment for the whole sum demanded, and raised questions of fact, held not error to dismiss a rule for judgment for want of a sufficient affidavit.—*Coates v. Allegheny Steel Co.*, 83 A. 77.

§ 348 (Pa.) In an action on a note, where the affidavit of defense is otherwise insufficient, the court may enter judgment against defendant, notwithstanding an allegation that defendant was not liable for protest fees, since there was no indorser on the note.—*Mutual Trust Co. v. Stern*, 83 A. 614.

§ 348 (Pa.) An attorney at law held not entitled to judgment for want of sufficient affidavit of defense in action for compensation, in absence of averments in statement showing authority of person with whom he dealt to act for defendants in employing attorney.—*Ulrich v. McTague*, 83 A. 616.

§ 348 (Pa.) Where the intention of the parties to a deed charging a dower fund on land was left in doubt by misrecitals and unskillful conveyancing in the deed itself, and in subsequent conveyance, but such uncertainty was capable of being cleared up by parol evidence, a rule for judgment for want of sufficient affidavit of defense was properly dismissed.—*Beck v. Schekter*, 83 A. 829.

§ 350 (Del.Super.) Under a statute and under Superior Court rule 27, plaintiff held not entitled to judgment before the last day of the term on affidavit of demand for the amount admitted by an affidavit of defense to be due.—*American Agr. Chemical Co. v. Gooden*, 83 A. 86.

§ 355 (N.J.Sup.) A declaration will not be stricken out on the ground of redundancy and prolixity merely because of unnecessary length and minuteness of statement, where it unmistakably sets out the ground of action, which is readily determined.—*Karpenski v. Borough of South River*, 83 A. 639.

PLEDGES.

See Bankruptcy, § 142; Banks and Banking, § 136; Fraudulent Conveyances, §§ 132, 133.

POLICEMEN.

See Municipal Corporations, § 1007; Towns, § 29.

POLICE POWER.

See Municipal Corporations, §§ 639, 641.

POLICY.

See Insurance.

POLITICAL RIGHTS.

See Elections.

PONDS.

See Waters and Water Courses, §§ 109, 114.

POOR DEBTORS.

See Execution, § 451.

POSSESSION.

See Adverse Possession; Dower, § 55; Eminent Domain, § 271; Frauds, Statute of, § 129; Fraudulent Conveyances, §§ 132, 133, 308; Husband and Wife, § 14; Trespass; Trial, § 295.

POWERS.

See Executors and Administrators, § 138; Wills, §§ 600, 610, 671-693.

II. CONSTRUCTION AND EXECUTION.

§ 33 (R.I.) Where a donee of a power to dispose of property by will intends to execute the power, the intention, in the absence of any statute on the subject, must be so apparent that the instrument is not fairly susceptible of any other interpretation.—*Rhode Island Hospital Trust Co. v. Dunnell*, 83 A. 858.

Under Gen. Laws 1896, c. 203, § 9, a donee of a power who bequeaths the rest, residue, and remainder of her property of which she may die seised or possessed, executes a power to dispose of personality by will.—*Id.*

Under Gen. Laws 1896, c. 203, § 9, a donee of a power to dispose of personality by will held to make a will executing the power where he gave the rest, residue, and remainder of the estate to persons named.—*Id.*

§ 36 (R.I.) The law in force at the place of the donor of a power controls as to the execution of the power by the donee.—*Rhode Island Hospital Trust Co. v. Dunnell*, 83 A. 858.

Where a will bequeathing property to a legatee for life, with power to appoint by will, did not specify that the power should be executed only by a special form of will, the law in force at the time of execution of the power governs.—*Id.*

PRACTICE.

See Criminal Law, §§ 656-834; Trial.

PREFERENCES.

See Descent and Distribution, § 53.

PREJUDICE.

See Appeal and Error, §§ 1033-1071.

PRELIMINARY INJUNCTION.

See Injunction, §§ 133-186.

PREMIUMS.

See Insurance, §§ 388, 585.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

PRESIDENT.

See Corporations, §§ 416, 428, 432.

PRESUMPTIONS.

See Appeal and Error, §§ 926-934; Evidence, §§ 67, 77.

PRIMARY ELECTIONS.

See Elections, § 126.

PRINCIPAL AND AGENT.

See Attorney and Client; Banks and Banking, § 108; Bills and Notes, § 483; Brokers; Corporations, §§ 291, 320, 642; Evidence, §§ 122, 242; False Imprisonment, § 15; Guaranty, §§ 7, 38; Insane Persons, § 5.

I. THE RELATION.**(B) Termination.**

§ 36 (Md.) A contract giving defendants the exclusive right to sell plaintiff's agricultural implements in certain territory for a period ending November 1st was not breached by plaintiff sending out a notice in the preceding July informing the trade that after November 1st a third concern would sell plaintiff's product in that territory.—*Rawlings v. Duane H. Nash*, 83 A. 646.

PRINCIPAL AND SURETY.

See Bonds; Estoppel, § 78; Executors and Administrators, § 531; Guaranty; Intoxicating Liquors, § 87; Municipal Corporations, § 347.

IV. REMEDIES OF CREDITORS.

§ 159 (N.J.) In a suit on a bond for performance of a contract, which requires notice by registered letter of default on the part of the principal, in the absence of evidence to the contrary, it will be presumed that a letter shown to have been sent to defendant was registered and received by the company.—*McCloud v. Illinois Surety Co.*, 83 A. 908.

V. RIGHTS AND REMEDIES OF SURETY.**(B) As to Principal.**

§ 175 (Vt.) Where several persons agreed with another to indorse notes as sureties for him on security, and security was given, the several persons were entitled to the benefit thereof, though the agreement did not specify what the security consisted of, and all of the indorsers did not have knowledge of a mortgage executed under the agreement.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

Where several persons agreed with a third person to indorse notes as sureties for his benefit on his giving security, and a mortgage was executed and handed to one of them for safe-keeping, the mortgage was sufficiently delivered to be effective for the benefit of all of the several persons.—*Id.*

(C) As to Co-Surety.

§ 194 (Pa.) Contribution between sureties on separate bonds for completion of a building may be compelled by one who has paid more than his share of the amount necessary to complete the building.—*Malone v. Stewart*, 83 A. 607.

PRIORITIES.

See Brokers, § 33; Mechanics' Liens, § 196; Municipal Corporations, § 373.

PRISONS.

§ 7 (N.J.Sup.) The warden of a county jail holds his position by the appointment of the sheriff, and is not protected from removal at his pleasure by the Civil Service Act (P. L. 1908, p. 235).—*Sullivan v. McOsker*, 83 A. 481.

PRIVATE NUISANCE.

See Nuisance.

PRIVATE ROADS.

See Easements.

PRIVILEGE.

See Witnesses, § 306.

PRIVILEGED COMMUNICATIONS.

See Witnesses, § 199.

PROBABLE CAUSE.

See Malicious Prosecution, §§ 25, 35.

PROBATE.

See Wills, §§ 216-423.

PROBATE COURTS.

See Courts, §§ 200, 472.

PROCESS.

See Divorce, § 76; Execution; Garnishment; Husband and Wife, § 294; Mandamus; Mortgages, § 441; Prohibition; Review; Statutes, § 107.

II. SERVICE.

(C) Publication or Other Notice.

§ 105 (Pa.) Act May 3, 1909 (P. L. 424), requiring the publication of legal advertisements in legal journals, is not applicable to a notice to a nonresident defendant in a equity case, required by Act April 6, 1859 (P. L. 387), where the court has made a special order directing in what newspaper the notice should be published.—Erdner v. Erdner, 83 A. 420.

PROHIBITION.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 28 (Del.Sup.) The Supreme Court, on a petition for a writ of prohibition, cannot determine issues of fact dehors the record, raised by the petition, answer, and accompanying affidavits; it having no machinery for the determination of such issues.—Glendaniel v. Conrad, 83 A. 1036.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance, §§ 542-559.

PROPERTY.

See Adverse Possession; Animals; Constitutional Law, §§ 270-314; Dedication; Eminent Domain; Mines and Minerals; Mortgages, § 137; Trade-Marks and Trade-Names.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 751-764.

PROXIMATE CAUSE.

See Negligence, §§ 63, 119.

PUBLICATION.

See Newspapers; Process; Statutes, § 141.

PUBLIC DEBT.

See Municipal Corporations, §§ 911-990.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 312-519.

PUBLIC POLICY.

See Constitutional Law, § 70.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC USE.

See Dedication; Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, § 203.

QUANTUM MERUIT.

See Assumpsit, Action of; Work and Labor.

QUARANTINE.

See Health, § 16.

QUESTIONS FOR JURY.

See Trial, §§ 136-143.

QUIETING TITLE.

See Interpleader, § 4.

II. PROCEEDINGS AND RELIEF.

§ 50 (Conn.) The superior court in a suit to quiet title, being required to distribute a fund of income in the hands of a receiver, had jurisdiction to determine that a widow was entitled to a dower interest in one of the shares and to award to her her proportionate share of the income.—Humphrey v. Gerard, 83 A. 210.

QUO WARRANTO.

See Elections, § 299; Municipal Corporations, § 192.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 33 (N.J.Sup.) At common law, which no statute has abridged, the Attorney General, ex officio, and on behalf of the state, may bring in question, by information in the nature of quo warranto, the right of persons to the offices of president, secretary, and treasurer of the State Dental Society.—Wilson v. Thompson, 83 A. 502.

§ 39 (N.J.Sup.) The Attorney General should not join two different persons as respondents in one information to determine rights to offices in the State Dental Society, except where the rights involved and the proof are substantially the same.—Wilson v. Thompson, 83 A. 502.

Where an information in the nature of quo warranto sets up separately the facts as to the election of each respondent, and calls upon him to show by what warrant he claims office, on the objection of one of the respondents, the court may order a severance.—Id.

§ 48 (N.J.Sup.) Informations in the nature of quo warranto to determine the right of persons to the offices in the State Dental Society are not rendered invalid by the fact that they are not directed to the nominees of the society for the State Dentistry Board.—Wilson v. Thompson, 83 A. 502.

RAILROADS.

See Appeal and Error, § 1056; Carriers; Electricity; Eminent Domain, §§ 17, 47, 198, 271; Evidence, § 501; Life Estates, § 15; Master and Servant; Municipal Corporations, §§ 425, 458; Street Railroads; Taxation, § 145; Trial, §§ 139, 260; Waters and Water Courses, § 61.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

§ 68 (Pa.) Where a railroad company is authorized to acquire land not to exceed four rods in width, except in the neighborhood of deep cuttings, the words "deep cuttings" mean such cuts as may be necessary for use for track purposes of a 66-foot right of way.—*Pennsylvania R. Co. v. Braddock Borough*, 83 A. 304.

IX. RECEIVERS.

§ 209 (N.J.) General Railroad Law, § 87, as amended, treats money deposited with the State Treasurer at the time of filing certificate of organization as money of the corporation, and the receiver of an insolvent corporation must distribute it, after payment of his expenses, to such creditors or stockholders as may be entitled thereto.—*Ogden v. Delaware River & A. R. Co.*, 83 A. 991.

Parties who, when all real stockholders of a railroad corporation were personally acting, advanced a deposit then required by General Railroad Law, § 46, on an agreement for repayment out of sales of stock, which agreement was never carried out, will be deemed stockholders pro hac vice, and entitled to protection in the distribution of the fund by the receiver pursuant to General Railroad Law, § 87, as amended.—*Id.*

Stockholders of an insolvent railroad who procured stock for which they paid nothing are not entitled to any part of the fund deposited under General Railroad Law, § 46, on the distribution thereof by a receiver pursuant to section 87, when the fund is insufficient to pay in full those who in equity hold full-paid stock.—*Id.*

Stockholders of an insolvent railroad who procured stock by paying only a part of its par value are not entitled to more than they paid, with interest, out of the fund deposited under General Railroad Law, § 46, on the distribution thereof by a receiver pursuant to section 87, when the fund is insufficient to pay in full those who in equity hold full-paid stock.—*Id.*

X. OPERATION.

(D) Injuries to Licensees or Trespassers in General.

§ 275 (Del.Super.) In an action for the death of a Pullman car employé by being crushed between two cars, plaintiff held entitled to recover if defendant was negligent in shifting the cars without warning, and this was the cause of the accident.—*Gatta v. Philadelphia, B. & W. R. Co.*, 83 A. 788.

§ 275 (Pa.) Where plaintiff was injured by the negligent act of defendant railroad while he was unloading a car on a switch, of which plaintiff's employer had the exclusive ownership and control, and cars placed thereon being always unloaded by such owner, his right of action was not limited by Act April 4, 1868 (P. L. 58), providing that, when a person is injured while lawfully engaged about railroad premises, he not being an employé of the railroad, his right of action should be only such as would exist if he were an employé.—*Engle v. Pennsylvania R. Co.*, 83 A. 301.

§ 275 (Pa.) Where a railroad permits consignees to enter its yard to unload cars, and it was necessary for consignees to go diagonally across intervening tracks to get to their cars, the railroad is liable for the death of a con-

signee killed by the negligent operation of a train while diagonally crossing such tracks.—*Bogge v. Baltimore & O. R. Co.*, 83 A. 356.

§ 275 (Pa.) A railroad company held liable for death of employé of consignee killed by negligent operation of train while he was crossing intervening tracks to car containing shipment.—*Caudell v. Baltimore & O. R. Co.*, 83 A. 361.

§ 278 (Del.Super.) In an action for the death of a Pullman car employé by being crushed between two cars, plaintiff may not recover if timely and sufficient warning was given, and deceased disregarded it, or if at the time he was about to pass between the cars the bell of the engine was ringing, and he was expressly warned not to go between the cars.—*Gatta v. Philadelphia, B. & W. R. Co.*, 83 A. 788.

(F) Accidents at Crossings.

§ 327 (N.J.) A driver of an automobile, approaching a railroad crossing, who is chargeable with notice of the presence of the railroad, is guilty of contributory negligence in failing to discover an approaching train, which he could have seen had he looked, in time to avoid a collision.—*Horandt v. Central R. Co. of New Jersey*, 83 A. 511.

§ 327 (N.J.) Where, in an action for injuries caused by collision with a train, the evidence showed a failure to look in the direction in which the train was approaching, there being no obstacle to his sight, plaintiff was guilty of contributory negligence.—*Joyce v. West Jersey & S. R. Co.*, 83 A. 889.

A person about to drive across a railroad track at grade must look each way before crossing in order to guard against the approach of trains.—*Id.*

§ 330 (Md.) A traveler approaching an electric railroad crossing who knew that the automatic alarm bell was out of order held required to exercise special care to look and listen for cars.—*Maryland Electric Rys. Co. v. Beasley*, 83 A. 157.

§ 347 (Md.) In an action for damages in a collision with an electric car at a highway crossing, evidence of the behavior of the automatic bell at the station designed to warn travelers of the approach of trains, held admissible.—*Maryland Electric Rys. Co. v. Beasley*, 83 A. 157.

§ 347 (N.J.) In an action for decedent's death at a railroad crossing, evidence as to the amount of noise made by pans sometimes contained in decedent's bakery wagon while being driven along the road held admissible.—*Danskin v. Pennsylvania R. Co.*, 83 A. 1006.

§ 348 (Md.) A traveler struck by an electric car at a crossing held guilty of contributory negligence as a matter of law.—*Maryland Electric Rys. Co. v. Beasley*, 83 A. 157.

§ 348 (Pa.) In action against railroad for injuries at a permissive crossing, caused by a backing engine, evidence held to sustain a verdict for plaintiff.—*Forno v. Pennsylvania R. Co.*, 83 A. 406.

§ 350 (N.J.) Whether a railroad company was guilty of actionable negligence in failing to ring the bell or sound the whistle on approaching a crossing held for the jury.—*Horandt v. Central R. Co. of New Jersey*, 83 A. 511.

§ 350 (N.J.) Whether decedent was negligent in failing to stop before passing obstructions to his vision as he approached a railroad crossing at which he was struck and killed held for the jury.—*Danskin v. Pennsylvania R. Co.*, 83 A. 1006.

A traveler about to cross a railroad track, though required to look and listen, is not negligent as a matter of law in failing to stop.—*Id.*

(G) Injuries to Persons on or near Tracks.

§ 356 (N.J.) Under normal conditions, the existence of a worn path across railroad tracks

to a station cannot be relied on as an invitation to intending passengers, so as to require the railroad company to make the path reasonably safe, where a sufficient means of access has been elsewhere provided.—Corson v. Atlantic City R. Co., 83 A. 885.

Where the passageway to a station regularly provided by a railroad is habitually blocked just prior to train time, and passengers are habitually forced to use another worn pathway, the jury may infer that the railroad recognized the latter, and invited intending passengers to use it.—Id.

§ 359 (Md.) Trainmen backing an engine owe no duty to a trespasser until they become aware of his peril.—State v. Baltimore & O. R. Co., 83 A. 166.

§ 367 (Del.Super.) A railroad company, switching cars in the yard, is bound to give warning of the approach and movement of its engines and trains to all persons who may be put in danger, the sufficiency of which depends on the character of the place at the point of danger, position of persons endangered, and the right and purpose of their presence.—Gatta v. Philadelphia, B. & W. R. Co., 83 A. 788.

The sufficiency of warning of the approach of engine and trains in a railroad yard has relation to and is controlled by the conditions of the place, the habits and customs of its occupants, and the particular dangers to be encountered.—Id.

§ 396 (N.H.) In an action for injuries from being thrown from a wagon upon teams becoming frightened by the negligent blowing of a locomotive whistle, the plaintiff need not prove that the engineer could control the loudness of the blast.—Kidder v. Boston & Maine R. R., 83 A. 458.

§ 400 (Md.) In an action for death of a trespasser by a train, negligence held for the jury.—State v. Baltimore & O. R. Co., 83 A. 166.

§ 400 (N.H.) Evidence held to warrant the submission to the jury of the question of whether there was justifiable cause for the blowing of a locomotive whistle which frightened the team and caused personal injuries.—Kidder v. Boston & Maine R. R., 83 A. 458.

(H) Injuries to Animals on or near Tracks.

§ 442 (N.J.Sup.) It was error to exclude testimony of defendant's surveyor and photographer as to observations at a railroad crossing nearly two years after an accident of the extent of view where the roadbed had remained unchanged, though it was uncertain whether certain obstructions and surroundings still existed when the observations were made.—Kosher Dairy Co. v. New York, S. & W. R. Co., 83 A. 498.

Though observations as to the extent of view at a railroad crossing were made in the daytime and the accident in question happened in the dusk of the evening, and though the testimony left it uncertain whether the surroundings were the same when the observations were made as at the time of the accident, the testimony was admissible; its probative weight being for the jury.—Id.

(I) Fires.

§ 453 (N.H.) A railroad company held not liable for the death of a child from fire communicated from its right of way, in the absence of proof of breach of some duty owing to her.—Madden v. Boston & M. R. R., 83 A. 129.

Where, in an action for the death of a child by fire communicated from defendant's right of way, it appeared that she was first seen on the right of way enveloped in flames, and there was nothing to show how she had caught fire, or how long she had been there, and it was disputed whether she was on the right of way

when she took fire, or on adjoining premises, she would be treated as a trespasser.—Id.

A railroad company is entitled to burn the dry grass by the side of its track, without keeping watch for casual trespassers who may get into the flames and be injured.—Id.

§ 482 (N.H.) In an action for death of a girl of tender years by fire communicated from defendant's railroad right of way, evidence held insufficient to show that defendant's servants knew or ought to have known of her presence or danger in time to have saved her.—Madden v. Boston & M. R. R., 83 A. 129.

RAPE.

See Contracts, § 128; Criminal Law, §§ 421, 1169.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 1 (Del.O.&T.) Rape is the carnal knowledge of a woman by force and against her will; force, either actual or presumptive, being an indispensable element.—State v. Brown, 83 A. 1083.

§ 6 (Del.O.&T.) Carnal knowledge of, or sexual intercourse with, a woman, if obtained without the use of force, or with her consent or silent submission, is not rape.—State v. Brown, 83 A. 1083.

II. PROSECUTION AND PUNISHMENT.

(B) Evidence.

§ 36 (Del.O.&T.) On a trial for rape, the burden is on the state to prove to the jury's satisfaction, beyond a reasonable doubt, that the carnal knowledge or sexual intercourse charged was consummated or effected by force and against the will of the prosecutrix, or by putting her in great fear or terror.—State v. Brown, 83 A. 1083.

§ 51 (Del.O.&T.) On a trial for rape, the jury should consider all facts shown by the evidence preceding, attending, and following the act of intercourse, including the conduct of prosecutrix, as indicating whether she resisted the intercourse or consented thereto.—State v. Brown, 83 A. 1083.

RATE.

See Carriers, § 10.

RATIFICATION.

See Work and Labor, § 4.

REAL ACTIONS.

See Ejectment; Partition; Quieting Title.

REASONABLE DOUBT.

See Criminal Law, § 789.

RECEIVERS.

See Appeal and Error, § 1022; Brokers, § 83; Corporations, §§ 252, 562, 621, 685; Husband and Wife, § 294; Judgment, § 822; Mortgages, § 183; Railroads, § 209.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(B) Grounds of Appointment of Receiver.

§ 16 (Md.) Where the property of a lunatic had passed into the hands of a committee appointed by the equity court, the appointment of a receiver after his death, pending a contest of his will, was unnecessary.—Curtis v. Piers, 83 A. 87.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(D) Sale and Conveyance or Redelivery of Property.

§ 133 (Pa.) Refusal to permit filing of an answer nunc pro tunc to a rule to show cause why a receiver should not make a private sale *held* proper.—*Moore v. Thomas Moore Distilling Co.*, 83 A. 281.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 153 (Md.) Where land or other property is under the control of a court of equity in receivership proceedings, the payment of taxes must be secured through the authority of the court.—*Blakistone v. State*, 83 A. 151.

Delinquency tax penalties *held* not recoverable against receivers in receivership proceedings.—*Id.*

RECEPTION OF EVIDENCE.

See Criminal Law, §§ 667-676.

RECORDS.

See Appeal and Error, §§ 543-671; Certiorari, §§ 56, 69; Courts, §§ 112, 113; Criminal Law, §§ 292, 1114; Dedication, § 19; Evidence, § 158; Indictment and Information, § 11; Judgment, § 338; Mortgages, §§ 173-174, 183, 572; Municipal Corporations, § 641; Prohibition; Statutes, §§ 217, 285.

REDEMPTION.

See Mortgages, § 593.

REDUNDANCY.

See Pleading, §§ 22, 192, 355.

REFERENCE.

See Constitutional Law, § 314; Equity, §§ 399-402; Jury, § 25.

III. REPORT AND FINDINGS.

§ 101 (Vt.) A recommittal of a cause to a referee will not be granted when based wholly on the failure of the parties to anticipate lines of decision as to the correctness of which no question is made.—*Roberts v. W. H. Hughes Co.*, 83 A. 807.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments; Specific Performance, § 39; Trusts, § 110.

I. RIGHT OF ACTION AND DEFENSES.

§ 19 (R.I.) Where it conclusively appeared that by mutual mistake a deed described the wrong property, the grantees were entitled to have it reformed, so as to carry out the original intention of the parties.—*Carroll v. Ryder*, 83 A. 845.

II. PROCEEDINGS AND RELIEF.

§ 32 (R.I.) Grantees who had no knowledge of a mistake in a deed *held* not guilty of laches, though they brought no action for relief until four years had passed, and the property had been attached for a debt of the grantors.—*Carroll v. Ryder*, 83 A. 845.

REHEARING.

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RELEASE.

I. REQUISITES AND VALIDITY.

§ 13 (Conn.) Any sum paid by defendant and received by the plaintiff in full satisfaction of an unliquidated claim for personal injuries is a valid consideration for a release.—*Church v. Spicer*, 83 A. 1115.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 52 (Conn.) Plaintiff, in an action for personal injuries, *held* not entitled to claim that a release was obtained from him by defendant by fraud, where he did not specially plead fraud.—*Church v. Spicer*, 83 A. 1115.

RELEVANCY.

See Evidence, § 99.

RELIGIOUS SOCIETIES.

See Charities; Constitutional Law, § 84; Statutes, § 226; Wills, § 15.

§ 24 (R.I.) Under an act of the January session, 1910 (Acts 1910, p. 299), affecting Six Principle Baptist Churches, but limiting the effect to those which have been affiliated with the General Conference created in 1895, the court has no jurisdiction over a church which became extinct before 1895.—*General Six Principle Baptist Conference of Rhode Island v. Bennett*, 83 A. 758.

REMAINDERS.

See Life Estates; Taxation, § 897; Wills, §§ 524, 634.

§ 10 (Pa.) A contingent remainder can exist only where it has a particular estate to support it, and with the destruction of the particular estate the contingent remainder necessarily falls.—*In re Gunning's Estate*, 83 A. 61.

Contingent remainders created by will *held* to fall on the failure of the particular estate because of failure of the condition upon which it was based.—*Id.*

Where a gift over is limited to take effect on a particular event and the opposite or alternative of that event happens, the subsequent gift falls, though the prior gift be out of the way.—*Id.*

REMITTITUR.

See Appeal and Error, § 933; New Trial, § 161.

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REVERSAL.

See Appeal and Error, §§ 1170-1178.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1032-1156; Wills, § 371½.

§ 8 (Me.) Petitioner, being prevented, without his own fault, from taking a case on exceptions from the superior court to the law court, *held* entitled to present them by a petition for review.—*McDonough v. Blossom*, 83 A. 323.

To entitle one to a writ of review, he must show that justice has not been done; that the consequent injustice was through fraud, accident, mistake, or misfortune; and that a further hearing will be just and equitable.—*Id.*

§ 16 (Me.) Where one asks for review of two actions, he should present a petition in each action; but, where the same facts apply to both cases, a single petition may be discontinued as to one of the causes, without prejudice, and a writ of review issued in the other.—*McDonough v. Blossom*, 83 A. 323.

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See Dedication, § 29; Licenses, §§ 58, 63; Wills, §§ 173-196, 222, 306.

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See Appeal and Error, § 1062; Bankruptcy, § 268; Brokers; Conversion, §§ 6, 16; Corporations, § 149; Damages, § 6; Dedication, § 19; Deeds; Estoppel, § 68; Executors and Administrators, §§ 138, 148, 339, 386; Food; Frauds, Statute of, §§ 23, 76, 106, 110; Fraudulent Conveyances, § 187; Good Will, § 6; Judgment, § 622; Judicial Sales, § 31; Malicious Prosecution, §§ 25, 41; Mortgages, §§ 338, 529, 544, 578; Partition, § 107; Pleading, § 8; Specific Performance; Taxation, §§ 692, 734; Trespass; Trial, §§ 194, 296; Vendor and Purchaser; Wills, § 734.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Md.) Offer to sell various grades of fertilizer in different quantities and at different prices provided a certain quantity was taken, and acceptance, being indefinite as to the grades and amount of each grade of fertilizer bought, *held* not enforceable against buyers and to be a mere option.—*Parks v. Griffith & Boyd Co.*, 83 A. 559.

II. CONSTRUCTION OF CONTRACT.

§ 71 (Md.) A contract giving defendant firm the exclusive right to sell plaintiff's harrows in certain territory for one year, and containing an order from defendant for a certain number of them, did not require plaintiff, after delivery of such number, to sell others beyond the reasonable needs of the firm's trade during such period.—*Rawlings v. Duane H. Nash*, 83 A. 646.

§ 72 (N.J.) If a contract for the purchase of a machine does not require the purchaser to pay until it operates to his satisfaction, he need not accept and pay for it until he is satisfied, unless the dissatisfaction is based on a reason not connected with its operation or is fraudulent, though his dissatisfaction may be to some extent unreasonable.—*Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co.*, 83 A. 969.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 181 (N.J.) In an action for the price of a printing press where plaintiff sought to excuse delay in installing the press on the ground of interference with the work by defendant, a question whether, before the contract was signed, any representative of plaintiff visited the premises *held* properly excluded.—*Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co.*, 83 A. 969.

§ 182 (N.J.) In an action for the price of a printing press, evidence *held* to authorize submission to the jury of the question whether defendant waived that part of a contract which only required him to pay at the end of 10 days from satisfactory operation of the press.—

Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co., 83 A. 969.

In an action for the price of a printing press, though the defendant was not called upon to accept the press until its operation was satisfactory, it was not error to refuse to direct a verdict for defendant where there was evidence raising the question whether the right of defendant to have a satisfactory operation had not been waived.—Id.

VI. WARRANTIES.

§ 262½ (N.J.) One contracting to sell from 700 to 800 tons of old iron ship plates, to be all the iron plate taken off the steamboat being dismantled, impliedly warrants that the vessel will produce at least 700 tons.—Pope v. Ferguson, 83 A. 353.

§ 263 (N.J.) The rule that, on sale of personalty, the vendor warrants the title to be unincumbered, does not apply where the vendee knows of the incumbrance, and it is evident that neither of the parties contemplated the conveyance of an unincumbered title.—Dreisbach v. Eckelkamp, 83 A. 175.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 364 (N.J.) In an action for the price of a printing press, an instruction as to waiver of clause requiring it to be satisfactory to defendant by letters claiming damages under warranty *held* not erroneous.—Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co., 83 A. 969.

VIII. REMEDIES OF BUYER.

(C) Actions for Breach of Contract.

§ 404 (N.J.) A purchaser who is not bound to accept until he is satisfied with the operation of a machine must either rescind and offer to surrender the machine or accept it and rely for his remedy on recovery of damages.—Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co., 83 A. 969.

§ 405 (N.J.) Where a buyer agreed to sell the goods to a third person on certain conditions, he did not thereby assign the contract of sale, but merely resold the goods bought, and he could sue the seller for breach of contract.—Pope v. Ferguson, 83 A. 353.

§ 418 (N.J.) Under P. L. 1907, p. 336, § 67, a buyer's measure of damages for the seller's failure to deliver goods is the difference between the contract price and the market price at the time the delivery ought to have been made.—Pope v. Ferguson, 83 A. 353.

The court in construing P. L. 1907, p. 311, relating to sales, must avoid such a construction as will throw the statute out of harmony with rules of law generally prevailing, and the court must ascertain whether there is any generally accepted rule prescribing the measure of damages for failure to deliver goods sold where the buyer has contracted to resell before applying the exception declared in section 67 of the act.—Id.

Under P. L. 1907, p. 336, § 67, a buyer who contracts to resell the goods *held* entitled to recover for the seller's failure to deliver the difference between the contract price and the market value at the time the delivery ought to have been made.—Id.

(D) Actions and Counterclaims for Breach of Warranty.

§ 428 (Del.Super.) In an action for the price of mortar, it was proper for defendant to allege and prove that the mortar was not suitable for the purpose for which he bought it, and that it was of no value to him.—Jones v. Charles Warner Co., 83 A. 131.

SATISFACTION.

See Payment.

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See Damages, § 124.

SCHOOLS AND SCHOOL DISTRICTS.

See Mandamus, § 76; Taxation, § 40; Witnesses, § 330.

II. PUBLIC SCHOOLS.

(C) Government, Officers, and District Meetings.

§ 46 (Md.) Acts 1896, c. 275, §§ 16-18, relating to a particular school in a county, and providing for the appointment of trustees, and the mode of filling vacancies, *held*, not repealed by Code Pub. Gen. Laws 1904, art. 77, §§ 7, 27.—Board of School Com'rs of Anne Arundel County v. Henkel, 83 A. 89.

(D) District Property, Contracts, and Liabilities.

§ 69 (Pa.) Board of school directors *held* to have abused its discretion in relocating a school, so that a court of equity has jurisdiction to interfere by injunction for protection of the public.—Lamb v. Redding, 83 A. 362.

§ 80 (N.J.) Where there is no direct proof that School Law, art. 6, had been adopted by vote of an incorporated town, but a resolution of the board of education for the building of a schoolhouse was passed, subject to the approval of the board of estimate, it will be deemed that that article governed.—Kay v. Board of Education of Kearny, 83 A. 954.

Where a public board, required to award a bid to the lowest responsible bidder after advertisement, allows bidders to furnish plans and specifications, all bidders were not made acquainted with the specifications in their entirety, and the opportunity to bid afforded by definite specifications, open to all bidders, was not given.—Id.

A public board, charged with the duty of awarding a contract for public work to the lowest responsible bidder, will not have discharged its duty where, after bids have been opened, it agrees with the then lowest bidder to diminish the amount of the work in consideration of a reduction of the bid.—Id.

(E) District Debt, Securities, and Taxation.

§ 99 (Me.) Pub. Laws 1909, c. 177, authorizing taxation for common school purposes, *held* not invalid on the theory that the town can relieve itself from local taxation for purposes other than school purposes.—Sawyer v. Gilmore, 83 A. 673.

Pub. Laws 1909, c. 177, authorizing taxation for common school purposes, *held* not violative of Const. art. 8, because section 6 of the act permits sums received from the state under distribution to be raised by the municipalities within Rev. St. c. 15, § 13, as amended by Pub. Laws 1909, c. 128.—Id.

Const. art. 8, which provides that the Legislature shall require the several towns to make suitable provision at their own expense for the support of public schools, is mandatory, and not prohibitory; there being no remedy on the Legislature failing or refusing to legislate.—Id.

The word "suitable" within Const. art. 8, which requires the Legislature to require towns to make suitable provision for common schools at their own expense is an elastic term, dependent upon the necessities of changing times, and subject to the Legislature's discretion to determine what is suitable.—Id.

Pub. Laws 1909, c. 177, authorizing general state taxation for common school purposes, is not unconstitutional, because under the practical workings of the act the towns of the state

are not required to raise a uniform amount per capita.—Id.

§ 103 (Pa.) After the passage of Act May 18, 1911 (P. L. 309), known as the "School Code," school boards in levying school taxes for the year 1911 were bound to levy them in accordance with the School Code, and not with the law as it existed prior to the approval of such code.—*Stevenson v. Henderson*, 83 A. 295.

(G) Teachers.

§ 139 (N.J.Sup.) The supervising principal of a school district tendered her resignation to take effect April 1st. On March 31st the board decided not to accept the resignation, and so notified her April 1st. On April 3d the board, whose membership had been changed without notice, accepted the resignation. *Held*, that such action was void because the resignation was not then pending and no opportunity to be heard was afforded such principal.—*Nicholson v. Board of Education of Swedesboro Dist.*, 83 A. 488.

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See Mortgages, § 441.

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I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 10 (N.J.Ch.) Specific performance of a contract to purchase three lots will not be decreed as to two, where the title to one of the lots is defective.—*Gosman v. Pfister*, 83 A. 781.

II. CONTRACTS ENFORCEABLE.

§ 29 (N.J.Ch.) Where H. contracted to sell a portion of his shares in a corporation, but refused to sell all of his interest, because he did not desire to sever his connection with the corporation, the contract was not susceptible of specific performance; the subject-matter being indeterminate.—*Sheehan v. Humphreys*, 83 A. 189.

§ 39 (Pa.) Though parol evidence may be introduced to vary a written sale of land on the ground of fraud, accident, or mistake, and the contract reformed, it will not be specifically enforced.—*Safe Deposit & Trust Co. of Pittsburgh v. Diamond Coal & Coke Co.*, 83 A. 54.

§ 75 (Pa.) Equity held without jurisdiction to compel specific performance of a contract by a street railway company based on an ordinance, to repair streets to the extent that it was liable under the ordinance.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 67.

III. GOOD FAITH AND DILIGENCE.

§ 91 (Pa.) A demand on a street railway company to repair certain streets held not a condition precedent to the maintenance of a bill in equity to compel such repairs.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 67.

§ 101 (N.J.Ch.) A vendor in a contract stipulating for the payment of the price in installments, and for a forfeiture on default, held to have waived his right to claim a forfeiture by receiving payments at irregular intervals and after default, and the purchaser held entitled to specific performance on payment of balance due.—*Baerenklau v. Peerless Realty Co.*, 83 A. 375.

IV. PROCEEDINGS AND RELIEF.

§ 127 (Vt.) Having jurisdiction to compel specific performance of an agreement to reduce an oral contract relating to land to writing, held, that equity would retain jurisdiction to compel an accounting pursuant to the agreement.—*Cunningham v. Blanchard*, 83 A. 469.

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VI. ACTIONS.

§ 215 (N.J.Sup.) In an action for a penalty under the Tenement House Act, the board of tenement house supervision created by section 203, being a state agency, is not liable for costs.—Board of Tenement House Supervision of New Jersey v. Schlechter, 83 A. 783.

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I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 64 (Del.Sup.) If 26 Del. Laws, c. 189, authorizing boulevard corporations to condemn land for boulevard purposes, does exempt such corporations from devoting the land to public purposes indefinitely, it is to that extent only invalid.—Clendaniel v. Conrad, 83 A. 1036.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 73 (Pa.) Act May 5, 1911 (P. L. 198), establishing a county court in Allegheny county, held not violative of Const. art. 5, § 26, requiring laws relating to courts to be general and of uniform operation.—Gottschall v. Campbell, 83 A. 286, 293.

That the procedure provided by Act May 5, 1911 (P. L. p. 198), for the county court of Allegheny county differs from that in the common pleas, does not lay the act open to the objection that it is not uniform.—Id.

§ 77 (Del.Sup.) A law having a uniform operation as to all persons uniformly situated is a general and not a special law.—Clendaniel v. Conrad, 83 A. 1036.

To render the classification of subjects of legislation valid, it must not be arbitrary or unreasonable, but must be a real classification, resting upon some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.—Id.

§ 80 (Del.Sup.) 26 Del. Laws, c. 189, relative to boulevards and boulevard corporations, held to be a general and not a special law, and hence not to violate Const. art. 9, § 1, nor article 2, § 19.—Clendaniel v. Conrad, 83 A. 1036.

That a statute framed in general terms, authorizing the organization of a class of corporations, was passed at the instance and request of an individual, who gave the Legislature assurance that he would organize such a corporation, does not render it a special law.—Id.

§ 93 (N.J.Sup.) Act April 27, 1911 (P. L. p. 512), excluding from its operation those cities where boards of education consist of less than nine members, is unconstitutional because of the improper classification.—Sheridan v. Lankering, 83 A. 641.

§ 93 (Pa.) Act May 5, 1911 (P. L. 198), establishing county court in Allegheny county, held not violative of Const. art. 3, § 7, though it would be local and special but for constitutional classification of Allegheny county as a distinct division.—Gottschall v. Campbell, 83 A. 286, 293.

§ 101 (N.J.Sup.) P. L. 1911, p. 444, protecting exempt firemen from removal from any office except for cause, and after opportunity to be heard, is not a violation of Const. art. 4, § 7, par. 11, subd. 5, relating to the passage of local acts.—McGrath v. City of Bayonne, 83 A. 780.

III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Del.Sup.) Under Const. art. 2, § 16, an act does not embrace more than one subject, unless the matters covered are incongruous and diverse to each other.—Clendaniel v. Conrad, 83 A. 1036.

The inclusion in one act of provisions relating directly or indirectly to the same subject, which are naturally connected with and not foreign to the subject expressed in the title, does not violate Const. art. 2, § 16.—Id.

An act providing for the organization of a corporation may include provisions relating to its operation, regulation, control, and maintenance, without violating Const. art. 2, § 16.—Id.

26 Del. Laws, c. 189, relating to the construction of boulevards by boulevard corporations, held not to embrace more than one subject, contrary to Const. art. 2, § 16, because it provides that a part of the boulevard shall be conveyed to and maintained by the state, and the remainder shall belong to and be under the care of a boulevard corporation.—Id.

26 Del. Laws, c. 189, relating to the construction of boulevards by boulevard corporations, held not to embrace more than one subject, contrary to Const. art. 2, § 16, because it provides for exemption from taxation of property of such corporations.—Id.

§ 107 (Md.) Where several sections of a statute refer to and are germane to the same subject-matter which is described in the title, the statute embraces but a single subject within Const. art. 3, § 29.—State v. Loden, 83 A. 564.

§ 107 (Pa.) Act April 27, 1909 (P. L. 182), entitled, "An act to amend the act of 1907 by permitting husband and wife to testify, and providing for the method of service of process," amending act of May 23, 1907 (P. L. 227), is not invalid as containing more than one subject in its title.—Erdner v. Erdner, 83 A. 420.

§ 109 (N.J.) Under requirement of the Constitution that the object of an act must be expressed in its title, the object expressed must give notice of the effect of the legislation to one conversant with the existing state of the law, and the validity of the title is not to be determined by nice distinctions of etymology or definitions of words.—Sawter v. Shoenthal, 83 A. 1004.

§ 109 (N.J.Sup.) Under Const. art. 4, § 7, par. 4, requiring the subject of every law to be expressed in its title, the title must be broad enough to express the general object sought to be accomplished, being a restriction upon the enacting part of the law.—Patterson v. Close, 83 A. 233.

The amendment of the title of a statute which was invalid, because its title did not express certain subjects included in the body of the statute, so as to include such subjects therein would not render the amended statute constitutional.—Id.

§ 113 (Del.Sup.) 26 Del. Laws, c. 189, amending the general corporation law, by authorizing the organization of boulevard corporations, held not to violate Const. art. 2, § 16, by containing more than one subject, part of which are not germane to its title, or the title of the general corporation law.—Clendaniel v. Conrad, 83 A. 1036.

§ 114 (Md.) Acts 1910, c. 693, regulating moving picture machine operators, entitled, "An act to add a new article to the Code of Public Local Laws, to be known as 'moving picture

machine operators," subtitle "Baltimore City," and be numbered," *held* not in conflict with Const. art. 3, § 29.—*State v. Loden*, 83 A. 564.

§ 115 (Pa.) Act April 1, 1909 (P. L. 87), entitled "An act to amend section 1 of an act entitled 'An act relating to descent and distribution of the estates of intestates,' passed and approved April 8, 1833 (P. L. 315), defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate," is not inadequate in title, though construed as applying to estates of intestates in which the widow elects to take against the will.—*In re Guenthoer's Estate*, 83 A. 617.

§ 121 (N.J.) The title to Act 1909 (P. L. p. 304), relating to collateral inheritance taxes, sufficiently states the object of the legislation.—*Sawter v. Shoenthal*, 83 A. 1004.

§ 121 (Pa.) Act May 6, 1887 (P. L. 79), "An act to provide for the better collection of collateral inheritance tax," is not unconstitutional, on the ground that its title fails to give sufficient notice of the provisions of section 3, relating to time for payment of the tax.—*In re Jewell's Estate*, 83 A. 610.

§ 125 (N.J.Sup.) Act March 26, 1902 (P. L. p. 65), entitled "An act to reduce the number of members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards," section 6, *held* to violate Const. art. 4, § 7, par. 4, requiring the subject of every law to be expressed in its title, because containing a provision changing the term of office of certain freeholders.—*Patterson v. Close*, 83 A. 233.

IV. AMENDMENT, REVISION, AND CODIFICATION.

§ 141 (Pa.) Const. art. 3, § 6, relating to republication of statutes revived, amended, extended, or conferred, does not apply to Act April 1, 1909 (P. L. 87), amending Act April 8, 1833 (P. L. 315) § 1, since said act refers to the general law in force at the time, and not to any particular statutes.—*In re Guenthoer's Estate*, 83 A. 617.

Where an amending statute makes reference to the law generally governing the particular subject, and not to any specific act or part thereof, the reference means the law at the time the emergency arises, and there is no distinction between acts referring to procedure and acts affecting substantive rights.—*Id.*

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Md.) Repeal by mere implication is not favored; and it is only where two statutes are clearly not susceptible of standing together under any reasonable construction, that such repeal will be declared.—*Board of School*

Com'rs of Anne Arundel County v. Henkel, 83 A. 89.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 181 (N.H.) Statutes are to be so construed as to avoid an absurd or unreasonable construction.—*Glover v. Baker*, 83 A. 916.

§ 182 (N.H.) A statute must be so construed as to carry out the intention of the Legislature, and to accomplish this the letter of a statute may be restrained or enlarged by equitable construction, or it may be construed contrary to the letter.—*Glover v. Baker*, 83 A. 916.

§ 205 (N.H.) In the construction of statutes all parts of the act must be construed together.—*Glover v. Baker*, 83 A. 916.

§ 217 (Del.Sup.) In a proper case, reference may be had to the message of the Governor, and other matters constituting a part of the legislative record, in connection with a bill, to aid the court in ascertaining its real object.—*Clendaniel v. Conrad*, 83 A. 1036.

§ 217 (N.H.) In the construction of a statute, the history of legislation upon the subject, the circumstances under which the act was adopted, and the other provisions accompanying it, are competent evidence.—*Glover v. Baker*, 83 A. 916.

§ 226 (N.H.) Pub. St. 1901, c. 152, § 10, limiting the income from gifts to religious societies, *held* not derived from the mortmain act (9 Geo. II, c. 36), and hence that the English decisions interpreting that act had no bearing on its construction.—*Glover v. Baker*, 83 A. 916.

§ 226 (R.I.) Where a foreign statute judicially construed is adopted, the construction given to it in the foreign jurisdiction will be adopted.—*Rhode Island Hospital Trust Co. v. Dunnell*, 83 A. 858.

(B) Particular Classes of Statutes.

§ 235 (R.I.) Gen. Laws 1909, c. 238, creating the Metropolitan park commission, with power to acquire and make available to the public open spaces for exercise and recreation, by purchase or condemnation, *held* an exercise of the police power, to be liberally construed.—*In re Opinion of the Justices*, 83 A. 3.

§ 241 (Conn.) A penal statute must be strictly construed, and the court cannot apply it to cases not within the obvious meaning of its language.—*State v. Penner*, 83 A. 625.

VII. PLEADING AND EVIDENCE.

§ 285 (Del.Sup.) Legislative journals considered, and *held*, that 26 Del. Laws, c. 189, was constitutionally enacted; the enrolled bill being the one passed by the Legislature.—*Clendaniel v. Conrad*, 83 A. 1036.

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I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 24 (Pa.) Street railway company obtaining municipal consent to operate railways is chargeable with notice of its duty to keep streets clean, as required by ordinance without special notice or request from the city.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

§ 57 (Pa.) In an action by a city against a street railroad for cost of cleaning the streets, evidence held to sustain verdict and judgment for plaintiff.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

II. REGULATION AND OPERATION.

§ 81 (Del.Super.) A street railway company must see that its cars are operated at reasonable speed, that proper warning is given of the approach thereof, and that the speed is slackened or the car stopped on the appearance of

imminent danger.—*Gismondi v. People's Ry. Co.*, 83 A. 136.

A street railroad company is bound to operate and manage its road and property with "ordinary care and caution."—*Id.*

§ 85 (N.J.Sup.) Street railroads have no superior right to the use of highways over persons on foot or with vehicles, except that, being confined to the tracks, others must give way when occasion requires.—*Luby v. Morris County Traction Co.*, 83 A. 184.

A duty devolves on persons using the highway upon which street railroad tracks lie to permit the passage of cars when they observe or are informed that such passage is required.—*Id.*

§ 90 (Md.) Though a car of a street railway company which caused an injury to one driving across its track was going at an excessive speed, there can be no recovery on that ground, unless it was the proximate cause of the injury.—*United Rys. & Electric Co. of Baltimore v. Durham*, 83 A. 154.

Where those in charge of a street car saw plaintiff before he got on the track, and the car, which was going swiftly, was visible for 300 feet, they had the right to assume that he would stop in a place of safety, and not attempt to cross in front of a car.—*Id.*

§ 93 (N.J.Sup.) Such timely warning of the approach of a trolley car must be given as to enable others to avoid danger from it.—*Luby v. Morris County Traction Co.*, 83 A. 184.

§ 98 (Pa.) A nonsuit held properly entered in action against street railway company for injuries, where plaintiff was injured while walking on a trestle on a private right of way, could have avoided injury by stepping to one side, and the motorman, on seeing that plaintiff made no attempt to avoid a collision, did all he could to stop the car.—*Bliss v. Pittsburgh Rys. Co.*, 83 A. 278.

§ 99 (Conn.) A driver of wagon failing to look for street cars until on the track held guilty of contributory negligence, precluding a recovery for injury from being hit.—*Joseph Williams, Bros. v. Connecticut Co.*, 83 A. 1022.

§ 99 (Md.) Where a driver stopped his wagon about 25 feet from a street railroad crossing to let a north-bound car pass, but neglected as he approached the second track to look and listen for a south-bound car, the curtains of his wagon being up, he was guilty of contributory negligence.—United Rys. & Electric Co. of Baltimore v. Durham, 83 A. 154.

§ 100 (N.J.) Coasting on a public street is not such an illegal act, constituting a public nuisance, as will bar a child from recovering for injuries received in a collision with a street car.—Lynch v. Public Service Corporation, 83 A. 382.

§ 100 (Pa.) A nearsighted woman stepping on street railway track where there is nothing to obstruct view of approaching car for more than a mile, and struck the instant she goes on the track, was guilty of contributory negligence.—Flynn v. Pittsburgh Rys. Co., 83 A. 207.

§ 102 (Del.Super.) Where a child came suddenly on the track in front of a car, and the motorman exercised reasonable care, but could not prevent the accident, the railway company was not liable.—Gismondi v. People's Ry. Co., 83 A. 136.

§ 102 (N.J.) One injured in a collision with a street car while coasting on a public street *held* entitled to recover, where the collision resulted from the negligence of the motorman, and not in consequence of contributory negligence.—Lynch v. Public Service Corporation, 83 A. 382.

§ 103 (N.J.Sup.) A violation of the duty not to obstruct a street railway track does not necessarily constitute such contributory negligence as to relieve the company from responsibility for an accident which might have been avoided by due care.—Luby v. Morris County Traction Co., 83 A. 184.

That plaintiff drove along a street railway track in a noisy wagon so that he could not hear the gong of defendant's car *held* not such contributory negligence as to relieve defendant from liability which might have been avoided by defendant's due care.—Id.

§ 112 (Del.Super.) In an action for death by being struck by a street car, the burden is on plaintiff to establish that the killing resulted from defendant's negligence as alleged.—Gismondi v. People's Ry. Co., 83 A. 136.

§ 114 (Me.) In an action to recover for death of a child struck by a street car, evidence *held* to show negligence on the part of the motorman.—Grant v. Bangor Ry. & Electric Co., 83 A. 121.

In an action for the death of a child about five years old struck by a street car, evidence *held* not to show want of due care on the part of the child.—Id.

§ 117 (Conn.) Where the evidence authorized conflicting conclusions on whether plaintiff's injury could have been avoided by the motorman, after he should have discovered her, it was error to direct a verdict for defendant.—Nichols v. Connecticut Co., 83 A. 1022.

§ 117 (N.J.) Whether a person, injured in a collision with a street car while coasting on a public street, was guilty of contributory negligence *held* for the jury.—Lynch v. Public Service Corporation, 83 A. 382.

Whether a motorman in charge of a street car colliding with a person coasting on a public street was guilty of negligence *held* for the jury.—Id.

§ 117 (Pa.) In an action for injuries to plaintiff in a collision between the wagon in which he was riding and a street car, evidence *held* to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.—Proctor v. Lehigh Valley Transit Co., 83 A. 1019.

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II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 40 (Me.) Pub. Laws 1900, c. 177, authorizing taxation for school purposes, *held* not violative of Const. art. 9, § 8.—Sawyer v. Gilmore, 83 A. 678.

That taxation may be equal within the requirement of Const. art. 9, § 8, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree, nor that each person should participate in each particular benefit.—Id.

Inequality of tax assessment vitiates it, but inequality of distribution of the proceeds does not, if the purpose be the public welfare.—Id.

§ 40 (R.I.) Gen. Laws 1909, c. 238, §§ 7, 8, providing for the appointment of commissioners to determine the proportion which each city and town in the Metropolitan park district shall annually pay to meet interest and sinking fund requirements, and that the amount required each year from each city of the district shall be assessed as part of its annual state taxes, *held* not void under Const. art. 1, § 2, declaring that the burdens of the state ought to be fairly distributed among its citizens.—In re Opinion of the Justices, 83 A. 3.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 81 (N.H.) Under Pub. St. 1901, c. 56, §§ 14, 30, a water company *held* not entitled to an abatement of taxes, because it had granted a perpetual easement in its reservoir.—*Bellows Falls Canal Co. v. Town of Walpole*, 83 A. 95.

(B) Corporations and Corporate Stock and Property.

§ 145 (N.J.) Part of railroad right of way not occupied by tracks or other railroad appliances and not devoted to other use is used for railroad purposes for purposes of taxation as matter of law.—*New York Bay R. Co. v. City of Newark*, 83 A. 962.

(D) Exemptions.

§ 241 (Vt.) Under P. S. 496, subd. 6, exempting from taxation property used for pious or charitable purposes, *held*, that a camp ground and its improvements were exempt, but that plaintiff's lot not connected with the camp ground or used therewith was taxable.—*Johnson v. Jones*, 83 A. 1085.

IV. PLACE OF TAXATION.

§ 263 (Me.) Logs and lumber used at a mill for manufacture of boxes for the manufacturer's use in shipping explosives are taxable as personalty "employed in the mechanic arts," within Rev. St. c. 9, § 13, par. 1, in the town where the mill is located.—*Inhabitants of Boothbay v. E. I. Du Pont De Nemours Powder Co.*, 83 A. 663.

§ 263 (Me.) Toothpicks stored by a manufacturer thereof in a storehouse preparatory to shipment in the general course of business are not taxable under Rev. St. c. 9, § 13, par. 1, as amended by Laws 1909, c. 4, as personalty "employed in trade" or "in mechanic arts."—*Inhabitants of Peru v. Forster's Estate*, 83 A. 670.

V. LEVY AND ASSESSMENT.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 376 (N.J.Sup.) Stock once issued remains outstanding within the franchise tax act, though owned by the corporation issuing it, until retired and canceled.—*Goldstein-Fineberg Co. v. State Board of Assessors*, 83 A. 773.

(E) Assessment Rolls or Books.

§ 441 (Vt.) An inseparable tax, in part void because assessed against exempt property, is also void as against the part taxable.—*Johnson v. Jones*, 83 A. 1085.

(G) Review, Correction, or Setting Aside of Assessment.

§ 482 (N.J.Sup.) On addition to duplicate assessment of omitted property, the board must give the owner notice thereof and of the next meeting of the board (P. L. 1906, p. 216, § 9 [Comp. St. 1910, p. 5120, § 37x]) and without such notice the addition is not binding.—*Shillingsburg v. Greenwich Tp.*, 83 A. 644.

§ 491 (N.J.Sup.) The addition of alleged omitted property to the duplicate of tax assessment requires the action of the board, which is not complied with by direction to its secretary, by one of its members, to add omitted property without proof that such was the determination of the board.—*Shillingsburg v. Greenwich Tp.*, 83 A. 644.

§ 495 (N.H.) On a tax appeal, the only issue is whether the petitioner's tax is greater than it should be; and so a tax case, transferred from the lower court on an agreement that

if notice be essential to the validity of the tax it should be abated, must be discharged.—*Page v. City of Portsmouth*, 83 A. 97.

§ 499 (N.H.) Under Pub. St. 1901, c. 56, § 14, the burden *held* on a water power company, in petitioning for abatement of taxes against a dam, water rights, etc., to show, not only that they had parted with rights in the property, but also that they were not in possession and occupation, and did not consent to be taxed.—*Bellows Falls Canal Co. v. Town of Walpole*, 83 A. 95.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

§ 549 (R.I.) Where a town meeting, after electing plaintiff collector of taxes, voted that his salary should be fixed at \$800, plaintiff, after subsequently qualifying, could not by refusing to accept the sum specified recover 5 per cent. of the taxes collected under Gen. Laws 1909, c. 62, § 4.—*Barber v. Adams*, 83 A. 262.

§ 571 (N.J.Sup.) An instruction that it was prerequisite to guilt that defendant converted the money with intent to defraud the county, and that the conversion to his own use might be inferred from his having taken it and loaned it in his own name, and that an intent to defraud might be inferred from his having parted with control of the money, *held* not erroneous.—*State v. Egan*, 83 A. 235.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 692 (Md.) The invalidity of a tax collector's proceedings in selling property for arrears of taxes on the ground of jurisdictional defects may be availed of by collateral attack.—*Mullen v. Brydon*, 83 A. 1025.

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 734 (Md.) Collector's levy and sale of property on which the taxes had in fact been paid makes his proceedings void, and confers no title upon the purchaser.—*Mullen v. Brydon*, 83 A. 1025.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 862 (N.J.) By the passage of Act 1909 (P. L. p. 304), amending Act May 15, 1894 (P. L. p. 318), the supplement of 1906 (P. L. p. 432), imposing a transfer tax, became enforceable legislation.—*Sawter v. Shoenthal*, 83 A. 1004.

§ 897 (Pa.) Under Act May 6, 1887 (P. L. 79), where testator died in 1876 and left real estate to a life tenant, who died in 1910, the remaindermen are liable only for the collateral inheritance tax on the value of the estate when they come into actual possession.—*In re Jewell's Estate*, 83 A. 610.

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I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 4 (N.J.Sup.) Under statutes the titles of which relate to telegraph companies alone, and supplementary acts bringing in telephone companies as well, a telephone company is included, and may be organized to act thereunder.—*Wright v. Mott*, 83 A. 995.

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§ 1 (R.I.) There is no right of survivorship between tenants in common.—Woodward v. Congdon, 83 A. 433.

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§ 3 (Md.) Acts 1910, c. 693, regulating moving picture machine operators. *held* to apply to all classes of moving picture machine operators.—State v. Loden, 83 A. 564.

§ 4 (N.J.Sup.) Theater ticket *held* to create only a revocable personal license, so that for the ejection of the purchaser without unnecessary force no action in tort will lie, but only an action in contract for the price of the ticket and incidental damages.—Shubert v. Nixon Amusement Co., 83 A. 369.

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See Appeal and Error, §§ 345, 353, 567, 628, 817, 956; Bankruptcy, § 392; Carriers, § 99; Contracts, §§ 322, 349; Eminent Domain, § 55; Evidence, § 145; Exceptions, Bill of, §§ 38-51; Jury, § 25; Master and Servant, §§ 39, 221; Mechanics' Liens, § 260; Municipal Corporations, §§ 124, 519; New Trial, § 117.

§ 5 (N.J.Sup.) The term "month" in a policy of life insurance construed to mean a calendar month.—Bobbles v. Prudential Ins. Co. of America, 83 A. 904.

§ 10 (N.J.Sup.) Where a premium was due on a life policy on June 30th, and the policy allowed one month of grace for its payment, and July 31st was Sunday, the insured had the first legal date thereafter, which was Monday, August 1st, on which to pay the premium.—Bobbles v. Prudential Ins. Co. of America, 83 A. 904.

TITLE.

See Adverse Possession; Attachment, §§ 50, 178; Bankruptcy, § 268; Descent and Distribution, § 12; Ejectment, § 9; Eminent Domain, § 320; Highways, § 87; Mortgages, § 137; Novation; Officers, § 83; Quieting Title; Sales, § 263; Specific Performance, § 10; Statutes, §§ 107-125; Taxation, § 734; Use and Occupation, §§ 4, 9; Vendor and Purchaser, § 130; Wills, § 693.

TORTS.

See Action, § 53; Assault and Battery, §§ 3, 29; Death; False Imprisonment; Husband and Wife, § 102; Insane Persons, § 80; Libel and Slander; Malicious Prosecution; Municipal Corporations, §§ 733-821; Negligence; Nuisance; Theaters and Shows; Trespass; Trover and Conversion.

TOWNS.

See Dedication, §§ 37, 39; Elections, § 299; Eminent Domain, §§ 9, 191; Highways, § 72; Money Received; Municipal Corporations; Schools and School Districts; Taxation, § 549.

II. GOVERNMENT AND OFFICERS.

§ 16 (Me.) Towns are mere agencies of the state, and their powers and duties are within the Legislature's control.—Sawyer v. Gilmore, 83 A. 873.

§ 29 (R.I.) The salary of the chief of police and town sergeant of a town, and the fees payable to him for his services as dog officer, under Gen. Laws 1909, c. 135, *held* an "ordinary expense" of the town; and hence the fact that the town had exceeded the debt limit fixed by Acts 1895, c. 1428, was no defense to an action for such services.—Trainor v. Lee, 83 A. 847.

§ 29 (R.I.) That the indebtedness of a town was in excess of its debt limit, prohibited by Acts 1895, c. 1428, *held* no defense to its liability for compensation of its dog officer for listing dogs under Gen. Laws 1909, c. 135, § 12.—Bagley v. Lee, 83 A. 852.

Where a bill for repairs to bicycles of policemen was regularly presented and allowed by the town council in the ordinary course of business, the town was liable therefor.—Id.

§ 29 (R.I.) Where a town solicitor was directed by the town council to defend a police officer in a civil action for damages arising from action taken by him in the discharge of his duty, the town was liable for the reasonable value of his services.—Grim v. Lee, 83 A. 853.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 45 (N.H.) A member of a town board of health, destroying infected bedding, does not act as the agent of the town, but as a public officer, under legislative authority, for the protection of the public health.—Creier v. Town of Fitzwilliam, 83 A. 128.

In absence of a statute, a town is not liable for bedding destroyed by member of its board of health, acting as a public officer under legislative authority.—Id.

TRADE FIXTURES.

See Fixtures.

TRADE-MARKS AND TRADE-NAMES.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

§ 9 (N.J.Ch.) There can be no exclusive right to the use of the word "London" as a trade-name.—Rosenthal v. Blatt, 83 A. 387.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(B) What Competition Unlawful.

§ 68 (N.J.Ch.) The test of whether the use of a trade-name amounts to unfair competition is whether the public is likely to be deceived thereby.—Rosenthal v. Blatt, 83 A. 387.

(C) Actions.

§ 85 (N.J.Ch.) Under equitable principles, the chancery court will not enjoin alleged unfair competition by the use of a trade-name similar

to complainants' name, "London Shop," to the extent that complainants seek to benefit from a suggestion by their name that their stores are connected with a London store, which is untrue.—*Rosenthal v. Blatt*, 83 A. 387.

§ 93 (N.J.Ch.) In a suit to restrain the use of the trade-name "Page of London," on the ground that its use amounts to unfair competition with complainants' business conducted under the name "London Shop," evidence held not to show that the use of its name tended to deceive the public, so as to be unfair competition.—*Rosenthal v. Blatt*, 83 A. 387.

TRANSCRIPTS.

See Appeal and Error, §§ 628, 664.

TRANSFERS.

See Carriers, § 269.

TRANSFER TAX.

See Taxation, § 862.

TRESPASS.

See Dedication, §§ 39, 45; Eminent Domain, §§ 119, 271, 293; Highways, § 96; Master and Servant, § 302; Railroads, §§ 359, 453.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 20 (N.H.) Plaintiff's possession held sufficient foundation for an action in trespass *quare clausum* against defendant, who entered upon the land and cut and removed therefrom grass which he had bought from plaintiff's wife, who had legal title to the land.—*Evans v. Watkins*, 83 A. 915.

TRESPASS TO TRY TITLE.

See Ejectment.

TRIAL.

See Adverse Possession, § 116; Animals; Appeal and Error, §§ 170-308, 543, 730, 882, 956-982, 991, 1005, 1033, 1053, 1062, 1064, 1068, 1197; Assault and Battery, § 92; Bankruptcy, § 304; Bills and Notes, § 537; Brokers, § 88; Carriers, §§ 94, 106, 187, 320, 321; Contracts, § 295; Costs; Criminal Law, §§ 1037, 1129; Damages, § 216; Dedication, § 45; Dismissal and Nonsuit; Electricity; Executors and Administrators, § 451; Fraudulent Conveyances, § 308; Gifts, § 50; Highways, § 184; Homicide, §§ 282½, 286; Judgment, § 958; Jury; Landlord and Tenant, §§ 169, 233; Libel and Slander, § 120; Malicious Prosecution, § 72; Master and Servant, §§ 43, 80, 265, 279, 286, 288, 293, 295, 332; Mortgages, §§ 529, 578; Municipal Corporations, §§ 706, 821; Negligence, § 136; New Trial, § 143; Railroads, §§ 350, 400; Sales, §§ 182, 364; Stipulations; Street Railroads, § 117; Taxation, § 571; Vendor and Purchaser, § 81; Venue; Wills, §§ 316, 332.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 3 (N.H.) Whether all or a part of the issues in an action tried by the court shall be tried together, and the order in which they shall be tried, are questions of convenience, to be settled by the superior court.—*Glover v. Baker*, 83 A. 916.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 28 (Del.Super.) In determining whether the jury should be given a view of the premises where an employé was injured, the court must find that a view is necessary to the just decision of the issues and that the place to

be viewed has not been changed since the accident.—*Seininski v. Wilmington Leather Co.*, 83 A. 20.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 33 (N.H.) Exclusion of evidence upon collateral issue held discretionary.—*Fellows v. Champion International Co.*, 83 A. 1091.

§ 48 (N.H.) Testimony being competent for testing the credibility of witness, even if incompetent for other purposes, its admission was not error.—*Scully v. Manchester St. Ry.*, 83 A. 512.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 121 (N.H.) Statement of counsel in challenging introduction of book, that he did not believe it was used in the regular course of business, held not improper, when not made under circumstances leaving impression that he was testifying.—*Fellows v. Champion International Co.*, 83 A. 1091.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 136 (N.J.Sup.) Where one party calls up another on the telephone by his number, recognizes his voice, and discusses with him business they have together, it is for the jury to determine, if the conversation is denied, whether it took place or of what it consisted.—*Murphy-Hardy Lumber Co. v. Roder*, 83 A. 769.

§ 139 (N.J.) Where plaintiff and his witnesses testified that, by reasonable care, a defect in a tool which injured plaintiff could not be discovered, it was error to direct a verdict for defendant.—*Maher v. Ferracute Machine Co.*, 83 A. 909.

§ 139 (N.J.) Negative evidence that witnesses did not hear any bell rung as the train that killed decedent approached the crossing in question is sufficient to take the question to the jury, if the witnesses were in a position to have heard the bell had it been rung.—*Danskin v. Pennsylvania R. Co.*, 83 A. 1006.

§ 140 (R.I.) The probative value of the testimony of children of tender years and of foreign parentage, testifying without the aid of an interpreter, is for the jury under suitable instructions.—*Cyrulik v. Bosworth*, 83 A. 81.

§ 143 (N.J.) Where there is a substantial dispute as to the facts, a motion for direction of a verdict is properly refused.—*Broome v. New Jersey Conference Camp Meeting Ass'n*, 83 A. 901.

§ 143 (N.J.) A matter fairly in dispute under the evidence in an action at law is for the jury.—*Dierkes v. Hankhurst Land Co.*, 83 A. 911; *Zimmerman v. Same*, *Id.*

(C) Dismissal or Nonsuit.

§ 165 (N.J.Sup.) The amount recoverable by plaintiff as damages for disturbance of an easement in gross is not in question on defendant's motion to nonsuit.—*Goldman v. Beach Front Realty Co.*, 83 A. 777.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 186 (Conn.) Court held entitled to comment upon the evidence so long as it did not direct or advise the jury how to decide the matter.—*Cullinane v. Colwell*, 83 A. 605.
§ 187 (Conn.) On the issue whether a will had been induced by undue influence, an in-

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struction as to the credibility of attesting witnesses *held* not an abuse of its discretion.—*Cullum v. Colwell*, 83 A. 695.

§ 194 (Conn.) Where the court, in an instruction on negligence, determines under a finding to be made by the jury the standard of duty of the defendant master, and does not determine the conduct of the defendant in the case, but leaves it to be found by the jury, the instruction does not invade the province of the jury.—*Messinger v. New York, N. H. & H. R. Co.*, 83 A. 631.

§ 194 (N.J.) In an action for the price of a printing press, a statement in an instruction that the defendant had used the machine commercially to get out evening editions was not erroneous as withdrawing from the jury the question whether it had been used commercially or only experimentally.—*Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co.*, 83 A. 969.

(B) Necessity and Subject-Matter.

§ 206 (Pa.) Where, in an accident case, the testimony of medical experts is conflicting, the trial judge should call the jury's attention to the conflict and instruct them to reconcile the contradictions and as to their duty if they could not do so.—*McGonnell v. Pittsburgh Rys. Co.*, 83 A. 282.

(D) Applicability to Pleadings and Evidence.

§ 252 (Md.) In an action for salary and expenses, evidence *held* to authorize an instruction for plaintiff that the jury found that he was to receive his salary and expenses or the difference between the amount of such salary and expenses and the amount he had received.—*Baer v. Robbins*, 83 A. 341.

§ 252 (Md.) Certain matters *held* no ground for discharge of a servant, and so, where the master assigned no other ground, instructions on the question of the servant's performance of duties were not objectionable because of lack of evidence that the servant exercised ordinary care.—*H. J. McGrath Co. v. Marchant*, 83 A. 912.

§ 252 (R.I.) In an action for assault and battery, where plaintiff claimed that the act of the defendant was willful and intentional, growing out of an altercation, and defendant denied this and claimed that he unconsciously dropped the pail which struck plaintiff, an instruction as to defendant's liability in case of negligence was without support in the evidence.—*Baran v. Silberman*, 83 A. 263.

§ 252 (R.I.) In assumpsit for the breach of a contract, the consideration of which was plaintiff's delivery of an option, an instruction that an option may be accepted verbally *held* proper, where there was evidence of such verbal instruction.—*Eastman v. Dunn*, 83 A. 1057.

In an action for breach of contract, where the consideration moving from plaintiff was an option to lease certain property, which he surrendered to defendants, an instruction that the amount of his recovery was the market value of the lease at the time he delivered it *held* not inapplicable to the evidence.—*Id.*

§ 253 (Conn.) In an action for injuries, alleged to have been caused by defendant's negligence in driving his team against plaintiff while walking on the highway, requested instruction *held* properly refused as ignoring the question of defendant's negligence.—*Church v. Spicer*, 83 A. 1115.

§ 253 (Md.) In an action against a railroad for personal injuries to a watchman, resulting from the collapse of a bridge in course of construction, a requested instruction, requiring the jury to find, either that the railroad did not use due care in planning construction of bridge, or in inspecting the work during its progress, was properly refused, as it ignored the question of

its liability, if it did not use due care in selecting the contractor to build the bridge, or was not constructed in accordance with the plans.—*Baltimore & O. R. Co. v. Wilson*, 83 A. 248.

§ 253 (Md.) In an action for injuries caused by a runaway, an instruction that if plaintiff's mules were roadworthy and easily controllable, the driver skillful and careful, and the vehicle and harness sufficient and in good condition, the plaintiff nevertheless could not recover if he might have prevented the injury by the exercise of reasonable care and caution, was properly refused as excluding consideration of the negligence *vel non* of the defendant shown.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 253 (Md.) Prayers ignoring vital issue of action in ejectment are properly refused.—*Mullen v. Brydon*, 83 A. 1025.

§ 253 (Pa.) In an action for death of a beer wagon driver attempting to board a street car for the alleged purpose of lodging a complaint at the car barns, the outcome of an altercation, submission of question whether decedent was a passenger without instructions as to contributory negligence *held* error.—*Geiger v. Pittsburgh Rys. Co.*, 83 A. 367.

(E) Requests or Prayers.

§ 258 (Md.) Putting the same legal proposition in different prayers referring in terms to different counts of a declaration *held* not objectionable.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254.

§ 260 (Md.) It is not error to refuse requests to charge, the substance of which is covered by instructions given.—*Cecil Paper Co. v. Nesbitt*, 83 A. 254; *Baer v. Robbins*, *Id.* 341.

§ 260 (Md.) An instruction covered by one given is properly refused.—*Hagerstown Brown Co. v. Gates*, 83 A. 570; *Rawlings v. Duane H. Nash*, *Id.* 646.

§ 260 (N.J.) In an action for death at a railroad crossing, an instruction given *held* to cover certain instructions requested.—*Danskin v. Pennsylvania R. Co.*, 83 A. 1006.

§ 260 (Vt.) In an employee's action for injuries caused by a defective machine, where the court charged that plaintiff could not recover on account of known and obvious dangers, that she was bound to take notice of the machine as it was, to see what a prudent person would see and to know what was obvious, the refusal of an instruction that the employer was not required to give her special instructions, unless there was some concealed danger about the machine, was proper.—*Duggan v. Heaphy*, 83 A. 726.

§ 261 (Conn.) A request to charge being considered as a whole was properly refused, where it contained in part an erroneous rule of damages.—*Johnson v. Connecticut Co.*, 83 A. 530.

(G) Construction and Operation.

§ 295 (Pa.) On an issue as to whether the donee of certain coal land had maintained absolute possession thereof, plaintiff was not prejudiced by the court's failure to use the term "exclusive possession" with reference to the possession required of the donee in a particular part of the charge, where the entire charge showed the necessity of absolute possession.—*Greenwich Coal & Coke Co. v. Learn*, 83 A. 74.

§ 296 (N.J.) In an action for the price of a printing press, an instruction that if the machine was in all respects according to contract, and the excuse for not having it up in time was a reasonable one, the plaintiff was entitled to a verdict *held* not erroneous in view of further instructions given.—*Potter Printing Press Co. v. Newark Daily Advertiser Pub. Co.*, 83 A. 969.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 306 (Del.Super.) Where the evidence is conflicting, it is the jury's duty to reconcile it, if possible; otherwise, to accept that which they believe is most worthy of belief.—*Gismond v. People's Ry. Co.*, 83 A. 136; *Gatta v. Philadelphia, B. & W. R. Co.*, Id. 788.

§ 307 (Pa.) In assumpsit for moneys due plaintiff, either party may send out with the jury a calculation and statement of claim based on the evidence.—*City of Pittsburgh v. Pittsburgh Rys. Co.*, 83 A. 273.

IX. VERDICT.

(B) Special Interrogatories and Findings.

§ 349 (Conn.) The superior court has the right to submit written interrogatories to the jury to be answered by them upon returning their verdict, for the purpose of ascertaining upon what ground the jury rested their verdict.—*Cullum v. Colwell*, 83 A. 605.

§ 350 (R.I.) The statute authorizing the submission of special issues to the jury only authorizes the submission of a material question on which the evidence is disputed in such a manner as to be readily comprehended by the jury.—*McQuillan v. McQuillan*, 83 A. 401.

TROVER AND CONVERSION.

II. ACTIONS.

(C) Evidence.

§ 40 (R.I.) In trover for the conversion of certain insurance policies, evidence held to warrant a finding that the policies belonged to plaintiff.—*McQuillan v. McQuillan*, 83 A. 401.

TRUST DEEDS.

See Mortgages.

TRUSTEES.

See Bankruptcy, §§ 142, 184, 195, 304.

TRUSTS.

See Action, § 6; Appeal and Error, § 870; Charities; Courts, § 514; Equity, §§ 390, 401, 427; Life Estates, § 15; Vendor and Purchaser, § 130; Wills, §§ 524, 671-693, 858, 865.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 21 (Md.) The creation of a trust must be reasonably definite.—Book Depository of Baltimore Annual Conference of Methodist Episcopal Church v. Trustees of Church Rooms Fund of Methodist Episcopal Church, 83 A. 50.

§ 25 (Del.Ch.) Where lessees of a mortgagor's grantee, who took subject to the mortgage, covenanted to pay rent to their immediate lessor, \$3,000 of which was to be paid to the mortgagee, and the balance retained by the lessor, there being no consideration from the mortgagee to the lessor, and no promise by either of the lessees or the lessor to pay rent to the mortgagee, and no intention of the lessees to constitute themselves trustees for the mortgagee, no trust was established against the lessees in favor of the mortgagee.—*Merchants' Union Trust Co. v. New Philadelphia Graphite Co.*, 83 A. 520.

§ 38 (Md.) The taking out of letters testamentary held sufficient to show an acceptance of a trust, where the trustee and executor under the will are the same.—*Coudon v. Updegraff*, 83 A. 145.

(B) Resulting Trusts.

§ 63¾ (Md.) Where an owner has vested his grantee with the legal title to lands, and

such grantee conveys to one who pays the purchase price, and orally agrees with the original owner that he may repurchase the land at any time within two years, there is no resulting trust created.—*Riggin v. Robinson*, 83 A. 143.

§ 72 (Conn.) That there may be a resulting trust in favor of one from the acquisition of title to property by others, part of the consideration by which they secured title must have come from him.—*Lander v. Persky*, 83 A. 209.

§ 80 (R.I.) Complainant agreed with defendant to engage in the purchase and development of real estate, defendant to furnish all the capital. Defendant with his own money took title to property negotiated for by the firm in his wife's name to defeat his partner's rights to profits. Held, that the property was held in trust for the firm.—*Moran v. McDevitt*, 83 A. 1013.

(C) Constructive Trusts.

§ 109 (Pa.) Where testator is induced to make a devise by promise of devisee to apply it to benefit of another, a trust is created that may be established by parol.—*Blick v. Cockins*, 83 A. 196.

§ 110 (Pa.) Under the evidence in a bill to have a trust ex maleficio declared in a defendant, with respect to property bequeathed to him by his wife, on the ground of fraud, it was error to refuse to decree a trust for complainants.—*Blick v. Cockins*, 83 A. 196.

Suit to have a trust declared held not a suit to reform a written instrument, but to prove fraud in the defendant, for which purpose testimony of one witness is sufficient, if believed.—Id.

II. CONSTRUCTION AND OPERATION.

(B) Estate or Interest of Trustee and of Cestui Que Trust.

§ 140 (N.J.Ch.) If one had no control during his lifetime over the corpus of a trust fund held in trust for him, he could not dispose of it by will.—*O'Gorman v. Crowley*, 83 A. 379.

III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§ 158 (Md.) Equity rather than the orphans' court held the jurisdiction for the administration of a trust created by will.—*Coudon v. Updegraff*, 83 A. 145.

§ 161 (Md.) Under Code Pub. Gen. Laws 1904, art. 16, § 235, equity held entitled to require a trustee about to loan money belonging to the trust without security to give bond for the faithful performance of his duties.—*Coudon v. Updegraff*, 83 A. 145.

§ 162 (N.J.Ch.) An order made by the Orphans' Court Act, § 146, discharging decedent "from the further duties of his office as executor," is properly treated as discharging him from the performance of trusts imposed upon the executor subject to an accounting to the substituted administrator, where it appears that he intended to apply for, and the court intended to grant, such discharge, and where the parties interested for several years treated the order as having that effect.—*Randall v. Gray*, 83 A. 482.

§ 162 (Pa.) Elderly trustee who has acted as such for over 20 years on filing and auditing of account held entitled to withdraw, notwithstanding objections of cestui que trust.—In re Nixon's Estate, 83 A. 687.

As a general rule, a trustee may relieve himself from the liabilities arising from a trust relation by submitting the administration of the trust to the jurisdiction of the court.—Id.

§ 161 (R. I.) A decree removing a testamentary trustee and requiring him to make a pay-

ment within 30 days, in default whereof his interest in the trust estate to be applied to such payment, *held* not erroneous because it made no provision for an extension of time in case of an appeal.—*McAuslan v. McAuslan*, 83 A. 837.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 270 (Me.) A person accepting a testamentary trust must execute it by carrying out testator's intention as expressed by the language creating the trust.—*Dunn v. Morse*, 83 A. 795.

§ 282 (Pa.) On assignment by a father to a trustee of certain property including notes made by two of his sons, the net income to be paid to the father and wife during life, and, on the death of the surviving parent, the fund to be distributed, the notes bore interest until the final distribution of the fund, and the sons' shares were chargeable with all unpaid interest.—*In re Barr*, 83 A. 202.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 359 (Md.) A bill for the administration of a trust estate created by will *held* within the jurisdiction of equity, where a number of the devisees were nonresidents.—*Coudon v. Updegraff*, 83 A. 145.

§ 372 (Md.) Evidence in an action to compel reconveyance of land conveyed to defendant by one whom the plaintiff had vested with the legal title *held* to sustain a decree dismissing the bill.—*Riggin v. Robinson*, 83 A. 143.

ULTRA VIRES.

See Corporations, §§ 484, 519.

UNDERTAKINGS.

See Bonds.

UNDUE INFLUENCE.

See Wills, §§ 166, 225, 332, 421.

UNFAIR COMPETITION.

See Trade-Marks and Trade-Names, §§ 68-93.

UNIFORMITY.

See Statutes, §§ 73, 77.

USAGES.

See Customs and Usages.

USE AND OCCUPATION.

§ 4 (Me.) One is not entitled to sue for use and occupation of land to which he has no legal title.—*Pennington v. Gartley*, 83 A. 701.

§ 9 (Me.) The burden was on plaintiff to show an express contract by defendant to pay her a fixed sum for the use and occupation of land to which she had no legal title.—*Pennington v. Gartley*, 83 A. 701.

In an action for use and occupation of land, evidence *held* insufficient to show promise by defendant to pay plaintiff rents and profits from land to which she had no legal title.—*Id.*

VACATION.

See Judgment, §§ 67, 68, 162, 163, 338-392, 416.

VALUE.

See Bankruptcy, § 57; Evidence, §§ 113, 201.

VEHICLES.

See Highways, § 184; Licenses, § 7; Railroads, § 827.

VENDOR AND PURCHASER.

See Brokers; Covenants; Dedication, §§ 48, 51; Deeds; Executors and Administrators, §§ 148, 339, 396; Frauds, Statute of, §§ 76, 106, 110; Judgment, § 619; Sales; Specific Performance; Trusts, §§ 63, 74, 80; Wills, § 734.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

§ 55 (Vt.) A contract giving orator the option to purchase a part of land, and for the sale and division of the proceeds of the rest, *held* divisible, so that he could enforce his equitable rights as to the latter part, though he had no right under the option.—*Cunningham v. Blanchard*, 83 A. 469.

§ 81 (Pa.) Construction of a contract relating to a written option to purchase land previously executed *held* to be for the court, notwithstanding certain parol evidence.—*Standiford v. Kroman*, 83 A. 311.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 83 (Pa.) A written agreement *held* not to change a prior option to purchase land to a contract of sale, but to be merely an extension of the option.—*Standiford v. Kroman*, 83 A. 311.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 130 (N.J.Ch.) Where the record title to land shows a conveyance by a trustee to a third person, and a reconveyance to the trustee individually, a purchaser will not be compelled to take such title.—*Gosman v. Pfister*, 83 A. 781.

Where a conveyance of land by a trustee to a third person and a reconveyance to himself individually was made only eight years before a suit for specific performance, the title will not be held marketable under the rule that after the lapse of a long period of time equity will presume that a trustee accounted to the beneficiaries and that all claims against him were barred by delay.—*Id.*

An outstanding tax title does not render the title to land unmarketable, where no entry under such tax title has been made within 20 years.—*Id.*

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

§ 230 (N.J.Ch.) A purchaser of land has constructive notice of what appears in antecedent title deeds.—*Gosman v. Pfister*, 83 A. 781.

VI. REMEDIES OF VENDOR.

(C) Actions for Damages.

§ 330 (N.J.Ch.) The measure of damages for a purchaser's refusal to take the land is the difference between the contract price and the value of the land.—*Baerenklau v. Peerless Realty Co.*, 83 A. 375.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 334 (N.J.Sup.) Where the parties to a contract of sale have rescinded, the vendor accepting the property, the vendee may maintain an action to recover the money paid.—*Gahan v. Plant*, 83 A. 775.

VENUE.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 70 (Vt.) On an application for a change of venue, the fact that defendant's petition was verified, and no counter affidavits were sub-

mitted, did not require the court to treat such application as conclusive on the facts covered thereby.—*Carpenter v. Central Vermont Ry. Co.*, 83 A. 466.

A court to which an application for a change of venue was submitted *held* not required to find that there was such a prejudice in the county against defendant that it could not obtain a fair trial, though there were no opposing affidavits.—*Id.*

VERDICT.

See Appeal and Error, §§ 933, 979, 1005, 1006, 1015, 1068; New Trial, §§ 68, 70, 72, 181; Trial, §§ 349, 350.

VERIFICATION.

See Municipal Corporations, § 1007.

VESTED ESTATES.

See Wills, §§ 629-634.

VICE PRINCIPALS.

See Master and Servant, §§ 159-201.

VIEW.

See Trial, § 28.

VILLAGES.

See Municipal Corporations.

VOTERS.

See Elections.

WAGES.

See Master and Servant, §§ 42, 80.

WAIVER.

See Appeal and Error, §§ 1062, 1078; Attorney and Client, § 86; Depositions; Equity, § 117; Estoppel; Insurance, § 388; Justices of the Peace, § 164; Limitation of Actions, § 175; Mines and Minerals, § 55; Mortgages, § 497; Payment, § 39; Sales, §§ 182, 364; Specific Performance, § 101.

WARNING.

See Railroads, §§ 278, 350, 367; Street Railroads, § 93.

WARRANTY.

See Landlord and Tenant, § 125; Sales, §§ 262½, 263, 364, 428.

WASTE.

See Mortgages, §§ 205, 207.

WATERS AND WATER COURSES.

See Eminent Domain, §§ 47, 84, 274, 277; Taxation, §§ 81, 499.

II. NATURAL WATER COURSES.

(B) Obstruction and Detention.

§ 61 (Pa.) On a bill by a borough against a railroad company to compel the removal of a pier from a stream, where the court finds that the pier obstructed the stream so as to be a public nuisance, a mandatory injunction will be granted.—*Carnegie Borough v. Pittsburgh, C. & St. L. Ry. Co.*, 83 A. 364.

IV. NATURAL LAKES AND PONDS.

§ 109 (N.H.) In the absence of a legislative grant, the state's title in great ponds extends to the highest water line; and a littoral proprietor cannot justify drawing the water down to low-water mark, as against the public, on

the ground that it is merely exercising its proprietary rights as a littoral landowner.—*State v. Great Falls Mfg. Co.*, 83 A. 126.

A littoral proprietor at the outlet of a great pond may use the water in a reasonable manner, depending on the circumstances.—*Id.*

§ 114 (N.H.) A bill in equity by the state to enjoin a littoral proprietor from using the water of a great pond, so as to lower the surface thereof below the natural level, alleging that defendant intends to continue to lower the pond, regardless of public rights, sufficiently alleges that defendant does not exercise its rights in a reasonable manner, in view of the public rights.—*State v. Great Falls Mfg. Co.*, 83 A. 126.

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

§ 203 (N.J.) Where, under a contract with a town, a water company supplied water for hydrants and received pay therefor for more than 30 years, and the town treated the contract as one for the calendar year by paying for the hydrants within the specified limits, the contract was binding, though, when it was made, the law authorized water companies only in municipalities of 2,000 population, which did not include defendant.—*Belvidere Water Co. v. Town of Belvidere*, 83 A. 241.

§ 203 (Pa.) A consumer of water, having stolen a large quantity and then sued to restrain the shutting off of its supply, was properly required to pay for the amount stolen, pursuant to water company's cross-bill, and was then entitled to a decree for water in the future.—*American Conduit Mfg. Co. v. Kensington Water Co.*, 83 A. 70.

§ 203 (R.I.) Contract between city and waterworks proprietor, providing a maximum price for water furnished the city, *held* not to require the furnishing of water for more than one constantly running fountain for such maximum price, especially in view of the acts of the parties under the contract.—*Newport Waterworks v. Taylor*, 83 A. 833.

Acts of parties under contract for furnishing water to city *held* relevant to show that it did not include water for constantly running fountains in the maximum price specified.—*Id.*

WAYS.

See Easements.

WEIGHTS AND MEASURES.

See Carriers, § 202.

WHISTLES.

See Railroads, §§ 350, 396, 400.

WIDOWS.

See Dower.

WILLS.

See Appeal and Error, § 308; Charities, § 21; Conversion; Courts, § 472; Descent and Distribution; Evidence, § 77; Executors and Administrators; Insurance, § 784; Partition, § 21; Powers; Remainders; Statutes, § 115; Taxation, § 897; Trial, § 187; Trusts, §§ 38, 109, 140, 158, 270.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 15 (N.H.) A gift of all the property of an estate not otherwise disposed of to a church in trust for the repair of the church, etc., and to extend to the Christian Science, *held* a gift for religious purposes, and not a gift to a church, and not within the terms of Pub. St. 1901, c. 152, § 10, limiting the income of any gift to a church to

\$5,000 a year, nor within R. L. Mass. c. 37, § 9, limiting it to \$2,000.—*Glover v. Baker*, 83 A. 916.

Under Pub. St. 1901, c. 186, § 1, and Pub. St. 1901, c. 152, § 2, *held*, that a gift in excess of \$5,000 made by a resident testatrix to a religious association in Massachusetts was not prohibited.—*Id.*

II. TESTAMENTARY CAPACITY.

§ 54 (Conn.) On probate of a will, evidence that about three weeks after the will was executed deceased undertook to make a gift of a bank book was admissible on the issue of her mental capacity to dispose of the same property by will.—*Cullum v. Colwell*, 83 A. 695.

IV. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 107 (Pa.) That testatrix, in her own handwriting, adds interlineations to her will, *held* not to avoid it.—*In re Rowan's Estate*, 83 A. 429.

(E) Nuncupative Wills.

§ 140 (Pa.) Probate of alleged nuncupative will will be denied, where the maker was competent to have asked another to have signed his name for him.—*In re Munhall's Estate*, 83 A. 66.

(F) Mistake, Undue Influence, and Fraud.

§ 166 (Pa.) On issue of *devisavit vel non*, a verdict against the will on the ground of undue influence *held* not supported by the evidence.—*Canfield v. Barnes*, 83 A. 403.

(G) Revocation and Revival.

§ 173 (Md.) A cancellation or obliteration of a will does not operate as a revocation, unless it was done *animo revocandi*.—*Safe Deposit & Trust Co. v. Thom*, 83 A. 45.

§ 174 (Md.) Under Code, art. 93, § 318, a testator may revoke one clause of his will without destroying other clauses, provided he does not enlarge the estate of one taking under the will, or change the character of the remaining provisions.—*Safe Deposit & Trust Co. v. Thom*, 83 A. 45.

Although Code, art. 93, § 318, authorizes a testator to revoke his will by canceling or obliterating it, an incomplete cancellation, where it shows that the testator had attempted to restore the marks erased, raises no presumption of revocation.—*Id.*

§ 196 (Md.) Where a portion of a will was revoked by erasure, *held*, that it cannot be re-established by restoring words or letters erased.—*Safe Deposit & Trust Co. v. Thom*, 83 A. 45.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) Probate and Revocation in General.

§ 216 (N.H.) Objection to a part of a will offered for probate defeats the will only to the extent of the proof, and it may be probated as to the part to which the objection is not proven.—*Glover v. Baker*, 83 A. 916.

§ 219 (N.H.) Testator's widow, a beneficiary under the will, was sufficiently "interested" in the will to be entitled to prosecute proceedings to prove the will in solemn form.—*Merrill v. Putnam*, 83 A. 94.

(B) Actions to Establish or Determine Validity in General.

§ 222 (Md.) A court of equity has no power to revoke an order of the orphans' court, admitting the will to probate.—*Bradley v. Bradley*, 83 A. 446.

§ 225 (N.H.) Whether a paper presented for probate was the will of the testator, or the product of other minds operating upon hers through fraud or undue influence, is a question

which could have been raised in opposition to its probate.—*Glover v. Baker*, 83 A. 916.

(E) Jurisdiction, Limitations, and Laches.

§ 253 (Md.) A court of equity has no power to determine whether a will shall be admitted to probate.—*Bradley v. Bradley*, 83 A. 446.

(H) Evidence.

§ 302 (Pa.) An issue of *devisavit vel non* *held* properly refused, when five witnesses positively identified the signature to a will as that of testatrix and stated that the entire will was in her handwriting, and only one testified that the handwriting did not look like that of testatrix.—*In re Rowan's Estate*, 83 A. 429.

§ 306 (Md.) In a proceeding for the probate of a will, evidence *held* insufficient to show that erasures made by the testator were made with the intention of revoking the will.—*Safe Deposit & Trust Co. v. Thom*, 83 A. 45.

(I) Hearing or Trial.

§ 316 (Pa.) An issue *devisavit vel non* was properly denied, where testatrix was shown to be of sound mind and no undue influence was shown.—*In re Jones' Estate*, 83 A. 686.

§ 332 (Conn.) On the issue of undue influence, an instruction *held* applicable to the facts of the case.—*Cullum v. Colwell*, 83 A. 695.

(K) Review.

§ 371½ (N.H.) It was error to dismiss an appeal from a decree in a proceeding in probate court to prove a will in solemn form, because certain persons were not properly made parties.—*Merrill v. Putnam*, 83 A. 94.

An appeal from a decree in a probate proceeding being improperly dismissed by the superior court the case should be brought forward on the superior court docket for trial, and not sent back to the probate court.—*Id.*

(M) Operation and Effect.

§ 421 (N.H.) The judgment of the probate court allowing a will *held* not open to collateral attack for fraud and undue influence in securing its execution.—*Glover v. Baker*, 83 A. 916.

§ 423 (N.H.) The decree of the probate court allowing a will is a judgment establishing the instrument to be the will of the alleged testator, and so long as it stands is conclusive of the genuineness and validity of the will.—*Glover v. Baker*, 83 A. 916.

VI. CONSTRUCTION.

(A) General Rules.

§ 439 (Md.) In construing a will, the intention of the testator *held* controlling in the absence of a conflict with a rule of property.—*Coudon v. Updegraff*, 83 A. 145.

§ 439 (Md.) Wills are construed more liberally than deeds in order to effectuate testator's intent.—*Barnett v. Barnett*, 83 A. 160.

§ 439 (N.H.) Where the testator's purpose can be ascertained, and is legal, it is the duty of the court to give it effect.—*Glover v. Baker*, 83 A. 916.

§ 439 (R.I.) A will should be so interpreted as to carry out the testator's intention.—*Woodward v. Congdon*, 83 A. 433.

§ 440 (Me.) In construing a will, testator's intention should be ascertained, if possible, from the will itself.—*Dunn v. Morse*, 83 A. 795.

§ 440 (Md.) The words of a will are the best evidence of the testator's intention.—*Coudon v. Updegraff*, 83 A. 145.

§ 441 (Md.) Testator's situation at the time of execution and the other surrounding circumstances may be properly considered with the language of the will.—*Barnett v. Barnett*, 83 A. 160.

§ 441 (R.I.) The intention of the testator must be gathered from the entire instrument.

taking into consideration the surrounding circumstances.—Perry v. Brown, 83 A. 8.

§ 447 (Pa.) In construing a restriction in a will, there is no presumption of illegality; but the presumption is in favor of innocence and validity.—In re Gunning's Estate, 83 A. 60.

§ 449 (R.I.) A will is to be so construed as to avoid partial intestacy if such construction is natural and reasonable.—Woodward v. Congdon, 83 A. 433.

§ 481 (Pa.) Wills should be construed to speak as if executed immediately before the testator's death, unless a contrary intent appears.—In re Gunning's Estate, 83 A. 60.

§ 488 (N.H.) A court is not entitled to pronounce an instrument ambiguous until it has brought to its aid in its interpretation all the light afforded by the collateral facts and circumstances.—Glover v. Baker, 83 A. 916.

(B) Designation of Devisees and Legatees and Their Respective Shares.

§ 524 (Pa.) Where will directs that in a certain event, after expiration of particular interest, estate shall go to those who would take under intestate laws, it is construed as meaning those who would have taken at his death, unless a different intent appears.—In re McFillin's Estate, 83 A. 620.

Limitation over in will to persons entitled as testator's next of kin *held* to refer to next of kin as of date of testator's death, and not as of termination of particular estate.—Id.

§ 524 (R.I.) Where a testatrix devised property to trustees to pay the income to her husband during his life, leaving the remainder to the children and grandchildren of a named couple, all of that class including those who might be born after the death of testatrix and before the death of her husband are entitled to take.—Perry v. Brown, 83 A. 8.

§ 531 (R.I.) Where a testatrix devised the residue of her property to the children and grandchildren of a named couple and two other named persons, the entire class took per capita and not per stirpes.—Perry v. Brown, 83 A. 8.

(D) Description of Property.

§ 570 (Conn.) Where testatrix owned a mortgage on real estate located on 143d street in New York City, near Riverside Drive, and by her will devised all her title and interest to "certain real estate situated on West 143d street near Riverside Drive in the city * * * of New York, consisting of five lots with building thereon," the will sufficiently described the mortgage to make a valid gift.—Weed v. Hoge, 83 A. 636.

§ 578 (N.H.) Where testatrix directed that her shares of stock and bonds and evidences of indebtedness be sold, and the proceeds divided among certain nephews and nieces, and by a codicil she designated a residuary legatee, the proceeds of stock, notes, etc., acquired subsequent to the execution of the will, passed to the nieces and nephews, and not under the codicil.—Livermore v. Wells, 83 A. 131.

(E) Nature of Estates and Interests Created.

§ 597 (Md.) Testatrix's children *held* to take a fee-simple, and not merely a life, estate.—Barnett v. Barnett, 83 A. 160.

To pass the fee, it is not necessary to use strictly technical language.—Id.

§ 600 (Me.) An absolute estate passes under an unlimited devise, with an unqualified and unrestricted power of disposition in the beneficiary; and any attempted limitation over of such part as may remain unexpended at the beneficiary's death is repugnant and void.—Lord v. Pearson, 83 A. 1102.

Under a will giving the residue of the es-

tate to a nephew, reciting a desire that he use as much of it as "he needs or wishes to, even if he spends the whole of it," but directing that, if at his death the principal should remain unexpended, it should be distributed in a specified manner, an absolute estate passed to the nephew.—Id.

§ 600 (Md.) If an estate is given to one generally or indefinitely with a power of disposition, he takes the property absolutely.—Barnett v. Barnett, 83 A. 160.

§ 610 (Me.) An absolute estate passes under an unlimited bequest, with an unqualified and unrestricted power of disposition in the beneficiary; and any attempted limitation over of such part as may remain unexpended at the beneficiary's death is repugnant and void.—Lord v. Pearson, 83 A. 1102.

A will *held* to give testatrix's nephew an absolute estate in the residue of the property.—Id.

§ 614 (Pa.) Where land is devised to testator's daughter to have and to hold for her natural life, and at her death to vest in her child or children if any should survive her, and in the event of her death without child or children, then over to testator's sons, the daughter takes a life estate only.—Donovan v. Woodworth, 83 A. 425.

§ 617 (R.I.) A testatrix's will, drawn by herself, in which she gave the residue to her husband for his personal use during life, but provided that the income of her property should not be devoted to the husband's maintenance until the income from his own property was exhausted, and placed all her estate in the hands of trustees, *held* not to give the husband a life estate, but only a limited right to the income of her property after the exhaustion of his own income.—Perry v. Brown, 83 A. 8.

§ 627 (Me.) On bequest of income to several persons by name, to be divided among them equally, the legatees take as tenants in common and not as joint tenants, and, on death of a legatee before termination of the trust, the income must be paid to the legal representatives of the estate of the deceased legatee.—Morse v. Ballou, 83 A. 799.

(F) Vested or Contingent Estates and Interests.

§ 629 (Me.) Generally a devise or bequest to a testator's children gives a vested interest unless a contrary intention is shown by the will.—Morse v. Ballou, 83 A. 799.

§ 630 (R.I.) The right of legatees who were to take if living at the death of testatrix's husband, to whom was given a life interest in the income of the estate, and if not living the legacies to remain in the general fund, *held* dependent upon their surviving the husband.—Perry v. Brown, 83 A. 8.

§ 634 (Pa.) Under provisions of will, testator's son's estate *held* to have a vested interest in one-half of the trust estate held for the life of a daughter, since deceased, and that one half of this one-half should be awarded to the son's widow, taking against the son's will, and the other half to the surviving daughter of testator under the son's will.—In re Massey's Estate, 83 A. 1087.

§ 634 (R.I.) Specific and residuary legatees taking after the expiration of a trust estate in favor of testatrix's husband, to whose support the trustees were directed to devote such of the income of testatrix's estate as might be necessary for that purpose after exhaustion of the income of the husband's personal estate, *held* to have vested interests.—Perry v. Brown, 83 A. 8.

(G) Conditions and Restrictions.

§ 647 (Pa.) Condition attached to devise, that the devisee should not be living with the woman he married in 1899, is a condition precedent and valid.—*In re Gunning's Estate*, 83 A. 60.

The rule invalidating gifts based upon a future separation of husband and wife is inapplicable to a legacy upon condition that it shall be effectual only if the legatee's wife be dead or divorced from the legatee.—*Id.*

§ 664 (Pa.) That a devisee is not at fault for the nonperformance of a condition precedent because he must do some act which he is incapable of performing is immaterial.—*In re Gunning's Estate*, 83 A. 60.

§ 664 (R.I.) Servants to whom testatrix directed a legacy and a salary respectively to be paid if they continued to care for the residence and attend testatrix's husband, who was insane, *held* not entitled thereto, where the husband did not reside at the family residence; his condition being such that he was confined in a hospital.—*Perry v. Brown*, 83 A. 8.

(H) Estates in Trust and Powers.

§ 671 (N.H.) The words of a will to create a trust must be imperative, must make the subject certain, and the object as certain as the subject.—*Glover v. Baker*, 83 A. 916.

A gift of all of an estate not otherwise disposed of by the will is sufficiently certain as to the subject of the trust.—*Id.*

§ 672 (N.J.Ch.) A mere discretion in the trustees is a mere power; but an imperative discretion implies a trust.—*O'Gorman v. Crowley*, 83 A. 379.

§ 672 (Pa.) A bequest to executors, in trust for testatrix's daughter, of income to be paid her during her life, free from control of any husband, with power in the daughter to dispose by will, but without limitation over, was an active trust for the daughter for life.—*In re Knight's Estate*, 83 A. 709.

§ 684 (Md.) A stock dividend declared on stock given by a will *held* income rather than principal.—*Coudon v. Updegraff*, 83 A. 145.

§ 684 (N.H.) Testator's sisters *held* entitled to the gross income of the estate created by a testamentary trust.—*Foster v. Hargate*, 83 A. 512.

§ 684 (R.I.) A will directed that testatrix's estate should be held by her trustees and the income thereof applied to the maintenance of her insane husband during his life in the event that the income from his own estate is insufficient for that purpose, but did not direct that surplus income should be accumulated. *Held*, that it was the evident intention of the testatrix to require such accumulation.—*Perry v. Brown*, 83 A. 8.

§ 686 (Me.) A will, creating a trust for payment of income to testator's daughters during the life of a third person, *held* to entitle the legal representative, and not the heirs of a daughter dying before termination of the trust, to the income from her share.—*Morsé v. Balou*, 83 A. 799.

§ 686 (N.J.Ch.) A provision of a testamentary trust, requiring the trustees to pay the trust fund to testator's son when, in their opinion, his condition made him competent to attend to affairs, *held* a naked power resting in the trustees' discretion, so that they could not be compelled to transfer the trust fund.—*O'Gorman v. Crowley*, 83 A. 379.

§ 686 (Pa.) Under provisions of will, corpus of estate *held* to have been placed in trust until the death of the last surviving child of testator, so that the grandchildren were not entitled to partition until such event happened.—*Gibbons v. Gibbons*, 83 A. 621.

§ 692 (Me.) Power in executors to designate needy relatives of testator as heirs to a trust

fund *held* to give them a discretion whether any relatives should so inherit, and, they not having designated in their lifetime any such needy relatives, the power cannot be exercised by the court.—*Dunn v. Morse*, 83 A. 795.

Where a will directed the executors to designate an "institution or institutions for the relief of suffering humanity" to receive trust funds on termination of the trust, but the executors, through death and infirmity, neglected to perform that duty, the courts will designate such beneficiaries.—*Id.*

In construing an imperative power in or direction to a testamentary trustee, it is not necessary that the appointing words be a command, it being sufficient if the language is such that it is reasonably inferable therefrom that it was the intention that it should be imperative.—*Id.*

§ 693 (Md.) Where an estate is given generally with power of disposition, the devisee or legatee takes the property absolutely, and not merely a power, but, where the property is expressly for life with a power of disposition annexed, the first taker has but a life estate with a superadded power.—*Snyder v. Snyder*, 83 A. 246.

A devise to a wife to manage and control the whole estate, "to sell any part of the whole if necessary or advisable in her best judgment," gave her absolute title not cut down by the further "wish and desire of my wife to make a will with such division of our estate among our children as in her best judgment will be just and proper."—*Id.*

Under a devise to a wife to manage and control and to sell any part or the whole if necessary or advisable in her best judgment, the further wish that she make a will making such division among the children as in her best judgment was proper, if construed as granting only a life estate, gave her power to sell.—*Id.*

§ 693 (N.J.Ch.) Under a clause in a will empowering trustees to sell or rent any of testator's real estate when deemed by them to be most advantageous, and to invest the proceeds and pay legacies from the income, the trustees were, by implication, authorized to assume the legal title.—*Randall v. Gray*, 83 A. 482.

(I) Actions to Construe Wills.

§ 697 (N.H.) A plaintiff, who is not a trustee or a beneficiary under a trust created by a will, and who does not ask the declaration of a trust in his favor, *held* not entitled to the advice of the court as to the true construction and effect of the will.—*Glover v. Baker*, 83 A. 916.

A court, in construing a will, does so as part of the determination of the cause, but is not required to advise every one who alleges an interest under or adverse to the will.—*Id.*

An heir claiming in hostility to a will has no such interest in its interpretation that he can require the advice of the court as to his rights in the estate by bill in equity for its construction.—*Id.*

On a bill against an executor showing a special case for equitable relief, a party may have his beneficial interest under his claim as heir to a distributive share in funds in the executor's hands declared.—*Id.*

§ 706 (N.H.) On the transfer from the superior court on demurrer of a bill for advice as to the construction of a will and plaintiff's right thereunder, *held* that the executor's concession that the proceeding was maintainable in some form authorized the court to express its opinion on the material questions argued, notwithstanding the bill was dismissed so far as plaintiff's right to maintain it.—*Glover v. Baker*, 83 A. 916.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.**(A) Nature of Title and Rights in General.**

§ 733 (Md.) A will *held* to warrant a distribution of the residuary estate before the death

of the testator's wife.—Coudon v. Updegraff, 83 A. 145.

§ 734 (Pa.) A legacy bears interest from the time it is payable under the terms of the will; the rule that interest runs from the expiration of a year from testator's death applying only when the will does not direct payment at a particular time.—In re Gunning's Estate, 83 A. 63.

Under a will directing sale of realty at best price obtainable, where delay in sale is due to effort to obtain best price, allowance of interest on legacies from one year from the death of testatrix held error.—Id.

§ 747 (Conn.) Where decedent left sufficient property to settle his estate, in addition to a parcel specifically devised, an action to set aside a conveyance of such tract was properly brought by the devisee.—Beckwith v. Cowles, 83 A. 1113.

(B) Specific, Demonstrative, and General Devises and Bequests.

§ 753 (Conn.) A "specific legacy" is a gift of particular specified things, or of the proceeds of the sale of specified things, or of a specific fund or a defined portion thereof, and it is satisfied by the delivery of the specific property identified as the subject of the gift, and where the same is not owned by testator at his death the legatee takes nothing, for he has no claim on the general assets.—Weed v. Hoge, 83 A. 636.

A will directing the executors to sell testatrix's property situated in the state and to give a specified part of the proceeds to her husband absolutely creates a specific legacy.—Id.

A devise in form of particular lands of which testator is mortgagee only passes the interest as being that which he must have intended to be the subject of his gift.—Id.

A will, devising testatrix's right, title, and interest as mortgagee to real estate described, creates a specific gift.—Id.

A bequest of the remainder of testatrix's personal effects, including furniture, bric-a-brac, etc., is specific and can only be satisfied by the delivery to the beneficiary of the particular things described.—Id.

§ 756 (Conn.) A "general legacy" may be satisfied out of the general assets of testator's estate without regard to any particular fund or property, and a general legacy has no reference to the actual state of testator's property, and it is supposed that testator has sufficient property to procure for the legatee the amount given him.—Weed v. Hoge, 83 A. 636.

(D) Election.

§ 801 (Pa.) Act April 1, 1909 (P. L. 87), giving widows a preference of \$5,000 in distribution, applies as well to the estates of testates, where the widow elects to take against the will, as to the estates of intestates.—In re Guenthoer's Estate, 83 A. 617.

That portion of a testator's estate which a widow receives on election to take against her husband's will comes to her by virtue of the statute as estate of an intestate, and not as the estate of a testate.—Id.

§ 801 (Pa.) Act April 1, 1909 (P. L. 87), giving widows a preference of \$5,000 in distribution, applies as well to the estate of testates, where the widow elects to take against the will, as to the estates of intestates; and the act is constitutional.—In re Deegan's Estate, 83 A. 620.

§ 801 (Pa.) Act April 1, 1909 (P. L. 87), giving to widows a preference of \$5,000 in distribution of intestate estates, applies to the estate of a testate whose widow has elected to take against the will, and is constitutional.—In re Mercer's Estate, 83 A. 707.

(F) Legacies Charged on Property, Estate, or Interest.

§ 821 (Pa.) Where testator gave all his personalty and real estate to his wife with desire that certain money legacies should be paid "out of the estate," a real estate devise to the wife was not charged with the money legacies.—In re Wallace's Estate, 83 A. 280.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 858 (R.I.) Residuary legatees held not entitled to surplus income, under a bequest to trustees to expend the income for the maintenance of testatrix's insane husband during his lifetime in case the income from his own estate was insufficient for that purpose; testatrix having also made specific bequests for the payment of which such income might be required.—Perry v. Brown, 83 A. 8.

§ 858 (R.I.) At common law as recognized in this state, lapsed or void bequests fall in the residuary.—Woodward v. Congdon, 83 A. 433.

Gen. Laws 1909, c. 254, § 7, providing that, if a devisee of real estate dies before testator without issue, the devise shall fall into the residue, and if a "residuary devisee or legatee" die before the testator without issue, the other residuary "devisees or legatees" shall take the share of the "devisee or legatee" so dying, applies to both real and personal property, and hence a lapsed, specific, pecuniary, or property legacy falls into the residue.—Id.

§ 863 (R.I.) Gen. Laws 1909, c. 254, § 7, provides that, where a residuary devisee or legatee dies before the testator without issue, his share shall pass to the surviving residuary devisee or legatee. Testatrix gave a specific pecuniary legacy to each of two cousins and also gave to each of them a specific legacy of personal property and made them residuary legatees and devisees. Held that, on the death of one of the cousins before testatrix without issue, his share of the residue augmented by the specific legacy passed to the surviving residuary legatees.—Woodward v. Congdon, 83 A. 433.

Such statute changes the rule against survivorship between tenants in common so far as such rule prevents residuary devisees or legatees from succeeding to the interests of co-devisees or co-legatees of the residue who die without issue before testator.—Id.

Where one of two residuary legatees who had also received specific bequests died a week after the execution of the will, and though testatrix lived for nine years thereafter she made no change in the will, it cannot be said that it appears by the will that testatrix did not intend the lapsed portion of the residue to go to the surviving residuary legatees within the meaning of Gen. Laws 1909, c. 254, § 7, providing for survivorship as between residuary devisees and legatees, unless a contrary intent on the part of testator appears in the will.—Id.

§ 865 (R.I.) If part of the income of a trust estate is undisposed of, by the will, the trustees should, in the absence of any provision whatsoever, accumulate it and pay it to those legatees who may be entitled to the original corpus of the estate.—Perry v. Brown, 83 A. 8.

WIRES.

See *Eminent Domain*, § 119.

WITNESSES.

See *Admission and Error*, § 232, 233, 1048; Criminal Cases, §§ 364-572, 576, 1133; Depositions, Evidence, Trial, §§ 48, 140.

II. COMPETENCY.

(A) Capacity and Qualifications in General.

§ 37 (N.J.) In a servant's action for injuries striking out testimony that plaintiff refused to submit to an operation was within the court's discretion, where the witness did not understand the plaintiff's language or the interpreter, and such testimony was at best an inference of the witness.—*Pavan v. Worthen & Aldrich Co.*, 83 A. 960.

§ 57 (Del.Gen.Sess.) In a prosecution for wife beating, prosecutrix *held* not a proper witness to testify that she and defendant were looked upon as man and wife.—*State v. Adams*, 83 A. 936.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 159 (N.J.) The test as to what is a "transaction with" deceased about which the other party to it cannot testify is to inquire whether, if the witness testified falsely, the deceased, if living, could contradict it of his own knowledge.—*Campbell v. Akarman*, 83 A. 881.

§ 178 (N.H.) Where defendant administrator took plaintiff's deposition as to a claim against the estate, he thereby made plaintiff a witness in the case, and it was error to thereafter exclude plaintiff from testifying for himself.—*Clark v. Clark*, 83 A. 515.

(D) Confidential Relations and Privileged Communications.

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(B) Cross-Examination and Re-Examination.

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(C) Privilege of Witness.

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§ 323 (N.J.Sup.) The trial court may permit a party to cross-examine his own witness, where he is unwilling and the party offering such witness has been surprised thereby.—*State v. Lewis*, 83 A. 692.

§ 330 (N.J.Sup.) On the trial of a member of the board of education of a town for solicit-

ing a bribe to vote for prosecutor as principal, where the prosecutor testified that the supervising principal had always commended his work and his school, a question on cross-examination whether the supervising principal had not presented to the board an adverse report was not proper to test the credibility of witness, in the absence of a showing that he had knowledge of the making of the report.—*State v. Merkle*, 83 A. 186.

(B) Character and Conduct of Witness.

§ 346 (R.I.) That a witness, who was also defendant, stated to plaintiff that he had rehearsed his story and would swear plaintiff out of the courthouse, is admissible as affecting his veracity.—*Eastman v. Dunn*, 83 A. 1057.

(D) Inconsistent Statements by Witness.

§ 380 (Md.) A party calling a witness, *held* entitled to show inconsistent statements made by him.—*State v. Baltimore & O. R. Co.*, 83 A. 166.

§ 392 (Pa.) A prisoner on trial for murder, who has assigned in his testimony a reason for leaving the place of the killing on the morning following it, *held* subject to cross-examination as to a letter in which were statements inconsistent with the reason assigned.—*Commonwealth v. De Masi*, 83 A. 430.

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